Probate, Trust, and Guardianship Case Law Update

At The

Annual Legislative & Case Law Update

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The Breakers
Palm Beach, Florida

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Legislative & Case Law Update Seminar

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1. Enforcement of Trust Terms[1]

In an opinion authored by Judge Scales, the Third DCA reversed a lower court's decision to distribute the assets of a special needs trust without enforcing a Medicaid "payback" provision in the trust instrument. The trust was created for the benefit of an adoptee pursuant to an adoption assistance agreement with the Florida Department of Children and Families. The terms of the trust required that, upon termination, the trustee must first reimburse the Agency for Health Care Administration (AHCA) for Medicaid benefits paid on Ryan's behalf.

The payback provision existed to allow the trust property to be exempt from being counted as an available resource when determining eligibility for Medicaid benefits. The trustee argued that the payback provision should not be enforced because by the time the trust was being terminated Ryan's disability had been removed.

[1] **Agency for Health Care Administration v. In Re Ryan Joseph Spence, 49 Fla. L. Weekly D1080b (Fla. 3rd DCA 2024). Note the style of this proceeding likely should have been In Re: Ryan Joseph Spence Special Needs Trust Agreement as the proceeding was apparently an *in rem* proceeding. See Fla. R. Civ. Proc. 1.100(c).**

The lower court approved the request of the trustee to terminate the trust, ignore the payback provision, and distribute the trust property directly to Ryan. The appellate court ruled that this was an error, emphasizing the clear intent of the trust to prioritize Medicaid reimbursement.

Consequently, the case was remanded with instructions to enforce the payback provision if the trustee proceeds with terminating the trust.

2. Expansion of Strict Compliance[2]

The appellate court reversed the lower court's determination that a change in beneficiary designation for an IRA account was effective. The IRA agreement between the deceased and the IRA custodian required the last beneficiary designation that had been accepted by the custodian to control the post-death distribution of the account. There was no evidence that the custodian had accepted, much less received, the new beneficiary designation purportedly sent by the deceased's counsel before his death. The appellate court rejected the argument that the substantial compliance doctrine could override the failure to demonstrate the custodian's receipt or acceptance of the new designation, as acceptance was a material term of the custodial agreement. The requirement of strict compliance is a natural extension of Florida's well developed law that strict compliance is necessary for estate planning documents. (Parsi v. Kingston, 48 Fla. L. Weekly D557a (Fla. 3rd 2023) requiring strict compliance with execution requirements set forth for durable powers of attorneys is required; Kelly v. Lindenau, 223 So.3d 1074 (Fla. 2nd 2002) holding that to execution requirements for testamentary aspects of revocable trusts are strictly construed; Allen v. Dalk, 826 So. 2d 245 (Fla. 2002) answering a certified question in the negative that precluded imposing a constructive trust when an invalidly executed will is the result of a mistake in execution, citing In Re Bancker's Estate, 232 So. 2d 431 (Fla. 4th DCA 1970) for the well established requirement that a testator must strictly comply with execution requirements in order to create a valid will.)

3. Due Process Even Under F.S. 57.105[3]

The appellate court reversed a lower court's order denying counsel's motion for relief from a final judgment awarding attorney's fees against him. The appellate court found that the judgment against the lawyer was void due to a lack of due process. Specifically, neither the original motion for appellate attorney's fees filed before the lawyer had appeared in the proceeding nor subsequent notices of the hearing indicated that fees were being sought against counsel. Additionally, the movant failed to comply with the safe harbor provision mandated by section 57.105(4), Florida Statutes. Therefore,

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[2] **Sobel v. Sobel, 49 Fla. L. Weekly D854a (Fla. 4th DCA 2043)**

[3] **Fantauzzi v. Fleck, 49 Fla. L. Weekly D700a (Fla. 2nd DCA 2024)**

the court ruled that the final judgment was void, reversed the denial of counsel's motion for relief, and remanded the case for the lower court to vacate the portion of the judgment against counsel.

4. Due Process, Homestead, and Trust Reformation[4]

The decedent's estate plan provided, through a trust instrument, that upon his death his surviving spouse would receive a life estate in his homestead and she would have the power to appoint the remainder to her granddaughter. The decedent's son, as the personal representative of the estate, filed a homestead proceeding asserting that because the decedent did not devise a fee simple interest to his surviving spouse, the disposition was void and the statutory provisions resulted in the surviving spouse receiving a life estate and the decedent's children the vested remainder.

While the homestead proceeding was pending in the estate administration, the trustee commenced a separate reformation proceeding. The reformation sought to cure the defect identified by the son. The proposed cure was to revise the trust terms to result in the surviving spouse receiving a fee simple interest retroactively to the settlor's death. This reformation petition was granted without notifying the settlor's children and without having been disclosed in the estate proceeding (where the homestead proceeding was pending).

When the decedent's children learned of the reformation, they filed a motion to vacate the judgment under Florida Rule of Civil Procedure 1.540(b)(3), claiming extrinsic fraud and a violation of due process rights. They argued that the appellees' failure to notify them and to inform the judge before whom the homestead proceeding was pending constituted extrinsic fraud. The lower court conducted an evidentiary hearing on the motion to vacate. Although the court recognized the fraud, it required the children to prove that their participation in the reformation action would have changed the outcome. The lower court concluded that even with the children's participation, it would have granted the reformation to carry out the settler's intent, thus finding no prejudice from the fraud and denying the motion to vacate. However, the lower court refused to allow the children to present evidence on the merits of the homestead status. Without that evidence, the lower court did not have before it the prejudice created by the reformation order.

The appellate court found error in this handling of the homestead issue. The appellate court held that the children's asserted homestead interest was crucial and should have been addressed before ruling on the motion to vacate. The appellate court explained that under homestead property rights vest immediately upon the settler's death, and any devise that does not grant a fee simple interest to the surviving spouse is invalid. Thus, the conveyance of a life estate with a remainder appointment violated the homestead laws. The appellate court concluded that the lower court's exclusion of

[4] **Stirberg v. Fein, 48 Fla. L. Weekly D577a (Fla. 4th DCA 2023)**

testimony regarding the homestead interest was an abuse of discretion. The homestead interest was directly relevant and potentially dispositive of the motion to vacate the reformation judgment. Therefore, the appellate court reversed the lower court's denial of the motion to vacate and remanded the case with instructions to consolidate the motion to vacate with the homestead petition and resolve both matters together.

5. Due Process Prevails Again[5]

The appellate court rightfully reversed and remanded when the lower court struck a purported last will without conducting an evidentiary review. Although the proposed will was handwritten, facially the will complied with execution requirements. The appellee is commended by the appellate court for confessing error. Of course, the entire appellate process might have been avoided if the appellee had joined in seeking relief in a rehearing or other proceeding giving the trial judge an opportunity to fix the mistake.

6. Summary Judgment in an Estate Setting[6]

Although the underlying dispute involved a decedent's estate, the issue on appeal was the appropriateness of entering summary judgment based upon an affirmative defense. Appellant sought to have a decedent's ownership interest in a company declared an estate asset based on an alleged oral agreement. The lower court granted summary judgment in favor of the appellees, determining that the claim was barred by the applicable four-year statute of limitations. The appellant argued that the statute of limitations defense was improperly pled and that there were genuine disputes of material fact. However, the appellate court found that the defense was properly pled and that no genuine disputes existed that would preclude summary judgment. Consequently, the lower court's decision was affirmed.

7. County Court and Probate[7]

After 262 docket entries and 15 hearings in Miami-Dade County Court over $17,575.45 of unpaid attorneys' fees arising from representation in a then-closed probate proceeding, the county court judge awarded $4,770. The defendant appealed raising a new jurisdictional issue. The appellant argued that because the circuit court has exclusive jurisdiction over the settlement of estates,

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[5] **Morrow v. Morrow, 48 Fla. L. Weekly D294b (Fla. 3nd DCA 2023)**

[6] **Montalvo v. Rovirosa, 48 Fla. L. Weekly D1749b (Fla. 3nd DCA 2023)**

[7] **Kilvoyne v. George, 48 Fla. L. Weekly D899b (Fla. 3nd DCA 2023)**

including determination of compensation to attorneys involved in the probate proceeding, the county court lacked authority to render its judgment.

After 56 docket entries in the appellate proceeding, the matter was reversed and remanded with instructions to transfer to the circuit court. On June 3, 2024, after another 50+ docket entries in the new circuit court proceeding, the parties report to the court they have "amicably" settled the matter and the case will not proceed to another trial.

The county court proceeding was brought as a contract dispute, and seemed to be squarely within the jurisdiction, based upon the amount in controversy, of the county court. The transfer to circuit court could have been avoided if the initial proceeding had been brought in the circuit court, even as a breach of contract claim. The instructions on remand were to transfer to the circuit court, with no mention of the probate division, underscoring that Florida has a circuit court and not a probate court.

8. Intersection of Homestead and Interested Person Status[8]

This decision involved the legal principles of Florida homestead law and the status as an interested person. The astute decision by Judge Soto in the probate division of the circuit court was affirmed in all respects. The decedent was survived by his mother and not by a spouse or a minor child. The decedent's will devised his freely-devisable homestead to his mother, or if the mother did not survive then to the decedent's daughter. The decedent nominated, and the court appointed, the decedent's daughter (the contingent homestead-beneficiary) as personal representative of the estate. After the decedent's death but before the conclusion of the probate proceeding, the homestead-beneficiary was declared incapacitated. Appellant, who was the son of the decedent, the grandson of the homestead-beneficiary, and likely a beneficiary of the homestead-beneficiary's estate upon her death, sought an order from Judge Soto ruling that the homestead vested in the decedent's mother as of the decedent's death. The appellate court reviewed well-established Florida law including the fluid definition of interested person and concluded Judge Soto correctly held that the appellant was not an interested person in the estate proceeding. In a footnote, the appellate court observed that its opinion should not be construed upon limiting the appellant's future participation in the guardianship proceeding.

[8] **Rudnikas v. Gonzalez, 49 Fla. L. Weekly D676a (Fla. 3nd DCA 2024)**

9. Settlement Agreements[9]

The appellate court affirmed the lower court's decision to enforce a settlement agreement between the plaintiff and the defendants. The plaintiff argued that no settlement agreement existed because he sought a net settlement of $100,000, while his attorney had negotiated a gross settlement of $100,000. The lower court found substantial evidence that the plaintiff's former counsel had clear authority to settle the case for $100,000 as the gross amount of the settlement. The court ruled that communications between the parties' attorneys established a meeting of the minds, confirming the terms of the settlement. Although the plaintiff did not sign the settlement agreement, this was not determinative because settlement agreements do not need to be signed to be enforceable.

10. Summary Judgment Resulting in Removal[10]

The appellate court reviewed a lower court's order that granted summary judgment against a personal representative and trustee, finding she breached her fiduciary duty and removing her from these roles. The appellate court confirmed it had jurisdiction to review the portion of the order removing her from her positions, as this was a final, appealable decision. The lower court's removal of the personal representative and trustee was supported by substantial evidence of multiple fiduciary duty violations, such as failing to comply with court orders, manage estate and trust assets properly, and avoiding conflicts of interest.

The lower court's decision to remove her was found to be appropriate, and thus this part of the order was affirmed. However, the appellate court dismissed the remainder of the appeal, which dealt with nonfinal aspects of the order concerning damages and attorney's fees, as these issues had not yet been fully resolved. The case was sent back to the lower court for further proceedings on these unresolved matters.

11. Only One Bite[11]

In another Scales-authored opinion, the appellate court affirmed Judge Cueto's decision to not allow a second bite at the Lost Will apple. Judge Scales relied upon established law of the case in an opinion that he authored on a different panel which was reported at the 2023 Legislative and Case Law Update Seminar. In that earlier decision, the court explained that an order entered "without prejudice" does not necessarily mean that the order is non-final, and therefore, not appealable. The

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[9] **Portner v. Koppel, 49 Fla. L. Weekly D599a (Fla. 4th DCA 2024)**

[10] **Gnaegy v. Morris, 48 Fla. L. Weekly D2331a (Fla. 3nd DCA 2023)**

[11] **Anderson v. In Re Estate of Mario Quintero, 49 Fla. L. Weekly D273a (Fla. 3nd DCA 2024)**

outcome in this case is based significantly upon procedural issues and only to a minor extent on the underlying probate issues presented by attempting to probate a lost will.

12. Marital Settlement Agreements are Contracts[12]

The appellate court addressed whether a provision in a marital settlement agreement required the husband to include the parties children in his last will. The majority decision held the marital settlement agreement required the named children to remain as beneficiaries in subsequent wills, notwithstanding the marital settlement agreement did not expressly prohibit removing the named children in later wills. The majority emphasized that the agreement should be interpreted like any other contract, and since the language was clear and unambiguous, the beneficiaries were entitled to their share of the estate. The majority also noted that the marital settlement agreement allowed for the addition of future offspring, implying that the named beneficiaries were intended to remain regardless of subsequent changes to the will. Therefore, the lower court's decision was affirmed.

This intermediate appellate decision includes a relatively rare dissent. The dissenting judge contends the husband was not required to maintain a will with the devise to the children of the husband and wife. The dissent would have found the marital settlement agreement did not prohibit revoking a will that had initially satisfied the requirement of the devise to the children. The dissent emphasizes that the marital settlement did not require the husband to maintain the required devise to the children.

At first read, the appellate court may have strayed from the current mainstream of textualism. Although the majority found the terms of the marital settlement agreement were not ambiguous, the opinion does not provide any reference to a requirement to maintain the devise to the children, as the dissent points out. However, the facts indicate the husband never made a will that complied with the required devise to the children. Accordingly, a textualist may well conclude, for reasons different than set forth in the court's decision, that the children prevail.

13. Procedure Trumps Homestead[13]

Although the underlying issues involved homestead status of real property, the disposition was based on procedural grounds. The disposition, which reversed the lower court having granted Motions to Strike, was based on procedural shortcomings in that the motions not being verified as required by the rules of civil procedure. In remanding for further proceedings, the appellate decision concludes by specifically indicating no opinion is being expressed on the merits of the petitions.

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[12] **Haskin v. Haskin, 48 Fla. L. Weekly D1628a (Fla. 3nd DCA 2023)**

[13] **Dora v. Morrison, 49 Fla. L. Weekly D561a (Fla. 5th DCA 2024)**

14. Trust Procedure Trumps Emergency[14]

The appellate court affirmed the lower court's denial of an emergency petition for a temporary injunction. The petition sought to compel the trustees to pay the beneficiary's expenses from trust funds. The lower court denied the petition because the beneficiary improperly filed it within the probate case without initiating a separate action concerning the trust, required by the Florida Trust Code. Any judicial proceedings regarding trusts must commence by filing a complaint. The denial was without prejudice and the opinion seemingly provides a roadmap to eliminating the procedural deficiency.

15. Trustee Cannot Appear as *Pro Se*[15]

The appellate court dismissed an appeal of a final summary judgment because the appellant appeared *pro se* both for himself individually and for himself as trustee of a trust. The appellate court relied on well-established law in Florida that prohibits a trustee from appearing *pro se* on his own behalf as trustee. The rationale is based upon the trustee representing the interests of the beneficiaries, which, in court would constitute the unauthorized practice of law. The appeal was dismissed without considering its merits.

16. Estate Assets in the Most Unusual Places[16]

The personal representative of an estate appealed a non-final order denying a motion to suppress and finding probable cause to support the continued seizure of cash by the Broward County Sheriff's Office (BSO). The BSO alleged the decedent was involved in workers' compensation insurance fraud and money laundering. BSO officers saw the decedent leaving a check cashing store with what they believed to be a backpack full of cash. They seized the backpack which did contain cash. BSO sought forfeiture of the cash under established state laws. The decedent sought to suppress the admissibility of the cash as evidence. The lower court denied the motion to suppress.

The decedent appealed and after the decedent's death the estate substituted in the appeal. The appellate court held the BSO lacked probable cause for the stop of the car and the lower court erred

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[14] **Johnson v. Marcus, 49 Fla. L. Weekly D974a (Fla. 4th DCA 2024)**

[15] **Darst v West Coast Group Enterprises, LLC, 49 Fla. L. Weekly D17357a (Fla. 2nd DCA 2024)**

[16] **Estate of Hernandez v Sheriff of Broward County, 49 Fla. L. Weekly D728a (Fla. 4th DCA 2024)**

in denying the motion to suppress. The appellate court reversed the decision and remanded the case with instructions to return the seized cash to the decedent's estate.

17. The Trustee, not the Beneficiaries, Have Standing[17]

The beneficiaries of a trust appealed the dismissal of their claim for statutory reimbursement, arguing the trust was an accommodation party and that they had standing to sue for reimbursement. The trustee of the trust had borrowed funds from the third party and pledged trust assets as collateral. The lower court held the trust was, indeed, an accommodation party, but that did not result in the beneficiaries having standing to bring the suit. The trustee, not the beneficiaries, is the real party in interest with authority to bring an action on behalf of the trust. The beneficiaries failed to demonstrate any common law exception that would grant them standing to sue, so the dismissal of their claim was affirmed.

18. A Waiver Not Revived[18]

The appellants, who are the decedent's children, appealed the lower court's interpretation of a prenuptial agreement between the decedent and his surviving spouse. The lower court found the surviving spouse had waived her right to serve as personal representative of the estate in the agreement. However, the lower court also found that another provision of the agreement countermanded that waiver and revived the statutory preference for the spouse to be appointed as personal representative. The appellate court found that the later provision did not conflict with the earlier waiver and reversed. Of course, if the decedent had executed a will sometime after entering into the prenuptial agreement in 2005 and his death in 2021, the court proceeding would likely have not been necessary.

19. Premature Appeal, Ripe Appeal, all in One Appeal[19]

Appellant challenged a lower court's order imposing sanctions against him. The appellate court dismissed as premature the appeal regarding the portion of the order that imposed monetary sanctions because the amount had not yet been determined, indicating that judicial work was still pending. However, the court affirmed the portion of the order that barred the appellant from receiving any distribution from the estate, concluding that the lower court did not abuse its discretion in finding that the appellant's failure to comply with an earlier order was willful and wanton.

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[17] **Roller v. Collins, 48 Fla. L. Weekly D2040a (Fla. 5th DCA 2023)**

[18] **Hughes v. Angelo, 48 Fla. L. Weekly D1892a (Fla. 6th DCA 2023)**

[19] **Nelson v Estate of Nelson, 49 Fla. L. Weekly D941a (Fla. 3nd DCA 2024)**

20. Termination of Trust Without Jurisdiction over the Trustee[20]

In this dissolution of marriage case, the appellate court affirmed the lower court's order requiring the former wife to terminate a trust. The appellate court was not troubled by lack of jurisdiction over the trustee because the court had personal jurisdiction over the former wife who apparently had the power to terminate the trust. The appellate court cited to authority that courts of equity with jurisdiction over a person can compel actions related to contracts, trusts, or undoing the effects of fraud.

21. Posthumous Conception[21]

At the request of the Eleventh Circuit Court of Appeals in the context of a claim for Social Security benefits, the Supreme Court of Florida interpreted a Florida statute concerning inheritance rights of posthumously conceived children from the eggs or sperm of deceased individuals. The statute, not part of the Florida Probate Code but instead in a chapter titled Determination of Parentage, limits the rights of a posthumously conceived child to claiming against a decedent's estate if the child has been "provided for" by the decedent's will. Because the decedent's will referred to "then living" children, the question was answered in the negative and the child will not receive Social Security benefits.

22. Contingent Fees[22]

The lower court, in a probate proceeding, ordered disbursement of funds based on a contingency fee agreement. The court had awarded $135,000 to the appellee, which represented an additional 5% of the judgment obtained in an unrelated civil suit. This additional fee was claimed for extra work the appellee performed. However, the appellate court found that this additional work was not related to any appeal or post-judgment proceedings required for recovery on the final judgment as stipulated by the contingency fee agreement. The appellant had originally hired the appellee to represent them in a dispute over the ownership of their deceased father's property. After a jury trial, a settlement was reached, and the sisters were declared the owners of the property, subject to the payment of attorney's fees. However, the appellant passed away before the property was sold, and the appellee filed a claim against the estate for their fees. The appellate court reviewed the contingency fee agreement, which specified additional compensation for appeals or post-judgment actions needed

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[20] **Hyatt v. Zimmerman, 48 Fla. L. Weekly D1424a (Fla. 4th DCA 2023)**

[21] **Steele v. Commission of Social Security, 49 Fla. L. Weekly S41b (Fla. 2024)**

[22] **Carter v. William Rambaum, P.A., 48 Fla. L. Weekly D534a (Fla. 2nd DCA 2023)**

to secure recovery on the judgment. Since the additional work claimed by the appellee was related to their own fees and not to securing the judgment for the clients, the appellate court ruled that the lower court erred in awarding the additional 5% fee. The case was reversed and remanded for further proceedings consistent with this interpretation.

23. Get Appointed, Then Sue[23]

In this wrongful death case involving a nursing home, the appellant, as personal representative of an estate, appealed the Judge Moe's order dismissing a negligence lawsuit. The lower court dismissed the case without prejudice because the appellant was not the personal representative of the estate when she filed the suit or when the court dismissed it.

The appellant argued that the relation-back doctrine should apply, allowing her to amend the complaint after she was appointed personal representative. However, the court held that the relation-back doctrine did not apply because she had not obtained standing before the dismissal or before moving for rehearing.

The lower court's dismissal was based on the appellant's lack of standing and not on the merits of the negligence claim. Additionally, the appellant waived the argument that the court looked outside the four corners of the complaint in deciding the motion to dismiss because this issue was not raised below. The appellant also did not dispute the facts relevant to her standing.

The appellate court affirmed the lower court's decision, concluding that there was no error in dismissing the lawsuit without prejudice and without leave to amend, given the appellant's lack of standing at the time of the dismissal. The court found no procedural error warranting relief

24. A Constructive Trust is a Remedy, Not a Cause of Action[24]

In a case that turned on civil procedure, the appellants challenged the lower court's order granting summary judgment on a constructive trust claim. The appellate court found that the lower court's order did not comply with the requirements of amended Florida Rule of Civil Procedure 1.510 because the complaint only vaguely described the factual history of theft and fraud and lacked sufficient legal specificity for appellate review. The order failed to specify the cause of action supporting the constructive trust remedy or detail facts identifying the breach of fiduciary duty as the underlying cause

[23] **Nieves v. Senior Health TNF, LLC, 49 Fla. L. Weekly D1673a (Fla. 3nd DCA 2023)**

[24] **Brown v Regan, 48 Fla. L. Weekly D1249a (Fla. 4th DCA 2023)**

of action. The appellate court reversed the order granting final summary judgment and remanded the case for further proceedings.

A constructive trust is not a cause of action, but rather a remedy available to place the parties in the place equity demands. In order to obtain the remedy of a constructive trust, first the breach or other action must be pled and ultimately proven.

25. Affirm, Dismiss, Quash: All in One Decision[25]

The appellant challenged an order that (1) removed her as a trustee, (2) imposed a $134,000 surcharge to be paid into a specific trust income account within sixty days, and (3) determined the plaintiffs were entitled to attorney's fees and costs. The appellate court affirmed the removal, quashed the requirement to pay within sixty days holding that relief was intertwined with unresolved factual matters, and dismissed for lack of jurisdiction the determination regarding attorneys' fees and costs.

26. Limited Liability Company Assets are Not Estate Assets[26]

The lower court entered an order determining the decedent's single-member limited liability company immediately dissolved upon the decedent's death and, as a result, the assets of that company became assets of the estate. The appellate court reversed and remanded. The appellate opinion describes important concepts involving limited liability companies, including the difference between disassociation (which occurs immediately upon the death of a member) and dissolution (which does not) and the existence of a company even after dissolution for purposes of winding upon it affairs.

27. Frustrated Judges Still Need to Provide Due Process[27]

The lower court judge, clearly frustrated and likely justifiably so, with the administration of the estate, acted arguably precipitously. The judge concluded the personal representative had neglected his responsibilities and had not acted with any measure of defendable diligence. So, the judge "administratively dismissed" the estate proceeding. The appellate court determined the judge should not have done so and should not have revoked letters without noticing the parties that those courses of action were possible outcomes of a hearing.

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[25] **Altman v. Brown, 48 Fla. L. Weekly D1322a (Fla. 3rd DCA 2023)**

[26] **Precious Ezeamama v Estate of Chibugo, 49 Fla. L. Weekly D920a (Fla. 3nd DCA 2024)**

[27] **McGhee v. Estate of McGhee, 48 Fla. L. Weekly D2136b (Fla. 2nd DCA 2023)**

28. DQ does not mean Dairy Queen Even in the Summer[28]

An attorney was disqualified from representing the appellant due to a conflict of interest, according to the lower court. The attorney had previously represented the decedent and the appellee (the appellant's brother) in various personal and business matters, which were relevant to the pending will contest.

The appellate court affirmed the lower court's order and provided a thorough analysis of relevant law. The disqualified attorney had an ongoing relationship with the decedent and the appellee, handling several issues related to the will and other estate matters.

29. Two Year Bar Precludes Vicarious Liability[29]

The plaintiffs filed a lawsuit against the estate of a deceased employee and his employer within four years of an automobile accident but more than two years after the employee's death. The Florida Supreme Court addressed whether the lawsuit was barred by the statute of repose under section 733.710(1) of the Florida Statutes, which states that claims against a decedent's estate must be filed within two years of the decedent's death. The plaintiff attempted to avoid the two year bar because recovery was only sought from the casualty insurer, not from the estate. In doing so, the court provides a well-constructed description of the interplay between section 733.702 and 733.710, both regarding to limitations on creditor claims against estates.

The decision addresses a situation that most certainly is unlikely to ever re-occur. The reason is because the statute of limitations for negligence claims giving rise to these types of actions was reduced from four years to two years effective March 24, 2023.

30. Intestacy Only Goes So Far[30]

The appellate court correctly applied the intestacy laws and concluded that the estate escheated to the State of Florida. To arrive at this outcome, the appellate court was required to reverse the lower court sitting in the probate division. The lower court had found the appellees were intestate heirs even though the closest relationship to the decedent was a common great-grandparent. That relationship does not result in a classification as an heir within Florida Statutes 732.103. The only time relatives that distanced from the decedent are included as heirs is a limited exception that involved Holocaust victims and only then for proceeds filed before January 1, 2005.

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[28] **Cordero v. Cordero, 48 Fla. L. Weekly D1618c (Fla. 3nd DCA 2023)**

[29] **Tsuji v. Fleet, 48 Fla. L. Weekly S130a (Fla. 2023)**

[30] **State of Florida v. Estate of Bruening, 48 Fla. L. Weekly D1867a (Fla. 4th DCA 2023)**

31. Survivors Means Survivors; Anti-Lapse No Help[31]

A petition to reopen an estate, alleging fraud by the previous administrator for not disclosing a potentially admissible will, was dismissed. The will at issue left the estate to two named persons or "the survivor of them in equal shares." The lower court found that the petitioner, who was a descendant of one of the two named persons, lacked standing. The main opinion analyzes when representation should apply. The concurrence describes Florida's anti-lapse statute and why that provided no relief for the petitioner – because the person through whom he would take was not a grandparent or descendant of a grandparent of the decedent.

32. Amending Revocable Trusts[32]

The lower court invalidated amendments to a revocable trust because the settlor did not substantially comply with the trust's amendment method. Specifically, the settlor, who was one of two trustees, failed to deliver the written amendments to the other trustee. The trust instrument required delivery to both trustees, emphasizing the importance of having two trustees for all decisions. This requirement was not met, so the court held the amendments were not considered valid.

The appellate court affirmed the lower court's decision, holding that substantial compliance requires following all essential steps, including delivery to both trustees. This decision refers to "substantial compliance" which is the statutorily established requirement when amending or revoking a revocable trust. Compare to the requirement for strict compliance when creating a revocable trust with testamentary aspects. See, Kelly v. Lindenau, 223 So.3d 1074 (Fla. 2nd 2002)

33. Claims Against an Estate[33]

The appellate court reversed and remanded because the lower court erred based on "faulty reasoning of the lower court." The lower court denied a claimant's motion to have his claim satisfied after the objection period had expired. The claimant sought the return of certain properties based upon equitable relief. The lower court incorrectly determined the issues had been previously litigated in a civil case. However, that civil case had been dismissed for failure to prosecute. That dismissal was not an adjudication on the merits and does not preclude a claim in probate. Additionally, the court wrongly concluded that the equitable relief sought was not the basis for a claim in probate.

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[31] **Chauncy v. Gorden, 48 Fla. L. Weekly D2129a (Fla. 5th DCA 2023)**

[32] **Grassfield v Grassfield, 48 Fla. L. Weekly D2317a (Fla. 3nd DCA 2023)**

[33] **Ford v. Estate of Ford, 48 Fla. L. Weekly D222b (Fla. 3nd DCA 2023)**

The appellate court reversed the lower court's decision and remanded the case, instructing the lower court to address the issue of whether the estate waived its right to contest the claim by not filing an objection within the statutory period.

34. Preponderance, not Clear and Convincing to regain Capacity[34]

The Florida Supreme Court provided guidance with respect to expert witness testimony in a post-Daubert environment. The Daubert, originating in a federal decision, has previously been adopted as the appropriate standard for determining admissibility of expert witness testimony. Importantly, the court held that expository testimony from an expert is permissible if the witness is properly qualified as an expert.

35. Murder Conviction and Expert Witnesses[35]

The Florida Supreme Court provided guidance with respect to expert witness testimony in a post-Daubert environment. The Daubert, originating in a federal decision, has previously been adopted as the appropriate standard for determining admissibility of expert witness testimony. Importantly, the court held that expository testimony from an expert is permissible if the witness is properly qualified as an expert.

36. AI-Related Discipline[36]

The District Court for the Middle District of Florida reviewed a Report and Recommendation from the Grievance Committee, which found that an attorney engaged in professional misconduct. The findings included violations of various Florida Bar Rules due to a lack of diligence, making misrepresentations to the court, knowingly disobeying tribunal rules, and other breaches of professional conduct, many of which seemingly stem from AI-generated excerpts and citations.

> The pleadings contain inaccurate authorities to support what appear to be mostly frivolous legal arguments in violation of Rule 4-1.3. Mr. Neusom admitted to the Committee in his telephonic interview that "he used Westlaw and FastCase and may have used artificial intelligence to draft the filing(s) but was not able to check the excerpts and citations". As such, the Committee finds that Mr. Neusom did not act

[34] **Hedges v. Hamilton 49 Fla. L. Weekly D1167a (Fla. 5th DCA 2024)**

[35] **Miller v. State of Florida, 49 Fla. L. Weekly S47a (Fla. 2024)**

[36] **In Re Thomas Grant Neusom, Case 2:24-mc-2-JES (M.D.Fla. 2023)**

with reasonable due diligence. Whereas we understand that artificial intelligence is becoming a new tool for legal research, it can never take the place of an attorney's responsibility to conduct reasonable diligence and provide accurate legal authority to the Court that supports a valid legal argument.

37. AI is OK

Members of The Florida Bar can use generative artificial intelligence (AI) in their practice but must ensure client confidentiality, provide accurate services, avoid improper billing, and adhere to advertising restrictions. Confidentiality must be safeguarded by understanding AI programs' data retention and sharing policies. Lawyers are accountable for their work and must implement practices to ensure AI use aligns with ethical obligations. Improper billing, such as double-billing, is not allowed when using AI. AI chatbots interacting with clients or third parties must comply with advertising rules and clearly state they are AI, not human lawyers. Lawyers must maintain technological competence and understand the associated risks and benefits.

> Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.[37]

[37] **The Florida Bar Opinion 24-1**

38. There Must Be A Better Way[38]

On April 30, 2024, the Florida Supreme Court created a workgroup on uncontested probate proceedings. The workgroup must:

1. Examine this state's practices, rules of court, and laws for uncontested probate proceedings.

2. Review processes and procedures for addressing uncontested probate proceedings in other states to identify reforms that may improve the efficient and effective resolution of such proceedings in this state.

3. Make recommendations, if warranted, to improve the processes and procedures for uncontested probate proceedings and propose any revisions to practices, rules of court, or statutes that are needed to implement the Workgroup's recommendations.

The timetable is aggressive, with a final report including findings and recommendations due by July 1, 2025. Before the final report is submitted, the Workgroup is to present its findings and recommendations to the Probate Rules Committee of The Florida Bar for comment.

39. Conclusion

[38] **Workgroup on Uncontested Probate Proceedings,AOSC24-20**