Annual Case Law Update

Essentials of Elder Law and Annual Update

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The Florida Bar

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Guardianship Cases

1. ***Smith v Smith,*** **____ So. 3d ____ (Fla. 2017). The Florida Supreme Court holds that where the right to contract has been removed from a ward, a marriage by the ward without prior court approval is not void but the marriage does need to be approved before it can be given legal effect.**

This case is a clash between two strong legal principles, the power of the state to protect vulnerable persons from exploitation and harm (*parens patriae)* versus an individual's right of autonomy and dignity and to have the court's protection be limited to the greatest extent feasible to preserve the person's liberty. The issue of *parens patriae* arose in both this case and last year's *Gort v. Gort* decision of the Fourth DCA. Hung Nguyen of our committee has written a good article describing the issues involved for RPPTL's ActionLine. *See* Nguyen, Hung, *Exploring the Limits of Parens Patriae from Two Recent Guardianship Decisions*, RPPTL ActionLine, Summer 2017. With regard to the facts of this case itself, Alan Smith was unable to handle financial affairs, such as contracts, as a result of diminished mental capacity from a car accident. Prior to the accident, Smith was engaged to Glenda Martinez Smith. Alan's daughter initiated a guardianship case and the court delegated the rights to contract and to manage the ward's property to a third party guardian. The order held Alan's right to marry to be subject to court approval, with language tracking F.S. Section 744.3215(2)(a). Alan and Glenda married a year after the accident and after the entry of the incapacity and guardianship order. They did not seek court approval prior to the wedding. Glenda asked the guardian to seek court approval after the wedding, but he refused. Alan's court-appointed attorney then filed a petition for annulment and Glenda moved to ratify the marriage. The trial court ruled the marriage was void and incapable of ratification because F.S. Section 744.3215(2)(a) did not contemplate the right to ratify an existing marriage. The Fourth DCA affirmed the trial court ruling, holding that it was not the marriage that was subject to court approval, but rather the right to marry. The Fourth reasoned that a person who has had their right to contract removed had no right to marry without prior court approval, so the marriage in this case was void from the outset and a void marriage cannot be ratified because it never existed. However, the Supreme Court reversed the Fourth DCA and held where the right to contract has been removed under F.S. Section 744.3215(2)(a), a ward is not required to obtain court approval prior to exercising the right to marry, but court approval is necessary before the marriage can be given legal effect. The marriage is neither void nor voidable, according to the Court. It explained that the plain language of section 744.3215(2)(a) reflects that the Legislature did not intend for the type of invalid marriage at issue in this case to be classified as either void or voidable according to how these terms have been defined under Florida precedent. The statute makes a ward's "right to marry" contingent on court approval if the right to contract has been removed. The Court held this meant

the ward's ability to enter into a valid marriage depends on court approval. If court approval is never obtained, the invalidity of the marriage cannot be cured, and the marriage can be given no effect. This is different from a void marriage, which can never be given effect since it never existed in the first place, and different from a voidable marriage, which is good for all purposes until challenged.

Application: The recent *Obergefell v. Hodges* case from the United States Supreme Court held that the right to marry is a fundamental constitutional right. This case illustrates the attempt to reconcile that fundamental right with the state's *parens patriae* interest in protecting vulnerable adults and with the public policy and legislative intent set forth in F.S. Section 744.1012 of protecting incapacitated persons from exploitation while upholding their rights to the greatest extent possible. The interpretation of F.S. Section 744.3215(2)(a) made by the Supreme Court protects the ward's fundamental marriage right while advancing both objectives of Florida Guardianship law. It protects the ward by allowing the guardianship court to review the circumstances of the marriage and possibility of exploitation before the alleged spouse acquires any rights as a result of the marriage. It also upholds the ward's fundamental right to marry to the greatest extent possible by allowing for the possibility of ratification and court approval after the fact.

2. ***Bivins v. Guardianship of Bivins*, ___ So. 3d ___ (Fla. 4th DCA 2017). The Fourth DCA confirms that a guardian may retain assets of the ward to pay the costs of administration that accrue between the filing of the final accounting and the order of discharge, even if the ward is deceased and a probate has commenced.**

For several years before his death, Oliver Bivins, the ward, was involved with litigation against his son Julian Bivins. The ward died in 2015 and the guardian and Julian subsequently entered into a global settlement agreement that specifically provided for distribution of proceeds from the sale of a $5 million property in New York City. After the ward's death, Julian was appointed "temporary administrator" of the ward's probate estate. In that capacity, Julian moved for the release of all of the ward's monies that were held back in the guardianship pursuant to the settlement agreement. The monies held back included $275,000 for attorney's fees and costs, approximately $400,000 of sales proceeds held in reserve for defense of actions that Julian had filed against the guardian, $72,000 of assets held back by the closing agent from the sale of the New York property, and $155,000 in unrelated accounts of the ward. The trial court ordered the Guardian to release the $400,000 but permitted the Guardian to retain all of the other funds. On appeal, the Fourth DCA affirmed the trial court as to its holding regarding the above-described funds, other than the $72,000, on the ground that a guardian may retain assets of the ward to pay the costs of administration that accrue between the filing of the petition for discharge/final accounting and the order of discharge,

even if the ward is deceased. The $72,000 was subject to being released pursuant to the terms of the global settlement agreement and the Court held that the settlement terms must be complied with.

Application: This case is a good illustration of two legal principles: (1) that the right of a guardian to reserve funds pursuant to F.S. Section 744.527 trumps and must be given effect prior to the general right of the personal representative to marshal assets under F.S. Section 733.607; and (2) settlement agreements are highly favored and will be enforced when it is possible to do so. One good clarification from the court is that F.S. Section 744.527 applies not only to past and current guardianship expenses but also future expenses. In other words, the statute contemplates that a guardian will perform services after the death of the ward and the guardian may retain funds to pay for future fees and costs that accrue during the process of winding up the guardianship estate.

3. ***Hernandez v. Hernandez*, ___ So. 3d ___ (Fla. 3d DCA 2017). The Third District continues to analyze who is, and is not, an "interested person" for purposes of objecting to petitions filed in guardianships.**

Antonio Hernandez, one of Elena Hernandez's (the "Ward") three children, appealed a trial order determining he was not an interested person with standing to contest attorneys' fees and costs in the guardianship of his mother. The Ward's son, Eusebio, was appointed her plenary guardian. Following the appointment, Eusebio obtained court authority to file an ejectment action against Antonio, Antonio's wife and Antonio's son, and also to file suit against them for undue influence, among other causes of action. The undue influence case included an allegation that Antonio and his family transferred $240,000.00 of the Ward's assets to Antonio's son, most of which was then used to purchase real property in Antonio's wife's name. To conduct the litigation, Eusebio sought court approval on numerous occasions for the payment of attorney's fees for the attorneys handling the litigation. The court approved these fees without notice to Antonio. Antonio moved to set aside the fee orders, but the trial court denied the relief, holding that Antonio was not an "interested person" within the definition of F.S. Section 731.201(23) with regard to the award of attorney's fees in the guardianship. Despite Antonio's participation in contested proceedings in the guardianship court and his filed Request for Notice and Copies in the guardianship case, the Third District Court of Appeals affirmed the trial court's finding that Antonio was not an interested person. The Third DCA ruling first cited F.S. Section 744.108, which only requires that notice of fee petitions be provided to the guardian and to the ward if the ward is not a minor or totally incapacitated. The Court then noted that the Florida Supreme Court in *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006), required service of fee petitions on interested persons. *Hayes* also held that determination of who is an interested person in a given proceeding will "vary from time to time and must be determined according to

the particular purpose of, and the matter involved in, any proceedings." Finally, *Hayes* noted that for certain fee petitions a person's involvement in the guardianship proceedings that were necessitated by their own mistreatment of the ward and misappropriation of the ward's funds does not entitle them to participate in proceedings involving requests for attorney's fees by the ward's attorney. Here, the Third DCA found that Antonio's involvement in the guardianship proceedings related to his alleged mistreatment of the Ward and misappropriation of her funds. Thus, he was not an interested person with standing to object to the attorney fee petitions related to fees for counsel to oppose him.

Application: Having filed a Request for Notice and Copies under Probate Rule 5.060 and being an active participant in guardianship proceedings does not necessarily entitle someone to standing to participate in all guardianship proceedings. A party might be an interested person as to one guardianship issue but not interested as to another issue.

4. ***Meyer v. Watras,*** **___ So. 3d ___ (Fla. 4th DCA 2017). The Fourth DCA confirms that orders awarding guardianship fees must contain express findings regarding reasonableness of hours and rates.**

In a guardianship where the guardianship estate was worth approximately $400,000, attorneys for the guardian of the incapacitated minor had received approximately $155,000 in attorney's fees and costs prior to their withdrawal in 2015. The same attorneys then filed three subsequent petitions for additional fees and costs totaling almost $100,000. The first petition, requesting approximately $80,000 in fees and costs, was granted as to approximately $37,000. The court denied the second petition on the grounds that the services were incurred after the time the attorneys withdrew as counsel. Finally, the court granted the third petition, which was for approximately $13,000 in fees and costs associated with the petition for fees and preparation for the fee hearings. The trial court, in cutting the fees was concerned about the time expended on medical malpractice and foreclosure matters, time spent in converting the guardianship into a trust, charging for meetings between lawyers and paralegals of the same firm, and unclear billing entries, among other issues. The Fourth DCA reversed the award on the first petition on the grounds that the order failed to specify the hourly rates and reasonable hours that form the basis of the court's decision. The Court remanded and directed that the trial court prepare a written order providing that information. The Court also held that an express reference in the order to F.S. Sec. 744.108 (the fee statute) was not required. Finally, the Court affirmed the award of fees and costs related to the fee hearing and expert testimony.

Application: The case continues a line of authority requiring certain findings to be set forth in orders awarding guardianship attorney fees. It confirms the

lodestar formula for an award of fees and also confirms that the guardianship court can award "fees for fees."

5. ***In re: Guardianship of Hawley*, 188 So. 3d 882 (Fla. 2d DCA 2016). An show cause hearing is required prior to the removal of a guardian pursuant to the findings of an emergency monitor under F.S. Sec. 744.1075 says the Second DCA.**

In any guardianship case, an interested person may request, or the court on its own power may appoint, an emergency monitor. "The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken." F.S. Section 744.1075. In this case, the guardianship court entered an order removing the limited guardian of the person on the grounds it was necessary to protect the physical or mental health or property of Ms. Hawley after reviewing the report and findings of a court-appointed emergency monitor. F.S. Section 744.1075, the emergency monitor statute, authorizes such a removal under 744.1075(4)(b). However, the statute requires as follows: "If the court finds probable cause, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action." No show cause hearing was held prior to the removal. The Second DCA reversed the removal and held that the show cause hearing is required prior to a removal under F.S. Section 744.1075(4)(b).

Application: This case is one of a series in which appellate courts have ruled that even though guardianship courts have broad equitable powers to protect wards, to the extent other parties, such as guardians, have their rights affected with regard to their own liberty, property, fees, or are to be removed, the court must give those parties due process. The case contains an interesting footnote 1 that reads as follows: "The parties are cautioned against engaging in protracted unnecessary litigation at the ward's expense."

6. ***Allen v. Montalvan*, 201 So. 3d 705 (Fla. 4th DCA 2016). The Fourth DCA confirms that it is the total amount of settlement, not just the amount payable to minors, that is relevant in determining whether a guardian ad litem must be appointed to review a settlement involving minors.**

This case involved a car accident affecting four children and two adults. One of the adults died. After the accident, an attorney was hired by the surviving adult who was also the mother of the minors. The attorney negotiated with the insurance company for payment of the full limits of the policy ($50,000) to

settle all claims. When the settlement and releases were prepared by the insurance company, numbers were not
filled into the blanks on the release as they were to be filled in by counsel for the plaintiffs. When the releases were returned two years later, they indicated that $25,000 was to be paid to the deceased driver's estate, $25,000 was to be paid to the mother, and $0 was to be paid to the minors. Two weeks after returning the releases, mother hired a new lawyer and filed suit against the insured on behalf of the children and the insured raised settlement and release as a defense. The trial court granted a motion to enforce settlement agreement finding and dismissed the claims. The Fourth DCA reversed holding that the settlement agreement could not be enforced against the children because it was not approved by the Court prior to the settlement being executed. The Court held that F.S. Section 744.3025(1)(b) requires the appointment of a guardian ad litem for a minor when a guardian has not already been appointed and the gross settlement equals or exceeds $50,000. The insured argued that the amount paid to the deceased driver should not be included in the calculation, but the Court relied on Probate Rule 5.636(d) in holding that the total amount of the settlement should be included.

Application: This case is a reminder to be very careful about settlement of disputes regarding minors. If there is an existing guardianship for the minor, the guardianship court should review and approve the settlement. If there is no guardianship for the minor, the circuit court in general jurisdiction must appoint a guardian ad litem whenever the total settlement is $50,000 or more. Further, if the minor actually receives benefits under the settlement there may need to be additional proceedings so the court can review the specific mechanics of the benefits, such as the provisions of a structured settlement and the terms of any trusts.

7. ***Cason v. Ross*, 207 So. 3d 1024 (Fla. 1st DCA 2017). The First DCA holds that there is no explicit timeline for appointment of a guardian after incapacity has been determined.**

After months of incapacity proceedings, the trial court entered an Order Determining Partial Incapacity on August 29, 2016. On September 8, 2016, Appellant filed a motion for rehearing stating that the Order Determining Partial Incapacity had determined the AIP's no longer had the ability to make certain decisions, but no order appointing a limited guardian or letters of guardianship was entered. On October 5, 2016, the circuit court entered an order granting the motion for rehearing and vacating the Order Determining Partial Incapacity. The trial court then set a non-jury trial to take place in January 2017 (before a new successor judge). Appellant filed a petition for writ of mandamus asserting that the trial court is required to issue letters of guardianship due to its finding of incapacity. The petition for writ of mandamus asserted that circuit court had a clear, ministerial duty and responsibility to protect the AIP's rights by appointing a guardian to protect the

AIP once incapacity is determined. However, the relief requested was the issuance of letters of guardianship, not a new order determining incapacity and an order appointing guardian. The First DCA denied the writ, holding that there was no showing that the Petitioner expressly requested the trial court enter an order appointing a guardian and that there was no explicit time deadline placed on a trial court to appoint a guardian in connection with a determination of incapacity. The standard for mandamus relief is that "the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). The Court found that it appeared that the trial judge determined that he could not enter an order on the guardianship matter before his time in the division ended. There was no showing that petitioner made an express request that the trial court enter a new order that appointed a guardian for the AIP. Absent a showing that an express and distinct demand for performance of this sort has been made, mandamus will not lie.

Application: Query how this case might have gone had the mandamus petition requested a new order determining incapacity and an order appointing guardian rather than just letters of guardianship. However, the key to the holding is that there is not an explicit timeline for appointment of a guardian (or determination of less restrictive alternatives) upon the finding of incapacity by the court. This will come as a surprise to many practitioners who would have thought that timeline was "immediately thereafter."

Probate Cases

8. ***In re Estate of Arroyo v. Infinity Indemnity Insurance Company*, 211 So. 3d 240 (Fla. 3d DCA 2017). The Third DCA reminds us that a claim against a decedent's insurer is not necessarily barred by the two-year nonclaim provisions of F.S. Section 733.710.**

This case had somewhat of a complicated fact pattern involving the failure of the decedent's insurer to defend him and the events that then ensued. Arroyo died in 2009. In 2011 Reyes filed a negligence lawsuit against the estate personal representative, related to a personal injury allegedly caused by the decedent, but never filed a written claim in the probate court. Although the estate tendered the defense of the negligence claim to Infinity, Infinity declined to defend the claim. In 2013, the estate settled the negligence lawsuit by entering into a Coblentz agreement with Reyes, in which Reyes and the estate agreed to the entry of a consent judgment, Reyes agreed not to execute the judgment against the estate, and the estate assigned any rights it had against Infinity to Reyes. After Reyes and the estate entered into the agreement and obtained the consent judgment, Reyes sued Infinity in circuit court pursuant to the assignment of rights provision in the Coblentz agreement, alleging in part

that Infinity had demonstrated bad faith by failing to defend the estate in the negligence lawsuit. The issue in this case was whether Reyes was barred from suing the decedent's insurer when any probate creditor claims he might have had were time-barred. The Third DCA held that Reyes could sue the decedent's insurer. The Court concluded that "although . . . Reyes did not file a claim against the Estate in the probate court within the two-year limitations period, [his judgment] is enforceable against Infinity if coverage is established and there was no fraud or collusion. Our conclusion is fully supported by … the Fourth District Court of Appeal's decision in *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997)." In *Pezzi*, the Fourth District held that the plaintiff's failure to comply with F.S. Sections 733.702 and 733.710 did not place limitations on the plaintiff's ability to recover against the decedent's insurer. *Id.* at 886. The jurisdictional limitation under section 733.710 "is specific to the decedent's estate, the personal representative, and the beneficiaries; the limitation does not extend to the decedent's insurance policy." *Id.* at 885.

Application: This case is a reminder that of the principle that almost every rule has an exception. Further, it illustrates that statutes restricting access to the courts will be narrowly construed in a manner favoring access. Since the plaintiff here was not seeking recovery from the estate's assets, the personal representative individually, or the beneficiaries, nothing in the Probate Code precluded him from bringing his cause of action and recovering to the extent that the decedent was covered by liability insurance.

9. ***Depriest v. Greeson*, ___ So. 3d ___ (Fla. 1st DCA 2017). An estate is not liable for a car accident under the dangerous instrumentality doctrine when the accident occurs prior to the estate being opened, according to the First DCA.**

The issue in this case was an estate's potential liability for a car accident under the dangerous instrumentality doctrine. The decedent lived with his daughter prior to his death. His car and its keys were kept at the daughter's house and she occasionally drove the car with his permission. About a month after the father's death, the daughter was driving his car and got into an accident. No probate estate had yet been opened and the decedent's nominated personal representative was a step-son who lived out of state. As a general matter, an estate can get sued if the decedent's car is involved in an accident. The liability arises from Florida's "dangerous instrumentality doctrine," which is a creature of common law that "imposes … vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). An owner voluntarily entrusts a vehicle to another when he gives that person authority to operate the vehicle by "either express or implied consent." *Id.* Normally express consent is not applicable in a probate context, as it was not applicable here. The issue is implied consent. The First DCA

noted that implied consent cases courts focus on factors such as what a car owner knows about the driver's prior use of the vehicle, the location and accessibility of the keys, the nature of any familial relationship between owner and driver, and the conduct of the parties after an accident occurs. Here, the Court held that implied consent was not applicable because a personal representative has no legal duties prior to his appointment. Therefore, the step-son in this case had no duty to prevent his step sister from driving her deceased father's car. The relation-back doctrine was also held not to apply here since that would create a duty to act prior to appointment. Such a duty is contrary to the distinction between authority and duty under F.S. Section 733.601.

Application: This would be a harder case if a personal representative had actually been appointed when the accident occurred. Once appointed, the personal representative should take steps to control the decedent's car and prevent anyone from using it without express authorization (such as to take it to a dealer for sale). If the personal representative doesn't take steps to prevent people from driving the decedent's car, consent potentially could be implied in case of an accident.

10. ***Spradley v. Spradley*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA reminds to be careful about references to "the estate," since the personal representative, in a representative capacity, is actually the proper party to litigation against the estate.**

This case is a reminder that under Florida law there is no such thing as a separate legal entity known as an "estate." It is the personal representative of the estate, in a representative capacity, that is the proper party to legal actions on behalf of the estate. In his complaint, Spradley alleged that the estate of his mother, Fuller/Waters and his brothers, Derrick and James Spradley, converted his property. However, his complaint merely named his mother's estate and the brothers as the defendants and did not sue the personal representative of the estate or even allege a probate administration had been opened. Spradley's complaint was dismissed as legally insufficient under F.S. Section 57.085(6) and that dismissal was upheld on appeal. However, the Second DCA held that Spradley should be allowed to amend his complaint to correct the defects if possible.

Application: This is one of those legal points for which there seemingly should be numerous cases to cite but the Second DCA noted that there does not seem to be a Florida case directly on point. The Court did then go on to say that "it is well-settled that "an 'Estate' is not an entity that can be a party to litigation. It is the personal representative of the estate, in a representative capacity, that is the proper party." The Court then cited the following law in support of the proposition: "*Ganske v. Spence*, 129 S.W.3d 701, 704 n.1 (Tex.App. 2004) (citations omitted); see also § 733.608, Fla. Stat. (2016) (describing the general

power of the personal representative); *Reopelle v. Reopelle*, 587 So. 2d 508, 512 (Fla. 5th DCA 1991) (highlighting that only the personal representative of a decedent's estate would have the right to intervene in litigation for the benefit of all the beneficiaries of the decedent's estate); 31 AM. JUR. 2D EXECUTORS AND ADMINISTRATORS § 1141 (2016) ("Since estates are not natural or artificial persons, and they lack legal capacity to sue or be sued, an action against an estate must be brought against an administrator or executor as the representative of the estate."); 18 FLA. JUR. 2D DECEDENTS' PROPERTY § 721 (2016) (same)." If you have this issue in a case, now you have a current Florida decision you can cite.

11. ***Cohen v. Shushan*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA, in a scholarly opinion, affirms that you must follow formal legal requirements to be married. This includes foreign marriages you seek to have recognized in Florida. You are either married or you are not.**

The issue in this case was whether a couple was ever lawfully married under Israeli law, such that the survivor was eligible for benefits as a surviving spouse under the Florida Probate Code. The probate court concluded that Shushan and the decedent, Cohen, were in a recognized legal union in Israel at the time of Mr. Cohen's passing. The legal union was that of "reputed spouse." Thus, according to the probate court, under F.S. Section 732.102. Shushan was entitled to a surviving spouse's share of Cohen's intestate estate. Cohen's daughter appealed the order. The Second DCA held that the probate court erroneously conflated a domestic union under Israeli law with marriage under Israeli law and reversed. The facts showed that Cohen formed a romantic and enduring relationship with Shushan. Beginning in 1990, Cohen and Shushan lived together as a couple in Israel and remained together until Cohen's passing in 2013. Shushan and Cohen had four children together, ran Israeli businesses together as partners, and held themselves out as husband and wife to their friends and family. To all appearances, they seemed a married couple, and, they may very well have thought themselves to be each other's spouse. But they never participated in a religious wedding through any religious authority recognized under Israeli law. In the probate litigation, the daughter did not dispute that Shushan was indeed her late father's "reputed spouse" in Israel, but she argued that legal status was not one the Israeli state recognizes as marriage. Because Israel's law limits marriage to a union formed under the auspices of a recognized religious authority, Shushan was never Mr. Cohen's married spouse, according to the daughter. At trial, the litigants, as well as their testifying experts, referred to Shushan's domestic relationship with the decedent alternatively as "common law spouse," "reputed spouse," or a "spouse known in public." The legal issue was whether Israeli law recognized a "reputed spouse" relationship as "marriage." When you boil down the testimony, both sides' experts essentially testified that while the Israeli State recognizes common law/reputed spouse as equal to marriage with regard to many rights, the two relationships—marriage and reputed spouses—remained distinct under

Israel's law. Reputed spouses were further explained as a civil relationship but the testimony confirmed there is no civil marriage in Israel but rather only religious marriage is recognized. The Second DCA construed the issue *de novo* as a question of law on appeal and held that the Israeli reputed spouse relationship is not marriage under Florida law for the purposes of F.S. Section 732.102 so Shushan is not entitled to the benefits of a surviving spouse. In its holding, the Court entered into a very detailed discussion of the nature of the marital relationship, its uniqueness, the fundamental rights involved, and the importance of being able to distinguish a marital relationship from other relationships that look similar but are not in fact marriage. The Court noted that due to the societal importance and personal significance of marriage, the law strives to keep as clear as possible what the points of entry into a marital relationship are so that the public can readily discern who has entered into a marriage union and who has not. In its summary the Court noted that the status of a reputed spouse relationship cannot be identical to the status of a married spouse's relationship because, under Israeli law, reputed spouses are not married and can informally end their relationships at any time without even seeking a divorce. Marriage, under the law, is not simply a bundle of rights and privileges; it is also a status. The Court explained that if it were to hold otherwise and approximate a reputed spouse relationship as "close enough" for purposes of marriage, our courts would simultaneously diminish, “the uniqueness of the marital status in the affairs of society and do offense to a sovereign nation's authority to define, for itself, the precise boundaries of marriage within its own jurisdiction.

Application: This case is an excellent explanation of the distinction between legal marriages and common law marriages, and why Florida law favors the former. It is also an explanation for why a surviving spouse has so many rights in the probate context.

12. ***Delbrouck v. Eberling*, ___ So. 3d ___ (Fla. 4th DCA 2017). A will contestant has standing to contest a will, even if his share is the same as under intestacy, where it is possible a different personal representative would be appointed after the contest, holds the Fourth DCA.**

Delbrouck died in 2014, and was survived by his three sons, the appellant, Aime Guy Delbrouck, and Claude Delbrouck. After the decedent's death, the probate court entered an order admitting his 2013 will to probate. The order noted that the decedent's will appointed Maria Eberling, Aime's ex-girlfriend, as the personal representative. Aime was appointed as the substitute personal representative. The will divided the decedent's assets equally among his three sons, who would have been the decedent's heirs at law had there been no will. Appellant then petitioned for revocation of probate alleging, among other things, that the will was procured by undue influence and overreaching on the part of Aime and the personal representative. The personal representative served a motion for summary judgment alleging that even if there had been

undue influence or if the will had been executed when the decedent lacked testamentary capacity, appellant would not receive any benefits by successfully revoking probate since his share in the estate was the same under intestacy. The personal representative then filed affidavits from Aime and Claude, who each attested that they would nominate the same personal representative and reject appellant's attempt to seek an alternate representative. After a hearing, the probate court granted summary judgment in favor of the personal representative on the ground that appellant lacked standing because, given the fact he would receive the same 1/3 share under the will or through intestacy, he would not be "affected" by the outcome of the proceeding and therefore was not an "interested person." The Fourth DCA reversed and held appellant would be affected by the outcome of the revocation petition insofar as a successful revocation would have removed the personal representative and there is no guarantee the same person, even if entitled to preference in appointment, would be appointed by the trial court after the revocation trial.

Application: The trial court here was likely concerned about the time and expense of litigation where the only potential issue that could change was the identity of the personal representative and where the majority in interest in the estate did not want that to change. However, personal representatives have a great deal of power and discretion as to the conduct of the administration and the court might decline to re-appoint someone as a fiduciary where the court believes that person was involved in wrongdoing related to the procurement of a will even when the financial outcome after challenge is the same.

13. ***Winslow v. Deck*, ___ So. 3d ___ (Fla. 4th DCA 2017). The Fourth DCA holds that a challenge to a will that was technically defective should not be dismissed with prejudice but that the challenger should be authorized to amend so long as the original challenge was timely filed.**

The decedent executed two wills. The first will left everything to decedent's two children, including Mallory Deck. Later, decedent executed a second will, which revoked all prior wills and left everything to a friend, Karen Winslow. Shortly after decedent's death, Deck successfully had the first will admitted to probate and she was appointed as personal representative. Then, shortly thereafter, Winslow filed the second will and: (1) an emergency petition to revoke letters of admin (2) a counterpetition for administration with the second will attached (3) an objection to Deck's petition and appointment as personal representative, and (4) a declaration that the probate proceeding was adversary. The trial court denied Winslow's emergency petition and upheld letters of administration issued under the first will. More than a year later, Deck moved to dismiss Winslow's counterpetition with prejudice, arguing Winslow lacked standing and asserting she failed to object to probate of the first will within the required 3 month time frame under F.S. Section 733.212(8)because her counterpetition did not specifically request revocation of the first will. The trial court then dismissed the counterpetition with prejudice. In the appeal the main issue was

whether the failure to specifically request revocation of the will in the counterpetition within the 3 month time period meant the challenge was time barred or whether the court should have granted Winslow leave to amend the counterpetition since that document was filed within the 3 month time period. The Fourth DCA held Winslow's intent in filing the counterpetition was clear in that she wanted to revoke probate of the first will and admit the second will, and that a mere technical failure in the pleading is not grounds for dismissal with prejudice. The Court then held that, even if the counterpetition was dismissed, the trial court should have granted leave to amend the counterpetition to cure the technical defect. The Court's reasons for granting the appeal were: (1) as a general rule, trial courts should not prevent a petitioner from challenging a will because of a technical defect in the petitioner's pleading without allowing for a reasonable opportunity to amend (2) the law is clear that trial courts must liberally construe court rules to allow parties to freely amend their pleadings in the interests of justice unless the privilege has been abused, there is prejudice to the opposing party, or amendment would be futile; (3) it was clear from the allegations contained in Winslow's filings that she sought to revoke the probate of the first will and admit the second will, thus satisfying the requirements of F.S. Sections 733.208 and 733.212(3); and (4) nothing in the record indicates that Winslow abused the privilege to amend, there would have been prejudice to Mallory by permitting leave to amend, or the amendment would have been futile.

Application: Although the probate court is a court of equity, certain probate time limits are hard and fast bars to relief such as the nonclaim two year period. This case is a reminder, though, that where a probate filing is made timely but is technically defective, the court can and should grant an amendment so long as there is not abuse, or prejudice to the other side.

Trust Cases

14. ***Ames v. Ames*, 204 So. 3d 132 (Fla. 4th DCA 2016). The Fourth District holds that an ex parte temporary injunction in a constructive trust matter may be entered and a temporary injunction then maintained as a constructive trust, without specific identification of assets, if the opposing party refuses to respond to discovery or present evidence regarding the location of the assets.**

Here, a father sued his two sons claiming breach of fiduciary duty under a power of attorney, fraud, and unjust enrichment after one of the sons utilized a power of attorney to liquidate more than $1 million of the father's investment account and used a power of attorney to sell the father's condominium and keep the proceeds. The sons claimed those assets were given as gifts to the sons. The Probate Court, in a case that was not a probate or guardianship case, but rather a breach of fiduciary matter related to a durable power of

attorney[1] entered an ex parte temporary injunction freezing all of the sons' assets, on the grounds that the father's assets, which were needed for his survival while showing signs of dementia, were being dissipated and a money judgment entered later would not suffice. After the ex parte freeze was entered, the trial court then held an evidentiary hearing regarding the injunction but the sons refused to appear at the hearing, refused to provide any discovery to the father, and failed to indicate where the father's money had been transferred after the transactions. The Fourth DCA affirmed the entry of the ex parte injunction and its maintenance after the evidentiary hearing and determined that a constructive trust remedy here was appropriate. Ordinarily, a constructive trust can be impressed only if the trust *res* is specific, identifiable property or if it can be clearly traced in assets of the defendant. *See Finkelstein v. Se. Bank, N.A.*, 490 So. 2d 976, 983 (Fla. 4th DCA 1986). In this case, the father served a notice of production inquiring about the subject assets after the sons moved to dissolve the injunction, but no information was ever provided by the sons. The sons also refused to provide depositions in this matter. The Fourth held that these efforts were sufficient to meet the requirements of *Finkelstein*.

Application: Assuming this was not a mental health incapacity case or guardianship matter, this case seems to be an extension of the broad equitable power a Probate Court has to enter ex parte injunctions merely to preserve the status quo and to protect vulnerable adults. *See also Estate of Barsanti,* 773 So. 2d 1206 (Fla. 3d DCA 2000). The case is a powerful weapon to assist attorneys seeking to assist clients who are potentially being exploited by an agent under a power of attorney who is breaching his duty.

15. ***Nelson v. Nelson*, 206 So. 3d 818 (Fla. 2d DCA 2016). The Second DCA holds that an irrevocable trust, even if established solely for creditor protection or estate planning purposes, is not a marital asset for equitable distribution purposes and cannot be reformed without consent or participation by all trustees and beneficiaries.**

This case involves property funded into an irrevocable trust. Such trusts are used to allow families to transfer wealth over multiple generations free from creditors, certain taxes, and potentially, ex-spouses. The recent case of *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013), held that such trusts can be pierced in favor of enforcement of alimony and child support orders. The court here was faced with the more drastic question of whether an irrevocable trust can be terminated and divided pursuant to equitable

[1] The case does not contain many facts and this summary is my speculation from reading the opinion. If the trial court case was a mental health incapacity matter, or a guardianship case, then I don't think the holding is unusual or groundbreaking since the Probate Court in guardianship cases already has broad equitable powers to freeze assets on an ex parte basis. *See Ripoll v. Comprehensive Personal Care Services, Inc.* 963 So. 2d 789 (Fla. 3d DCA 2007).

distribution in a divorce case, as was argued by the husband in this case. The trial court held that the trust was subject to equitable distribution but the Second DCA reversed and held that a divorce court cannot force you to terminate your irrevocable trust and split the assets with your divorcing spouse. The Court determined that assets, even if initially marital in nature, don't retain their marital-asset status once they've been gifted away, as happened when the irrevocable trust was funded. The irrevocable trust is an entity distinct from either the husband or wife. Alternatively to equitable distribution, the husband sought to reform the trust by stating that the trust was solely to create an estate planning mechanism intended to protect the home from claims made by his heirs in the event he were to predecease the wife during their marriage. The husband then argued that since that purpose no longer existed, the trust was subject to reformation pursuant to the Florida Trust Code. The Court rejected the reformation argument, noting that reformation pursuant to F.S. Section 736.04113 could only be initiated by a trustee or beneficiary of the trust, not the initial settlor. The court also rejected application of common law authority to modify or terminate an irrevocable trust, citing to absence of consent from all beneficiaries of the trust.

Application: Irrevocable trusts do protect assets in the context of a divorce, but only as to equitable distribution and not as to alimony and child support claims. Alimony claims can be addressed through marital agreements and such agreements may further eliminate potential litigation such as this case. In addition, the Florida Trust Code and case law provide many tools to modify or reform even irrevocable trusts but those remedies have very specific requirements and if you fail to meet one of the requirements a remedy such as reformation will be unavailable.

16. ***Edwards v. Maxwell*, ___ So. 3d ___ (Fla. 1st DCA 2017). The First DCA holds that beneficiaries of purely discretionary trusts do not have standing to contest adoptions adding beneficiaries to the trusts.**

In 2004 Edwards adopted a son named Kuiper. This had the legal effect of adding Kuiper to the class of eligible beneficiaries for three irrevocable discretionary trusts created by the great-grandparents of Edwards' biological son, Maxwell. Maxwell filed suit in 2014 claiming the adoption was a sham that diluted his interest in the trusts. Maxwell argued he should have received notice of the adoption in 2004, which would have given him an opportunity to fight it in court. The trial court agreed and vacated Kuiper's adoption order. The First DCA reversed and held that since beneficiaries of purely discretionary trusts don't have any fixed or certain property rights in such trusts, they don't have legal standing to challenge adoptions of new potential beneficiaries in court. In this case, as a practical matter, Maxwell couldn't demonstrate that Kuiper's adoption had an economic impact on him. Without a direct, financial, and immediate interest in the trusts, he lacked standing to set aside the 2004 adoption because he wasn't entitled to notice in the first place.

Application: Under F.S. Section 732.608, adoptions can be used to add individuals to the class of eligible beneficiaries of irrevocable trusts. Adoptees are treated by the statute as descendants of their adoptive parents for inheritance purposes. Regarding the holding in this case, it seems to me that if Maxwell had been vested as beneficiary as to a certain right, for example, some percentage interest or set share in the trust principal, then the result in this case would have been different.

17. ***Landau v. Landau*, ___ So. 3d ___ (Fla. 3d DCA 2017). The Third DCA holds that the Probate Court's inherent jurisdiction to freeze assets extends to trusts where the trustee is in front of the court, the evidence shows a failure to file timely and accurate accountings, and where the beneficiaries have pled breach of trust claims against the trustee.**

David Landau ("David") appealed a trial court order freezing the assets of the trust of his late wife, Flois Landau ("Flois"), under which he was serving as trustee. He was also serving as personal representative of Flois's estate. Susan Landau ("Susan"), one of Flois's daughters and a residuary trust beneficiary, moved to freeze the trust assets upon receipt of an unsigned trust accounting that she believed raised concerns regarding David's actions as trustee and regarding the status of the estate and trust assets. Susan had first filed a complaint to compel trust accountings, which led to David providing the unsigned trust accounting. Susan then amended her complaint after service of the unsigned accounting to include actions for breach of trust, removal of trustee, and for a temporary injunction over trust assets. In February 2017, a hearing was held and the trial court judge deferred on an injunction or removal and granted David additional time to address outstanding issues. However, by May 2017, David still had not served a 2016 accounting, corrected the 2015 unsigned accounting, or filed certain back tax returns. The trial court therefore ordered the trust assets frozen until David completed and filed the 2016 accounting. The Third DCA affirmed the trial court decision freezing assets, holding that the "probate court's inherent jurisdiction to protect the assets under its supervision is well established." *See In re Estate of Barsanti*, 773 So. 2d 1206, 1208 (Fla. 3d DCA 2000). The *Barsanti* temporary injunction standard in probate is looser than the general civil standard and is predicated on the court's authority to maintain the status quo with regard to potential probate assets until the rights of the parties before the court can be more finally determined. The Third did not cite to, or distinguish this case from, *Dowdy v. Dowdy*, 182 So. 3d 807 (Fla. 2d DCA 2016), which applied the general civil injunction test as the test to freeze trust assets. However, under these facts, the Third DCA specifically rejected David's arguments that freezing trust assets violated due process.

Application: This case is an interesting extension of the probate court's inherent jurisdiction and equitable authority. Litigants concerned about

potential trustee wrongdoing can cite this case as support for an injunction of trust assets, along the lines of *Barsanti* in probate matters and *Ripoll v. CPCS*, 963 So. 2d 789 (Fla. 3d DCA 2007) in guardianship matters. The Third DCA, although it did not explain its holding this way, was likely differentiating the result from *Dowdy* due to the establishment of certain facts in this case prior to the injunction and the interrelation of the trust with a pending probate estate (same trustee and PR) all in front of the court.

18. ***Guardianship of Bloom v. Bloom*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA confirms that denial of fees is an appealable order and gives clarity to service requirements for fee petitions under F.S. Section 736.1005.**

Leon Bloom died in 2015 while a guardianship proceeding against him was still pending. His nephew, Marshall, was acting as emergency temporary guardian and was in the process of defending a claim by Leon's wife, Dorothy, regarding reimbursement from Leon's trust for funds she claimed had been used to care for her husband. Marshall was then appointed as personal representative of Leon's estate. As personal representative, Marshall obtained an order allowing him to substitute as PR to continue challenging Dorothy's claim. The successor trustee of Leon's trust unsuccessfully attempted to have that order quashed, and the appellate court entered an order awarding fees to Marshall. Subsequently, Marshall successfully obtained an order disqualifying the trustee and appointing an independent trustee. Marshall then filed a request for payment of fees from the trust for services rendered, pursuant to F.S. Section 736.1005. The trial court rejected the request for attorney's fees. The appellate court reversed that decision, in part, and remanded for proceedings to determine if Marshall had "rendered services to a trust." In doing so, the Court made two holdings of note. First, a denial of fees is an appealable order under Florida Rule of Appellate Procedure 9.170. This seems like it would be fairly straightforward but the rule states in 9.170(b)(23) that orders that "award attorney's fees or costs" are appealable. The Second DCA explained that Rule 9.170 generally describes appealable probate and guardianship orders as those "that finally determine a right or obligation of an interested person" under the Probate Code. The denial of fees was found to finally determine a right or obligation. In addition, the Court observed that the description of the laundry list of appealable orders in the rule was explicitly set forth as non-exclusive and that a denial of fees is appealable under existing case law. Second, the Court also focused upon an ambiguity in the fee statute regarding when interested parties are to receive notice of those proceedings. The statute requires notice "on the trustee and all beneficiaries entitled to an accounting...." The statute could be interpreted to say that the notice to those parties is not required at the time the fee petition is filed but rather could be provided at any time before court entered its order on the petition. The Court rejected that argument and held that a petition for attorney's fees under F.S.

Section 736.1005 must be served contemporaneously with the filing of the application with the court.

Application: The opinion is somewhat helpful in analyzing procedures for seeking attorney's fees in trust matters but more helpful in terms of analyzing the application of the relatively recent probate appellate rule and in terms of clearing up what could be interpreted as an ambiguous service requirement for attorney's fee petitions in certain trust matters.

19. ***Kelly v. Lindenau*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA holds reformation is not available to reform a trust merely to correct an error in execution of the trust.**

Falkenthal created a revocable trust while residing in Illinois. He later moved to Florida, and while residing in Florida, separately executed two amendments to the trust, both prepared by his Illinois attorney. The amendments were executed in the presence of two witnesses, but were only signed by one of the witnesses. The second amendment devised real property to Donna Lindenau. After Falkenthal's death his daughter, Judy Mors-Kotrba, as successor trustee of the trust, filed a declaratory action seeking to determine the validity of the amendments. Lindenau filed a counterclaim seeking to reform the trust to correct a mistake, arguing that the error in not having two witnesses sign the second amendment was a mistake of law. Falkenthal's other children opposed the reformation, taking the position that the amendments were invalid, as they were not executed in compliance with Florida law. There did not appear to be any dispute that the decedent's intent was to leave the property to Lindenau. The issue was improper execution. At trial, the court ultimately granted the reformation. The Second District reversed and held that F.S. Section 736.0415, governing reformation of trusts, provides that a trust can be reformed "to conform . . . to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." However, the Court found that there were no "terms of the trust" to reform due to the invalid execution at the outset. Lindenau was not seeking reformation of the terms of a valid trust, but rather to remedy an error in execution. The terms of the trust document itself were clear and not in need of reform, what needed correction was the execution. However, the Court concluded reformation is not a remedy for invalid execution of a trust. The Court also held the imposition of a constructive trust is not available where there is an error in the execution of the document.

Application: This is a situation of varying state execution requirements and lack of involvement of Florida counsel defeating the uncontroverted intent of the decedent. The case gives further clarity to the application of the trust reformation remedy found under F.S. Section 736.0415.

Procedure and Judicial Administration Cases

20. ***Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*, ___ So. 3d ___ (Fla. 3d DCA 2017). Being a Facebook "friend" of the judge, without more, is not grounds for disqualification of the judge.**

A petition for writ of prohibition to disqualify the trial court judge was filed on the basis that the judge was a Facebook "friend" with a lawyer who represented a potential witness and potential party to the litigation. Petitioner claimed the "friend" status supported petitioner's "well-grounded" fear that their client would not receive a fair trial, and that the Facebook "friend" status was evidence the attorney was influencing the trial judge. The Third DCA held the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend." The Court noted that the test for determining the legal sufficiency of a motion for disqualification is whether "the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." The issue in this case was therefore whether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit. The Court explained that under existing law, allegations of mere `friendship' with an attorney or an interested party have been deemed insufficient to disqualify a judge. The court, after conducting its analysis, cited the following reasons for its holding: (1) many people have a large number of Facebook friends, (2) Facebook users often don't remember all of the people they have accepted as "friends", and (3) Facebook suggests friendships based on its proprietary technology. Finally, the Court noted that social media is evolving at an exponential rate and that acceptance as a Facebook "friend" may well once have given the impression of close friendship and affiliation but currently, however, the degree of intimacy among Facebook "friends" varies greatly. The designation of a person as a "friend" on Facebook does not differentiate between a close friend and a distant acquaintance.

Application: This case conflicts with *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012), in which the 4th DCA held that recusal was required when the judge was Facebook "friends" with the prosecutor. The Fourth DCA based its decision on a 2009 Judicial Ethics Advisory Committee opinion prohibiting judges from adding lawyers who appear before them as Facebook "friends." The Third's opinion notes that the Fifth DCA has also signaled disapproval of *Domberg* in *Chace v. Loisel*, 170 So. 3d 802 (Fla. 5th DCA 2014) and cites with approval the American Bar Association, *Judge's Use of Electronic Social Networking Media*, Formal Opinion 462 (Feb. 21, 2013) (which holds that "nothing requires a judge to search all of the judge's ESM [electronic social

media] connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.").

21. ***Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC*, ___ So. 3d ___ (Fla. 1st DCA 2017). The First DCA finds no excusable neglect and affirms denial of relief from a judgment entered by the trial court when the firm seeking relief had implemented an ill-advised email system.**

In this non-probate matter, a trial court entered an order assessing attorneys' fees against appellant. On March 20, 2014, the clerk of court served the order via email to the addresses designated by counsel for each party. On May 12, 2014, appellant filed a motion for relief from the order, claiming excusable neglect under FRCP 1.540(b) and asking the trial court to vacate and reenter the order so appellant could file a timely notice of appeal. The firm claimed they did not receive a copy of the order until after expiration of the time to appeal. At the hearing on appellant's motion, there was testimony from IT personnel for the Clerk and for the firm. The Clerk's office confirmed the email was delivered to the host server for the primary and secondary email addresses listed for appellant's counsel. The Clerk did not receive a bounce-back or error message indicating any issue with receipt of the emails. Further testimony showed the firm had a system that permanently deleted any emails designated by the system as "spam" email before anyone could review the messages. Apparently there was no spam folder in the email system. There was also no testimony that the firm had someone checking the court docket to see if orders were entered when no emailed order would show up. The First DCA, in reviewing the case, found that the trial court could conclude the firm received the email with the order but never saw it due to their ill-advised email spam deletion system. The Court held that the firm's conscious decision to use this type of email system without any safeguards or oversight in order to save money did not constitute excusable neglect.

Application: This case is part of a trend where The Florida Bar and the court system are taking a hard line regarding lawyers' use of technology and the need for law firms to stay current. Under the Rules Regulating The Florida Bar, Rule 4-1.1, Competence, there is a comment that states that "[c]ompetent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications." The trend is also illustrated by the efiling case last year of *United Bank v. Estate of Frazee*, 197 So. 3d 1190 (Fla. 4th DCA 2016)(timely paper filing rejected and subsequent late-efiled claim in probate then deemed time-barred).

22. ***U.S. Sugar Corp. v. Estate of Mullins*, 211 So. 3d 110 (Fla. 4th DCA 2017). Discovery for a wrongful death case needs to be conducted in a filed wrongful death case, not in the probate administration, holds the Fourth DCA.**

The personal representative of the estate in question sought discovery from a non-party to the probate action. That non-party, U.S. Sugar, was the entity which owned the location where the decedent Mullins died. Prior to filing a wrongful death case or any adversary action against U.S. Sugar, the estate served a subpoena duces tecum seeking documents relating to its investigation of the fatal accident which killed the decedent. U.S. Sugar sought a protective order, arguing the subpoena did not seek discovery of admissible evidence in the probate action and sought privileged attorney-client and work product documents. The trial court overruled the relevance objections and required U.S. Sugar to file a privilege log. The Fourth DCA reversed, holding that discovery related to a wrongful death claim is not reasonably calculated to lead to discovery of admissible evidence in a probate action, since the wrongful death matter cannot be litigated in the estate proceeding. The Court stated it would refuse "to open wide the probate court doors for discovery to support unfiled wrongful death actions." The Court also granted the privilege objections and noted that a privilege log cannot be required from a nonparty producing documents. The Court noted with regard to the privilege log issue that even if the documents requested were arguably non-privileged, U.S. Sugar should have been ordered to segregate those documents which they claimed were privileged, after which the court would hold an evidentiary hearing and conduct an *in camera* review if necessary.

Application: If the personal representative wants discovery related to a possible wrongful death cause of action, the personal representative will have to be willing to engage counsel to litigate the case and file an adversary action where the discovery can be conducted.

23. ***Dandar and Dandar & Dandar, P.A. v. Church of Scientology Flag Service Organization, Inc.*, 190 So. 3d 1100 (Fla. 2d DCA 2016). The Second DCA holds that the trial court did not have jurisdiction to entertain a subsequent motion to enforce settlement agreement when the case was voluntarily dismissed with prejudice and the Court did not reserve jurisdiction to enforce the agreement.**

Litigation between the parties to this case began in 1997, when Kennan G. Dandar and the law firm of Dandar & Dandar, P.A. (collectively "Dandar"), represented the Estate of Lisa McPherson in a wrongful death action against the Church of Scientology. A confidential settlement agreement was reached in that case in 2004, which Dandar signed in his individual capacity, and the parties filed a joint stipulation of voluntary dismissal with prejudice. Dandar pledged in the agreement that he would not be involved in any adversarial

proceedings against the Church under any circumstances at any time. In 2009, Dandar then filed a complaint on behalf of another plaintiff against the Church. The Church sought an order in the action that had been settled and dismissed to enforce the settlement agreement and Dandar argued that the Trial Court lacked jurisdiction. At the trial court, the Church successfully moved to enforce the agreement against Dandar and was awarded attorney's fees and costs in the amount of $1,068,156.50, plus postjudgment interest. The trial court found that it had jurisdiction to enforce the settlement agreement based on language within the agreement that provided "the circuit court … shall retain jurisdiction to enforce the executory terms of this Confidential Settlement Agreement which shall be filed under seal if enforcement becomes necessary." The Second DCA held that the trial court did not have jurisdiction to entertain the Church's motion after the Church had previously dismissed its cause of action with prejudice. The Court then reversed the judgment.

Application: This case highlights the difference between presenting a settlement agreement to the trial court for approval prior to dismissal of an action and cases where the parties voluntarily dismiss the action without an order of the court pursuant to Florida Rule of Civil Procedure 1.420. As the Second DCA held here, a voluntary dismissal under rule 1.420(a) divests the trial court of continuing jurisdiction over the case. In order to allow the court to retain jurisdiction, the parties, prior to dismissal, may present the settlement agreement to the trial court for approval and the trial court then enters an order of dismissal predicated on the parties' settlement agreement, the trial court retains jurisdiction to enforce the terms of the settlement agreement. Alternatively, the parties could have obtained an order of dismissal incorporating the settlement agreement or an order reserving jurisdiction to enforce the terms of the agreement. However, in this case the trial court could not rely on its inherent power to enforce its own orders since there is no judgment or order for the court to enforce. In this instance, the Church's appropriate remedy was to pursue a new breach of contract action to enforce the settlement agreement.

24. ***JBK Associates, Inc. v. Sill Bros, Inc.*, 191 So. 3d 879 (Fla. 2016). The Florida Supreme Court confirms that a debtor did not destroy the protected status of funds from the sale of his homestead by placing them in non-high risk mutual funds and stocks.**

In 2010, JBK obtained a final judgment against Sill in the amount of $740,487.22. In 2013, Sill and his wife sold their marital home due to divorce and Sill placed his portion of the homestead proceeds in a "FL Homestead Account" with Wells Fargo. The bank split the funds into three subaccounts: one cash account and two securities accounts containing mutual funds and unit investment trusts. In 2014, JBK served garnishment writs on Wells Fargo to collect on the judgment from Sill's accounts. Sill moved to dissolve the writ

asserting that the funds were entitled to homestead protection. The trial court agreed and JBK appealed to the Fourth DCA. The Fourth District found that the investment in securities was not so inconsistent with the purposes of homestead for the funds to lose their protected status under the Supreme Court decision in *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201 (Fla. 1962). Florida's homestead exemption provides protection not only for the physical homestead property, but also for both the cash and non-cash proceeds from a voluntary sale of the homestead as well. "However, the following requirements must be met for sale proceeds to maintain the same protection from creditors as the original homestead: (1) there must be a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; (2) the funds must not be commingled with other monies; (3) the proceeds must be kept separate and apart and held for the sole purpose of acquiring another home." *Orange Brevard*, 137 So. 2d at 206. The Fourth District found that Sill did not commingle the proceeds with other funds and there was no evidence that the securities in Sill's account were particularly risky or kept separate and apart from Sill's other funds. Sill ultimately did use the proceeds to purchase a new home. The case made its way to the Florida Supreme Court and the Supreme Court affirmed the Fourth's opinion and held that Sill had not violated the requirements of the *Orange Brevard* case (which the Court reaffirmed as good law). The Court observed that in today's economic climate, when traditional bank accounts do not earn any significant amount of interest, placing sale proceeds in the type of common and relatively safe investment accounts at issue did not demonstrate an intent so different from reinvestment in a new homestead within a reasonable time as to violate *Orange Brevard*. Finally, the Court held that "any decision contrary to the one we make here would require judgment debtors to place homestead sale proceeds in non-interest-earning mediums only — perhaps an escrow account or even a jar under one's bed — and we decline to read Florida's homestead exemption provision so narrowly, especially given the liberal construction this area of Florida law typically enjoys."

Application: This case is part of the strong body of case law liberally interpreting Florida's homestead creditor protections. It gives comfort to debtors who seek to invest the sales proceeds in investments that will at least garner some positive return above that available for cash accounts only while the debtor then shops for a new residence.

25. ***Yergin v. Georgopolis*, 217 So. 3d 155 (Fla. 3d DCA 2017). The Third DCA explains the procedure for litigating entitlement to unclaimed property.**

Richard Yergin took out a life insurance policy on himself, and named as the beneficiary Georgopolos, who was listed as Richard's mother. The policy and

the $41,687.74 it paid out on Richard's death in 1997, however, were unknown to Georgopolos and Richard's heirs. They didn't know about the money when Richard died or when Richard's estate was probated in 1998. The money was finally discovered by the parties in 2015. By then, the insurance company had turned over the funds to the Florida Department of Financial Services. In 2015, Glen Yergin, Richard's half-brother, petitioned to reopen Richard's estate, appoint himself the personal representative, and for a declaration from the probate court that the insurance money: (1) was a failed transfer because Georgopolos was not Richard's mother as stated on the policy; and (2) belonged to the estate. Georgopolos made a claim for the funds with the financial services department, and moved to dismiss the petition, which the probate court granted. The Third DCA affirmed since it was undisputed that the brother did not file a claim with the financial services department. The issue in the case was whether a personal representative that seeks to obtain money or property delivered to the financial services department as unclaimed must first file a claim with the department, and exhaust administrative remedies, before it can file a lawsuit or petition in the probate court to determine ownership of the property. The brother contended that the probate court must decide first because Florida law gives it exclusive jurisdiction to determine whether property is part of an estate. This appears to be a logical argument but the Court noted that Florida's constitution and statutes give the financial services department jurisdiction to make determinations as to unclaimed property deposited in the state treasury. *See* ART. IV, § 4(c); § 717.124(1), Fla. Stat. (2015). The Court held that while Florida law does generally give jurisdiction to the Probate Court to determine all matters related to the settlement of estates and determination of estate property, it is "consistent with [the] legislative intent" to give jurisdiction to the circuit court over the settlement of estates, and jurisdiction to the financial services department over unclaimed property, "any estate or beneficiary . . . of an estate seeking to obtain property paid or delivered to the department . . . must file a claim with the department." § 717.1242(1), Fla. Stat. (2015). Only after a claimant has exhausted the administrative procedures with the financial services department may it seek relief in the circuit court.

Application: This issue is a bit of a trap for the unwary. Even if a probate court erroneously enters an order with regard to unclaimed property, if the financial services department procedures have not been followed the government will not comply with the probate court order and will be within its rights to ignore the order. As the Court notes, the Legislature has set forth an extensive administrative procedure for seeking unclaimed property. That procedure must be followed and contains timelines for determination of rights and administrative hearings. The administrative process must be followed to conclusion prior to seeking any court determination of rights.

26. ***Paton v. GEICO General Ins. Co.*, 190 So. 3d 1047 (Fla. 2016). The Florida Supreme Court holds that the time records of opposing counsel are permissible discovery as evidence to support the reasonableness of the propounding party's own fees.**

The appellant in this case moved for attorneys' fees and costs stemming from a bad faith claim against GEICO. In connection with the attorneys' fees claim, which was contested, Appellant sought discovery of the opposition's attorneys' time records arguing they would support the Appellant's claim that the number of hours spent by Appellant was reasonable and that the claims involved were complex. The issue eventually worked its way up to the Florida Supreme Court, which held that "[T]he billing records of opposing counsel are relevant to the issue of reasonableness of time expended in a claim for attorney's fees, and their discovery falls within the discretion of the trial court when the fees are contested." The Court stated that any privilege concerns could be solved through redaction. Finally, the Court noted that "the entirety of the billing records are not privileged, and where the trial court specifically states that any privileged information may be redacted, the plaintiff should not be required to make an additional special showing to obtain the remaining relevant, non-privileged information."

Application: The availability of opposing counsel billing records in contested fee matters will hopefully help lead to settlement of these disputes or less marginal objections being made in the first place. One can always hope…