The Probate Team 2022

Probate Power Hour

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October 14, 2022
Orlando, Florida

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Table of Contents

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1. HOW LONG IS LIFE?

   A. New actuarial tables were issued as proposed regulations by the government on May 5, 2022.

      (1) The proposed tables are based on the 2010 census.

      (2) The new factors can be used, according to the proposed regulations, for gifts made and decedents dying after 2020, at the election of the taxpayer.

         a. ACTEC has suggested the new tables should be available for transactions on or after May 1, 2019.

   B. These tables are required to be used for valuing certain interests for federal tax purposes.

      (1) The value of a life estate for a 65 year old using an interest rate of 3% under the previously issued tables was 38.83%. Under the proposed table, the factor for the same age and interest rate is 41.165%. This difference is because life expectancies are longer under the proposed tables, so a life estate is more valuable.

      (2) Conversely, the value of the remainder interest after the life of a 65 year old, using an interest rate of 3%, will decrease from 61.170% to 58.835%.

   C. See, https://www.irs.gov/retirement-plans/actuarial-tables.

2. DISPOSING OF A LIFE ESTATE.

   A. Transferring a legal life estate, such as a homestead benefit to a surviving spouse, is permissible.

   B. Transferring a beneficial life estate, such as an income interest in a trust, may be permissible.

      (1) Read the trust instrument and consider the application of a spendthrift or other anti-alienation provision.

   C. Watch out for unexpected income tax results.

(1) Uniform basis rules likely apply, with the result that the disposition by sale of a life estate could result in capital gain recognition with zero basis in the life estate.

a. *I.R.C. §1001(e)(1)*

(2) A sale or other disposition that results in all interests in the property (remainder, as well as life estate) to a third party is not subject to the surprise "no basis" result.

a. *Treas. Reg.§1.1014-5, example 4*

3. GOVERNING LAW PROVISIONS.

A. Administration/Consulting:

(1) Review existing trust instrument to determine governing law.

B. Drafting:

(1) Blank slate?

C. Different purposes:

(1) Validity

(2) Interpretation (or construction)

(3) Administration.

D. Florida law provides that the meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms of the trust, provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including, but not limited to, the location of real property held by the trust or the residence or location of an office of the settlor, trustee, or any beneficiary; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is first created.

(3) Notwithstanding the above, a designation in the terms of a trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of this state. *Florida Trust Code §736.0107.*

E. Sample provisions:

(1) Governing Law. The law of the State of Florida shall govern the validity and interpretation of the provisions of this instrument. The law of the jurisdiction in which a trust provided for under this instrument is then being administered shall govern the administration of that trust.

(2) Bonus: Rule Against Perpetuities. No trust created in this instrument or by exercise of a power of appointment under this instrument shall continue for more than the longest limiting period permitted by the applicable Rule Against Perpetuities, which in Florida is 1,000 years. Any property still held in trust at the expiration of that period shall immediately be distributed to the persons then entitled to receive or have the benefit of the income therefrom in the proportions in which they are entitled thereto, or if their interests are indefinite, then in equal shares.

4. ONE OR TWO?

A. One, not two. A sad day...

(1) One space ..., not two, should be used between two sentences. *Chicago Style Guide §6.7 (2022)*

(2) Use only one space after the end of a sentence. *AP Style Guide (2022)*

(3) Because we've all switched to modern fonts, adding two spaces after a period no longer enhances readability, typographers say. It diminishes it. "Space Invaders" Citation omitted.

(4) For much of the twentieth century, typographers used double spacing after each sentence, but single-space formatting has become the standard in twenty-first-century word processing.

B. Bonus: S'S

(1) Old School: Never add an s after an apostrophe to a word ending with an s.

a. Correct: Davis' fast car is cool.

b. Incorrect: Davis's fast car is cool.

(2) New Fad: Add an s after an apostrophe to a word ending with an s.

a. Incorrect: Davis' fast car is cool.

b. Correct: Davis's fast car is cool.

(3) But wait: Either is correct. *Chicago Manual of Style*

5. CLASS: OPEN OR CLOSED?

A. A class gift requires a determination of whether the class is open or closed.

(1) "I devise $10,000 to each of my niblings."[1]

a. If siblings are living as of my death, then more niblings can be born or adopted later.[2]

B. Good drafting expressly closes the class.

(1) "I devise $10,000 to each of my niblings who are then living. The class shall be closed as of my death regardless of whether niblings may be born or adopted after my death."

6. RELATION-BACK

A. The relation-back doctrine in the Florida Probate Code has been a long-standing part of the law.

(1) Time of accrual of duties and powers.—The duties and powers of a personal representative 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. *Florida Probate Code §733.601*

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[1] Words we are Watching, Merrian-Webster (2022).

[2] This discussion disregards to issues created by Artificial Reproductive Technology (ART).

B. To be able to relate back, the person taking the acts must eventually be appointed as personal representative.

C. In a war between two tort lawyers, each seeking a part of a contingent fee, the court ruled that a law firm engaged by a person who never became personal representative cannot rely upon the relation-back doctrine. *Estate of Pounds v. Miller & Jacobs, P.A., 336 So. 3d 14 (Fla. Dist. Ct. App. 2022)*

7. HOMESTEAD: SPOUSAL WAIVER

A. Waivers of homestead rights (and other spousal rights) after marriage requires fair disclosure. *Florida Probate Code §732.702(2)*

B. There is no authority for waivers after the death of the homesteading spouse.

(1) A post-death waiver would be a disclaimer. A disclaimer of a homestead does not cause the homestead to pass as if the surviving spouse had waived before death.

C. Waivers signed by a surviving spouse, to facilitate the homesteading spouse in obtaining loans secured by a mortgage on the homestead, were "determined to be procedurally deficient and insufficient to evince an intent by [the surviving spouse] to waive [his] homestead rights."

D. In addition, a waiver signed by the surviving spouse after the death of the homesteading spouse was "too little, too late." Once the homesteading spouse died, the homestead rights vested.

E. The personal representative argued that the post-death waiver should be considered a disclaimer. However, the document at issue was "statutorily noncompliant" because it did not include the formalities required for a disclaimer under Florida Statutes Chapter 739. "That chapter is the exclusive means by which a disclaimer may be made under Florida law."

F. *Feldman v. Schocket, 47 Fla. L. Weekly D1930 (Fla. 3d DCA September 21, 2022)* Not final until time for rehearing has expired.

8. HOMESTEAD: FRAUD VS. FRAUDULENT TRANSFER

A. The trial court held that a tort creditor could impose an equitable lien on defendant's homestead property but refused to allow foreclosure while the property was the defendant's homestead.

B. The plaintiff had been injured by an automobile operated by a company owned by the husband of the defendant. The company received certain life insurance proceeds when the husband died and transferred those proceeds to the defendant. Defendant used those funds and others to purchase a new residence which became her homestead. In enforcement proceedings, the plaintiff sought to impose a lien on the homestead and to foreclose on that lien. The trial court allowed the imposition of the lien under a badges of fraud analysis but prohibited foreclosure on that lien while the property was homestead.

C. Upon cross-appeals, the defendant argued that a lien could not be imposed because homestead properties are exempt from fraudulent transfer claims and the plaintiff argued that he should be able to immediately foreclose to avoid unjust enrichment of the defendant.

D. The appellate court affirmed the imposition of the lien by the trial court and then reversed the trial court's denial of the right to foreclose.

E. On August 26, 2022, a Motion for Rehearing/Rehearing *En Banc* were filed, and are pending as of September 18, 2022.

F. *Renda v. Price, No. 4D21-534 (Fla. Dist. Ct. App. Jul. 27, 2022)* Not final until time for rehearing has expired.

9. REHEARINGS REQUIRED

A. Why bother with a re-hearing? Why not just appeal and get in front of new jurists?

B. Because, on its own motion, the Florida Supreme Court has amended Rules 1.530 and 12.530 to provide that filing a motion for rehearing is required to preserve an objection to insufficient trial court findings in a final judgment order.

C. Effective upon issuance, which was August 25, 2022.

D. Comments must be filed by November 8, 2022.

E. No comments filed as of September 18, 2022.

10. WITHOUT PREJUDICE ≠ NON-APPEALABLE, NON-FINAL ORDER.

A. An order that is entered without prejudice is not necessarily a non-appealable, non-final order.

B. An order that resolves an issue with the result that no further judicial labor is required is generally appealable.

C. Appellant moved the lower court to strike the Statement Regarding Creditors. The lower court summarily denied that motion.

D. A Statement Regarding Creditors is just that - a statement that regards creditors after a diligent search. Specifically:

> "Within 4 months after the date of the first publication of notice to creditors, the personal representative shall file a verified statement that diligent search has been made to ascertain the name and address of each person having a claim against the estate. The statement shall indicate the name and address of each person at that time known to the personal representative who has or may have a claim against the estate and whether such person was served with the notice to creditors or otherwise received actual notice of the information contained in the notice to creditors; provided that the statement need not include persons who have filed a timely claim or who were included in the personal representative's proof of claim." *Florida Probate Rules 5.241(d)*

E. The Statement Regarding Creditors is just a statement. If the information in the Statement is inaccurate, the remedy is not for a wanna-be beneficiary to strike the Statement.

F. *Anderson v. Estate of Quintero, 47 Fla. L. Weekly D1817 (Fla. 3d DCA August 31, 2022)*

11. PRO HAC VICE

A. 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.

B. The substance of the rule and a form of a motion remain in Rule 2.520, Rules of General Practice and Judicial Administration.

12. TAKING A STATEMENT AT FACE VALUE.

A. A law that requires a filing to include certain information does not, by itself, result in the filing being ineffective if the information is inaccurate.

B. Indeed, a recent decision involved a provision in the election code that requires a candidate to timely file papers that include certain information, including a statement that the candidate had been a member of the relevant party.

C. The statement was timely filed and included all of the required information.

D. The trial court found that a portion of the required information was inaccurate and, therefore, ruled that the candidate was disqualified.

E. The appellate court, based upon a plain reading of the statute, ruled that the inaccurate information did not give authority to the election official or the court to disqualify the candidate. Therefore, the candidate was allowed to remain on the ballot and stand for election.

F. The appellate court also acknowledged there are criminal and financial consequences to lying under oath.

G. *Jones v. Schiller, 47 Fla. L. Weekly D1767a (Fla. 1st DCA August 22, 2022)*

13. STRICT COMPLIANCE FOR POWERS OF ATTORNEY

A. Strict compliance is well established as a requirement for the execution of a will in Florida.

B. The same holds true for a Power of Attorney according to a circuit court.

C. *In Re: Estate of Quadri, 30 Fla. L. Weekly Supp. 77 (11th Circuit, April 5, 2022)*

14. CONSTRUCTION, NOT VALIDITY

A. A will was admitted to probate on petition of the decedent's two sons, and the two sons were appointed as co-personal representatives.

B. Subsequently, and after the time for contesting the validity of the will had expired, one of the sons filed his petition to construe the will and to determine certain rights, including the enforceability of certain requires in the will.

(1) The will provided for a disposition for the son in trust if, and while, he was married to his second wife.

(2) The will also provided that if the son was not married as of the decedent's death, or later is not married, then the disposition was to be outright, not in trust, or the trust was to terminate with an outright distribution to the beneficiary.

C. The trial court struck the petition agreeing with the argument that the relief sought was actually a challenge to the validity of the will, and therefore untimely.

D. Relying upon Tendler v Johnson (see below), the appellate court reversed and reminded the trial judge that a proceeding to construe can only be instituted after a will has been admitted to probate.

E. *Gundlach v. Gundlach, 47 Fla. L. Weekly D1144 (Fla. 4th DCA May 25, 2022)*

15. CONSTRUCTION, NOT CONTEST

A. The decedent's will was admitted to probate without any objection being made by the decedent's 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.

B. 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.

C. The default taker under the grandfather's trust, to the extent the power had not been exercised, was the brother.

D. 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 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.

E. 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.

F. 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.

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

16. NOMINATED PERSONAL REPRESENTATIVE

A. The will nominated an otherwise qualified person to serve as personal representative.

B. A son of the decedent filed a petition seeking appointment of the nominated person.

C. The other son objected to the appointment of the qualified person and persuaded the trial judge accordingly.

D. The trial court held that there were tangible and substantial reasons to believe that damage would accrue to the estate if the nominated person was appointed because the facts presented displayed an adverse interest to the estate.

(1) The court specifically found that the person would be a material witness regarding whether a certain asset was properly an asset of the estate and that the person knew that the petitioning son had used an invalid power of attorney, which did not have the required number of witnesses, to handle the decedent's financial affairs.

E. The appellate court, after a thorough analysis of precedent, found a distinction between priority afforded in an intestate estate and priority when nominated by the testator in a will.

F. The appellate court remanded with directions to appoint the nominated person as personal representative.

G. Unstated in the decision is the ability of the trial court to appoint an administrator ad litem on issues that, in fact, present a conflict between the personal representative's personal interests with his fiduciary duties.

H. *Araguel v. Bryan, 47 Fla. L. Weekly D1517 (Fla. 1st DCA July 13, 2022)*

17. CLIENTS WITH DIMINISHED CAPACITY

A. When a client has diminished capacity, a lawyer is to maintain a normal client-lawyer relationship as much as reasonably possible.

B. A lawyer need not seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client who may exhibit diminished capacity. However, when the lawyer reasonably believes that (i) the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and (ii) is not able to act in the client's own interest, the lawyer may take reasonably necessary protective action. The action may include consulting with family members or other individuals, or organizations or other entities, that may be able to protect the client. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem or guardian. However, a lawyer is required to make reasonable efforts to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights or the appointment of a guardian.

C. The general confidentiality rules apply even when representing a client with diminished capacity. When taking protective action under this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

D. Significantly with representation of a client with diminished capacity, the attorney-client privilege is not necessarily waived when a family member or others participate in discussions with the attorney. When necessary to assist in the representation, the presence of these persons furthers the rendition of legal services to the client and does not waive the attorney-client privilege. Of course, the lawyer must keep the

client's interests foremost and, except for authorized protective action, must look to the client, and not family members, to make decisions on the client's behalf. A lawyer should be mindful of protecting the privilege when taking protective action.

E. *Rule Regulating The Florida Bar 4-1.14*

18. CREDITOR PROTECTION FOR IRAS TRANSFERRED IN A DIVORCE

A. The long-standing exemption of retirement accounts from claims of creditors now clearly applies to retirement accounts received by a spouse incident to divorce.

B. *Florida Statutes §222.21(2)(c)*

19. FILING CLAIMS WHEN LITIGATION IS PENDING

A. A claimant is required to institute an independent action when an objection to a claim is filed.

B. The responsibilities of the claimant were unclear when a court proceeding had been initiated against the decedent during the decedent's lifetime.

C. New legislation now clarifies in those situations that, within 30 days after filing of the objection, the claimant must:

(1) file a motion complying with the rules to substitute the proper party, or

(2) an order substituting the proper party must be issued.

D. Additional provisions are included to address a requirement to arbitrate or if an arbitration was already pending as of the decedent's death.

E. *Florida Probate Code §733.705(b)-(e)*

20. NEARLY SELF-SETTLED TRUSTS

A. Generally, creditors of a settlor may reach assets of a trust created by a settlor to the extent that the assets can be distributed to or for the settlor's benefit.

(1) Self-settled trusts are not permitted in Florida. Mostly.

B. If a settlor creates a trust for the settlor's spouse for which the marital deduction is allowed, then the settlor's spouse is treated as the settlor even if the original settlor is a beneficiary after the death of the spouse.

(1) This provision allowed for lifetime qualified terminable interest trusts (QTIPs).

C. New legislation now allows for the same treatment (shifting the settlor to the spouse after the spouse's death) for a trust created by the settlor of which the spouse is a beneficiary and the settlor is not a beneficiary during the spouse's lifetime, if the transfer to the trust is a completed gift.

1. This provision does not require the trust to qualify for the martial deduction.
2. This provision allows for the original settlor to be the beneficiary after the spouse's death for spousal lifetime access trusts (SLATs).
3. *Florida Trust Code §736.0505*

21. RESIGNATIONS BY TRUSTEES

A. The resignation by a trustee pursuant to the trust code has historically required 30 days notice to qualified beneficiaries, the settlor, if living, and all cotrustees, or with court approval.

B. New legislation allows a trustee to resign in accordance with terms of the trust instrument and upon notice to the cotrustees, or if none, to the successor trustee who has accepted the appointment, or if none, to the person or persons who have the authority to appoint a successor trustee.

(1) In absence of a procedure in the trust instrument, the former exclusive manner of resigning remains in place - i.e., 30 days notice to the qualified beneficiaries, the settlor, if living, and all cotrustees, or with approval of the court.

22. MORE PORTABILITY RELIEF

A. A portability election must be made, if at all, on an estate tax return.

B. If an estate tax return is not otherwise required, a portability election can be made on a return filed withing five years after death.

(1) This is not available for estates that are otherwise required to file an estate tax return, even if no tax is due.

C. Previously, portability-only returns were required to be filed within two years after death.

D. *Revenue Procedure 2022-32 (July 8, 2022)*

23. SCHEDULED REDUCTION OF GIFT/ESTATE EXEMPTION

A. In late 2017, December 31, 2025 seemed soooo far away.

(1) Bonus exemption for decedents dying and donors making gifts between January 1, 2018, and December 31, 2025.

B. Since 2017, much has happened.

C. As of October 15, 2022, only 39 months remaining until the scheduled reduction of these exemptions.

24. E-FILING STUFF: CONFIDENTIALITY ISSUES

A. Responsibility for protecting confidential information has always been on the filer.

(1) Notice of Confidential Information

(2) Motion Regarding Confidential Information

B. Until July 1, 2021, the clerks had concurrent responsibility to protect confidential information.

(1) To speed up access to filings, the Florida Supreme Court eliminated the clerk's responsibility for civil case types in circuit, county, or small claims (CA, CC, and SC).

(2) *In Re: Amendments to Florida Rule of Judicial Administration 2.420, 46 Florida L. Weekly S22a (Fla. January 21, 2021)*

C. That was not enough for Courthouse New Service, which filed suit in federal court in early 2022.

(1) Judge Mark E. Walker issued an injunction on August 5, 2022, which required the portal authority and the Clerk in Broward County to comply with a joint plan that will result in all filings being available no later than 23 hours after filing.

(2) A mediation resolved the matter with the result that:

a. A statewide public access system will be created within the e-filing portal for non-confidential circuit civil complaints, that will result in access to the public in no more than five minutes after submission. The complaints will remain in this system for five days.

b. All filers now must make a designation noting whether:

(1) The document(s) submitted contain no confidential information as defined by Rule 2.420; or

(2) The document(s) are accompanied in the same filing session by a Notice of Confidential Information within Court Filing as provided in Rule 2.420; or

(3) The document(s) are accompanied in the same filing session by a Motion to Determine Confidentiality of Court Records as provided in Rule 2.420.

c. Filers who select option "A" must—before filing—acknowledge that their filings will be made publicly available. Filers who select options "B" or "C" will have their filings deemed confidential and flagged for further review and processing.

D. Even though these processing procedures do not, at this time, apply to probate cases (Civil Probate), all filers should be mindful of the concepts, and know that the responsibility for protecting confidential information is, and always has been on the filer.

(1) Conversely, the filer is equally responsible to not assert confidentiality when no law supports keeping information out of the public domain.

25. REMOTE PROCEEDINGS

A. The Florida Supreme Court issued an opinion on July 14, 2022, modifying several sets of court rules to allow for "permanent and broader authorization for the remote conduct of certain court proceedings." *In Re: Amendments to Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure, 47 Fla. L. Weekly S187a (Fla. July 14, 2022)*

B. The changes emanated from the court's Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19 (Workgroup), chaired by Chief Judge Munyon.

C. The rules generally allow for proceedings through communication technology. The rules apply unless another, more specific rule or law applies.

(1) Baker acts are excepted because of the right to be present at an involuntary commitment hearing being a fundamental due process right.

D. Remote appearances are allowed upon a party's written motion or at the discretion of the court official.

(1) Motions must be granted for non-evidentiary proceedings of 30 minutes or less absent good cause to deny the request.

(2) A party may object to an remote appearance ordered by the court official.

(3) Parties not represented by an attorney must serve a designation of email addresses and then service must be by email, including an email delivered by the portal. RGPJA 2.516(b)((1)(C).

E. Effective October 1, 2022.

26. PROPOSED CHANGES FOR FILINGS IN PROBATE ADMINISTRATIONS

A. Proposed Amendments to Rules of General Practice and Judicial Administration Regarding Electronic Filing are the work product submitted to the Florida Supreme Court after the dismissal of an earlier rules case.

(1) The earlier case was dismissed without any changes being approved by the court. The court recognized the earlier requests for changes lacked meaningful consideration of the unique issues presented in probate administrations.

(2) The new leadership of the Rules of General Practice and Judicial Administration Committee was very inclusive to probate practitioners' views.

B. Under the pending proposed amendments, a lawyer may file a document on behalf of an unrepresented party by:

(1) the placement of an electronic signature indicator above the printed name of the unrepresented party on whose behalf the filing is being made and who has requested that the lawyer file the document; or

(2) the signature of the unrepresented party in any form recognized by law on the paper document and the inclusion of that document as part of an electronically filed document or with a notice of filing containing the style of the case, the name of the document, and certificate of service.

The electronic signature indicator may be an "/s/" in front of their signer's printed name or may be in any other form that meets with the Florida Courts Technology Standards. Proposed Rule 2.515(b)(1)(A)(iii).

C. The proposed amendments exempt filings under Rule 2.515(b)(1)(A)(iii) from the general proposed rule which will treat the act of filing a document as the filer's signature. Proposed Rule 2.515(b)(1)(B).

27. GUARDIANSHIP FEES: NO BENEFIT TO THE WARD REQUIRED

A. 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's 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's 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.

B. 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.

C. 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 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, undercompensated 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. 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.

D. *Guardianship of Sanders v. Chaplin 47 Fla. L. Weekly D557a (Fla. 1st DCA March 2, 2022*

28. A GIFT IS A GIFT

A. 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.

B. 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.

C. Years later, mother and son informed the attorney that Stock Certificate #2 had been lost. This conclusion was well documented and the attorney then prepared Stock Certificate #3 as a replacement for Stock Certificate #2, and sent it to the mother for signature. Although the 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.

D. 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.

E. 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.

F. 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.

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

29. A CLOSED PROBATE

A. 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 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."

B. 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.

C. The appellate court found no error and affirmed.

D. *Buechel v. Shim 47 Fla. L. Weekly S133a (Fla. May 26, 2022)*

30. NO PRIORITY FOR YOU

A. 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.

B. 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.

C. 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.

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

E. *Jones v. McKinney 47 Fla. L. Weekly D899a (Fla. 2d DCA April 20, 2022)*

31. LLC'S: DANGER WILL ROBINSON

A. 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.

B. 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.

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

D. 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.

E. *Tita v. Tita 47 Fla. L. Weekly D532c (Fla. 4th DCA March 2, 2022)*

32. RESTRICTED ACCOUNTS

A. Restricted accounts are often a tool for courts to use to safeguard liquid assets from inappropriate use by a personal representative.

B. However, just because this process is used for estates, the availability with trusts is not so clear.

C. The trial court wrongly required a trustee to deposit the proceeds of the sale of a residence in a restricted account.

(1) The requirement was ordered as a result of a beneficiary alleging misconduct by the trustee.

(2) The beneficiary argued that the court could require the deposit of the funds under either Florida Statutes §69.031(1) or Florida Trust Code §736.1001(2)(c).

D. The appellate court held that the authority under Florida Statutes §69.031(1) is only available for an "estate in process of administration." The residence being sold was never in an estate and by the time of the sale the property was no longer in a trust. Accordingly, relief under that section was unavailable to the court.

E. The appellate court also considered the beneficiary's argument for allowing the sought remedy under the Florida Trust Code.

F. However, the authority there only applies once a breach of fiduciary duty had been determined.

(1) Just as with most civil matters, pre-judgment attachment of assets is not permitted.

G. Accordingly, the appellate court reversed the trial court's order requiring the proceeds from the sale of the residence from being deposited into a restricted depository pending the outcome of the breach of fiduciary duty proceeding.

H. *Trombino v Echeverria, 47 Fla. L. Weekly D1925 (Fla. 4th DCA September 21, 2022) Not final until time for rehearing has passed.*

33. <u>DIVORCE IS OVER NOT UNTIL IT IS OVER</u>

A. 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.

B. 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.

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

D. 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.

E. 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 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.

F. *Merli v. Merli 47 Fla. L. Weekly D144a (Fla. 4th DCA January 5, 2022)*

34. CONCLUSION

The best of times, the worst of times...