Recent Case Law Update

Dade County Bar Association
Probate and Guardianship Committee

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Probate Cases

1. ***Bitetzakis v. Bitetzakis*, ___ So. 3d ____ (Fla. 2d DCA 2019). The Second DCA holds that you must make a complete signature in order for your will to be "signed."**

George Bitetzakis attempted to execute his will in his kitchen on September 26, 2013. It's not clear if the will was drafted by an attorney or was a self-drafted or internet will. The decedent, his wife, and two witnesses were present in the kitchen for the execution and the witnesses signed the will first. George began to sign when his wife stopped him under the mistaken belief that a notary was required for the execution. George did not complete his signature and the will only had a partial signature with George's first name. The evidence at trial was that George's normal signature was his complete name. The following day, the wife took George to a notary. He only brought the self-proof affidavit with him. George and the notary signed the affidavit. Following George's death, his grandson sought to have the will admitted to probate. George's daughter objected on the grounds that the execution did not meet Florida's formality requirements. The trial court admitted the will to probate, finding that the decedent intended the will to be his last will and testament even though he did not sign his full name. The Second DCA reversed, holding that although "[t]he primary consideration in construing a will is the intent of the testator," "when testamentary intent is contained in a will, it can only be effectuated if the will has been validly executed" in strict compliance with F.S. Section 732.502, the execution statute. Here, the Court found that the decedent did not sign the will because he made less than his full customary signature. The Court also held that the partial signature was not a "mark" that could be used in place of a signature since the decedent did not intend for the partial signature to serve as a "mark."

Application: A signing ceremony supervised by a competent attorney would not have these defects or issues. This case is an example of the value lawyers can add to the estate planning process by making sure the client's testamentary intent is actually carried out. The case is also a good example as to why a lawyer should insist on lawyer supervision of any will execution for a will drafted by the lawyer.

2. ***Wallace v. Watkins*, 253 So. 3d 1204 (Fla. 5th DCA 2018). The Fifth DCA holds that the probate non-claim statute does not prevent heirs from re-opening a closed probate administration years after the case is closed.**

Watkins died intestate in 1971. In 2000, 39 years later a petition for summary administration was filed by Wallace and Mansell alleging they were the only heirs at law of the decedent. The sole asset was a piece of real property in St. Augustine. In 2001, an order was entered on the summary administration distributing the property to Wallace and Mansell. In 2016, a petition to reopen

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summary administration was filed by 3 different people alleging they were additional heirs. The petitioners were the biological children of Mansell and alleged that their grandmother, the decedent, adopted them in 1963. They attached a copy of the adoption decree, and their petition indicated they had received no notice of the proceedings in 2000 despite the fact that they were easily ascertainable and obviously heirs of the decedent. By this time Mansell had conveyed her interest in the property to Wallace's son, Strawter. Wallace and Strawter filed a response arguing the 2016 petition was time-barred and that Strawter was a bona fide purchaser. The trial court held a non-evidentiary hearing where it took judicial notice of the court records regarding the adoption (with agreement by Wallace and Strawter's counsel), granted the petition to re-open and determined that the grandchildren/adopted children were the legal heirs. Wallace and Stawter argued on appeal that the trial court violated their due process rights by not holding an evidentiary hearing and by granting relief not requested in the petition. However, the Fifth DCA disagreed, finding that the petition alleged that Appellees were heirs and that judicial notice of the adoption decree was uncontested. In addition, the appellants argued the petition was time-barred by the nonclaim statute, F.S. Section 733.710. Rejecting this argument, the Court held the nonclaim statute applies to claims brought by creditors, not to the beneficial interests of heirs. In addition, the Court noted that summary administration has its own non-claim provisions under F.S. Section 735.206 and that these provisions did not bar beneficial interests of heirs either.

Application: Creditors and beneficiaries are treated differently under the Probate Code. Many creditor provisions are strictly construed against creditors but rights of beneficiaries receive more liberal treatment. As an aside, be mindful of when agreeing with the judge may have an evidentiary impact on your client's rights and appellate remedies. Judicial notice is a tool to have evidence admitted, but this was a non-evidentiary hearing that ended up being an evidentiary hearing to all intents and purposes.

3. ***Maldonado v. Buchsbaum*, 259 So. 3d 302 (Fla. 4th DCA 2018) and *Rittirucksa v. Barrette*, 254 So. 3d 1194 (Fla. 5th DCA 2018). The Fourth DCA and Fifth DCA issue decisions related to probate injunctions that seem to be missing certain analysis of existing case law.**

The Probate Court has the inherent jurisdiction to monitor the administration and to take action it deems necessary to protect the assets of the estate for the benefit of the beneficiaries. *Markowitz v. Merson*, 869 So.2d 728 (Fla. 4th DCA 2004); *In re Estate of Barsanti*, 773 So.2d 1206 (Fla. 3d DCA 2000); *Estate of Conger v. Conger*, 414 So.2d 230 (Fla. 3d DCA 1982). More importantly, since at least 2000 and the *Barsanti* decision (and probably much earlier as I will show below) it's been clear that traditional standards controlling the issuance of temporary injunctions in other civil actions do not constrain the probate

court in the exercise of its inherent jurisdiction over a decedent's estate. *In re Estate of Barsanti*, 773 So.2d 1206, 1208 (Fla. 3d DCA 2000). In other words, the requirements to obtain a temporary injunction (or "freeze" order) in probate are looser and less restrictive than in general jurisdiction cases. Such an injunction should be obtainable ex parte, via a sworn petition, and without necessity of a bond. The probate court is not required to engage in the analysis found in general civil cases due to the inherent jurisdiction to monitor the administration and to take action it deems necessary to protect the assets of the estate for the benefit of the beneficiaries. In my opinion, the probate court standard is this:

Is there a prima-facie case sufficient to command the exercise of sound judicial discretion in ordering the protection of the assets in question, preventing their removal from the jurisdiction of the Probate Court and preserving the status-quo until further order of the Probate Court determines the rights of the interested parties?

The general civil requirements (that I think are inapplicable in probate and guardianship cases, and even some trust cases) for establishing the right to preliminary injunctive relief are: (a) the likelihood of irreparable harm, and the unavailability of an adequate remedy at law, (b) the substantial likelihood of success on the merits, (c) that the threatened injury to petitioner outweighs any possible harm to the respondent, and, (d) that the issuance of the injunction will not disserve the public interest.

An alternative way of reading the development of the law is that the probate court satisfies the four civil injunction requirements merely by meeting the inquiry I pose as the probate standard above.

Regardless of whether there is actually a different probate injunction test or whether there is the same civil test but probate cases can meet the test with a more liberal showing, my read of probate injunction law is pretty conventional and this is not a new concept. This seems to have been the clear law even prior to *Barsanti*. For example, the broad powers of the probate court to monitor the administration and to take action it deems necessary to protect the assets of the estate for the benefit of the beneficiaries include the ability of the probate court to act *on its own motion* to protect the estate. *Estate of Feldstein*, 292 So.2d 404 (Fla. 3d DCA 1974) ("Even if the beneficiaries lacked standing the court on its own motion may require an accounting or evidence concerning the estate assets from the personal representative."). In *Perez v. Lopez*, 454 So.2d 777, 778 (Fla. 3d DCA 1984), the Court affirmed the probate court's marshalling and freeze of disputed estate assets, stating: "The order under review was properly entered insofar as it acted to "freeze" or marshal assets--including corporate stock--in which the decedent may have had an interest, pending further order of the probate court in the administration of his estate."

(basically a recitation of what I pose is the probate injunction standard). There is no mention of the civil standard in *Perez*. Further, in *In re Estate of Katz*, 501 So. 2d 68 (Fla. 3d DCA 1987), it was held that the probate court did not abuse its discretion in its appointment of a curator to marshal the decedent's assets and hold them for safekeeping, including assets claimed by a beneficiary as nonprobate assets (such as a joint account), when there were allegations that the beneficiary was making distributions of those assets. In *Sanchez v. Solomon*, 508 So. 2d 1264 (Fla. 3d DCA 1987), the probate court did not abuse its discretion in granting and continuing an injunction regarding funds in bank accounts in the decedent's name in trust for others, pending a final determination as to ownership. *Sanchez* cites the civil injunction standard but appears to take the position that even that standard is met by a prima-facie case sufficient to command the exercise of sound judicial discretion in ordering the protection of the funds in question, preventing their removal from the jurisdiction of this Court and preserving the status-quo until further order of the court. The First DCA held that an order entered by the probate court freezing assets, pending a will contest, is in the nature of a temporary injunction. The Court then noted that the function of a temporary injunction in probate cases is to preserve the status quo pending the final outcome of a case. *Brock v. Brock*, 667 So. 2d 310 (Fla. 1st DCA 1995). The *Brock* court upheld the probate injunction and didn't even engage in any analysis of the civil standard but rather assumed the preservation of the probate status quo during litigation where assets might disappear was sufficient justification for the freeze. The Third DCA affirmed a probate injunction with absolutely no mention of the civil requirements in *Wise v. Schmidek*, 649 So. 2d 336, 337 (Fla. 3d DCA 1995)(holding that a circuit court, sitting in its probate capacity, has inherent jurisdiction to monitor the administration of an estate and to take such appropriate action as it may deem necessary to preserve the assets of the estate for the benefit of the ultimate beneficiaries). The *Wise* decision cites an even earlier case, *Estate of Conger,* 414 So.2d 230 (Fla. 3d DCA 1982), as justification for its holding. After *Barsanti* in 2002, the Court in *Brodfuehrer v. Estate of Brodfuehrer*, 833 So.2d 784 (Fla. 3d DCA 2002) upheld a probate court order that required persons in another state to return an estate asset (a motorcycle) to the personal representative.

As you can see, the Third District, in particular, has recognized the probate court's role as a protector of assets under its authority. The Third District has expanded the broad, liberal view of injunctions in matters administered by the Probate Court to both guardianships and to certain trust matters. *See Ripoll v. Comprehensive Personal Care Services, Inc.*, 963 So. 2d 789 (Fla. 3d DCA 2007)(applying *Barsanti* injunction standard to guardianship cases); *Landau v. Landau,* 230 So. 3d 127 (Fla. 3d DCA 2017)(freezing trust assets before the court where there was undisputed evidence of trustee breaches of duty).

Now, on to the recent cases. Let's first deal with *Rittirucksa* from the 5th DCA. *Rittirucksa* contains very few facts but the decision itself is likely correct in that the Court overturned a probate injunction based on lack of a sworn filing and based on lack of findings of fact by the probate court. This is correct. What is troubling about *Rittirucksa* is its citation of the general civil standard as the injunction standard, even though this is a probate case, without mentioning any of the case law above.

The first case, the *Buchsbaum* case from the Fourth District, is more troublesome. That case is a probate case where the Court upholds an injunction but engages in analysis that does not address the distinct body of law related to injunctions in probate. Maldonado appealed the injunction and argued that the temporary injunction was improper because the trial court: (1) failed to make specific findings of fact to show all four requirements were met to enter a temporary injunction; (2) failed to provide explicit reasons why the injunction was granted without giving notice; (3) failed to endorse the date and hour the injunction was entered and require a bond; and (4) imposed prior restraint in violation of her First Amendment rights. Rather than differentiating probate matters from this recitation of the civil standard, the 4th DCA determined that all four civil requirements to justify entry of a temporary injunction were met and that there was sufficient explanation of why the injunction was granted without notice. The Court may have believed it didn't need to address the *Barsanti* case law since the higher standard was being argued on appeal and could be met but it would be helpful for the *Barsanti* standard to be clearly discussed. The bigger issue was the Court's requirement of a bond. The Court held that "A temporary injunction without notice is an extraordinary remedy and the order must strictly comply with Rule 1.610." Florida Rule of Civil Procedure 1.610(a)(2) requires that: "Every temporary injunction granted without notice shall be endorsed with the date and hour of entry …." Additionally, Rule 1.610(b) requires that: "No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." The problem with this analysis is that Rule 1.610 of the Rules of Civil Procedure is inapplicable to non-adversary probate cases. Those cases are governed by the Florida Probate Rules, which do not require a bond for temporary injunctions. In addition, a temporary injunction, other than as related to an injunction for protection against exploitation of a vulnerable adult under F.S. Section 825.1035. A normal probate freeze is obtained very early in the probate administration prior to any adversary case existing. The Rules of Civil Procedure are inapplicable to probate administrations except for cases that are specifically defined as adversary by Probate Rule 5.025.

Application: It's unclear from these decisions whether the *Barsanti* probate injunction case law was argued by the parties in either trial case or appeal.

Unfortunately, neither case cites any of the probate injunction case law or analysis so we are left to wonder what the courts reviewed in making their decisions. With regard to probate injunctions, though, I would cite the case law and analysis I set forth above if I had this issue in court. In my opinion, you can obtain an ex parte injunction in probate without bond so long as you convince the court there a prima-facie case sufficient to command the exercise of sound judicial discretion in ordering the protection of the assets in question, preventing their removal from the jurisdiction of the Probate Court and preserving the status-quo until further order of the Probate Court determines the rights of the interested parties. The court's order should set forth detailed findings of fact that track your sworn filing and should further set forth the date and the hour the injunction commence.

4. ***Sims v. Barnard*, 257 So. 3d 630 (Fla. 1st DCA 2018). The First DCA affirms that an order of discharge does in fact discharge the personal representative from subsequent lawsuits.**

Sims appealed a final summary judgment in favor of Barnard, as the former personal representative. Two years after Barnard was discharged by the probate court, Sims filed suit and alleged that Barnard, and his law firm, had committed embezzlement, gross negligence, and malpractice in the administration of Sims' father's estate. Barnard was discharged as the personal representative of the estate after the probate court approved his final accounting and distributions over Sims' objections and after notice to Sims. Based on the res judicata effect of the final orders in the earlier probate case, and on F.S. Section 733.901, the trial court entered summary judgment for Barnard in Sims' subsequent action. The First DCA affirmed and held that Sims had repeatedly but unavailingly raised his same objections and claims of mismanagement against Barnard throughout the probate proceedings and that Sims was an active participant in the probate action via pro se filings of requests, motions, and objections at every opportunity. The Court noted that Section 733.901 "does not serve as an absolute bar to the suits filed after the discharge of the personal representative," and that the bar will not be applied to a suit for fraud by concealment, where its application "would permit a fiduciary to benefit from its alleged wrongful acts if it could conceal them for the statutory period." *Karpo v. Deitsch,* 196 So.2d 180, 181 (Fla. 3d DCA 1967) (holding that suit was not barred by discharge where suit alleged PR concealed from heirs the true value of estate and concealed from the court the identities of the heirs preventing heirs from asserting objection or claim prior to discharge). The Court also noted that where the PR conceals intentional transfer of an estate asset by failing to report the distribution in the petition for distribution or otherwise, the PR "is not entitled to the sanctuary provided by" section 733.901. However, the Court noted that nothing alleged by Sims met any of the exceptions to the bar and that the probate court's entry of orders approving and authorizing the PR to act despite Sims' objections constituted denials of his allegations and objections. Thus the lawsuit filed two years after

closure of the probate case was barred as res judicata and by section 733.901(2).

Application: A strong public policy in Florida is that of finality of estate administrations. Interested parties to estates need to be able to rely on the surety of property payments and distributions and fiduciaries need to be certain they no longer have any duties or liability related to an administration. This case is support for the finality of discharge and explains the very limited exceptions to that finality.

5. ***Maercks v. Maercks***, **___ So. 3d ___ (Fla. 3d DCA 2019). The Third DCA affirms Judge Colodny and gives guidance as to what is a non-appealable order in probate under Rule of Appellate Procedure 9.170.**

Decedent Nita Maercks executed a will that was admitted to probate. She also executed another document related to the distribution of her assets. Arin Maercks, one of the three children who are beneficiaries under the will and who is the personal representative, petitioned to have the second document admitted to probate as a codicil even though he had not initially petitioned for its admission to probate with the original will. The trial court granted the motion to admit the document to probate as a codicil. In its order doing so, the trial court stated: "*By entering this Order, the Court does not make any rulings of fact or law, as it applies to the content of the [Codicil] . . . , the legal positions of the parties, or the effect of the Codicil on the Order entered in this case. Any such arguments will need to be further litigated by the parties. The Court simply rules on the admission of the Codicil which was executed on November 16, 2013, to probate.*" Rian Maercks, another of the three children, appealed and contended there was appellate jurisdiction under Florida Rule of Appellate Procedure 9.170, in particular 9.170(b)(2), (12) & (13). The rule provides a non-exclusive list of probate orders that are appealable because they "finally determine a right or obligation of an interested person." Arin moved to dismiss the appeal for lack of jurisdiction. The Third DCA dismissed the appeal, holding the order does not "finally determine a right or obligation of an interested person." The Court noted that the order expressly states that it "simply rules on the admission of the Codicil." The Court further noted that the order itself explicitly states that it "does not make any ruling of fact or law, as it applies to the content of the Document . . . , the legal positions of the parties, or the effect of the Codicil on the other Orders entered in this case." Thus, the Order expressly contemplated additional judicial labor and did not provide finality as to any issue or party in this case. The Court rejected the arguments that the order, merely by virtue of admitting the document as a codicil, constituted a determination regarding revocation of probate (which had not been filed) or that it determined estate property interests or that it determined exempt property or homestead status.

Application: The opinion does not give many underlying facts, for example as to the actual contents of the will or questioned codicil other than that the three children were beneficiaries under the will. Therefore, it is hard to determine from the opinion what the underlying issues were and it is possible the appeal was filed as protective appeal so that an argument was not made later that appellate rights as to the effect of the codicil were not waived by failure to appeal. In any event, the case does give guidance as to what orders in probate are actually appealable.

6. ***Lee v. Lee*, 263 So. 3d 826 (Fla. 3d DCA 2019). The Third DCA holds that, as to an estate itself as opposed to recording requirements, a disclaimer is not required to include a legal description of subject real property in order for the disclaimer to be valid as to an interest in an estate holding real property.**

Andre Lee died intestate and was survived by his three children: Camille Lee, Bruce Lee, and Nicole Lee. The estate consisted of real property located in Miami and certain cash proceeds from a settlement. On July 14, 2014, the probate court appointed Camille Lee as the personal representative. On July 8, 2014, prior to Camille Lee's appointment, Nicole Lee executed a document prepared by Camille Lee's attorney, styled "Disclaimer of Interest in Property of Estate." Nicole Lee's signature on this disclaimer was witnessed by two persons and notarized. The disclaimer reads as follows: *I, Nicole Lee, residing at 15711 SW 137 Avenue, Apartment 205, Miami, Florida, 33157, hereby irrevocably disclaim all right, title, and interest, current or prospective in or to the property described below, to which I am a beneficiary from the estate of Andre Lee, the creator of the interest, All Estate assets I acquired knowledge of the interest in the property on January 6, 2014, and this disclaimer is filed within a reasonable time thereafter. O*n December 11, 2014, Camille Lee filed a petition for discharge seeking distribution of the estate's assets. On April 9, 2015, the probate court entered an order granting the distribution of assets. Then, on May 24, 2016, Nicole Lee filed an objection to the petition for discharge, arguing that the disclaimer she had signed was deficient. Pursuant to F.S. Section 739.104 a person may disclaim any interest in or power over any property or power of appointment. In order for a disclaimer to be effective, a disclaimer must: (i) be in writing, (ii) declare that the writing is a disclaimer, (iii) describe the interest or power disclaimed, (iv) be signed by the person making the disclaimer, (v) be witnessed and acknowledged in the manner provided for by deeds of real estate, and (vi) be delivered in the manner provided in section 739.301 of the Florida Statutes.2 § 739.104(3), Fla. Stat. The probate court held a hearing and determined that the disclaimer was both legally insufficient under F.S. Section 739.104(3) and violative of the statute of frauds because the disclaimer did not specifically identify the real property being disclaimed. The Third DCA reversed and held that the disclaimer met each statutory requirement found in F.S. Section 739.104(3). The Court noted that while the absence of a legal description of the subject property rendered the disclaimer

incapable of recordation under section 739.601, the lack of a legal description did not otherwise affect its validity. For a disclaimer to be recorded in the public records to provide notice to third parties, the disclaimer must contain a legal description of the real property. The Court held, though, that a non-recorded disclaimer is valid as between the disclaimant and the person to whom the property passes by reason of the disclaimer, regardless of whether the disclaimer includes a description of the real property. The Court finally noted that if the legislature had intended for all disclaimers of real property, whether recorded or not, to contain a legal description, there would have been no need in F.S. Section 739.601(1) to include a requirement of a legal description for disclaimers that would be recorded. As a last holding, the Court found that even if Florida's statute of frauds were to apply to disclaimers of real property governed by chapter 739, the subject disclaimer was in writing and signed by the proper party so it met the statute's requirements.

Application: The case gives helpful guidance regarding disclaimer procedures generally, the validity of disclaimers with or without legal descriptions of disclaimed real property, and the effect of recording disclaimers.

7. ***Rizk v. Rizk*, 260 So. 3d 467 (Fla. 3d DCA 2018). The Third DCA reviews admission to probate of a foreign will and affirms Judge Muir's grant of summary judgment as to the issue of proper execution.**

George Rizk died in April 2013 and a few months prior to his death, he had a will prepared in accordance with Haitian law. His sister, Catherine, contested the admission of the will in Florida. Joseph, the decedent's brother moved for summary judgment as to its validity. Joseph provided affidavits from the Haitian notary and a Haitian attorney attesting to the validity of the will under Haitian law. In addition, the record at the hearing demonstrated that Catherine didn't challenge the will in Haiti and she was actually receiving benefits from the will as one of the beneficiaries. Catherine argued that there were issues of material fact as to the validity of the 2013 will. She argued that decedent did not execute the will on February 1, 2013, because he was not in Haiti on that day; and further, that three of the four witnesses did not sign the 2013 will on that date as well. The opinion implies that these were just arguments, though, as opposed to evidence before the court. The probate court granted summary judgment in favor of Joseph. The Third DCA affirmed and noted that F.S. Section 732.502 provides "Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida . . . is valid as a will in this state if valid under the laws of the state or country where the will was executed." Here, Joseph provided sufficient and undisputed evidence at summary judgment that the 2013 will was valid in Haiti.

Application: The opinion is a further guide as to which foreign wills are valid in Florida and how to get one admitted over an objection. The opinion also may be

a reminder that at summary judgment hearings courts require facts in evidence, and not just arguments, in order to receive a favorable ruling.

8. ***Goodstein v. Goodstein*, 263 So. 3d 78 (Fla. 4th DCA 2019). The Fourth DCA holds that a blanket circuit policy requiring restricted depositories to be used in all probate cases is improper.**

Andrew, the decedent, was survived by his adult son and two minor children. The decedent's father was appointed as personal representative by settlement of the parties. The decedent's children became concerned regarding the estate assets and petitioned the court for an order designating a restricted depository. The petition contained two grounds: (1) a local policy requiring a depository in all probate cases, and (2) the beneficiaries disputed the personal representative's marshalling and expenditure of estate assets. Additionally, at the hearing they also asked for the depository based on the litigious nature of the case. The trial court granted the petition and noted that restricted depositories were a matter of course in all probate cases in its jurisdiction, pursuant to local policy. It explained that the policy was intended to prevent assets from disappearing during probate administration. The court also believed the policy reduced expenses and increased productivity by encouraging attorneys to resolve cases more quickly. The court indicated it was willing to reconsider the order if the use of a restricted depository increased litigation or became problematic. The Fourth DCA affirmed the depository order as to this case but held that a blanket depository policy is improper. Under the F.S. Sec. 69.031, there are only two situations in which a court may order a restricted depository be used: (1) when the size of the bond required of the administrator or other officer is burdensome or (2) "for other cause." The Fourth DCA held a blanket policy invalid and that a depository is to be ordered, if at all, under one of the two statutory situations. In this particular instance, there was no bond and the record presented grounds for the trial court to properly find "other cause" requiring a restricted depository. The estate had significant assets and the trial court did not know how estate assets were being spent. Finally, the record evidenced great tension between the P.R. and beneficiaries including a lawsuit concerning the P.R.'s failure to timely provide information about estate assets.

Application: The court can order a depository where there is no objection to a depository petition or when: (1) the size of the bond is burdensome, or (2) for other cause. Given the decision against a blanket depository requirement, there are situations where a depository certainly should not be required. For example, if the estate is willing to post a sufficient bond and that is not objected to, then a depository should not be required.

Trust Cases

9. ***Hadassah v. Melcer***, **___ So. 3d ___ (Fla. 4th DCA 2019). The Fourth DCA clarifies the meaning of qualified beneficiaries with regard to trust matters.**

In 1989 Gelt created a trust, which provided upon her death for a credit shelter trust for her husband during his life, and the remainder to 3 separate trusts for their daughters upon his death. The daughters' trusts provided for income and principal distributions to them during life. Upon the death of each daughter, her trust terminates, and the remainder is redistributed to the trusts of the remaining daughters. When the last daughter dies, the trust terminates and 3 charities receive the balance. The daughters did not have a power of appointment to direct the assets to any other potential beneficiary. Once both Sylvia and her husband were dead the trustee filed a resignation in court and named the daughters and the charities as defendants, alleging they were all qualified beneficiaries. The daughters argued the charities were not qualified beneficiaries of the trust and the trial court agreed. On appeal, the Fourth DCA examined Fla. Stat. § 736.0220 and reversed, holding that the charities are qualified beneficiaries because if the daughter's interests all ceased the charities would be the distributees. The Court found that the trial court ruling, in denying the charities qualified beneficiary status, assumed a sequential termination of each daughter's interest but the Court held that F.S. Sec. 736.0110(b) by its clear language contemplates simultaneous termination of all current interests in making the qualified beneficiary determination.

Application: The determination of whether a beneficiary is a qualified beneficiary is important because qualified beneficiaries are entitled to obtain information regarding the trust and receive notices and accountings from the trustee.

10. ***Sibley v. Estate of Sibley*, ___ So. 3d ___ (Fla. 3d DCA 2019). The Third DCA explains the limits of the "relation-back" doctrine and refuses to allow it to be used to save a failed charitable gift.**

Charles Sibley (brother of decedent, Curtiss Sibley, and Trustee of the Curtiss F. Sibley Revocable Living Trust) appealed the probate court's order which (1) determined that the Curtiss F. Sibley Charitable Foundation (the Foundation) was "not in existence" upon Curtiss' death; and (2) based upon that determination and pursuant to the Trust's provisions, ordered Charles to distribute all assets and monies in the trust estate to Fellowship House as the residuary beneficiary. Before his death in 2011, Curtiss executed both a will and a revocable living trust, naming Charles the personal representative of the estate and Trustee. The Trust provided, in pertinent part:

Upon the Settlor's death, the Trustee shall distribute the trust estate as follows:

> *. . .*
> *(B) Two hundred and fifty thousand dollars ($250,000.00) to the FELLOWSHIP HOUSE FOUNDATION of South Miami, Florida*
> *. . .*
> *(D) All remaining trust estate to the Settlor's charitable foundation, the CURTISS F. SIBLEY CHARITABLE FOUNDATION. If the [Foundation] is no longer in existence upon the Settlor's death, then the Trustee shall distribute all of the remaining trust estate to the FELLOWSHIP HOUSE FOUNDATION of South Miami, Florida.*

Fellowship House alleging that, upon Curtiss' death, the Foundation was "no longer in existence" and therefore, pursuant to the Trust provisions, the remaining trust estate must be distributed to Fellowship House as the ultimate residuary beneficiary. The probate court conducted an evidentiary hearing in September 2018. It was established that on September 23, 2011 (three months before Curtiss' death), the Foundation was administratively dissolved, and was not reinstated until July 9, 2012 (seven months after Curtiss' death). Charles testified at the hearing and acknowledged he never funded the Foundation (even though he was in control of the Trust funds), he never opened a bank account for the Foundation, or filed any Foundation paperwork with the IRS. Instead, he explained that in 2018 (seven years after his brother's death), the Foundation was now "ready" to be funded. Following the hearing, the court concluded that the Foundation "was not in existence" when Curtiss died because it had been administratively dissolved three months before his death and had not been reinstated until seven months after his death. The court further concluded that the Foundation was a "non-functioning option" and that Charles, as Trustee, "failed to fund the Foundation, open a bank account for the Foundation or file the necessary Foundation filings with the IRS." Based upon this determination, the court entered an order in favor of Fellowship House. Charles appealed and contended that the probate court erred in equating the Foundation's administrative dissolution with it being "no longer in existence" as provided in the Trust. Charles argued the application of F.S. Section 607.1421(3), which provides in part that "a dissolved corporation continues its corporate existence." However, that statute reads in its entirety: *A corporation administratively dissolved continues its corporate existence but may not carry on any business* ***except that necessary to wind up and liquidate its business and affairs*** *under s. 607.1405 and notify claimants under s. 607.1406.* (Emphasis added). The Court held that given the fact that the Foundation had been administratively dissolved on the date of Curtiss' death (in addition to the other evidence regarding the Foundation's non-functioning status), the trial court properly determined the Foundation was no longer in existence, and on the date of Curtiss' death was authorized only "to wind up and liquidate its business and affairs." Charles then contended that because the Foundation was reinstated ten months after it

was administratively dissolved (and seven months after Curtiss' death), the court erred in not relating back the reinstatement to the date of the administrative dissolution, which would treat the Foundation as if it had never been administratively dissolved. Charles cited F.S. Section 607.1422, which contains a relation-back provision. The Court disagreed and held that this statutory provision does not apply to the issue presented here: a determination of whether, at a fixed point in time (the date of Curtiss' death), the Foundation "was no longer in existence" as instructed by the Trust's specific testamentary provision. The Court noted if it were to apply the relation-back provision of section 607.1422 to these circumstances, the administration of an estate might never achieve finality, "because an administratively dissolved beneficiary might (at some unknown point in the future) be reinstated and seek application of the relation-back provision to establish its nunc pro tunc existence." The Court further stated that "[t]o assume the ability to perpetually reinstate the Foundation by [Charles] (or anyone else for that matter) after the death of Curtiss renders meaningless the testamentary instruction, as the Foundation could, quite possibly, always be in existence as long [as] someone prospectively filed the necessary annual reports and paid the delinquent fees." The Court then cited the "basic tenet in the construction of trusts is to ascertain the intent of the settlor and to give effect to this intent." The issue, given the intent of the settlor, was whether, at a precise point in time, the Foundation was "no longer in existence." To apply the relation-back provision of section 607.1422 to this determination would have frustrated Curtiss' intent as set forth in the Trust.

Application: The case is a good example of a court drilling down into the practical application of settlor intent in reviewing trust language and a good analysis of when certain actions can relate back to a prior date and reasons why they might not be allowed to relate back.

Procedure and Judicial Administration Cases

11. ***Samad v. Pla*, ___ So. 3d ___ (Fla. 2d DCA 2019). The Second DCA holds that the tenant in common election right of surviving spouse related to homestead rights is statutory, rather than based on rule, order of the court, or notice, and therefore enlargement of time after missing the statutory deadline is not available even due to excusable neglect.**

12. ***Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 260 So. 3d 167 (Fla. 2018). The Florida Supreme Court holds a party may pay a fact witness for the witness's assistance that is directly related to the witness preparing for, attending, or testifying at proceedings.**