Recent Case Law Update

Dade County Bar Association
Probate and Guardianship Committee

Presented May 10, 2018

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Probate Cases

1. ***Crescenzo v. Simpson*, ___ So. 3d ____ (Fla. 2d DCA 2018). The Second DCA holds that an answer to a petition for administration can serve as a caveat for purposes of F.S. Sec. 731.110 so that the petition cannot be granted without due process to the challenger.**

Crescenzo appealed from an order of the probate court that admitted the will of Quinones to probate. He argued that before the court could admit the will, the probate court had to decide a challenge to the will's validity that was contained in an answer he filed to the petition for administration. The personal representative countered that because Crescenzo's challenge was not contained in a caveat under Florida Probate Rule 5.260, the court did not have to decide that challenge before admitting the will to probate. The Second DCA reversed and held that Crescenzo's answer was the functional equivalent of a caveat. The petition for administration sought the appointment of Simpson as PR. The petition stated that Ms. Quinones had a will, identified Ms. Quinones' sister and niece as the beneficiaries of that will, and sought to have the will admitted to probate without notice to any other persons. Crescenzo filed a pleading styled "Answer and Affirmative Defenses to Petition for Administration." That pleading contained a caption stating that it was being filed "In re: The Estate of Herminia Quinones," identified the case number, and stated that Crescenzo had an interest in the estate because he was a fifty-percent owner of the real property that was its sole asset. The answer contained the name and address of Crescenzo's lawyer. It also contained "affirmative defenses" in which Crescenzo disputed the validity of the will, alleging that it was procured through fraud and undue influence, and raised objections to the administration of the estate and the appointment of Simpson as personal representative. Without conducting a hearing or otherwise considering the issues raised by Mr. Crescenzo's pleading, the probate court entered an order admitting the will to probate and appointing Ms. Simpson as personal representative. The order found that the will had been validly executed and stated that there had been no objection to the will being admitted to probate. The issue then was whether the answer was the functional equivalent of a filed caveat. If a caveat is filed by an interested person other than a creditor, the court may not admit a will to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the opportunity to participate in proceedings on the petition. As a practical matter, this typically means the probate court must make a determination on the challenge to the will prior to appointing a personal representative and admitting the will to probate. The Second DCA held that Probate Rule 5.260 sets forth the procedural requirements for filing a caveat and that even though an "answer" is not styled as a "caveat," in this case it was the functional equivalent of the form of caveat the rule contemplates. It identified the estate, it identified Crescenzo's interest in the estate (half-owner of the estate's sole

asset), and it provided the name and mailing address of his authorized representative (his lawyer). Although the caveat did not provide Quinones' social security number or year of birth, there was no indication that Crescenzo or his counsel knew that information. In addition, the Court found that we were not dealing with a petition filed before death or before any probate proceedings had been commenced, where the absence of that identifying information might be expected to cause confusion. Here, Simpson filed a petition for administration of Quinones' estate that contained the last four digits of Quinones' social security number. Mr. Crescenzo's answer referenced the petition and identified the case number assigned to it, so that anyone who needed it could have found it. Any differences between the answer and a caveat contemplated by Rule 5.260 were immaterial matters of form that had no effect on the substance of the proceedings.

Application: This case is similar in concept to *In re Estate of Koshuba*, 993 So.2d 983, 986 (Fla. 2d DCA 2007) where the court found that allegations contained within a petition for administration and petition for appointment of guardian ad litem were substantially sufficient to place interested persons on notice of a creditor claim without the necessity of the filing of a separate statement of claim. If some sort of answer or objection to the petition for administration is filed prior to the issuance of letters of administration, then the court must address this prior to entry of an order on the petition.

2. ***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.

3. ***Choice Plus, LLC v. Department of Financial Services*, ___ So. 3d ___ (Fla. 1st DCA 20187). The First DCA determines that escheated funds are to be treated differently than unclaimed funds by the State and overturns an administrative decision that ignored a probate court order regarding entitlement to estate funds.**

This case relates to the unusual situation of escheated funds and a subsequent claim for entitlement. In most probate administrations, heir determinations take place prior to any escheat to the estate. This case was different. In 2005, Rigley died in Pinellas County. In 2007, the probate court determined that Rigley died intestate, having no known beneficiaries. The court ordered that under F.S. Section 732.107 the assets of the estate escheated to the State of Florida. Pursuant to the statute, the estate funds were paid to the Chief Financial Officer and the Department of Financial Services documented receipt of $98,185.79 from Rigley's estate and marked it as an "escheated estate." However, F. S. Section 732.107(3) provides that at any time within 10 years after the payment to the Chief Financial Officer, a person claiming to be entitled to the proceeds may reopen the administration to assert entitlement to the proceeds. If no claim is timely asserted, then the state's rights to the proceeds shall become absolute. In 2013, before the ten-year deadline expired, Choice Plus took action to assert entitlement. Choice Plus is a private investigative agency registered with the Department as a claimant's representative (an heir locator company).[1] Choice Plus petitioned to reopen the estate and petitioned the probate court to determine that ten claimants were

[1] As the claimants' representative, Choice Plus stood to receive $21,500.53 in fees if the estate funds were ordered to be paid to claimants.

Rigley's heirs. Attached to the petition to determine heirs was a researcher's report that included various proofs of heirship such as birth and death records that tied into a family tree of Rigley. Choice Plus's petitions also requested the court to declare the ten claimants were entitled to the funds deposited with the State. The Department was not a party to the probate proceedings but Choice Plus did properly notice the Attorney General's Office as required by F.S. Section 733.816(3), Florida Statutes. The Attorney General did not file any objections or appear on behalf of the Department. In 2013, the probate court reopened the estate, as petitioned, and determined that the ten claimants were the heirs of Rigley's estate. The court's order set forth the estate share each claimant was owed; and ordered that "after providing for payment of costs and fees, the State of Florida is hereby authorized and directed to pay the funds it holds on behalf of the Estate of [Mrs. Rigley]" to the ten claimants in the proportions set forth in the court's order. Choice Plus then filed with the Department a claim on behalf of ten claimants, seeking payment of each claimant's portion of the estate funds. The claim was submitted on the Department's required form and attached the requisite paperwork as well as certified copies of the probate court order demonstrating the claimants' entitlement to the estate funds. In 2014, the Department issued a Notice of Intent to deny the claim as incomplete because it did not include the appropriate documents in Florida Administrative Code Rule 69I-20.0022(3)(b) (2014)[3] to connect the ten claimants to Rigley. The Department took the position that as custodian of the estate funds under The Florida Disposition of Unclaimed Property Act, Chapter 717, Florida Statutes, it had authority to determine the merits of each claim for funds separate and apart from any probate court determination, and the claim as submitted failed to meet the burden of establishing entitlement to the estate funds by a preponderance of the evidence. The Department ultimately concluded that it had been vested with the sole jurisdiction to administer chapter 717 and to determine the merits of each claim for funds held in the State Treasury regardless of the probate court's previous determination of entitlement. The First DCA set aside the agency action. It held that the issue was a purely legal issue so the review was de novo. It then held that while an agency's interpretation of a statute that it is charged with administering is entitled to greater deference and will not be reversed unless clearly erroneous, deference is not warranted when the agency's interpretation conflicts with the plain meaning of the statute. The Court held that there is a clear difference between escheated funds and unclaimed funds and that the difference was determinative to the outcome of the case. Escheated funds pass directly to the ownership of the State, unlike unclaimed funds. In addition, escheated funds are never referred to as "unclaimed" in the statutes. The Court's holding further explained that Chapter 717 is not intended to address a narrow subset of unclaimed property but rather to provide substantive and administrative law addressing all varieties of unclaimed property. The fact that escheated funds are addressed within the ambit of chapter 717 does not mean that they lose their distinct character and become subject to the entirety of chapter 717. While the funds escheat to the

State upon a determination of intestacy, the funds are never without an identifiable owner like other forms of "unclaimed" property in chapter 717. Simply because Choice Plus had to file an "Unclaimed Property Claim" under section 717.124 in order to have the Department disburse the estate funds does not make the estate funds themselves "unclaimed" and subject to all provisions of chapter 717. Escheat funds revert to the State after the probate court determines there are no heirs. If potential heirs then come forward, they do not go directly to the Department, but must first go to the probate court, which has jurisdiction over administration of the estate including regarding determination of heirs. The Court noted that the Department's interpretation of chapter 717 as requiring a second, independent determination of entitlement would render the probate court's function meaningless and would raise separation of powers concerns. Under the Article V of the Florida Constitution, circuit courts have jurisdiction pertaining to probate matters. The Department's legal remedy in this matter was to appear in the probate court proceedings, which it did not do.

Application: This case has a different outcome than those involving unclaimed funds, where the Department's authority does trump that of the probate court. The case is an excellent discussion of the law regarding escheated property and of the authority of the Department of Financial Services with regard to various types of property versus that of the probate court.

Trust Cases

4. ***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[2] entered an ex parte temporary injunction freezing all of the sons'

[2] 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).

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.

5. ***Edwards v. Maxwell*, 215 So. 3d 616 (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.

6. ***Flanzer v. Kaplan*, 225 So. 3d 811 (Fla. 2d DCA 2017). The Second DCA holds that the delayed discovery doctrine set forth in F.S. Sec. 95.031(2)(a) is applicable to computation of the limitations period for bringing an undue influence action to contest the trust.**

Flanzer's parents, Gloria and Louis Flanzer, created an irrevocable charitable trust in December 2005. Louis died in June 2013; Gloria died in March 2015. In November 2015, Flanzer sued to challenge the trust on the grounds of undue influence. Flanzer alleged that during a period of time from at least 2001 until her mother's death, the Trustees maintained a fiduciary relationship with her mother and served as her personal accountant, business and financial advisor, and attorney in addition to their roles as trustees after 2005. According to Flanzer's complaint, her mother had a diminished mental capacity during this period and was susceptible to the undue influence of the Trustees. Flanzer further alleged that the Trustees exploited their confidential relationship with Flanzer's mother to alienate and ultimately eliminate Flanzer from her mother's estate planning scheme and to cause the creation of the trust. The Trustees asserted that action must be dismissed with prejudice because the trust became irrevocable at its creation in 2005 and "[t]he applicable statute of limitations to challenge an irrevocable trust is four years from the date of its creation." The trial court agreed and dismissed the action with prejudice. The Second DCA reversed. In its analysis it began by noting that an action to contest the validity of a trust may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. The Court then noted that the Florida Trust Code does not specify a limitations period in which to challenge a trust. This meant the applicable limitations period would be found in chapter 95, Florida Statutes. *See* F.S. Sec. 95.011 ("A civil action . . . shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere."). The parties at trial had apparently agreed, and the Court here confirmed that under chapter 95 the limitations period applicable to Flanzer's action is four years. *See* F.S. Sec. 95.11(3). The Court further noted that a review of section 95.11 leads to the conclusion that undue influence claims can only fall under subsection 95.11(3)(j), "[a] legal or equitable action founded on fraud." Flanzer, however, successfully argued to the Fourth DCA that since courts treat undue influence as a species of fraud, undue influence is therefore subject to the delayed discovery doctrine. The delayed discovery doctrine states that "an action founded upon fraud under s. 95.11(3), including

constructive fraud, must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered." F.S. Sec. 95.031(2)(a). The Court recognized that undue influence claims and fraud claims are distinct causes of action but found the doctrine to countenance a broader class of claims than merely actions fraud in general. The Court remanded the case to provide Flanzer the opportunity to satisfy the requirements of the doctrine in avoiding dismissal.

Application: This case clarifies application of the delayed discovery doctrine to trust matters and makes arguing limitations against potential claimants tougher. The potential statute of limitations for undue influence in a trust matter could be as long as twelve years from the time the trust becomes irrevocable if the doctrine is found applicable.

Procedure and Judicial Administration Cases

7 . ***Boren v. Rogers,*** **____ So. 3d ____ (Fla. 5th DCA 2018). Fifth DCA granted writ of cert. and quashed a protective order because plaintiff was entitled to some discovery related to prior estate planning documents to show she had standing to contest subsequent documents or court had to specify good cause why no discovery was allowed.**

Boren filed a complaint seeking to void a 2014 trust and a 2013 trust executed by Mullins. Boren alleged that for many years prior to Mullins' death in December 2014, Mullins had maintained a longstanding estate plan whereby her assets would pass to certain family members, including Boren, upon her death. Boren further alleged that the respondent, Rivera, unduly influenced Mullins to execute these two trusts. But for these trusts, Boren alleged she would be a trust beneficiary under Mullins' earlier trusts. Co–Respondent, Thomas Rogers, the named trustee of the 2014 and 2013 trusts and also the attorney who prepared the trust documents, answered, denied the material allegations of the complaint, and asserted that Boren also lacked standing to void the trusts under the doctrine of dependent relative revocation because the trust was initially created in 1992 and "was amended and/or restated in 1996, 2000, 2002, 2005, 2007, 2013, and 2014," and asserted Boren must first show that she would have been a beneficiary under an earlier trust before she would be entitled to receive a copy of the most recent trust documents. Boren then filed a request for production of documents requesting that Rogers produce copies of all trust documents prepared by Rogers, his law firm, or by anyone else for Mullins' signature from January 1, 1992, to date, among other things, such as file notes and communications with Mullins. Rogers moved for

a protective order as to all requested documents on four grounds: (1) Boren must overcome the presumption that Mullins' 1988 will that Boren sought to administer in a separate probate proceeding was lost or destroyed; (2) Boren's request was overbroad because it asked for documents from a period of twenty-two to thirty years; (3) Rogers contended that the requested documents are irrelevant to the amended complaint and, thus, he should not have to produce them because Boren does not allege the specific trust for which she claims that she is a beneficiary and, (4) to the extent that the requested documents contain Mullins' "private financial information," those documents are protected by the constitutional right of privacy. The trial court held a hearing on the motion for protective order and, in its first order, directed that Rogers provide the trust instruments from 1992–2007 to the court for an *in-camera* review. The documents were submitted to the court under seal. Following its review, the court entered a subsequent order finding that Boren was "not entitled to a review of those documents" and granted the motion in its entirety as to all requested documents without further explanation. Boren sought certiorari relief from this second order. The 5th DCA reversed and held that "[c]ertiorari is the appropriate remedy when a discovery order departs from the essential requirements of law, causing material injury to the petitioner throughout the remainder of the proceedings in the trial court, effectively leaving no adequate remedy on appeal." The Court noted that "[c]ertiorari is rarely available to review orders denying discovery because in most cases the harm can be corrected on appeal." However, in certain rare circumstances when the discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order effectively eviscerates a party's claim, defense, or counterclaim, relief by writ of certiorari is appropriate said the Court. Rule 1.280(b)(1) permits a party to obtain discovery regarding any non-privileged information that is relevant to the subject matter of the pending action and that would be admissible at trial or appears reasonably calculated to lead to the discovery of admissible evidence. Subsection (c) of the rule then provides that a court, upon a showing of good cause, may order that discovery not be had. In this case, the Court found that the trial court made no finding of good cause, provided no explanation in its order for denying the motion, nor did it separately analyze the individual requests contained in the respective paragraphs of Boren's discovery request. This is was held insufficient when, as here, Boren's document request is directed at items that, based on the allegations in the complaint, would appear to be admissible at trial or otherwise reasonably calculated to lead to admissible evidence. Moreover, because Boren would need the trust documents at trial to establish that she has standing as a prior interested beneficiary in the trust to bring this suit, the order effectively eviscerated her claim, which could not be remedied on direct appeal because with no access to the documents (or at least excerpts), Boren lacked the ability to explain or demonstrate on appeal how the trust documents would have established her standing. The trial court was ordered to permit discovery of the requested trust documents or, alternatively, make the requisite finding of good cause as to why the trust documents must be protected from

production and further specifically address whether good cause exists as to Rogers' objections to the production of the remaining categories of documents requested, including a claim of privilege regarding the documents allegedly containing Mullins' private financial information.

Application: Standing is an important issue in will and trust contests and beneficiary status (or lack thereof) under prior documents is a critical element in a case. The status of a contestant as a prior beneficiary or not will implicate whether multiple estate plans may have to be challenged or how or when the doctrine of dependent relative revocation will arise or whether intestacy is an issue. This case opens the door to some discovery of prior estate planning documents, at least as to an *in camera* review by the court as to whether the contestant should be granted such discovery.

8. ***Dubner v. Ferraro,*** **____ So. 3d ____ (Fla. 4th DCA 2018). The Fourth DCA addresses temporary injunction standards in the context of what is required to lift an institutionally-placed freeze on a brokerage account.**

Dubner ("Appellant"), instituted several lawsuits in Palm Beach Circuit Court (including trust, probate, and tort actions) based on claims that his half-siblings had unduly influenced their incapacitated mother to alter the estate plan of their mother and father in order to give them millions of dollars in inter vivos gifts, to the detriment of Appellant. Appellant also filed a separate lawsuit in Broward Circuit Court, which related to separate conduct and causes of action (unjust enrichment, constructive fraud, tortious interference with a business relationship, exploitation of a vulnerable adult, and declaratory action) by his half-siblings, which also named as defendants two companies in which Appellant previously held ownership interests and the financial broker (the "Broker") holding accounts of Appellant's half-sister, half-brother, and other family entities (the "Broward Action"). After the Broward Action was filed, the Broker put a freeze on the accounts in dispute in the Broward Action pursuant to a contractual right contained in an account agreement with Broker. The half-siblings ("Defendants") filed an emergency verified motion for injunctive relief in the Palm Beach County probate case seeking an Order enjoining the Broker to remove the freeze or the posting of a $60 million bond by Appellant. Defendants claimed "irreparable harm" citing their purported "inability to access critical funds not subject of a court order." Defendants also claimed a likelihood of success on the merits arguing Appellant had not moved for injunctive relief prior to the Broker instituting the freeze. In addition, Defendants claimed that allowing a broker in a case like this to arbitrarily freeze client accounts would be a disservice to the public interest "as it would allow more frivolous filings of lawsuits simply naming different financial institutions in complaints as a method of securing prejudgment relief." The trial court granted Defendant's motion and ordered the Broker to release any hold or freeze on the accounts. The Fourth DCA reversed and agreed with Appellant's arguments that (1) the injunction was defective for failure to comply

with the procedural and substantive requirements for temporary injunctions, (2) the injunction was defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b), and (3) Defendants had failed to meet the standard of proof for issuance of a temporary injunction. The Court noted that the trial judge orally announced at the hearing, "I'm ruling that the brokerage house have no freeze on it . . . ; that there's not to be any freeze," but there was no other oral explanation or findings in the Court's pronouncement or its order. Therefore, the temporary injunction order failed to comply with the requirements of Rule 1.610(c), Fla. R. Civ. P. The Court further held that Defendant's arguments had not established a substantial likelihood of success on the merits or shown irreparable harm. Finally, the Court agreed with Appellant's argument that the injunction is defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b).

Application: Freeze orders are a big deal in probate, trust, and guardianship cases. This case is a reverse of the usual fact situation in which a litigant is seeking to enjoin and freeze disputed assets. The freeze issue in that context largely falls on whether the moving party is able to argue the freeze is related to a pending probate or guardianship administration and is necessary to preserve the status quo. If that argument can be made successfully, the case law allows for the probate court to freeze assets without regard to the requirements of Rule 1.610(c), Fla. R. Civ. P. since the court in probate and guardianship matters has inherent authority to manage and protect assets under administration. However, this case involved assets already frozen by a financial institution pursuant to contract and that were frozen in the context of a civil action outside of a probate and guardianship administration. Therefore, the civil rule applies and Appellant correctly argued the high civil bar related to injunctions was applicable.

Homestead Cases

9. ***Webb v. Blue,*** **____ So. 3d ____ (Fla. 1st DCA 2018). The First DCA rejects argument that with regard to a non-heir only a specific devise of homestead to the non-heir, as opposed to a devise generally through residue, is effective to defeat the passage of homestead outside probate to the decedent's heirs.**

Decedent, Daniell, died testate with no surviving spouse or children. The decedent's last will and testament named Blue ("Blue") as the personal representative and sole beneficiary. The will included the following provision: "My entire estate is all property I own at my death that is subject to this will. I leave my entire estate to Judith D. Blue." On October 4, 2016, Blue filed a petition for administration. The petition and an inventory listed two estate assets: (1) the decedent's non-exempt homestead; and (2) the decedent's truck.

In 2017, relatives of the decedent ("Appellants") filed a Petition to Determine Homestead Status of Real Property. The petition asserted the real property was the decedent's homestead and descended to the decedent's heirs at law where there was no specific intent in the will to pass the homestead property to Blue, who was a friend rather than legal heir of the decedent. Appellants further argued that the will was prepared by a non-attorney and did not contain the language required to include homestead property into the estate. The trial court rendered an order that, among other things, denied the Petition to Determine Homestead Status of Real Property. Specifically, the court found that the decedent was not survived by a spouse or minor child and that the decedent could freely devise his homestead to anyone. The court further found that the decedent's will clearly stated his intention to leave his entire estate, including his homestead, to Blue. The First DCA affirmed. Because the decedent was not survived by a spouse or by minor children, there was no constitutional restriction on the devise of the homestead. Thus, the homestead could have been devised to heirs—the class of persons who could be a beneficiary under the laws of intestacy—in order to maintain the homestead's protections against creditors. However, the decedent was also free to devise the homestead to someone other than an heir, which would render the homestead a general asset of the estate subject to administrative expenses and claims. The Court reaffirmed that "It is an elementary principle that a person can dispose of his or her property by will as he or she pleases so long as that person's intent is not contrary to any principle of law or public policy." *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005). The Court further noted that "[O]nce the intent of the testator is ascertained, the entire will should be considered and construed liberally to effectuate the testator's intent." *Id.* Since it was undisputed that the decedent had no surviving spouse or minor children, the decedent's homestead constituted devisable property that the decedent owned at his death, rendering it part of the decedent's estate if he chose to devise it to a non-heir, which he did. The Court further held that there is no constitutional, statutory, or common law requirement that the decedent specifically devise his homestead to Blue (a non-heir) where the decedent was survived by heirs.

Application: This case reaffirms several concepts: (1) homestead can be devised through the residuary of an estate and does not have to be specifically devised; (2) homestead property becomes an asset subject to probate administration and loses its protected status when devised to a non-heir; and (3) the courts take seriously the bedrock principle that a person can dispose of his or her property by will as he or she pleases so long as that disposition is not contrary to law or public policy.

10. ***Stuart v. Ryan*, ___ So. 3d ___ (Fla. 4th DCA 2017). The Fourth DCA, in dicta, refuses to extend the equitable lien exception to homestead creditor protection to allow recovery for wrongful acts of a trustee.**

Stuart appealed a trial court order that determined she qualified for the Florida's homestead exemption protections but that her wrongful acts as trustee of the estate required the imposition of an equitable lien against her homestead property. The Fourth DCA reversed on the grounds that Stuart did not qualify for homestead due to lack of residency but noted in its opinion that the equitable lien would have been improper if the property was, in fact, her homestead. The Court's analysis noted that Florida's homestead exemption is robust, and the Florida Constitution provides that "[t]here shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon ... the following property owned by a natural person . . . (1) a homestead." Art. X, § 4(a)(1), Fla. Const. The Court emphasized that the homestead protection can only be breached in limited situations: "(1) government entities with a tax lien or assessment on the property; (2) banks or other lenders with a mortgage on the property which originated from the purchase of the property; and (3) creditors with liens on the property which originated from work or repair performed on the property." Art. X, § 4(a), Fla. Const. In addition to the constitutional exceptions, the Court found that the Florida Supreme Court created a fourth exception for alimony creditors. Finally, the Court also noted that other exceptions appear in case law but determined that each of these exceptions was narrow and involved application of the homestead exemption in a manner that complies with the plain language of the constitution. For example, most of those cases involve equitable liens that were imposed where proceeds from fraud or reprehensible conduct were used to invest in, purchase, or improve the homestead and other cases cited involved situations where an equitable lien was necessary to secure to an owner the benefit of his interest in the property. The Court then held that courts are required to liberally apply the homestead exemption and strictly construe the exceptions. *See Butterworth v. Caggiano*, 605 So. 2d 56, 58 - 61 (Fla. 1992). The availability of exceptions not found in the constitution should therefore be questioned. The Fourth concluded by stating that "we would limit the exceptions to the constitutional homestead exemption to those specifically stated in the Florida Constitution and, because we are compelled to do so, those specifically recognized by the Florida Supreme Court."

Application: This case is a good one to use to argue against the further extension of the equitable lien doctrine that seeks to challenge homestead exemption protection. It would be especially useful in arguing against the application of that doctrine with regard to surcharge cases or other cases brought against a fiduciary.

11. ***DeJesus v. A.M.J.R.K. Corp.*, ___ So. 3d ___ (Fla. 2d DCA 2018). The Second DCA holds that a residence owned by a corporation is not entitled to homestead protection against forced sale.**

In this case the residence in question was owned by A.M.J.R.K. Corp., in which Guillen was the president and sole shareholder. In 2012, DeJesus suffered

injuries on the property and sued A.M.J.R.K. for damages. Subsequently, in 2015, Guillen started to reside on the property. On December 8, 2015, the trial court entered final judgment in DeJesus's favor in her suit against A.M.J.R.K. and awarded her damages. Various attempts were made to deed the property from the corporation to Guillen, although these efforts suffered from a variety of defects. Eventually, in an effort to collect on her judgment, DeJesus, as the judgment creditor, filed a supplementary complaint alleging that A.M.J.R.K. had attempted to transfer the property to prevent a forced sale of the asset. Ultimately, the trial court ruled (1) that prior quitclaim deeds were defective and that the attempted transfers from A.M.J.R.K. to Guillen were ineffective; (2) that despite the ineffective transfers, homestead attached to the property when Guillen began residing there in 2015; (3) that since the property did not receive homestead status until after DeJesus filed her action against A.M.J.R.K., DeJesus was entitled to a lien on the property; and (4) that despite DeJesus' lien on the property, due to its homestead status, the property was protected from forced sale or transfer to DeJesus. The Second DCA reversed, holding that the trial court erred in determining that a corporation like A.M.J.R.K. could hold a homestead exemption on real property. Article X, section 4(a), of the Florida Constitution, entitled "Homestead; exemptions," provides as follows: "There shall be exempt from forced sale under process of any court, and no judgment, decree[,] or execution shall be a lien thereon, . . . **property owned by a natural person**." (Emphasis added.) As such, the plain language of the Florida Constitution requires that the owner of the property be a natural person to claim the homestead exemption. The trial court had determined that homestead attached to the property because Guillen, a natural person, resided at the property and Florida law allows beneficiaries of trusts to receive homestead protection under certain circumstances. The trial court's decision was in line with the logic of case law protecting trust beneficiaries and also holding that "the individual claiming homestead exemption need not hold fee simple title to the property." *Bessemer Props., Inc. v. Gamble*, 158 Fla. 38, 27 So. 2d 832 (Fla. 1946); *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774, 776 (Fla. 1st DCA 1991) (beneficiary of spendthrift trust entitled to claim homestead exemption as to trust property). The Second DCA distinguished those cases from this case and noted that in trust cases protecting homestead, the trust beneficiary held an equitable ownership interest in the property. Here there was no ownership interest, either legal or equitable, in the property. Being president and shareholder of an entity does not give an ownership interest in the underlying property of the corporation.

Application: This case illustrates the seemingly endless variety of homestead fact patterns and analyzes the type of ownership entitled to claim the homestead protection from forced sale. It has some interesting analysis related to homestead protection for trust beneficiaries, which is an area where the law is still arguably unsettled.

Guardianship Cases

12. ***Tenzer v. Tenzer,*** **____ So. 3d ____ (Fla. 4th DCA 2018). The Fourth DCA dismisses an appeal of the probate court's order approving a trust in a guardianship matter and illustrates the importance of interested person status determinations.**

Appellant Tenzer, as natural parent and guardian of the property of her son, H.T., appealed a November 2016 final order approving a trust set up on behalf of her former husband, who was a ward in a guardianship matter. Tenzer argued she was denied due process because she was not permitted to participate in the hearing seeking approval of the trust. The Court dismissed the appeal due to lack of jurisdiction. The reason for the lack of jurisdiction dismissal was that in September 2016, the probate court entered an order striking Appellant from the trust proceeding because she was not an interested person. Appellant failed to timely appeal that order and that order was an appealable final order because it removed Appellant from the action pertaining to the establishment of the trust. Her failure to appeal the September final order was a bar to any subsequent attempt to appeal the court's later determination.

Application: This case underscores the importance of the determination of status as interested party. Interested party status gives standing and lack of interest means lack of standing. Parties seeking to assert they are entitled to relief or due process in a probate court matter must show they are interested parties and those seeking to bar them on standing grounds should contest any claim of that status. Assertions of interested party status are obvious when a party files a complaint or petition seeking some relief from the court but can come in less obvious forms such as a Request for Notice and Copies. If the status of interested party is not objected to, objections to that status can be waived. This case shows that a determination of lack of interested party status is a final order for appellate purposes.

13. ***In re Guardianship of Jones*****, ___ So. 3d ___ (Fla. 2d DCA 2018). The Second DCA explains the process for appointment of a professional guardian as permanent guardian after the professional has served as the emergency temporary guardian.**

Zebny is a professional guardian who was appointed as the emergency temporary guardian for Jones. Subsequently, the trial court waived the limitations restricting a previously serving emergency temporary guardian from serving as a permanent guardian and appointed Zebny remain as plenary guardian pursuant to F.S. Section 744.312. The underlying petition to determine incapacity and appointment of an emergency temporary guardian (ETG) arose because Lyublanovits was allegedly unduly influencing Jones, a

ninety-seven-year-old man with dementia, to change his long-term estate plan for the benefit of Lyublanovits. Lyublanovits objected to both the ETG and the subsequent appointment of Zebny as plenary guardian. Lyublanovits argued that section 744.312 prohibited the appointment of Zebny because she served as Mr. Jones' emergency temporary guardian and therefore was disqualified from serving as his permanent guardian. He also argued that she had no "special talent or specific prior experience" as required by section 744.312. The trial court had found that during Zebny's five-month tenure as the temporary guardian, she assisted Jones in a variety of matters including his day-to-day affairs, provided counseling, and helped him cope with his wife's death. Zebny was a grief counselor, licensed clinical social worker, and professional guardian with an educational background in mental health. Zebny developed a positive rapport with Jones, he had no next of kin and he expressed his request to the court that Zebny "stay on" as his permanent guardian. Generally, section 744.312 provides that a trial court may appoint "any person who is fit and proper and qualified to act as guardian." § 744.312(2). It also provides that the court shall consider, among other things, "the wishes expressed by an incapacitated person as to who shall be appointed guardian." § 744.312(3)(a). However, the statute also places some "limitations" on the trial court's ability to appoint a guardian. Specifically, section 744.312(4)(b) provides that an emergency temporary guardian who is a professional guardian may not be appointed as the permanent guardian unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian. The court may waive these limitations if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify waiving the limitations of (4)(b). Subsection (4)(b), therefore, limits the ability to appoint an ETG who is a professional guardian as the permanent guardian to certain situations. Those situations are where either the alleged incapacitated person's next of kin or the ward "requests that the professional guardian be appointed as permanent guardian." In addition, the statute also makes clear that a trial court "may waive" those limitations and appoint the professional guardian as the permanent guardian "if the special requirements of the guardianship demand that the court appoint a guardian" with "special talent or specific prior experience." In this case, the trial court, after conducting an evidentiary hearing, provided a detailed order setting forth its specific findings of fact in support of waiving the limitations of section 744.312(4)(b). The Second DCA noted that the findings of facts were supported by competent substantial evidence in the record. The Court held that the trial court had not abused its discretion in finding that Jones' guardianship demanded the appointment of Zebny.

Application: The appointment of professional guardians has been a topic that has received press coverage and attention from the Florida Legislature over the past several years. This case interprets a recent legislative change related to

the appointment of professional guardians and gives practitioners and courts a roadmap to follow when it may be necessary and appropriate to appoint a professional guardian who has been serving as an ETG.

14. ***Schlesinger v. Jacob*, ___ So. 3d ___ (Fla. 3d DCA 2018). The Third DCA**

Attorneys Michael J. Schlesinger, of Schlesinger & Associates, P.A., and Luis E. Barreto, of Luis E. Barreto & Associates, P.A. ("Appellants") provided legal services in a guardianship case which included (1) filing a petition to determine incapacity, which the trial court granted upon a determination that the Ward was totally incapacitated; and (2) filing a petition to establish a plenary guardianship. The trial court granted both petitions after determining that guardianship was necessary "to provide for the welfare and safety of the Ward," and because there was no less restrictive alternative to plenary guardianship that would "sufficiently address the problems and needs of the Ward." Appellants then filed a motion for entitlement to attorney's fees and costs pursuant to F.S. Section 744.108, which the trial court denied. In its order denying the motion for entitlement to attorney's fees and costs, the trial court concluded that none of the services rendered by Appellants benefitted the Ward. The Third DCA reversed the trial court's order finding that the trial court's conclusion was unsupported by competent substantial evidence in the record. In particular, the Court found that as a result of the Appellant's services, "the Ward received the full benefit and protection of a plenary guardianship of person and property under Florida law." In addition, the Court also noted that "[t]he trial court's order appears to have conflated the separate determinations of entitlement to attorney's fees with the reasonable amount of fees to be awarded." It held that entitlement to attorney's fees is governed by F.S. Section 744.108(1), which provides that "… an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward." The determination of a reasonable fee is governed by F.S. Section 744.108(2). The majority opinion then noted that the Third District Court of Appeal "has adopted our sister courts' construction of section 744.108(1)" and cited to *Losh v. McKinley*, 106 So. 3d 1014, 1015 (Fla. 3d DCA 2013). The opinion also contains a special concurring opinion by the Honorable Robert J. Luck. Judge Luck opined that the Third District Court of Appeal "should recede from *Losh* and read section 744.108 as the legislature wrote it."

Application: The case itself reaffirms the Court's recent holding in *Losh* and clarifies the entitlement to attorney's fees and costs when a lawyer provides services that lead to the appointment of a guardian. The opinion is made more interesting by the discussion in the concurrence about the issue raised by case law holdings that construe F.S. Sec. 744.108 to hold that "an attorney's entitlement to payment of reasonable fees and costs is subject to the limitation

that his or her services must benefit the ward or the ward's estate." The Court here and in other cases held that establishment of the guardianship itself was a benefit to the ward but the concurrence argues that the “benefit” requirement is found nowhere in the statute and the case law requirement should be receded from.

15 . ***Sarfaty v. M.S.*, ___ So. 3d ___ (Fla. 3d DCA 2017)(Eric Virgil has a client in this case so no analysis).** Incapacity proceedings and application of F.S. Sec. 744.331 and F. Prob. R. 5.550 during such proceedings.

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