Legislative & Case Law Update Seminar

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The Breakers
Palm Beach, Florida

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Table of Contents

Forward

These materials are an amalgamation of decisions from a variety of sources. The order of presentation may seem like no order at all, yet some method certainly existed at some point during the preparation of this outline. Much of the text presented is directly from decisions cited, yet quotes are typically omitted unless seemingly additive to the presentation. Sometimes sentences have been shortened, while others are just as scribed by the member of the judiciary who penned the particular opinion. Sometimes paragraphs are eliminated and even entire arguments deleted when those provisions seem more distracting than useful in making the intended points. None, or nearly none, of the positions presented are my own; all come from the judiciary, with the exception of the headings. Those are mine and meant to be tantalizing[1] or at least catchy.

The scope of the subjects covered is likely broader than the organizers intended. Most are compliant with the expectations, of this I am sure. However, I could not resist adding an interesting disbarment case or other tangentially related opinion on occasion. Those decisions seemingly far afield from the assigned subject matter typically are included to make a point. Much can be garnered from decisions on other issues, with respect to court procedure and the like. On the other hand, I tried to resist the temptation to include a decision just because it related to my assigned scope if I concluded the decision was of no particular use in other situations or did not present an interesting issue. While some decisions of this type might have slipped into the outline, many did not.

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[1] I thought I meant for the headings to be "titillating" until I looked up that word.

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1. **Follow the Rules, Avoid Sanctions**[2]

On Motion for Rehearing En Banc: The respondent's counsel filed a Motion for Rehearing En Banc, together with separately filed appendices in support of that motion. Those were stricken because they violate the Florida Rules of Appellate Procedure and the Rules Regulating The Florida Bar.

Order to Show Cause. On its own motion, the court found a reasonable basis to conclude that the Motion for Rehearing En Banc violates the Florida Rules of Appellate Procedure and Rules Regulating The Florida Bar. The court included in its order that (i) counsel filed an appendix comprised of documents that are outside the record on review, which address events or proceedings that occurred after the lower court entered the order on review, and are otherwise unrelated to the instant petition; (ii) despite the contention that the case is of exceptional importance, counsel failed to show how the opinion quashing a discovery order that failed to comply with the Florida Rules of Civil Procedure deprived his client of any of his constitutional rights; (iii) counsel takes one or more frivolous positions or makes one or more arguments in bad faith; and (iv) counsel recklessly impugns and disparages the judges of this Court and certain judges of the circuit court.

[2] Bank of New York Mellon v. Bontoux, 47 Fla. L. Weekly D653a (Fla. 3d DCA March 16, 2022)

2. **How To Get Disbarred**[3]

Notwithstanding counsel's long membership in The Florida Bar and lack of prior disciplinary history, the court concluded that counsel's actions demonstrate so purposeful and considered violations of his oath of attorney as to require disbarment. The court disapproved the referee's recommended sanction of suspension.

The underlying case in which the bad acts occurred was the counsel's dissolution of marriage. Counsel fell substantially behind in alimony payments, and his former wife filed a motion for contempt, seeking payment of in arrearages. While that litigation was pending, counsel settled a tort claim for a client and was entitled to a fee of approximately $400,000 from the settlement proceeds.

Counsel was deceitful and directly disobeyed court orders regarding discovery of his law firm file and records. The court required counsel to produce (1) a redacted copy of his retainer agreement setting forth his fee agreement/compensation arrangement, (2) all settlement correspondence and written communications with the defendants, all documents, that are not privileged, related to any settlement payments by the insurance company, and (3) any settlement agreements.

Counsel not only failed to fully comply, he engaged in estate planning by which he transferred to a trust for himself and his grandchildren. He also represented to the court in the dissolution proceeding that no settlement had occurred, so no documents existed or could be found that were responsive to the court's order. Despite the court's order, he failed to bring his law firm file with him to the trial, so the court recessed for an hour so that he could return to his office and obtain the file which the court reviewed *in camera*. Not surprisingly, the court found the settlement agreement and ordered its

[3] The Florida Bar v. Koepke 46 Fla. L. Weekly S324a (Fla. October 28, 2021)

production to the former wife. Because the newly discovered evidence justified a continuance beyond the time allotted for trial, and because the judge was slated soon to rotate out of the division, the court declared a mistrial. The former wife's counsel filed a motion for an order to show cause why Mr. Koepke should not be held in contempt.

When the new trial began, the successor judge found counsel guilty beyond a reasonable doubt of indirect criminal contempt and sentenced him to 30 days in jail. In the order finding Mr. Koepke guilty, the lower court found that he was untruthful and intentionally misleading in his discovery responses to the former wife to delay and obfuscate the former wife's discovery of the settlement agreement in the personal injury case. The court referred counsel to the Bar for disciplinary review. On appeal of the order finding contempt, the appellate court *per curiam* affirmed.

Acting on the lower court's referral, the Bar filed a complaint which was referred to a referee, who conducted a hearing on the matter and filed her report. The referee recommended that counsel be found guilty of violating Bar rules and determined that his failure to disclose the settlement agreement was deceitful. However, the referee found that counsel's failure to bring the client file pursuant to the subpoena *duces tecum* was not deceitful by clear and convincing evidence because counsel had filed a notice of joinder in a motion to quash the subpoenas *duces tecum*.

The referee recommended that counsel be suspended for one year. The Bar sought review of the referee's report, particularly the recommended discipline, and requested disbarment. After receiving an extension of time, counsel filed his initial answer brief four days late; the brief was at first accepted then stricken for noncompliance. He was directed to file an amended answer brief which he filed sixty-one days late, after the case had already been set for conference.

In focusing on the appropriate sanction, the court recited the purposes of attorney discipline as: (1) protection of the public from unethical conduct without undue harshness towards the attorney; (2)

punishing misconduct while encouraging reformation and rehabilitation; and (3) deterring other lawyers from engaging in similar misconduct.

The court found the referee's recommended discipline to be inappropriate and held that disbarment was the appropriate sanction, holding that counsel's conduct demonstrated a willful lack of candor with the court and abuse of the legal process and focusing on the intentionality of his actions, his selfish motive, and the serious, adverse impact that his actions had on the parties and underlying case.

3. **Pro Hac Vice**[4]

The rules for admission of out-of-state attorneys to practice in Florida have changed, primarily with respect to location and not much with respect to substance. The substance of the rule and a form of a motion remain in Rule 2.520, Rules of General Practice and Judicial Administration.

4. **Ask for What You Want and Do So While the Court Has Jurisdiction**[5]

Brother contested the will of his sister. Glavin had prepared the will at issue, under which Glavin was nominated as personal representative. Glavin obtained an order awarding her compensation of $220,042.82 following termination of the will contest. The will contest was based on claims that the decedent lacked testamentary capacity at the time the will was executed and further allegations that Glavin had employed undue influence. The brother alleged that the 1999 will, naming him personal representative, should have been probated instead.

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[4] Amendments to Rules Regulating Florida Bar 1-3.10 and Florida Rule of General Practice and Judicial Administration 2.510 46 Fla. L. Weekly S378a (Fla. December 9, 2021)

[5] Voyles v. Galvin 47 Fla. L. Weekly D573a (Fla. 5th DCA March 4, 2022)

Shortly before trial, Baxter terminated the will contest litigation by filing a written withdrawal of all objections. Nearly a month after Baxter withdrew his objections and ended all the probate litigation, Glavin filed a motion to tax fees and costs against Baxter. Glavin's motion stated it was made pursuant to principles of equity applicable to chancery actions but did not mention sanctions, the inequitable conduct doctrine, bad faith, or anything remotely similar to those terms. The hearing on Glavin's motion was set for November 10, 2020, which was during the COVID-19 pandemic. Approximately one week before the hearing on Glavin's motion to tax fees and costs, Glavin filed 180 pages of affidavits and billing invoices from the several attorneys that she had employed during the three-year-long will contest. None of those documents mentioned sanctions, inequitable conduct, bad faith, or anything remotely similar.

On the day of the hearing, at noon, Glavin filed a notice of additional authorities in support of her motion to tax fees and costs against Baxter, which was the first reference to the inequitable conduct doctrine. This doctrine was described as permitting the award of attorney's fees where one party has exhibited egregious conduct or acted in bad faith.

Within twenty-four hours of submission of proposed orders and without a single edit, the judge signed the proposed judgment submitted by Glavin. The inequitable conduct doctrine was the sole basis relied upon by the lower court for the award against the brother. The final judgment did not mention any of the statutes or rules Glavin relied upon in her motion to tax attorneys' fees.

The appellate court acknowledged the lower court's inherent authority to impose attorney's fees as a sanction for bad faith conduct with the caveat that due process is required: that is, notice and an opportunity to be heard, which includes the opportunity to present witnesses and other evidence. Providing notice mere hours before the hearing that Glavin might seek attorneys' fees on some basis not

identified in her motion, i.e., as sanctions under the inequitable conduct doctrine, does not comport with due process.

The appellate court ruled for the brother and vacated the judgment against him for two reasons: (i) the court lost jurisdiction over Baxter after he voluntarily dismissed his will contest, and (ii) a court's inherent authority to impose attorney's fees as a sanction for bad faith conduct is subject to due process requirements – namely notice and an opportunity to be heard.

5. **Covid Relief**[6]

An interested person in a summary administration was unable to participate in a hearing allegedly because of a lack of sufficient information on the Notice of Hearing. The hearing was held when most courthouses were closed to in-person appearances, and the notice provided a telephone number to call to attend the hearing. The interested person alleges that he called that number but could not get through to the hearing. In his absence, the lower court entered an order adverse to him.

The interested person later learned of another number that he needed to call when more than one party was attending a hearing. The Notice of Hearing did not include that additional information.

The lower court's order was affirmed by the appellate court. In doing so, the appellate court expressly ruled that the outcome was without prejudice to the interested person pursuing his rights under the civil procedure rules to obtain relief from judgments entered by mistake, etc. The appellate decision did not address the inapplicability to most probate proceedings, including summary administrations.

[6] Park v. Park 47 Fla. L. Weekly D622e (Fla. 5th DCA March 11, 2022)

6. **No Transcript, Incomplete Record**[7]

The defendant filed exceptions to the general magistrate's report regarding a discovery dispute. However, the defendant did not provide a record or written transcript of the relevant proceedings to the lower court. The lower court heard argument on the exceptions and issued a written order granting the exceptions. The result of the order was to require the plaintiff to furnish certain requested documents in discovery.

The rules require that a party filing exceptions to a magistrate's report must provide the court in advance of the hearing a record sufficient to support the exceptions. If a party fails to provide the court with a sufficient record, which ordinarily includes a transcript, to support the exceptions, the exceptions will be denied.

Without any record, the lower court overruled all of the general magistrate's findings based on the attorney's argument and extra-record filings from unrelated proceedings. The lower court's order failed to address whether the general magistrate's findings were supported by competent, substantial evidence or whether the general magistrate made clearly erroneous conclusions of law. Accordingly, the appellate court found the order departed from the essential requirements of law.

Therefore, the petition for writ of certiorari was granted and the order was quashed, allowing the exceptions of the magistrate to stand.

7. **No Transcript, Incomplete Record - Part Deux**[8]

The lower court conducted an evidentiary hearing at which testimony on the necessity and reasonableness of the fees was taken. Following the hearing, the lower court issued an order reflecting that the parties agreed to the hourly rates and directed the opponent to

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[7] Bank of New York Mellon v. Bontoux, 47 Fla. L. Weekly D105c (Fla. 3d DCA January 5, 2022)

[8] Lanford v. Phemister 47 Fla. L. Weekly D832a (Fla. 5th DCA April 8, 2022)

submit objections to either by timeline or line item entries, as to the necessity or reasonableness of the line items. The opponent did not comply with this directive.

The lower court granted the requested fees. However, the order did not differentiate between fees and costs incurred by the estate versus fees and costs incurred by a related trust. To the extent the estate had insufficient funds, the court authorized payment from the escrowed homestead sale proceeds. The parties agree assets of the estate are insufficient and, therefore, the homestead sale proceeds were necessary to pay the amount ordered in full. The opponent challenges the lower court's authorization of payments from the homestead sale proceeds and the reasonableness of the awards.

Because the appellate court had no transcripts of the evidentiary hearing regarding the fees and costs incurred in administering the estate and the related trust, the lower court's order was allowed to stand. The court expressly indicated that the absence of both a transcript and critical information from a record below compelled the affirmance on this point.

8. **Being Appointed Matters**[9]

Pounds died in a motor vehicle accident. He died intestate and had no surviving spouse. His sole heir was his minor child. Greenland is the child's mother. Tijuana is the decedent's mother.

Eleven days after the accident, Tijuana entered into a contingency fee agreement with the law firm of Miller & Jacobs to prosecute a wrongful death claim. She authorized Miller & Jacobs to investigate, negotiate, and resolve the matter on behalf of the estate, which had not yet been opened.

Thirteen days after the accident, Greenland entered into a contingency fee agreement with the Law Office of Mallorye Cunningham to prosecute a wrongful death claim. Cunningham sent

[9] Estate of Pounds v. Miller & Jacobs, P.A. 47 Fla. L. Weekly D124a (Fla. 4th DCA January 5, 2022)

a letter to GEICO requesting insurance coverage information, but the record does not show that she took other actions to pursue the wrongful death claim.

A few months later, Miller & Jacobs had obtained the bodily injury policy limits from the insurers of four separate tortfeasors, recovering a total of $145,000 in settlement proceeds. The funds were deposited into the firm's trust account.

Around the same time, Cunningham, on behalf of Greenland, filed a petition for administration of the estate, alleging that no person had equal or higher preference than Greenland to be appointed personal representative. Greenland was appointed and two days later Cunningham sent a demand letter to Miller & Jacobs claiming that the law firm lacked the legal authority to represent the estate because the personal representative of the estate had not signed a written contingency agreement for the firm's services. Cunningham further claimed that any funds which Miller & Jacobs collected from the insurance companies on the estate's behalf were obtained by negligent misrepresentation. She demanded that Miller & Jacobs release the entire $145,000 in settlement proceeds. Miller & Jacobs rejected the demand.

Greenland, now as personal representative of the estate, petitioned the circuit court for an order requiring Miller & Jacobs to relinquish the settlement proceeds to her for safekeeping or deposit the money into the court registry. Greenland asserted that Miller & Jacobs should not participate in any legal fees because Greenland never signed any contingency agreement with the firm to represent the estate, despite multiple emails from the firm requesting her to do so. She alleged that Tijuana entered into a contingency contract with Miller & Jacobs without Greenland's knowledge and consent.

Tijuana responded in opposition to Greenland's petition for relinquishment of the settlement proceeds, and moved for a determination of her counsel's entitlement to attorney's fees and costs. Tijuana alleged that she had the intent to serve as personal

representative of the estate when she executed the written retainer agreement with Miller & Jacobs. Tijuana argued that, as a prospective personal representative, she was able to execute a contingency fee agreement on behalf of the estate prior to the estate being opened, so long as the estate would have been solely benefitted from the resulting settlement, and no settlement proceeds would be distributed to her personally. Tijuana further argued that it would be unjust enrichment to award Cunningham any portion of the contingency fee, because it had been earned by the efforts of Miller & Jacobs.

Meanwhile, Tijuana moved to set aside Greenland's appointment as personal representative and to revoke the letters of administration. She alleged that she told Greenland of her preference to serve as personal representative and petitioned the court without notice to her.

The lower court denied Tijuana motion without prejudice, as formal notice of the motion had not been provided to Greenland. Tijuana filed again and alleged that she was best suited to serve as personal representative and that Greenland had not been appointed as the guardian of the minor child's property.

The lower court held a non-evidentiary hearing on Greenland's petition for relinquishment of the settlement proceeds. The lawyers on both sides made numerous unsworn factual assertions. The two sides presented very different versions of whether Greenland acquiesced to Miller & Jacobs's entry into the case. However, Greenland's counsel acknowledged that a guardianship had not yet been established for the property of the minor child.

Following the hearing, the lower court entered an order denying in part Greenland's petition for relinquishment of the settlement proceeds. The court found that Miller & Jacobs was operating in good faith and was lawfully retained pursuant to a written contingency fee contract with Tijuana, who intended to serve as personal representative of the estate. The court further found that prior to the court's appointment of a personal representative, Miller & Jacobs procured a $145,000 benefit for the estate.

The lower court determined that: (1) Miller & Jacobs was entitled to its contingency fee of $48,285 because the contingency contract upon which the representation was based has been met; and (2) Tijuana was entitled to 3% of the net benefit of the settlement proceeds for her participation in procuring a benefit to the estate prior to the court's appointment of a personal representative. This appeal then ensued.

As a threshold matter, Greenland argues that she was properly appointed as personal representative. However, the lower court had not yet definitively ruled on that issue because Tijuana's motion to revoke the letters of administration and set aside Greenland's appointment was still pending. Generally, notice need not be given of the petition for administration or the issuance of letters when it appears that the petitioner is entitled to preference of appointment as personal representative. However, before letters may be issued to any person who is not entitled to preference, formal notice must be served on all known persons qualified to act as personal representative and entitled to equal or greater preference.

Th letters of administration were properly issued to Greenland if she had preference over Tijuana to serve as personal representative. In this case, the minor child is the decedent's only heir. Although Greenland is the natural guardian of the decedent's minor child, she has never been appointed as guardian of the property of the child and thus is not entitled to exercise the right to select the personal representative. Accordingly, Greenland is incorrect in arguing that she was the apparent or statutorily preferred personal representative.

Because no guardian of the property had been appointed for the minor child at the time Greenland became the personal representative, neither Greenland nor Tijuana currently has any preference over the other to serve as personal representative. The appellate court acknowledged that resolving who will serve as personal representative could affect the validity of Tijuana's contingency fee agreement with Miller & Jacobs.

The appellate court ruled that negotiations of a wrongful death claim are anticipated under the law to commence prior to establishing an estate administration. The relation-back doctrine is central to that conclusion. While the duties and powers of a personal representative generally commence upon appointment, the powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.

The appellate court also referenced the Bar rule which requires that every lawyer who enters into a contingency fee agreement must do so only where the fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. The client must be furnished with a copy of the signed contract and any subsequent notices or consents. This rule creates a practical difficulty in situations where an attorney is hired to prosecute a wrongful death claim before any person is authorized to sign a contingency fee agreement on behalf of the client.

The appellate court observed that the relation-back doctrine does not save Miller & Jacobs because Tijuana (the person who purported to hire that firm) had not (at least as of the time of the appellate decision) been appointed as personal representative, and the person Greenland (who was serving as personal representative) had not ratified Tijuana's fee agreement with Miller & Jacobs.

The appellate court remanded to the lower court to rule upon Tijuana's motion to revoke letters of administration. If the court were to grant that motion and appoint Tijuana as personal representative, then Miller & Jacobs would be entitled to enforce the contingent fee contract, based upon the relation-back doctrine.

The appellate court determined that Miller & Jacobs might be entitled to some fee even to the lower court denies the motion to revoke letters of administration and Greenland does not ratify the contingent fee contract. However, the fees in that situation would be limited to the reasonable value of its services on the basis of *quantum meruit*.

The appellate court reversed the lower court's award of a personal representative fee for Greenland, who had not been appointed as personal representative. Although Tijuana's actions benefitted the estate, she has never served as personal representative. Thus, based on the current posture of this case, it was premature to award her a personal representative fee.

9. **Premature Filing? No Problem**[10]

The personal representative, before being appointed as such, filed a petition for workers' compensation benefits. The company moved to dismiss the pending claim alleging that because the filing occurred before the personal representative was appointed as such the filing is a nullity. The personal representative argued that a relation-back doctrine should apply.

The Judge of Compensation Claims rejected the relation-back argument, finding the doctrine did not apply. In reversing and reinstating the claim, the appellate court focused on the portion of the probate code that expressly allows for relation-back and cited to other holdings supporting this type of relation-back when filing.

[10] Estate of McKenzie v. Hi Rise Crane, Inc. 46 Fla. L. Weekly D1890a (Fla. 1st DCA August 19, 2021)

10. **An Invalid Devise of Protected Homestead**[11]

In 2002, mother died owning her homestead and survived by her husband. Her will devised a life estate to her husband and the remainder to one of her two adult sons (having no minor children). Until his death in 2019, husband lived in the residence. Shortly before the husband's death, the disfavored son died, survived by one intestate heir, his daughter.

In 2020, the favored son filed a petition for summary administration and the daughter of the deceased disfavored son filed a petition to determine homestead property. The favored son argued to the court that he was entitled to ownership of the residence pursuant to the mother's will which was then being offered for probate in the summary administration. The disfavored son's daughter argued that the devise was invalid under Florida law, with the result that the homestead descended on the mother's date of death with a life estate to the husband and with the remainder equally to the two sons. The favored son argued, in part, that homestead rights had been waived.

The appellate court made short shrift of the favored son's argument by indicating that equitable principles such as waiver or estoppel cannot operate to nullify a homestead interest. The disfavored son's vested remainder interest in the homestead came into existence at the moment of the mother's death.

11. **Homestead Determination: No Appeal, No Chance to Fix an Error**[12]

The decedent died in 2016, leaving the residuary of her estate, including her homestead, to a testamentary trust. The decedent's sister was the trust's primary beneficiary and a charitable trust was the remainder beneficiary.

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[11] Ballard v. Prichard 47 Fla. L. Weekly D1a (Fla.2d DCA December 22, 2021)

[12] Lanford v. Phemister 47 Fla. L. Weekly D832a (Fla. 5th DCA April 8, 2022)

In separate final orders, the lower court determined that the home constituted the decedent's protected homestead, and that constitutional homestead protections inured to the trustee of the trust for the sister's benefit. Nobody appealed either final order.

The lower court then authorized the trustee of the trust to sell the homestead property, which was accomplished.

When the sister died two years later, the remaining property was to pass to the charitable trust. The personal representative and trustee petitioned the lower court to order payment of fees and costs from the homestead property sale proceeds. Following a hearing, the lower court granted the petitions for fees and costs and authorized payment from the escrowed homestead sale proceeds if necessary for the award to be paid in full. An appeal was filed to determine whether the homestead proceeds could be used for paying fees and costs.

The parties seeking the fees and costs insist the trust is not the decedent's heir for the purpose of constitutional homestead protections. However, the appellate court felt constrained to not rule on that issue because the parties had not appealed the lower court's previous orders. Accordingly, the appellate court determined that the protections afforded to homestead properties applies, which precluded payment for the estate's fees and costs.

12. **Homestead Proceeds: No for Estate Expenses; Yes for Trust Expenses**[13]

The lower court authorized reimbursement from the sale of the homestead property for reasonable fees and costs incurred for two discrete functions: (i) administering the decedent's estate as personal representative; and (ii) acting as trustee of the trust to which the estate, including the homestead, was devised. The appellate court reversed the authorization for estate while affirming reimbursement for fees and costs incurred for the testamentary trust.

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[13] Lanford v. Phemister 47 Fla. L. Weekly D832a (Fla. 5th DCA April 8, 2022)

13. **Not Your Job**[14]

A surviving spouse petitioned to probate a lost will, and asked for the deceased spouse's son to be appointed as personal representative consistent with the provisions in the lost will. At the same time, the surviving spouse filed her Election to Take Elective Share and she filed and served a Notice of Election to Take Elective Share.

Months later, the court admitted the will to probate and appointed the son as the personal representative. Shortly after, the son filed the Notice of Administration and a Notice of the Elective Share. On the same day, he also served those documents on himself and the other beneficiaries of the estate. Within 20 days after serving the Notice of Elective Share upon himself, he objected to the election and the other beneficiaries adopted that objection.

By then, the surviving spouse had died. The personal representative of her estate responded to the objection and argued that the objection was untimely, having been filed more than 20 days after the surviving spouse's service of the Notice of elective share. The lower court agreed that the objection was untimely, which resulted in allowing the elective share.

The deadline for objecting to the elective share is tied to when Notice of the election was served. Although the surviving spouse served a Notice of election, the rule provides that the Notice is to be served by the personal representative. Accordingly, the deadline can only be established after the personal representative served the Notice of the election.

The appellate court ruled that objection was timely.

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[14] Rasor v. Estate of Rasor 47 Fla. L. Weekly D759b Fla. 4th DCA March 30, 2022)

14. **"Shall Toll" Means "*Shall* Toll"**[15]

The surviving spouse filed not one, not two, but three petitions to extend the time by which she could file for the elective share. The record does not indicate an objection to any of those three petitions for extension. Prior to the date set forth in the third petition for extension, the surviving spouse filed her election by which she claimed an elective share of the estate.

Objections ensued. The lower court concluded the Election to Take Elective Share was untimely.

On appeal, the surviving spouse argued her election was timely because it was filed while her timely petitions for extension of time were pending, relying upon the probate code that states a petition for an extension of the time for making the election or for approval to make the election shall toll the time for making the election.

The appellate court found the statutory language to be clear and that timely filing a petition for an extension of time tolls the time for making the election. Most significantly, the appellate court held that a petition for extension of time does not require a hearing or ruling for the time to be tolled.

15. **Who's in Control (Of the Litigation)?**[16]

The proponent petitioned to admit to probate a purported will left by his father. The contestant filed a caveat and an answer which precluded the admission of that will without more effort required of the proponent. Although the contestant did not plead any independent, cognizable causes of action, he did seek affirmative relief in the form of an accounting and a deposit of assets in the court registry.

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[15] Futch v. Haney 46 Fla. L. Weekly D2239c (Fla. 2d DCA October 13, 2021)

[16] Tien v. Estate of Tien 46 Fla. L. Weekly D2463a (Fla. 3d DCA November 17, 2021)

The proponent then voluntarily dismissed the petition to admit the will, which was promptly followed by the court entering a final order of dismissal. The contestant unsuccessfully sought relief from the dismissal, and an instant ensued.

The contestant contends the voluntary dismissal was improper in view of his caveat and answer. Although a plaintiff's right to take a voluntary dismissal is near absolute, a voluntary dismissal cannot prejudice a pending counterclaim. In the instant case, the contestant did not reference a counterclaim and his filings lacked the essential elements of any cognizable cause of action. Under these circumstances, the appellate court ruled that the proponent was authorized to abandon his effort to admit the disputed testamentary documents and the court had no authority or discretion to deny the voluntary dismissal. The dismissal was effective upon service. Accordingly, the appellate court found no error and affirmed the denial of the contestant's request to continue to litigate.

16. **All's Well That Ends Well**[17]

A daughter appealed the final order determining incapacity and appointing a plenary guardian for her mother. After the lower court issued its order determining incapacity and appointing the plenary guardian, the daughter filed a motion for rehearing based on newly discovered evidence. However, the mother, who by then was a ward, died before the court ruled on the motion for rehearing. The guardian filed a response opposing the motion. The lower court denied the motion without a hearing, concluding the motion was moot due to the death of the ward.

The appellate court concluded the lower court properly ruled on the evidentiary issues and reached appropriate legal conclusions based upon the evidence presented. However, the appellate court also took the opportunity to remind guardianship judges that the death of

[17] Guibord v. Chopin 47 Fla. L. Weekly D529a (Fla. 4th DCA March 2, 2022)

the ward renders a motion for rehearing moot as to the incapacity determination and the appointment of the guardian of the person but the ward's death does not render a motion for rehearing moot as to the appointment of a guardian of the property if the guardian of the property handled the ward's property for a period of time or engaged in any transactions affecting the ward's property to a significant degree. The reason announced by the appellate court is because collateral legal consequences may flow from the appointment of the guardian of the property.

As the guardian correctly conceded at oral argument, the ward's death did not render the motion for rehearing moot as to the appointment of a guardian of the property. However, the appellate court agreed with the guardian that the new evidence asserted in the motion for rehearing was irrelevant to the issue of the appointment of the guardian of the property. Thus, any error in the lower court's reasoning for the denial of the motion for rehearing as moot, is harmless.

17. **Do Over**[18]

An alleged incapacitated person sought to retain counsel of his choice to replace the counsel appointed for him by the court. The lower court refused to allow the replacement of counsel, going so far as to strike the desired counsel's notice of appearance after denying the motion to substitute. The lower court had removed the alleged incapacitated person's right to contract and delegated it to the temporary guardian through the emergency temporary guardianship. Once that had occurred, the lower court concluded that the right to change counsel, other than by action of the temporary guardian, had been removed, or at least suspended.

The appellate court determined that the alleged incapacitated person's right to substitute appointed counsel with counsel of his or

[18] Foster v. Radulovich 46 Fla. L. Weekly D2677a (Fla. 2d DCA December 17, 2021)

her choice during proceedings to determine incapacity cannot be removed to the temporary guardian. The court explains that this situation is distinguishable from after a person has been determined to lack capacity and a guardian is appointed with the power to contract for the ward.

The losing party in the appeal then suggested that the appellate court's ruling was moot because by that time the lower court had determined the alleged incapacitated person to be, in fact, lacking capacity and had removed the right to contract to a guardian. On a motion for rehearing, the appellate court did not react kindly to that suggestion.

The alleged incapacitated person, who by then had been upgraded (or downgraded) to a ward, argued that the appellate court's ruling should return the parties to the positions they were in before the motion to substitute counsel had been denied, which would then require the lower court to again undertake proceedings to determine his capacity, while this time represented by counsel of his choice. The opposing party argued the motion for substitution of counsel has been rendered moot by the subsequently entered order adjudicating Mr. Foster incapacitated and that reconsideration of the motion for substitution of counsel on remand would be unnecessary.

The appellate court reminded the losing party that it had already declined a request to dismiss the appeal based on mootness. The appellate court then played the logic card: logic does not permit the conclusion that a subsequent adjudication of incapacity pursuant to proceedings during which the court found he should have been represented by his choice of counsel would justify denying him representation by his choice of counsel again upon remand.

18. **Guardianship Fees: No Benefit to the Ward Required**[19]

An attorney was appointed by the court to represent the alleged incapacitated person in all proceedings involving the petition for determination of incapacity and appointment of guardian and, if there be an adjudication of incapacity, to review the initial guardianship report and represent the ward during any objections. The attorney filed a timely request for payment of attorney fees and costs, asserting that she had rendered services to the guardian and incurred expenses for the benefit of the ward. The guardian contested entitlement to those fees and costs, and argued that (i) assuming the appointment was under section 744.331 that section is silent with respect to payment of fees and costs, and (ii) attorney fees and costs are only allowed under section 744.108 if there was a showing of benefit to the ward. The guardian asserted that there was no benefit to the ward because there was no disagreement that the ward was incapacitated and in need of a guardian. The attorney responded by alleging entitlement under both sections 744.331 and 744.108. The lower court awarded fees and costs in the amount requested without citation to any specific statutory provision.

The appellate court held that the guardian's argument that section 744.331 is silent with respect to payment of fees and costs is meritless based upon the plain reading of that statute.

The appellate court also found that a benefit to the ward was not necessary, notwithstanding authority from sister courts to the contrary. The appellate court ruled that the sister courts have erroneously conflated the separate and distinct subsections of 744.108 and imposed a judicially created benefit to the ward standard to fee entitlement which is not supported by the plain language of the statute. The appellate court adopted the reasoning of Judge Luck in his concurring opinion that this judicial infusion of a 'benefit' standard

[19] Guardianship of Sanders v. Chaplin 47 Fla. L. Weekly D557a (Fla. 1st DCA March 2, 2022)

for fee entitlement has adverse, broad, and unintended consequences. Also quoting Judge Luck, the court agreed that judicially imposing a 'benefit' standard will make it harder for family members and interested parties to bring claims on behalf of their loved ones, undercompensate attorneys who render services to a ward (although don't ultimately prevail in the case), and double count certain factors in the entitlement decision and then again when considering the amount to award. Continuing with the Judge Luck quotefest, the court indicated there is no question the Legislature knows how to write attorney's fee statutes that require the lawsuit to end successfully.

19. **Status Quo (and Claim Dicta)**[20]

The surviving spouse and children of a decedent disputed the ownership of a painting. The children claimed ownership by an inter vivos gift from their father (the decedent). The surviving spouse argued the painting is part of the estate to which she alleged that she was entitled pursuant to the testamentary documents of the decedent. As of the decedent's death, the painting was, as it had been for decades, on loan to a museum located in Maine.

While litigation was pending, the painting was moved from one location to another and eventually was listed for auction in a sale catalogue. The lower court granted an injunction, concluding the *status quo* was necessary until the ownership issue had been fully litigated.

The surviving spouse then sought a temporary injunction which, if granted, would have relocated the painting to Florida. The court denied that relief and ordered the painting remain in the custody of the auction house (but not to be sold). The instant appeal followed, which up held the lower court's determination that *status quo* is a good status for this situation.

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[20] Namon v. Elder 46 Fla. L. Weekly D2507a (Fla. 3d DCA November 24, 2021)

The appellate court also described, albeit in *dicta*, the application of the probate non-claim statute to tangible personal property that is part of an estate.

20. **Good Ol' Fashion Undue Influence and Diminished Capacity**[21]

A successful businessman executed a will in 2001, with assistance from his long-time estate attorney. Eighteen months before his death in 2013, he executed another will.

The 2001 Will left the testator's girlfriend a condominium but not much else. The 2013 Will left all but $5,000 to the girlfriend. Between 2001 and 2013:

a. The girlfriend contacted the testator's estate attorney after learning of the 2001 Will and a related power of attorney. She informed him the testator had lied to her, and she had concerns regarding serving as a co-agent with the testator's daughter. She described their relationship as acrimonious and indicated the testator would revise the terms of the will.

b. The testator returned to his estate lawyer to request a will revision. At his direction, the attorney prepared a will that included a $500,000.00 devise to the girlfriend, if she survived him, and devised his remaining assets to his children. That will was never executed.

c. Two years later, the testator again returned to his long-time estate attorney, this time for the purpose of directing the preparation of a will reducing the girlfriend's interest to a life estate in the condominium and $100,000.00. The residuary would again be left to his children. Like the prior draft, that will was never executed.

d. Three years later, accompanied by the girlfriend, the testator again met with his estate attorney for the purpose

[21] Swiss v. Flanagan 46 Fla. L. Weekly D2233a (Fla. 3d DCA October 13, 2001)

of revising his will. The testator appeared to be in deteriorating health. After discovering the testator inexplicably intended to disinherit his children and devise his entire estate to his girlfriend, the attorney deviated from his standard practice and requested two competency evaluations. The testator later provided the attorney with a report confirming he was able to render health and welfare decisions. The report, however, was silent as to his capabilities relating to financial transactions. The attorney refused to draft the requested document, instead referring him to another attorney.

e. The testator then met with the other attorney and requested the preparation a new will and other related drafts. The documents were provided, and the girlfriend faxed a copy, along with proposed edits, to yet a third attorney. The testator purportedly destroyed the drafts, and no further action was taken until the following year.

f. In 2012, the testator selected a fourth attorney from a list of names supplied by the girlfriend. He met with that attorney initially but shortly thereafter the testator fell and fractured his hip. This precipitated surgery, followed by a lengthy convalescence in a post-surgical rehabilitation facility. While in recovery, the testator was uncooperative, belligerent, and exhibited signs and symptoms associated with an altered mental status. Nonetheless, the fourth attorney conducted a second meeting at the rehabilitation facility.

g. At that time, the testator was not properly monitoring his finances and could not adequately care for himself. The girlfriend completed insurance forms and other documents on his behalf, while, at times, representing she was his wife, and managed his affairs. She also discussed the

nature of his assets with others and curtailed communication with his children.

h. Within days of his release from the rehabilitation facility, the testator again met with the fourth attorney, this time at the girlfriend's home, for the purpose of completing revised estate documents. By that time, the testator was nonambulatory and incontinent.

i. Two witnesses were secured by the attorney and the will, which erroneously recited that the testator was not a resident of Florida, was executed in 2013. A contemporaneously executed affidavit contained multiple discrepancies, including denominating the testator as a surviving spouse rather than a divorcé and mischaracterizing his eldest daughter as his youngest.

j. The week after the 2013 will was executed, the testator was diagnosed with dementia, anxiety, and depression. A subsequent fall resulted in further medical complications, and a routine scan revealed a history of cerebral infarctions. Later acquired medical records were replete with observations regarding his impaired cognitive abilities. The testator's health continued to degenerate, and he did not execute any further estate documents before his death.

The lower court weighed the evidence and concluded the 2013 will was the product of undue influence and admitted the 2001 will. An appeal ensued.

The appellate court explained that although the burden is initially with the party seeking to invalidate the will, a rebuttable presumption of undue influence can arise where a substantial beneficiary, occupying a confidential relationship with the testator, is shown to have actively procured the will. When this presumption arises, the burden then shifts to the beneficiary to come forward with a reasonable explanation as to his or her active role in the affairs of the testator. Once that burden is met, the presumption vanishes, and

the lower court decides the case in accord with the greater weight of the evidence.

Applying these principles, the lower court found the girlfriend was a substantial beneficiary, that she had a confidential relationship with the testator, and that she was actively involved in the procuring the 2013 will. Once the rebuttable presumption of undue influence was established, the girlfriend then had a chance to explain her actions. The lower court found her testimony unpersuasive and ruled against her.

The appellate court was satisfied with the adequacy of the lower court's factual findings and did not find any misapplication of the law. Accordingly, the lower court's judgment was affirmed, resulting in the 2001, not the 2013, will being probated.

21. **Construction, Not Contest**[22]

The decedent's will was admitted to probate without any objection being made by his brother. The will included an exercise of a power of appointment over assets in a trust established by the decedent's (and brother's) grandfather. The permissible appointees were anyone except the decedent, the decedent's creditors, the decedent's estate, or creditors of the decedent's estate.

The effect of the exercise of the power of appointment in the will resulted in the assets of the trust being distributed to the then serving trustee of the decedent's revocable trust for satisfying the specific gifts set forth in that instrument and any remaining amount to be distributed as part of the residuary trust estate.

The default taker under the grandfather's trust, in the event the power had not been exercised, was the brother.

The trustee of the grandfather's trust refused to distribute the assets to the trustee of the decedent's revocable trust. The personal representative of the decedent's estate petitioned for instructions. The

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[22] Tendler v. Johnson 47 Fla. L. Weekly D40 (Fla. 4th DCA December 22, 2021)

brother answered the petition and asserted that the exercise of the power of appointment was not effective because the appointed assets could be used to pay the creditors of the decedent's estate after those assets became assets of the decedent's revocable trust.

The personal representative sought to strike the brother's reply by asserting it was untimely because it was not filed within three months of receipt of the Notice of Administration. The lower court agreed with the personal representative and found the brother's response to be untimely. The court reasoned that any objection challenging the validity of a will was required to be filed within three months of receipt of the Notice of Administration.

The appellate court held that the brother's response was not a challenge to the validity of the will but rather sought to construe a provision in the will. A construction proceeding can only be brought after a will has been admitted to probate.

22. **No Native American Giving**[23]

Upon formation of Karibu Properties, Inc. ("Karibu I"), Stock Certificate #1 was issued for 100 shares to the mother. Those were the only shares issued at that time, making mother the sole shareholder.

Subsequently, the mother expressed her intention to transfer her stock in Karibu I to her son, as a gift. The son created another entity, Karibu II, Ltd. ("Karibu II"), for the purpose of receiving the gift of stock in Karibu I. The mother instructed her attorney to prepare Stock Certificate #2 for 100 shares to be issued to Karibu II, and she returned Stock Certificate #1 to the attorney. The attorney sent Stock Certificate #2 to the mother for her signature, and noted in the stock transfer ledger that he had done so. The attorney retained Stock Certificate #1 in the corporate book for Karibu I.

Years later, mother and son informed the attorney that Stock Certificate #2 had been lost. This conclusion was well documented and

[23] Ordway v. Karibu Properties, Inc. 47 Fla. L. Weekly D906a (Fla. 3d DCA April 20, 2022)

the attorney then prepared Stock Certificate #3 as a replacement for Stock Certificate #2, and sent it to mother for signature. Although mother had executed Stock Certificate #3, she never delivered it to the son. After the son's death, the mother returned Stock Certificate #3 to the attorney and instructed him to void it. The lower court found in favor of the mother and determined that she (and her estate) continued to own all of the stock in Karibu I.

The personal representative for the son's estate appealed that decision. The appellate court focused on the donative intent at the time Stock Certificate #2 was signed and delivered to the son. Notwithstanding that Stock Certificate #2 was thought to be lost for some period of time, the gift that occurred at the initial delivery was complete and could not be taken back by later actions of the mother.

The lower court improperly placed too great an emphasis on the lack of compliance with corporate formalities for the transfer of stock in reaching its conclusion regarding the ownership of Karibu I. Compliance with corporate formalities are not the exclusive manner in which to effect a gift of stock and the lack of those formalities do not undercut the validity of a gift which is otherwise effective under common law standards. Therefore, contrary to the lower court's conclusions of law, the mother's failure to write void on Stock Certificate #1 or to execute a stock power or other documents proving the transfer occurred, or even her failure to file a gift tax return after delivering Stock Certificate #2 to the son does not negate that a valid transfer by gift was made when she delivered Stock Certificate #2, even if it was later lost.

23. **Finalmente (The End!)**[24]

The lower court dismissed with prejudice a complaint against a former personal representative. The two-count complaint alleged that the defendant -- who had served as the personal representative for the

[24] Hannan v. Doyle 47 Fla. L. Weekly D589a (Fla. 3d DCA March 9, 2022)

estate of the plaintiff's grandmother in a now closed probate proceeding -- had breached a purported oral agreement and her fiduciary duties by failing to pay the plaintiff "$16,000 to satisfy his portion of the probate proceeds."

The lower court took judicial notice of the probate records in the estate case and determined that the claims were barred by the probate code and *res judicata*.

The appellate court found no error and affirmed.

24. **Defendants, Not Property**[25]

A creditor prevailed at trial and obtained a judgment against a defendant over whom the court had personal jurisdiction. During the collection efforts, the creditor discovered the defendant had about $4 million of the funds in a safe at his home in South Korea. The creditor filed a motion to compel the defendant to turn the funds over, arguing the lower court could order the defendant to do so pursuant to its *in personam* jurisdiction over him and the broad discretion granted to courts under the applicable law.

The lower court disagreed, reasoning Florida courts do not have *in rem* or *quasi in rem* jurisdiction over foreign property. Because the property at issue was in South Korea, the lower court denied the creditors' motion basing its denial on a lack of jurisdiction over the property.

The appellate court reversed and explained that a lower court may order a debtor, over whom the court has *in personam* jurisdiction, to act on assets outside the court's territorial jurisdiction. The court drew a significant distinction between having authority to directly act upon property which lies beyond its borders from directing a defendant to act on that property. Although the court would lack jurisdiction for the former, the appellate court had no trouble finding jurisdiction of the latter.

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[25] Buechel v. Shim 47 Fla. L. Weekly S133a (Fla. May 26, 2022)

In weighing in on this issue, the Florida Supreme Court cleared up a conflict between districts by agreeing with the appellate court in this case. The court explained that a defendant's obedience is compelled by proceedings in the nature of contempt, attachment, or sequestration and are imposed against the defendant -- not the property -- so that the defendant is held accountable and to prevent the defendant from relocating assets outside of Florida to avoid execution of a judgment.

25. **To the Back of the Line**[26]

A very bad actor exploited and committed civil theft against her victim. When the bad actor passed away, the victim filed a statement of claim in the bad actor's estate. The personal representative objected to the claim. The victim then filed a separate lawsuit against the estate, consistent with the claims process. The victim prevailed with a judgment against the estate for over $2 million.

The victim then recorded the judgment in Charlotte County at which time she obtained a statutory judgment lien on all of the estate's real property. When the personal representative tried to sell the estate's real property, the victim asserted her lien had priority and would have to be satisfied.

The personal representative asserted that the amount due to victim, notwithstanding the judgment lien, remained a lowly Class 8 claim. The lower court allowed the victim to execute on its lien, effectively giving that claim a priority over other claims in the estate. The lower court relied on the statutory exception found in the probate code that allows enforcement of liens encumbering specific property.

The appellate court reversed the lower court, explaining that recording a judgment creates a lien generally on any real property of the debtor in the county where it is recorded. The lien is not on a

[26] Jones v. McKinney 47 Fla. L. Weekly D899a (Fla. 2d DCA April 20, 2022)

specific property and therefore the probate code exception does not apply.

26. **If it Needs Said, Say it**[27]

The lower court denied the petitioner the right to change her name, stating only that the petition was denied and that the petitioner shall continue to be known as her current name. The petitioner appealed that denial.

The appellate court reversed the denial, finding that when a court denies a facially sufficient petition for name change, the court must provide the factual basis for doing so. Without any testimony and an order that simply denied the petition, the appellate court was required to remand for further proceedings. The appellate court also instructed the lower court to provide a factual basis if the petition is denied again.

27. **Limited Liability Companies**[28]

The decedent specifically devised his interest in a limited liability company to two of his children and left the residuary estate to his wife. The operating agreement included a provision that allowed the company to buy the interest of a deceased member from the deceased member's estate. During the administration of the decedent's estate, the company exercised that option, which resulted in the decedent's membership interests being converted into cash.

The wife then asserted that the specific devise failed. She argued that because the company exercised the buy-out right, the decedent's attempt to devise the membership interest failed, which caused the proceeds from the buyout to become part of the residuary estate, of which the wife was the sole beneficiary.

The lower court sided with the two children, and determined that the devise of the decedent's interest in the company did not fail when

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[27] In Re: The Name Change of Sheikera Williams 47 Fla. L. Weekly D700a (Fla. 4th DCA March 23, 2022)

[28] Tita v. Tita 47 Fla. L. Weekly D532c (Fla. 4th DCA March 2, 2022)

the company exercised its buy out rights and that the children will receive the proceeds of the buyout.

The appellate court agreed with the lower court that the operating agreement of a limited liability company did not nullify a specific devise in a will of the decedent's interest in the company. The appellate court distinguished the facts of this case from restrictions within an operating agreement on who may receive membership interests.

28. **It Ain't Over Until It's Over**[29]

The decedent died intestate during the pendency of a dissolution of marriage. During that proceeding and before his death, the decedent and his wife entered into a partial marital settlement agreement. The partial marital settlement agreement divided certain marital assets and liabilities, but specifically excluded alimony and a portion of the decedent's pension benefits. Also, the partial marital settlement agreement provided for the sale of the marital home, but did not contain an agreement to change the spouses' ownership interest in the marital home. Although the court had adopted the partial marital settlement agreement, the final judgment of dissolution of marriage had not been entered.

The decedent's brother petitioned to serve as personal representative of the decedent's estate. The brother contended he had standing as the heir-at-law. The brother requested enforcement of the partial marital settlement agreement and a determination that the marital home had been converted to a tenancy in common between the decedent and the wife.

The wife counter-petitioned to serve as personal representative on the basis that she was still the decedent's surviving spouse and sole beneficiary of the decedent's estate. The wife later moved for final summary judgment on her counter-petition, arguing, in part, that the couple's marriage had never been dissolved and pointing out the

[29] Merli v. Merli 47 Fla. Law W. D144a (Fla. 4th DCA January 5, 2022)

dissolution proceeding had been dismissed as a result of the decedent's death.

The lower court granted the wife's summary judgment motion and appointed her as personal representative of the decedent's estate. The lower court found the partial marital settlement agreement did not contain any language which could constitute a waiver of spousal rights. The brother appealed.

The appellate court reviewed the partial marital settlement agreement in the context of a waiver of spousal rights. Finding no such waiver, the appellate court affirmed the lower court's judgment.

29. **Online Prenups on the Wedding Day**[30]

Man and woman, both residents of Florida, began discussing getting married to one another. Although the man had indicated about a year before the marriage that he would want a premarital agreement, the woman had refused to consider and the issue had not received any further discussion between them.

They agreed to get married on a certain date at the man's second home in Massachusetts. The morning of the wedding, the man tells the woman to find a prenuptial agreement online so they may sign it before the wedding. The woman balks. The man, apparently using all the tact that he can muster, announces that she will be his fifth wife and a prenuptial is necessary in the event of divorce. The woman relents and follows the man to his home office where she obediently searches for a prenuptial agreement on the man's computer. The woman located an online program to create an agreement which required filling in responses to prompts. Most of the information provided in response to the prompts was supplied by the decedent. After the agreement was signed at a nearby notary, the woman rushed to get ready for the marriage ceremony, which occurred at 4:00 p.m. that day, in front of a large crowd of friends and family.

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[30] William-Paris v. Joseph 46 Fla. L. Weekly D1959a (Fla.4th DCA November 17, 2021)

The man (now the husband) and the woman (now the wife) lived together for about four years, at which point the husband (now the decedent) passed away intestate and still married to the wife. The wife petitioned the court seeking to set aside the prenuptial agreement and allow her to assert her rights as the surviving spouse.

The decedent's children were adverse to the wife and moved for a summary judgment that the prenuptial agreement was binding and applied even in the event of death. The lower court ruled in favor of the children with respect to the coercion and duress claims by the wife but ruled in favor of the wife regarding her claims of unilateral mistake, ruling material disputed facts remained as to whether the decedent represented the agreement was to apply only in the event of divorce and not death. After a trial, the court ruled in favor of the children on the remaining claims by the wife, thereby validating the prenuptial agreement with respect to testamentary claims.

After a lengthy analysis, the appellate court affirmed the lower court's determination that Florida law, rather than Massachusetts law, governed the validity of the prenuptial agreement. The court then turned to interpreting a specific provision in the agreement that refers to the residence. In reversing and remanding on this point, the appellate court concluded the agreement does not apply to the decedent's homestead.

30. **SCOTUS on Medicaid**[31]

A victim, when resident in Lee County, Florida, was injured and settled the tort claim for $800,000, of which $35,367.52 was designated as compensation for past medical expenses. The settlement did not specify an amount for future medical expenses.

The victim had, as of 2021, received payments from Medicaid for health care in excess of $860,000. The Agency for Health Care Administration, which administers the Medicaid program in Florida, continues to pay for the victim's care.

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[31] Gallardo v. Florida Agency for Health Care __ U.S. __ (June 6, 2022)

The Florida agency sought to collect 37.5% of the $800,000 settlement, which is $300,000. This percentage is the amount allowed to be collected from settlements for medical care under applicable regulations. The victim argued that the agency could only collect 37.5% of the amount allocated for past medical expenses, which would be $13,125.

The victim appealed the agency's decision administratively and also instituted a court proceeding in which she sought to prevent the agency from receiving any payment for future medical expenses.

The United States Supreme Court agreed with the agency and, by a 7-2 vote, allowed the agency to recover from the settlement that is allocated for future medical expenses.

31. **Conclusion**