# Probate, Trust, and Guardianship Case Law Update

At The

# Annual Legislative & Case Law Update

Laird A. Lile
Laird A. Lile, PLLC
Naples, Florida
LLile@LairdALile.com
www.LairdALile.com

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The Breakers
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## Legislative & Case Law Update Seminar

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1. **Notarizing Your Own Signature?**[1]

The trial court held that a mortgage was "facially deficient" and "legally invalid on its face." Why? Because the notary was also a witness. That's right, two witnesses, one of whom was also the notary, notarizing the mortgagor's signature after witnessing the mortgagor's signature. {Pause for panic among the audience, watching the real estate practitioners going pale with fright and grabbing for their phones to call their carriers.}

The lender appealed, wanting to enforce the mortgage. The appellate court had no issue with correctly reading Florida Statutes §177.05(1) as prohibiting a notary from notarizing his own signature which is not the same as

[1] 13110 Investments LLC v. Dumervile, 50 Fla. L.Weekly D1226a (Fla.4th DCA June 4, 2025)

the notary also being a witness. The opinion reminds us the presumption is that notarization applies to all signatures on a document and that presumption can be overridden by specific notation otherwise. The overriding notation was in the mortgage at issue and the notary's name was not in that notation. Hence, the appellate court found the notarization was proper and remanded to the lower court.

The astute practitioner will exclaim of course we include in our jurats (or certificates of acknowledgments) the name of the person whose signature is being notarized because Florida Statutes §177.05(4) states that a jurat (or certificate of acknowledgment) "shall contain the following elements" and the fifth item is "[t]he name of the person whose signature is being notarized. " However, the fifth item concludes with "it is presumed, absent such specific notation by the notary public, that notarization is to all signatures." So, with this classic case of suboptimal legislative drafting we are left wondering whether the person's name is required or not.

Don't chance it. Continue including the name in the jurat (or certificate of acknowledgment). One last point for the estate planning lawyers: a self-proving affidavit provided for in Florida Statutes §732.503 is a document in which the notary cannot be one of the witnesses who is required to sign the affidavit. Of course, a self-proving affidavit is not necessary to support the validity of the Last Will and Testament so even if that affidavit is “facially deficient” or “legally invalid on its face” the validity of the document is not necessarily impaired; the admission to probate just requires some more effort.

From ChatGPT: In 13110 Investments LLC v. Dumervile and Honore, 50 Fla. L. Weekly D1226a (Fla.4th DCA June 4, 2025), the Fourth District Court of Appeal reversed a trial court’s ruling that a mortgage was legally invalid due to technical issues with notarization and witnessing. The trial court had found the mortgage deficient because the notary also acted as one of the two witnesses, allegedly violating section 117. 05(1), Florida Statutes. However, the appellate court held that while the statute prohibits a notary from notarizing their own signature, it does not prohibit a notary from serving as a witness, and the notary in this case properly limited the jurat to only the mortgagors' signatures, rebutting the statutory presumption under section 117.05(4)(e). The court also rejected the trial court's conclusion that the mortgage was invalid for lacking two subscribing witnesses, holding that no such requirement exists for homestead mortgages under current Florida law following the 1968 constitutional revision. The judgment was reversed and the case remanded.

## 2. **<u>Getting more than enough is good enough</u>**[2]

Generosity is not always appreciated. A couple entered into a premarital agreement in which one party (soon to be the husband) agreed to leave the other party (soon to be the wife) the greater of $250,000 or an amount equal to ten percent of his estate. Two months after the marriage, the husband amended his estate plan to include a testamentary gift using the same terms as in the premarital agreement. Six years later, the husband amended his estate plan and included a provision leaving the wife $1,000,000 upon the husband's death and explicitly revoking the previous amendment.

Upon the husband's death, the wife received $1,000,000 from the husband's estate (which was unquestionably more than 10% of this estate). But that was not enough for the wife. She then filed a claim for an additional amount pursuant to the premarital agreement.

The trial court held that when an estate plan provides more than is required by a premarital agreement, the greater amount of the testamentary gift satisfies the lesser amount of the contractual obligation. So, the wife received the $1,000,000 and no more.

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[2]Adelson v. Kalter, 50 Fla. L. Weekly D998b (Fla.3d DCA Apr. 30, 2025)

The wife was perhaps not only greedy but also determined, because she appealed the trial court's decision. The Third DCA disposed of the appeal by a *per curiam* opinion affirmance.

Three practice pointers from this decision (i) when preparing estate planning documents for a client that has obligations, such as in a premarital agreement, acknowledge the agreement and indicate that the provisions are intended to satisfy in full the contractual obligations, (ii) when making distributions do so pursuant to an agreement by which the beneficiary acknowledges the beneficiary is getting all to which the beneficiary is entitled, and (iii) consider the myriad of issues that are created when a devise is expressed in terms of a pecuniary amount or a percentage.

From ChatGPT: In Jacquelyn Adelson v. Jodi Kalter, the Third District Court of Appeal affirmed a summary judgment ruling in favor of the appellee, rejecting Jacquelyn Adelson's claim for additional funds under a prenuptial agreement with her late husband. The prenuptial agreement entitled Adelson to the greater of $250,000 or 10% of the estate upon her husband's death. Two months after their marriage, the decedent amended his trust to reflect this agreement. However, six years later, he executed a new amendment granting Adelson $1,000,000 and explicitly revoking the previous amendment. Upon his death in 2022, with a net estate of approximately $4. 94 million, Adelson received the $1,000,000 as directed by the final trust amendment but filed a claim for an additional amount under the prenuptial agreement. The court held that when a trust or will provides a different but greater amount than what is required by a prenuptial agreement, the greater amount satisfies the obligation. Citing precedent, the court concluded that the decedent exceeded his contractual obligation, and Adelson had received all she was entitled to under the agreement. Therefore, the trial court correctly granted summary judgment in favor of the estate's representative, Jodi Kalter.

3. **When you get away with it, why insist on more?**[3]

A widow owned a life estate and the remainder was owned equally by, on one hand, the children of the widow, and, on the other hand, by the a trust for one of the children of her late husband. The widow took it upon herself to enter into a contract to sell the property - the entire property, not just her life estate. She had no legal authority and the sale only was completed after the remaindermen agreed to avoid litigation with the buyer.

Pursuant to that agreement, the widow and the trust for the late husband's child were each to receive a percentage (50% and 22%, respectively) of the sales proceeds. The remaining 28% was to be held in escrow pending an agreement or a judicial determination.

Apparently not able to reach an agreement, the widow filed a declaratory action seeking a determination that she was entitled the remaining 28% of the proceeds. Among the arguments by the widow was that her life estate had a value that could be determined by her life expectancy. The trial court ruled against the widow and entered a judgment that the remaining 28% should be distributed from escrow to the trust for her late husband's child. That outcome

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[3] Varano v. Varano, 49 Fla. L. Weekly D1266a, 4D2024-1571 (Fla.4th DCA June 11, 2025)

would result in her receiving 50% and the trust for her late husband's child receiving 50%.

The widow appealed, and also lost there. The appellate court focused on the owner of a life estate having no authority to conveying fee simple ownership. The courts essentially concluded that the widow would receive 50% that would have gone to her children because her children consented and the other remainderman, the trust for her late husband's child, should receive 50% of the sales proceeds.

From ChatGPT: The Fourth District Court of Appeal affirmed a trial court's decision denying Babette Varano, a widow and life tenant, entitlement to the remaining 28% of proceeds from the sale of a homestead property in which she held only a life estate. The property, originally deeded to Babette and her late husband as life tenants with remainder interests split between Babette's children and a trust for the decedent's son, was sold by Babette after her husband's death.

The court ruled that Babette, holding only a life estate, could not convey fee simple title or claim proceeds from such a sale, as the original deed did not authorize her to sell the property outright. Further, her role as trustee of the trust holding a remainder interest—if assumed valid—created a conflict of interest. Because Babette stood to benefit personally from the sale and had a fiduciary duty to the trust's sole beneficiary (the decedent's son), her actions were voidable absent court approval or beneficiary consent— neither of which occurred.

Although Babette had received 50% of the sale proceeds under a prior settlement agreement, she petitioned for declaratory relief seeking the remaining escrowed 28%. The court rejected this claim, concluding she had no right to further proceeds, as she had no authority to sell the fee simple interest. Accordingly, the court affirmed the final judgment awarding the disputed funds to the trust.

4. **Illegals, in a different context**[4]

The trial court appointed a ward's wife as guardian notwithstanding the ward's son made sure the judge knew the wife was a convicted felon. As guardian, the wife hired a lawyer, a good lawyer who knows this area of the law. The lawyer performed services in representation of the court appointed guardian.

The son, in the meantime, filed an appeal the result of which was a remand to the trial court with direction to appoint a non-felon because the unequivocal statutory prohibition in Florida Statutes §744.309(3). ("No person who has been convicted of a felony shall be appointed to act as guardian. ") After the remand, the wife resigned as guardian and the court appointed a person who was qualified to serve as guardian.

During this time, the wife received representation as guardian and that lawyer sought to be paid for his services for representing the wife as guardian and performing services for the benefit of the ward. Admirably, the lawyer did not seek fees relating to the appeal or the litigation. The trial court was persuaded and awarded fees.

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[4]Beckford, 50 Fla. L. Weekly D1257a (Fla.2d DCA June 6, 2025)

The son argued that the attorney should not receive fees for representing an "illegal" guardian. The appellate court determined that the wife was, in fact, the guardian, even though she was wrongfully appointed, and as such she was entitled to representation. The court also pointed out the statutes that allow an attorney to be compensated from the guardianship estate when providing services that benefit the ward.

A different result would have wreaked chaos. Imagine the delays and expense arising from every third party who is asked to rely upon Letters of Guardianship as the grant of authority needing to look behind the appointment to be sure that the guardian was not an "illegal."

From ChatGPT: In *In re Guardianship of Wayne Astor Beckford*, the Second District Court of Appeal affirmed a trial court's decision to award attorney's fees to Hamden H. Baskin, who had provided legal services to Donna Beckford, the former court-appointed guardian of Wayne Astor Beckford. Although Donna was later disqualified from serving as guardian due to a prior felony conviction—a violation of section 744.309(3), Florida Statutes—the appellate court ruled that Baskin was still entitled to fees under section 744.108(1), which permits reasonable compensation for attorneys who render services to a guardian on behalf of a ward. The court emphasized that, at the time the services were rendered, Donna had been officially appointed by the court, even if that appointment was later reversed. Citing legal precedent, the court concluded that attorney fee entitlement under section 744. 108(1) does not depend on the ultimate legality of the guardian's appointment, but rather on whether the services benefitted the ward while the guardian was duly appointed. Because Charles Beckford, the appellant and Wayne's son did not challenge the reasonableness of the fees, the appellate court affirmed the award in full.

5. **Another Felon Wanting to be a Guardian (Advocate)**[5]

The qualifications for serving as a guardian in Chapter 744 also apply to guardian advocates under Chapter 393.

From ChatGPT: In the case Henriette LaFrance v. Guardian Advocacy of Jayden Emile, Henriette LaFrance appealed a decision related to the guardian advocacy of Jayden Emile. The case was heard in the Fourth District Court of Appeal under Case No. 4D2023-2291. The dispute centered on issues concerning the guardianship or legal advocacy for Jayden Emile, possibly involving the rights or role of LaFrance in relation to the guardianship. Upon review, the appellate court examined the lower court's handling of the guardian advocacy proceedings and ultimately affirmed the decision, ruling in favor of the appellee and upholding the trial court's judgment.

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[5]LaFrance v. Guardian Advocacy of Jayden Emile, 50 Fla. L. Weekly D235b (Fla.4th DCA Jan. 22, 2025)

## 6. **Declarations and Hearsay**[6]

The trial court was charged with appointing a guardian of a successful physician. The incapacity proceeding was lengthy and thorough, at the conclusion of which the court determined a limited guardianship was necessary.

The trial court was presented with two preneed guardian declarations. One was executed years before the current proceeding, when the physician's capacity was without question. The person named as the guardian was one of the physician's two sons, who was a practicing lawyer and seems to have remained close to his father, albeit the relationship became strained when the guardianship proceeding was pursued. The other preneed designation, executed shortly after the determination of partial incapacity, named a professional guardian.

The trial court held the second declaration was not effective because it had not been executed by a "competent adult" which is a requirement in Florida Guardianship Law §744.3045 Accordingly, the trial court appointed the son as provided for in the initial preneed declaration.

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[6]Silva v. Silva. , 49 Fla. L. Weekly D1280a (Fla.3d DCA June 12, 2024)

The physician also challenged the trial court's reliance on the reports of the examining committee as hearsay. This challenged pertained to the extent of rights removed, and not to the determination that the physician lacked some degree of capacity.

The appellate court affirmed the appointment based upon the original designation and reversed for further proceedings based upon the hearsay nature of the examining committee reports.

From ChatGPT: In a family guardianship dispute, the Third District Court of Appeal affirmed in part, reversed in part, and dismissed in part the trial court's orders regarding Dr. Orlando Silva's incapacity and the appointment of his son, Jorge Silva, as his limited guardian.

Dr. Silva, an oncologist, executed a valid Declaration of Preneed Guardian in 2016 naming his son Jorge, a licensed attorney, as his chosen guardian. Following signs of mental and physical deterioration, his sons filed for emergency guardianship, citing concerns that Dr. Silva's long-term partner was exploiting him financially. Medical evidence, including reports from two court-appointed examiners and a primary care physician, supported a finding of diminished capacity. The trial court appointed Jorge as emergency guardian and later, following further proceedings, found Dr. Silva to be partially incapacitated.

Dr. Silva did not appeal the trial court's January 2023 written order determining limited capacity, so the appellate court dismissed the appeal on that issue for lack of jurisdiction under Florida Rule of Appellate Procedure 9.170(b)(8). The court reaffirmed that repeating the same ruling in a later order does not restart the appeal clock.

On the issue of guardian appointment, the court upheld Jorge Silva's designation as limited guardian. The court emphasized that under §744.3045, Fla.Stat., a valid preneed guardian declaration creates a rebuttable presumption in favor of the named person unless they are unfit. Although Dr. Silva later executed a second declaration naming a professional guardian, this was done after the trial court had already determined his incapacity, rendering it a "post need" designation and thus invalid under the statute.

However, the appellate court found error in the removal of certain rights. Specifically, it reversed the portion of the trial court's order that relied on inadmissible hearsay—the written reports of examining committee members who did not testify and for whom no hearsay exception was proffered. The court held that the Florida Rules of Evidence apply in guardianship proceedings (per Probate Rule 5.170), and relying on such reports without live testimony violates hearsay rules, citing *Shen v. Parkes* and similar decisions.

Conclusion:

**Dismissed** Dr. Silva's appeal of the limited incapacity finding as untimely.

**Affirmed** Jorge Silva's appointment as limited guardian under a valid preneed declaration.

**Reversed** the portion of the order removing rights based on hearsay reports and remanded for further proceedings compliant with evidentiary rules.

7. **Trust Beneficiaries Infiltrating Probates**[7]

The personal representative—a well-known and well-regarded member of the bar—sought to close the estate by filing and serving a Petition for Discharge and Final Accounting. The estate was devised for the benefit of the decedent's three sons. Two of the sons were to receive their shares outright. The third son's share was devised to a trustee of a testamentary trust for his benefit. That son was the current beneficiary of the trust and his descendants were the remainder beneficiaries.

Despite not being a direct beneficiary of the estate, the third son filed documents in the probate proceeding. The personal representative served the Petition for Discharge and Final Accounting on the two sons receiving outright distributions and on the trustee of the testamentary trust—but not on the third son himself. Nonetheless, the third son filed an objection to both the Petition for Discharge and the Final Accounting, asserting that he was an interested person and as such entitled to notice and to object.

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[7] Carmel v. Fleischer, 49 Fla. L. Weekly D1339 (Fla.4th DCA June 20, 2024)

The trial court granted the personal representative's motion to strike the third son's filings, holding that the trustee—not the third son—was the appropriate party. The third son appealed.

On appeal, the third son argued that he was an "interested person" under the Florida Probate Rules because, as a beneficiary of the testamentary trust, he was reasonably expected to be affected by the outcome of the proceeding. The appellate court accepted that argument. It appeared to be influenced, at least in part, by a conflict between the trustee and the third son. But conflicts between trustees and beneficiaries are common—arising every time a beneficiary requests a distribution and the trustee denies it.

Although the decision now represents the law in the Fourth District, its holding—that beneficiaries of testamentary trusts are interested persons in the estate proceeding—rests on questionable underpinnings. The personal representative should be permitted to account to, and deal only with, those entitled to receive directly from the estate: here, the two sons receiving outright distributions and the trustee for the third son. The personal representative should not be required to look through the trust and address objections by trust beneficiaries.

That principle is currently reflected in the definition of "beneficiary" under Florida Statutes § 731.201(2). ("Beneficiary means heir at law in an intestate estate and devisee in a testate estate. … In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. … The beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary....").

The estate closing process requires service of the Petition for Discharge and Final Accounting on, and permits objections by, "interested persons." Fla.Prob.R. 5. 400(c). That term is defined more broadly than "beneficiary." ("Interested person means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. … The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.").

This broader definition is necessary—for example, to ensure that creditors or surviving spouses whose claims are unsatisfied may participate in the closing process, even though they are not "beneficiaries."

However, in applying that definition here, the appellate court went too far. While it was appropriate to consider whether the third son might reasonably be affected by the proceeding, the court's interpretation was too expansive in the context of estate closing.

This unfortunate outcome highlights the need for a legislative or rule change to restore the principle that a personal representative need only serve and account to the trustee—not the trust beneficiaries—when dealing with a devise to a trust. See Appendix A.

From ChatGPT: In Mark Carmel v. Norman Fleischer, the Fourth District Court of Appeal reversed a trial court's order that dismissed Mark Carmel's objections to the final accounting and petition for discharge of the estate's personal representative, Norman Fleischer. The trial court had found that Mark lacked standing because he was the beneficiary of a testamentary trust, not the estate itself. However, the appellate court held that a beneficiary of a testamentary trust qualifies as an interested person" under section 731.201(23), Florida Statutes, because such a person may reasonably be expected to be affected by the outcome of probate proceedings. The court emphasized that beneficiaries, even contingent ones, of a testamentary trust can challenge estate matters if improper administration might reduce or jeopardize trust distributions.

The court rejected Fleischer's reliance on section 731.303(1)(b), which allows orders binding trustees to bind trust beneficiaries in the absence of a conflict of interest. The appellate court found a clear conflict between Mark and the trustees of his trust—particularly his brother Randall, who was both a trustee and a beneficiary of the estate—making it improper to treat the trustees as binding Mark's interests. As such, Mark's objections and his surcharge petition, which alleged estate mismanagement and improper expense allocations, were improperly struck. The appellate court reversed the trial court's order granting Fleischer's discharge and remanded the case for further proceedings, restoring Mark's right to participate as an interested person in the estate litigation.

8. **A Deed is A Deed by Any Other Name**[8]

The trial court held that a document titled as "Revocable Trust" and appearing to be a trust instrument could function as a deed if the requirements for a deed were otherwise met. On cross motions for summary judgment, the trial court found conveyance language in the trust instrument, found evidence of delivery, and noted that the execution requirements for a deed were met on the face of the trust instrument.

The appellate court agreed.

From ChatGPT: In Fuentes v. Link, Case No. 3D22-2053, the Florida Third District Court of Appeal upheld a summary final judgment in favor of Irene C. Link, affirming that a revocable living trust can function as a valid conveyance of homestead property. Douglas A. Link, who died intestate in 2020, had executed a trust agreement assigning his Miami-Dade County homestead to Irene, his wife, naming her as both trustee and beneficiary. Although the document was signed by Douglas, Irene, and two witnesses, it was not recorded until after his death. Donna Fuentes, Douglas's daughter, contested the conveyance, asserting that the trust did not constitute a valid deed and that she was entitled to a share of the property as an intestate heir. The trial court, relying on the precedent set in Flinn v. Van Devere, 502 So. 2d 454 (Fla.3d DCA 1986), determined that the trust agreement met the necessary formalities of a deed, including the presence of two witnesses and an adequate legal description, and effectively conveyed the property to Irene. The appellate court agreed, emphasizing that absent evidence of revocation or lack of intent to transfer, the trust operated as a deed under Florida law. The court also noted that delivery of the trust document was evidenced by its recording after Douglas's death, which is generally presumed to be equivalent to delivery. Therefore, the court affirmed the trial court's judgment, recognizing the trust as a valid instrument of conveyance for the homestead property.

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[8] Fuentes v. Link, 49 Fla. L. Weekly D1319 (Fla.3d DCA June 19, 2024)

9. **A Motion by Any Name**[9]

The trial court entered a dismissal of a tort claim arising from an automobile accident. The dismissal was with prejudice and likely indicated a trial judge who was of the mind that this case needed resolution.

The defendant died shortly after the lawsuit was initiated. A suggestion of death was filed, which triggered a 90 day rule-based deadline for filing a motion for substitution of parties. (The substitution need not occur within the 90 days, only the filing of the motion.)

Prior to the expiration of that deadline, appellant filed a Motion for the appointment of a guardian ad litem, an administrator ad litem, and an attorney ad litem to represent the defendant's interests. The court denied that motion. On the day after the deadline expired, the defendant moved for dismissal. Four days later, the appellant filed an "amended motion to substitute" and the defendant opposed that motion. Defendant argued that the earlier motion, for an ad litem, was the equivalent of a motion to substitute. The trial court denied the motion to dismiss, finding the appellant had demonstrated excusable neglect and gave the appellant an extension of time to substitute the property party.

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[9]Green v. Polukoff, 49 Fla. L. Weekly D195e, 377 So. 3d 1175 (Fla.4th DCA 2024)

For reasons not disclosed in the appellate decision, the appellant was unable for more than a year to get an estate opened. Defendant filed another motion to dismiss. The trial court agreed and held that after that passage of time the neglect was no longer excusable.

The appellate court held that dismissal was not appropriate because a motion to substitute had been filed. While the appellant was undertaking efforts to obtain an appropriate representative, the appellate court indicated that the matter should have been abated by the trial court.

From ChatGPT: In *Green v. Polukoff*, 49 Fla. L. Weekly D195e, 377 So. 3d 1175 (Fla.4th DCA 2024), the Fourth District Court of Appeal reversed the trial court's dismissal of David Green's complaint. The lower court had dismissed the case with prejudice after determining Green failed to file a motion for substitution within 90 days of the suggestion of death of defendant Renee Polukoff, as required by Florida Rule of Civil Procedure 1.260(a)(1). However, the appellate court held that Green's timely filed motion to appoint a guardian ad litem, administrator ad litem, and attorney ad litem to represent the deceased defendant's interests qualified as a motion for substitution under the rule. The court emphasized that a motion need not be specifically labeled as a "motion for substitution" so long as it clearly seeks to have someone represent the deceased party's interests. Since Green's motion was filed within the required time frame and cited Rule 1.260, dismissal was improper. The appellate court reversed and remanded the case for further proceedings, stating the action should have been abated until a proper legal representative was substituted.

10. **<u>Agreements Should Be Enforced</u>**[10]

Certainly the most expensive appeal covered in these materials, and the longest decision, coming in at 22 pages, involved the Nemours Foundation, the Alfred I. duPont Charitable Trust, and the Delaware Attorney General. The Delaware Attorney General alleged that the trustees and Nemours had breached both a 1980 settlement agreement and their fiduciary duties by exceeding a 50% out-of-state spending limit set forth in that agreement.

The trial court dismissed the claims, reasoning that Delaware lacked standing, the 1980 settlement agreement was not enforceable as a contract, and that a prior decision—State ex rel. Gebelein v. First Nat'l Bank of Florida, 381 So. 2d 1075 (Fla. 1st DCA 1979)—was wrongly decided or effectively superseded by Florida's 2007 Trust Code. The Fifth DCA disagreed on all three grounds. The court held that Gebelein remains good law and that Delaware, as the state whose children were to be given "first consideration" under the terms of the trust and the settlement agreement, had special-interest standing to sue under Florida law. The legislative adoption of the Florida Trust Code did not explicitly abrogate this common-law standing doctrine, and the court declined

[10]Jennings v. Durden, 49 Fla. L. Weekly D1154 (Fla.5th DCA May 31, 2024)

to read such a change into the statute. This decision reminds us that the Florida Trust Code did not replace the common law of trusts and principles of equity as made clear in Florida Trust Code §736.0106.

On the enforceability of the 1980 settlement agreement, the court concluded that the agreement was a valid and binding contract, not merely a judicially approved compromise. Florida law favors the enforceability of such settlement agreements, especially when they were adopted into a final judgment and expressly contemplated future enforcement actions. The Fifth DCA also rejected the trial court's reliance on Biden v. Lord, 228 So. 3d 1185 (Fla.1st DCA 2014), explaining that the Biden decision addressed the timeliness of a proposed intervention and did not overrule Gebelein or reject the concept of special-interest standing.

Judge Makar concurred, emphasizing the continued authority of Gebelein and the contractual nature of the 1980 settlement agreement.

Chief Judge Edwards concurred in part and dissented in part. She agreed that Delaware had standing but disagreed with the majority's conclusion that the 1980 agreement could be enforced against Nemours as a contract. In her view, the 50% spending limitation was a trust modification imposed by judicial order, not a voluntary contractual obligation on the part of Nemours, and any remedy for violating that limitation should be pursued through an action for breach of trust, not breach of contract.

The case reinforces several principles that may, on occasion, be relevant to Florida trust practitioners. A foreign state attorney general may maintain an action in Florida courts to enforce a charitable trust when the beneficiaries include the citizens of that state with priority. A settlement agreement that modifies or constrains the administration of a charitable trust may be both judicially enforceable and contractual in nature. And importantly, longstanding appellate precedent, such as Gebelein, remains binding unless overturned by a higher court or legislative enactment, even if some courts have since questioned its soundness.

From ChatGPT: In Jennings v. Durden, the Florida Fifth District Court of Appeal addressed the standing of the Delaware Attorney General (DAG) to enforce a charitable trust established by Alfred duPont. The DAG sought to intervene in the administration of the trust, asserting that the trust's provisions were being violated. The trial court ruled that the DAG lacked standing to enforce the trust, citing the special interest doctrine and the exclusivity of the Florida Attorney General's authority in such matters.

On appeal, the Fifth District reversed the trial court's decision, holding that the DAG had standing to enforce the trust. The court emphasized the importance of upholding judicial precedents and the special interest doctrine, which allows for the enforcement of charitable trusts by parties with a special interest, even if they are not direct beneficiaries. The decision reinforced the principle that courts should respect established legal doctrines and precedents, particularly in matters involving public trust and charitable interests.

This ruling underscores the broader scope of standing in charitable trust enforcement and the judiciary's role in maintaining the integrity of charitable purposes, even when the state attorney general does not act.

11. **<u>Fixing Problems by Reforming</u>**[11]

All is not lost when things don't line up just right. The decedent executed Lady Bird deeds in favor of two of his grandchildren. Then he died.

His daughter initiated litigation in which she pointed out that the real property at issue was titled to the decedent as trustee of a trust that he had established in 2006. The daughter asserted that the deeds did not convey the real property because the deeds were executed by the decedent individually not as trustee of the trust.

The grandchildren counterclaimed seeking to reform the deeds to include the correct grantor. The trial court reformed the deeds with the result that the grandchildren receive the real property at issue.

The appellate decision describes the requirements for reformation and affirmed the lower court's decision.

From ChatGPT: In *Kathryn Johnson, Successor Trustee of the Krippes Living Trust v. Dominic Johnson and Caroline Johnson*, Case No. 1D2024-1139, the Florida First District Court of Appeal affirmed a trial court's ruling in favor of the appellees, Dominic and Caroline Johnson. The case involved two parcels of real property held by the Krippes Living Trust, established by James and Harriet Krippes. In 2017, James allegedly promised his grandchildren, Dominic and Caroline, that they would receive the properties in exchange for Dominic's help caring for him. In 2018, James executed "Lady Bird" deeds to convey the

[11]Johnson v. Johnson, 50 Fla. L. Weekly D1021a (Fla.1st DCA May 7, 2025)

properties to the grandchildren, but the deeds mistakenly listed James individually as the grantor instead of identifying him in his capacity as trustee. After James's death, Kathryn Johnson, as successor trustee, filed an ejectment action against Dominic and Caroline. They counterclaimed for reformation of the deeds, arguing mutual mistake. The trial court granted summary judgment in favor of the grandchildren, reforming the deeds to correctly reflect James's role as trustee. On appeal, the First District agreed, holding that mutual mistake was clearly established and that parol evidence supported the intent to transfer the trust property. The court concluded that equitable reformation was appropriate, and because valid title passed to Dominic and Caroline through the corrected deeds, Kathryn lacked standing to eject them. The appellate court thus affirmed the trial court's ruling.

12. **<u>Its Hard to Give it Up</u>**[12]

When she died, the decedent was in a nursing facility. The death certificate reflected that facility as the decedent's residence. Prior to moving to the nursing facility, the decedent resided in a residence that she owned in her name.

The court denied a petition to determine the residence owned by the decedent as her homestead. The denial was without a hearing and apparently only based upon the information in the petition and the death certificate.

The petitioner appealed. The Fifth District cites to a series of cases standing for the proposition that eliminating homestead status is not achieved lightly. (Once homestead is established, "it can be waived only by abandonment or by alienation in the manner provided by law." Carbonell v. Glade, 394 So. 3d 679, (Fla.3d DCA 2024) (quoting Fid. & Cas. Co. of N.Y. v. Magwood, 145 So. 67, 68 (Fla.1932)). Whether a homestead has been abandoned is determined on a case-by-case basis and "is necessarily a fact-intensive inquiry." Yost-Rudge v. A to Z Props., Inc., 263 So. 3d 95, 97-98 (Fla.4th DCA 2019) (citing Beensen v. Burgess, 218 So. 2d 517, 519 (Fla.4th DCA 1969)). "[A]

[12] Lauth Investigations Int'l, Inc. v. Goforth, 49 Fla. L. Weekly D2544a (Fla.5th DCA Dec. 13, 2024)

finding of abandonment requires a ‘strong showing' of intent not to return to the homestead. ” Id. at 97 (citing In re Herr, 197 B. R. 939, 941 (Bankr. S. D. Fla.1996)).)

Not surprising after reading those citations, the appellate court reversed and sent the matter back to the lower court for a proper determination.

From ChatGPT: In the case Lauth Investigations International, Inc. v. Bonnie Mae Goforth, Lauth Investigations International, Inc., acting as the owner and holder of an assignment of interest from Angie Kincaid and William Chesteen—intestate beneficiaries of the Estate of Joan Welch Rowan—appealed a decision involving the distribution of the estate. The dispute centered on Lauth’s claimed rights through the assignments it received from the beneficiaries and its challenge to actions or determinations favoring appellee Bonnie Mae Goforth. Heard in the Fifth District Court of Appeal under Case No. 5D2024-0979, the case involved legal questions about the validity and enforceability of the assigned interests. The appellate court ultimately ruled on the matter, affirming the lower court’s decision in favor of Goforth.

## 13. **Carpenter And Summary Judgment**[13]

Summary judgment sustained on appeal has become commonplace. However, that is not always the outcome. The decedent had two children. She left 70 acres to one son in her estate plan and she deeded the same 70 acres to the other son during her lifetime. But the deed was not recorded until after her death.

Presumably to no one's surprise, the son who thought he would receive the 70 acres under his mother's Will was not happy when he learned of the deed. The deed-son filed a motion for summary judgment which will-son opposed. Deed-son provided testimony from the lawyer,who was the same lawyer that prepared the deed. The summary judgment evidence also included that deed-son was at the deed signing and the original deed was kept by the deed-son's lawyer.

After reviewing the *Carptenter* factors, and citing to authority that Carpenter has been extended to deeds, the appellate court found evidence existed to establish a rebuttable presumption of undue influence, making summary judgment inappropriate.

[13]Leitner v. Leitner, 49 Fla. L. Weekly D1653a, 391 So. 3d 1023 (Fla.5th DCA, Aug. 2, 2024)

From ChatGPT: The Fifth District Court of Appeal reversed a trial court's grant of summary judgment in favor of Phillip M. Leitner in a case brought by George W. Leitner III, as personal representative of the estate of Julia Williams Leitner. George challenged the validity of a 2016 warranty deed by which their mother, Julia, conveyed her real property to Phillip prior to her death, arguing it was the product of undue influence.

The appellate court held that the trial court erred by granting summary judgment because the record contained sufficient facts to raise a rebuttable presumption of undue influence under the standards set forth in *In re Estate of Carpenter*. Specifically, Phillip, who had a confidential relationship with the decedent and was a substantial beneficiary, was allegedly involved in multiple suspicious circumstances surrounding the deed: he was present at its execution, recommended the attorney who prepared it, participated in meetings about it, and had a role in securing witnesses.

Although the drafting attorney provided a conflicting version of events that downplayed Phillip's involvement, the appellate court ruled that such factual disputes—particularly those involving credibility—preclude summary judgment. Once the presumption of undue influence arises, it becomes a question for the trier of fact and cannot be resolved as a matter of law.

Accordingly, the Fifth DCA reversed the summary judgment and remanded for further proceedings.

14. **A Man Without A Home (or at least Domicile)**[14]

The decedent moved from Jamaica to New York many years before his death. The decedent had expressed his plans to retire to either Jamaica or Florida where he had amassed significant real estate holdings.

At different points in time, he executed documents claiming to be a resident of Florida and of New York. In 2018, a guardian was appointed for him in New York where he was receiving medical treatment. In 2020, he moved from New York to Jamaica, remaining there until his death in 2023.

The appellants initiated probate in Florida in 2023, asserting that the decedent was a resident of Broward County, Florida at the time of his death even thought he was physically in Jamaica at that time. A judge in Broward County admitted the Last Will and Testament to probate and appointed appellants as personal representatives.

Appellee sought to transfer the probate proceeding to New York asserting the decedent was last domiciled in New York and although he expressed intentions to change his domicile from New York he did not do so. The trial judge granted the request to transfer, finding that notwithstanding owning

[14]Colin Markes & Sharon Hart-Corrigan v. Garret Markes, 50 Fla. L. Weekly D975a (Fla.4th DCA Apr. 30, 2025)

property in Florida, the decedent had not been to Florida for at least four years prior to his death.

The appellants filed an appeal contending error based on the decedents residency as of his death. Alternatively, the appellants argued venue is proper because the decedent owned property in Broward County.

The appellant court reversed the lower court's ruling regarding domicile as of death, concluding the decedent was domiciled as of his death in Jamaica. The appellant court also reversed the lower court's decision to transfer the proceeding to New York, concluding that a transfer cannot be made when there is no probate proceeding existing in the other sate. Lastly, the court determined that the trial court could maintain a probate proceeding because of the real property in Florida.

From ChatGPT: In this probate dispute, the Fourth District Court of Appeal reversed a trial court's order transferring the probate proceedings of Keith Albert Markes's estate from Florida to New York. Although the trial court correctly determined that Florida was not the decedent's domicile at the time of his death, it erred in ordering the transfer because (1) the decedent owned substantial real property in Florida, including in Broward County where probate was initiated, making venue proper under Florida law, and (2) Florida courts lack the legal authority to transfer probate proceedings to another state.

Keith Markes, a Jamaican citizen, had lived in New York for many years but had expressed his intent to retire either in Florida or Jamaica. He moved to Jamaica in 2020, lived there until his death in 2023, and never returned to the

U.S. Though a guardianship had been established over his property in New York in 2018, there was no evidence that New York was his domicile at death. The appellate court found that the decedent's domicile at death was Jamaica.

The court held that Florida had jurisdiction over the estate based on the decedent's real property in Broward County, despite his non-domiciliary status. It emphasized that a Florida probate court may adjudicate an estate when the decedent owned property in Florida. Furthermore, Florida law does not permit probate courts to "transfer" proceedings to another state, especially where no probate case is pending there.

Thus, while affirming the trial court's finding that Florida was not the decedent's domicile, the appellate court reversed the order to transfer the case and remanded for further proceedings in Broward County.

15. **You're In, Mr. Personal Representative**[15]

The trial court effectively struck objections to the guardian's final report. The objections had been made by the personal representative of the ward's estate. The trial court concluded that because the personal representative had not filed a request for notice under Florida Probate Rule 5. 060, he was not an "interested person" and thus lacked standing.

The appellate court reversed the trial court's actions after determining that a personal representative of a ward's estate does not need to file a Request for Notice in order to be an interested person for purposes of reviewing, and having an opportunity to object to, the guardian's final report. Instead, the appellate court looked to F.P.R. 5.680 which effectively gives the personal representative automatic standing.

From ChatGPT: In the case In re Guardianship of Patricia A. McLain, John H. McLain, Jr., acting as the personal representative of the Estate of Patricia McLain, appealed a decision involving Suzanne Wernicke, who served as the guardian of Patricia McLain, an incapacitated person. The dispute arose in the context of the guardianship and estate proceedings, with John McLain challenging certain actions or decisions made by the guardian. The Second District Court of Appeal reviewed the case under Case No. 2D2023-2364 and issued a ruling addressing the legal responsibilities and decisions related to Patricia McLain's care and estate, ultimately affirming the lower court's ruling in favor of the guardian, Suzanne Wernicke.

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[15] In re Guardianship of Patricia A. McLain, 50 Fla. L. Weekly D805b (Fla.2d DCA Apr. 4, 2025)

16. **<u>Capacity Matters</u>**[16]

The Fourth District reminds us of the difference between being a party as a trustee versus being a party in an individual capacity. Accordingly, when a person has been sued only as a trustee, not individually, a disgorgement order is reversible.

The lower court had ordered one of the siblings to return to a trust $100,000 that the sibling admitted having taken. Over the objection of that sibling, the court entered an order requiring that sibling to return the $100,000. The appellate court reversed because that sibling was not in the case individually and the disgorgement is "tantamount to a judgment for damages, requiring personal service on the fiduciary as an individual, and not in any representative capacity." (citing Kozinski v. Stabenow, 152 So. 3d 650 (Fla. 4th DCA 2014).

From ChatGPT: In this consolidated appeal, the Fourth District Court of Appeal reversed a trial court order requiring David Miller, in his capacity as co-trustee of the Barbara R. Nurenberg Florida Trust, to disgorge $100,000 that he had removed from a separate Michigan Trust for which he served as sole trustee. While the trial court reasoned that the funds were used to benefit the Florida Trust (including legal fees), the appellate court held that disgorgement imposes personal liability and thus could only be imposed on Miller in his *individual capacity*, not in his *representative capacity* as co-trustee.

Miller had not been personally served in the underlying Florida case, and Moore, the appellee and a beneficiary of both trusts, had only countersued

[16] David Miller v. Leah Marissa Moore., 49 Fla. L. Weekly D1622a, 391 So. 3d 938 (Fla.4th DCA 2024)

Miller in his capacity as co-trustee. The court emphasized that under Florida law, disgorgement and surcharge claims based on alleged fiduciary breaches require that the fiduciary be individually named and personally served, since such remedies impose personal financial liability.

Relying heavily on precedent from *Kozinski v. Stabenow*, the court concluded that Moore's attempt to obtain a disgorgement order without personally serving Miller failed as a matter of law. The court reversed the disgorgement order *without prejudice*, allowing Moore the opportunity to refile such claims against Miller individually, provided personal jurisdiction can be established.

The court affirmed without discussion a separate order denying Miller's motion to restore his account authority but made no ruling on whether Florida courts have long-arm jurisdiction over Miller, a Michigan resident, in his personal capacity. It remanded for further proceedings consistent with the opinion.

## 17. **Appellate Court Doesn't Do Your Job, Even When Trial Court Held Your Hand**[17]

In another LaRose authored opinion from the Second District, the court addressed the intersection of a last will, homestead, and notice.

The homestead argument by the appellant was spurious at best. The argument was that an unmarried childless woman could not devise her homestead by a residuary devise. Of course that was inconsistent with the law and the appellate court made short work of that issue.

The lost will issue was not complicated for the lower court. The appellate decision includes the text of a memorandum the lower court sent to the petitioner that essentially created a road map for the petition even explaining that live testimony, not affidavits, are required to establish a lost will.

The petitioner asserted the decedent had no heirs in the lost will proceeding. Accordingly, no notice was provided to heirs. Nevertheless, the court's order granting the petition states all interested persons were given notice or waived notice.

Property Solutions Powerhouse, LLC (the "Company") removed for rehearing asserting its status as an interested person. The Company alleged that

[17] Property Solutions Powerhouse, LLC v. Jonathon Nelson, 50 Fla. L. Weekly D1255a (Fla.2d DCA June 6, 2025)

some of the decedent's heirs had assigned their rights to it. To support its position, the Company filed a document described as an affidavit of heirs. The appellate court found multiple issues with that document, including that the document was not notarized. Rehearing was denied and the Company appealed.

After the appellate court indicated the Company may have a colorable claim that it was entitled to an evidentiary hearing, the decision makes clear that the appellate court is not going to reframe issues for the appellant. The relief sought by the Company was a reversal based upon the trial court erroneously entering the order admitting the lost will to probate without notice.

After noting numerous deficiencies in the Company's filings—including unverified motions, documents labeled as affidavits that were neither notarized nor, in some cases, even signed—the appellate court concluded that the Company failed to offer evidence to support its position on the record before it.

A properly framed appeal brought by the correct party likely would have prevailed. Even if, as the petitioner asserted, the decedent had no heirs, the State of Florida should have received notice of the petition to establish a lost will, as it would have taken the estate in the absence of a valid will.

From ChatGPT: The Second District Court of Appeal affirmed a trial court's order admitting a lost will to probate and awarding homestead property to Jonathon Nelson, the sole devisee of decedent Margaret O. Templeton. The appellant, Property Solutions Powerhouse, LLC, challenged the probate orders, arguing it was denied due process due to lack of notice and that the homestead should not have been included in the estate.

Property Solutions claimed it had received assignments from Ms. Templeton's alleged intestate heirs and therefore was entitled to notice of the probate proceedings. However, the appellate court found that Property Solutions failed to establish its entitlement to notice. Its supporting affidavit lacked notarization and personal knowledge, and several assignments were either missing, unsigned, or unnotarized. The trial court's finding that notice had been provided or waived was upheld, and the appellate court refused to reframe Property Solutions' argument as a request for an evidentiary hearing.

Regarding the homestead, the court found that Ms. Templeton-unmarried and without minor children at the time of death-was constitutionally free to devise her homestead. She left it to Mr. Nelson via a residuary clause in her will. The court cited established precedent affirming that when no surviving spouse or minor children exist, homestead may pass through a will-even to a nonheir.

Accordingly, the court held that Property Solutions failed to demonstrate any error in the probate court's rulings. The orders admitting the lost will to probate and awarding the homestead to Nelson were affirmed.

## 18. **Timing Is Everything**[18]

As a result of excellent lawyering by top notch estate planners and strategic summary judgment evidence orchestrated by the top notch litigators, the proponent of a will executed shortly before death was successful on summary judgment.

A prominent, wealthy centenarian executed a new will just two months before his death, disinheriting his grandson and leaving most of his estate to a charitable foundation. The proponent of the will presented extensive affirmative evidence of testamentary capacity, including affidavits from experienced attorneys who had long relationships with the testator and who had met with him multiple times leading up to the execution. These witnesses testified that Reeves, Sr. was alert, understood the nature of his assets and relationships, and expressed clear testamentary intent. One witness, a lawyer who had served as Reeves, Sr.'s general counsel, described how the testator led detailed discussions and directed substantive revisions to the estate plan.

In contrast, the challenger, the disgruntled grandson, submitted an affidavit from a psychiatrist who never examined the testator and based his opinion on medical records from periods before and after execution. Although

[18]Reeves v. Gross, 50 Fla. L. Weekly D274a (Fla.3d DCA Jan. 29, 2025)

the expert opined that Reeves, Sr. suffered from a neurocognitive disorder with delirium, the court found his affidavit lacked a fact-based explanation for how the condition precluded the lucid intervals described by other witnesses. Reaffirming Florida’s presumption of testamentary capacity, the court held that the mere possibility of incapacity was insufficient to create a genuine issue of material fact, particularly in light of strong contemporaneous evidence of lucidity at the time of execution.

From ChatGPT: In the case *Garth Basil Reeves v. Oliver Gross*, Garth Basil Reeves appealed a ruling related to probate proceedings involving the estate of a deceased individual. The case was heard in the Third District Court of Appeal under Case No. 3D23-0856, originating from lower tribunal Case No. 20-977-CP-02. Reeves challenged actions or decisions made during the administration of the estate, in which Oliver Gross was involved, possibly in a fiduciary or representative capacity.

The dispute likely involved claims over the management or distribution of estate assets, rights of beneficiaries, or procedural issues within the probate court. Upon review, the appellate court evaluated whether the lower court acted appropriately in its decisions. Ultimately, the Third District affirmed the trial court’s ruling, rejecting Reeves’s arguments and upholding the decisions made in favor of Oliver Gross.

19. **Timing Is Everything - Part II**[19]

The decedent's daughter offered for probate a codicil signed on September 20, 2018. The daughter also provided a court order from a guardianship proceeding in which the decedent was then the ward, indicating that in August 2018 the ward had regained capacity.

The decedent's son contested the admission of the codicil to probate because the decedent lacked capacity or had been unduly influenced by the daughter.

The sister moved for a judgment on the pleadings betting heavily on the guardianship order. It worked, and the trial court granted her motion and admitted the codicil to probate.

The son appealed. The appellate court found the trial court had over-relied on the guardianship order, primarily because of the passage of time. The court reaffirmed that testamentary capacity is time-specific and must be proven at the moment of execution. It remanded the case for further proceedings. The appellate court acknowledged that the determination by the guardianship court, only a month before the execution of the codicil may be relevant in determining

[19] Thomas Scott v. Deborah Young and Linda Jean Scott, 49 Fla. L. Weekly D2026a, 5th DCA (Oct. 4, 2024)

capacity as of the execution of the codicil. But that is not enough for granting a motion for judgment on the pleadings.

From ChatGPT: The Fifth District Court of Appeal reversed a trial court's order granting judgment on the pleadings in an adversarial probate dispute over the validity of a codicil to Anna Marie Scott's will. Appellant Thomas Scott, the decedent's son and removed personal representative, challenged the codicil executed on September 20, 2018, which instead named Deborah Young as personal representative. Scott alleged the decedent lacked testamentary capacity or was unduly influenced at the time of execution.

The trial court had ruled the codicil valid based on a guardianship court's August 14, 2018 order finding that the decedent had testamentary capacity. That order relied on medical evaluations conducted in April 2018. The appellate court held that this prior finding was not dispositive because testamentary capacity must be present at the time the codicil was executed, and the guardianship order predated the codicil by more than a month. Furthermore, the trial court erred by not accepting Scott's well-pleaded allegations as true when deciding the motion for judgment on the pleadings.

The appellate court emphasized that while the guardianship order may be evidence of capacity, it could not preclude litigation of capacity at the time of codicil execution. Therefore, the dispute required factual development and could not be resolved as a matter of law. The court reversed and remanded for further proceedings.

20. **<u>Even Attorneys Can Have Standing</u>**[20]

The Third District issued another decision on standing in probate. An attorney who had represented a personal representative sought standing to re-open an estate after the court dismissed the case without prejudice. The dismissal was the direct result of the personal representative failing to file a petition regarding a distribution. The personal representative's former attorney had filed a charging lien. When that attorney tried to reopen the estate, the trial court held he lacked standing.

The appellate court found that the attorney had standing and reversed and remanded.

From ChatGPT: In the case Jesus O. Valentino, Esq. v. In Re: Estate of Pedro E. Andollo, Jesus O. Valentino, an attorney and the appellant, challenged a ruling related to the probate proceedings of Pedro E. Andollo's estate. The case was heard in the Third District Court of Appeal under Case No. 3D24-1558, stemming from lower tribunal Case No. 21-3327-CP-02. The appeal involved issues surrounding the administration of the estate, with Valentino contesting decisions made during the probate process. The appellate court reviewed the procedural and substantive aspects of the case but ultimately upheld the lower court's decision, ruling against Valentino and in favor of the appellees associated with the estate of Pedro E. Andollo.

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[20]Jesus O. Valentino, Esq. v. In Re Estate of Pedro E. Andollo, et aL., No. 3D24 1558 (Fla.3d DCA Apr. 30, 2025)

21. **<u>Fiduciary Breach ≠ Punitive Damages</u>**[21]

Pursing punitive damages requires allegations of fraud, malice, or other misconduct in a manner that is more than bare allegations. This requirement is not met simply by demonstrating breaches of fiduciary duty.

From ChatGPT: In Wells Fargo Bank, N.A. v. Gopher, 49 Fla. L. Weekly D2190b, 4th DCA (Oct. 30, 2024), the Fourth District Court of Appeal reversed a trial court's nonfinal order allowing plaintiffs to amend their complaint to assert punitive damages against Wells Fargo and several of its former employees. The plaintiffs had alleged that Wells Fargo, acting as trustee, breached fiduciary duties by charging over $7 million in fees not properly disclosed on a fee schedule.

The appellate court held that the trial court erred because the plaintiffs failed to proffer any evidence of fraud, malice, or other culpable misconduct, which is required to support a punitive damages claim under Florida law. A mere breach of fiduciary duty is not sufficient on its own to warrant punitive damages. Additionally, the plaintiffs failed to present any evidence that a managing agent of Wells Fargo participated in or knowingly condoned the misconduct, which is necessary for corporate liability under §768.72(3), Florida Statutes.

The appellate court therefore reversed the portion of the order granting leave to plead punitive damages related to the breach of fiduciary duty. On cross-appeal, the court affirmed the trial court's decision denying leave to add punitive damages for alleged mismanagement of trust investments and violation of the prudent investor rule. The case was remanded for further proceedings.

[21] Wells Fargo Bank, N.A. v. Gopher, 49 Fla. L. Weekly D2190b, 4th DCA (Oct. 30, 2024)

22. **<u>Non-Final ≠ Appeal</u>**[22]

Decedent's daughter filed a petition for administration asserting that her father died intestate and sought to become personal representative. Decedent's wife (not the mother of the daughter!) moved to dismiss the petition and asserted that she should, based upon statutory priority, be appointed as personal representative. The widow also pointed out that the sole asset identified by the daughter was owned as tenants by the entireties. The probate court dismissed the petition without prejudice.

Over a year later, daughter filed a civil action against her step-mother and others alleging tortuous interference with expectation of an inheritance. The case was moved to the probate division. The daughter later added a count to void certain testamentary documents. The daughter also filed an amended petition for administration, listing assets and seeking to invalidate testamentary instruments. The widow moved to dismiss.

After a recitation of some of the procedural concerns identified by the appellate court, dismissal of the appeal was granted based upon the orders which were the subject of the appeal being nonfinal orders.

[22]Jacobs v. Jacobs, 50 Fla. L. Weekly D508a, 3rd DCA (Feb. 26, 2025), amending original opinion at 49 Fla. L. Weekly D2100a

One final practice point that arises from this decision's reference to Florida Rule of Appellate Procedure 9.170. The appellate courts generally do not hear non-final orders. In probate and guardianship proceedings, the determination of whether an order is final is not as clear as in most civil litigation. Several years ago, Rule 9.170 was created which described appealable orders in probate and guardianship cases as those that finally determine a right or obligation of an interested person. The rule includes a non-exclusive list of 25 such proceedings, which are:

> (1) determine a petition or motion to revoke letters of administration or letters of guardianship;
>
> (2) determine a petition or motion to revoke probate of a will;
>
> (3) determine a petition for probate of a list or destroyed will;
>
> (4) grant or deny a petition for administration under section 733.2123, Florida Statutes;
>
> (5) grant heirship, succession, entitlement, or determine the persons to whom distribution should be made;
>
> (6) remove or refuse to remove a fiduciary;
>
> (7) refuse to appoint a personal representative or guardian;
>
> (8) determine a petition or motion to determine incapacity or to remove rights of an alleged incapacitated person or ward;
>
> (9) determine a motion or petition to restore capacity or rights of a ward;
>
> (10) determine a petition to approve the settlement of minors' claims;
>
> (11) determine apportionment or contribution of estate taxes;
>
> (12) determine an estate's interest in any property;

(13) determine exempt property, family allowance, or the homestead status of real property;

(14) authorize or confirm a sale of real or personal property by a personal representative;

(15) make distributions to any beneficiary;

(16) determine amount and order contribution in satisfaction of elective share;

(17) determine a motion or petition for enlargement of time to file a claim against an estate;

(18) determine a motion or petition to strike an objection to a claim against an estate;

(19) determine a motion or petition to extend the time to file an objection to a claim against an estate;

(20) determine a motion or petition to enlarge the time to file an independent action on a claim filed against an estate;

(21) settle an account of a personal representative, guardian, or other fiduciary;

(22) discharge a fiduciary or the fiduciary's surety;

(23) grant an award of attorneys' fees or costs;

(24) deny entitlement to attorneys' fees or costs; or

(25) approve a settlement agreement on any of the matters listed above in (b)(1)–(b)(24) or authorizing a compromise under section 733.708, Florida Statutes.

Although the list in the appellate rule is expressly non-exclusive, being able to identify a proceeding as being on this list will often eliminate the appealability issue.

From ChatGPT: In Jacobs v. Jacob, 50 Fla. L. Weekly D508a (Fla. 3d DCA Feb. 26, 2025), the Third District Court of Appeal dismissed an appeal brought by Nava Jacobs, who had challenged orders dismissing her probate-related claims for lack of standing. After her father's death, Nava initiated probate proceedings and filed civil claims seeking to invalidate his will and related transfers, but the trial court dismissed her petitions and denied her appointment as personal representative. Nava appealed, arguing that the trial court's orders finally determined her rights as an interested person under Florida Rule of Appellate Procedure 9.170.

The appellate court disagreed, holding that the challenged orders did not fall within any of the enumerated categories in Rule 9.170(b), such as orders determining heirship, revoking probate, or adjudicating an estate's interest in property. The court emphasized that the will had not been admitted to probate, Nava had not been appointed as personal representative, and the trial court's orders lacked the finality required for appellate review. Because the orders merely denied her standing to act on behalf of the estate and allowed for further proceedings, the appeal was dismissed as premature.

BONUS: **Only Interested Persons**

From ChatGPT: The Appellate court dismissed Dathan Griffin's appeal for lack of jurisdiction, holding that he was not an "interested person" under Floridas Probate Code because he lacked standing to challenge the will. Griffin, who had no familial or legal connection to the decedent and merely attempted to claim the decedent's home through adverse possession after her death, had no legally recognized interest in the estate. Because the trial court's order did not determine a right or obligation of an interested person, the appellate court had no authority to review it.

23. **Careful What You ask For**[23]

The appellant filed a Statement of Claim in a probate proceeding. The basis of the claim was expenses of an arbitration commenced after the decedent's death, which occurred in 2011, on behalf of the estate. The estate lost the arbitration and the other party then, in 2017, obtained a fee award in the arbitration. Over five and a half years later, the appellate filed a Motion to Prohibit Disbursement of Estate Proceeds and two days later filed a Statement of Claim.

The estate moved to strike the statement of claim as untimely, pursuant to Florida Probate Code §733.710. The appellant responded by indicating the basis for the claim was the post-death action brought by the estate and therefore the claims period is not relevant. The trial court struck the claim. The reasoning to support doing so is that the arbitration agreement had been entered into by the decedent during his lifetime and indicated that the appellant should have filed a contingent claim once the arbitration had commenced.

The appellate court provides a review of the statutory provisions comprising the claims process for estates. The appellate court agreed with the

[23] Palm Garden of Winter Haven, LLC v. Estate of Dempts, 50 Fla. L. Weekly D324b, 6th DCA (Feb. 7, 2025)

appellant and was satisfied the action that gave rise to the fee award at issue was action taken after death by the estate, making the award an expense of administration instead of a claim. Accordingly, the order by the lower court was reversed and the matter remanded.

Of course, this appeal would likely have been avoided if the appellant had not filed a Statement of Claim in the estate.

From ChatGPT: In Palm Garden of Winter Haven, LLC v. Estate of Leon C. Demps, 50 Fla. L. Weekly D324b (Fla. 6th DCA Feb. 7, 2025), the appellate court reversed a probate court's order striking as untimely a nursing home's claim for arbitration costs. Palm Garden had successfully defended a negligence suit filed against it by the Estate and was awarded nearly $200,000 in arbitration costs. The trial court struck Palm Garden's statement of claim as barred by the deadlines in Florida's probate claims statutes, finding it was a contingent claim that should have been filed earlier.

The appellate court disagreed, holding that Palm Garden's right to recover costs arose solely due to the Estate's post-death decision to sue, not due to any obligation of the decedent during his lifetime. Therefore, the claim did not fall within the definition of a "claim" subject to the three-month deadline under section 733.702 or the two-year nonclaim bar under section 733.710. Because the claim was not based on a pre-death liability of the decedent, no timely statement of claim was required. The court reversed and remanded for further proceedings.

## 24. **No Prejudice, No Dismissal**[24]

The decedent created three revocable trusts, which he later made irrevocable. Several years after doing so, and apparently having second thoughts, he filed a seven-count action seeking to invalidate the change from revocable to irrevocable and the related transactions. His daughters were defendants in that lawsuit. The decedent had sued in his individual capacity and as settlor and trustee of the three trusts. In that lawsuit, he asserted claims based on undue influence, fraud, mistake, civil theft, breach of fiduciary duty, and declaratory relief. Before the case progressed significantly, he passed away.

Following his death, the decedent's widow moved to substitute herself in as plaintiff, both individually and as trustee of a newly disclosed revocable trust that had not been referenced in the original filings. According to the widow's motion, the decedent had assigned to himself, as trustee of that newly disclosed trust, "any and all of [his] rights and interests in any and all claims that can be, may be, or will be brought or pursued" against his daughters. The daughters alleged this was the first time they learned of the assignment or the existence of

[24]Correa v. Tovar-Restrepo, 50 Fla. L. Weekly D447a (Fla. 3d DCA Feb. 19, 2025)

this additional trust. The trial court allowed the substitution of the widow and also allowed the daughters to preserve their right to challenge standing.

The daughters moved for summary judgment based on lack of standing. They argued the decedent lacked standing at the time he filed the lawsuit because the claims had been assigned to the newly disclosed trust. As a result, they argued the decedent no longer held the rights personally and therefore he had no standing to bring the original lawsuit individually. The daughters also asserted that the widow's attempt at substitution could not cure that original defect in standing. The trial court agreed and entered summary judgment for the daughters.

The widow appealed. During oral argument, then-Chief Judge Logue questioned both sides about prejudice suffered by the daughters. The daughters responded by pointing to the time and effort expended in probate proceedings that they assert would have been avoided. The widow's counsel responded that the probate litigation involved broader issues that would have proceeded regardless of the timing of the disclosure of the assignment.

The appellate court reversed. The panel held that there was no prejudice from the late disclosure of the assignment. Because the assignment was to a revocable trust for which the decedent was both settlor and sole trustee, he effectively retained full control and ownership of the claims. Therefore, the decedent had standing to bring the lawsuit at its inception. The substitution of the widow, as successor trustee of the revocable trust, was proper, and the summary judgment was erroneous.

From ChatGPT: In Correa v. Tovar-Restrepo, 50 Fla. L. Weekly D447a (Fla. 3d DCA Feb. 19, 2025), the Third District Court of Appeal reversed the trial court's dismissal of a lawsuit brought by Jose Pablo Tovar Parra against his daughters. Mr. Tovar had sought to invalidate amendments that made three revocable trusts irrevocable, alleging fraud and undue influence. The trial court ruled that Mr. Tovar lacked standing from the outset because he had previously assigned his rights to bring claims against his daughters to the Colspak Revocable Trust and therefore could not sue in his individual capacity.

The appellate court disagreed, holding that Mr. Tovar had standing because he was the sole grantor, trustee, and beneficiary of the Colspak Revocable Trust when the lawsuit was filed. Under Florida Rule of Civil Procedure 1.210(a), a trustee may sue in their own name without joining the trust as a separate party, and the failure to plead representative capacity is not jurisdictional. Since Mr. Tovar held legal title to the claims in his capacity as trustee, he had standing to initiate the action, and upon his death, his successor trustee, Maria Eugenia Correa, properly continued the litigation. The dismissal was reversed and the case remanded.

# Appendix A

## Testamentary Trust in Probate: Standing Should Be Limited to the Trustee

### INTRODUCTION

In Florida probate proceedings, a recurring issue arises when a testamentary trust is named as a devisee under a will: who is the proper party to receive notice and participate in estate administration proceedings? Should it be the trustee of the trust, the trust beneficiary, or both?

The Florida Probate Rules require that the petition for discharge and the final accounting be served on all "interested persons," who may then object. Recent interpretations to include trust beneficiaries—despite the devise being made to the trustee—raise significant concerns.

This white paper outlines the relevant legal framework, highlights practical problems created by the expansion of standing, and offers a policy-based rationale for restoring the principle that only the trustee of a testamentary trust—not the trust beneficiary—should be treated as an "interested person" for purposes of probate administration.

### LEGAL FRAMEWORK

Florida Statutes § 731.201(2) defines "beneficiary" for purposes of the Probate Code:

> "In the case of a devise to an existing trust or trustee, or to a trust or trustee described by a will, the trustee is a beneficiary of the estate. The beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary."

This definition makes clear that, where a devise is made to a trust, the trustee—not the trust beneficiary—is the estate beneficiary.

Separately, Florida Statutes § 731.201(23) defines "interested person" as:

> "Any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings."

Rule 5.400(c) of the Florida Probate Rules requires that the petition for discharge be served on all interested persons and gives those persons standing to object.

In Carmel v. Fleischer, 391 So. 3d 907 (Fla. 4th DCA 2024), the Fourth District held that a beneficiary of a testamentary trust had standing to object to the personal representative's petition for discharge and final accounting—even though the devise was made to the trust and only the trustee had been served—because the beneficiary's interest was "reasonably be expected to be affected by the outcome" of the probate proceedings.

Earlier decisions such as Richardson v. Richardson, 524 So. 2d 1126 (Fla. 5th DCA 1988), and Estate of Watkins, 572 So. 2d 1014 (Fla. 3d DCA 1991), show a more restrained approach to interpreting "interested person," one that considers the function of the proceeding and the statutory structure in limiting participation to those with a direct legal interest in the estate.

## THE PROBLEM

Some courts have interpreted the broad definition of "interested person" to permit beneficiaries of a testamentary trust to participate directly in estate proceedings, even where the trustee has been served and is actively involved. This expansive view of standing creates both doctrinal and practical difficulties.

### A. Disregard for Settlor Intent

A testator may intentionally structure a gift through a testamentary trust to ensure that a fiduciary—rather than the beneficiary—is responsible for managing and protecting the interest in the estate. The trust structure may reflect concerns about the beneficiary's financial acumen, emotional stability, or maturity. Allowing the trust beneficiary to bypass the trustee and intervene in the estate proceeding frustrates that intent.

### B. Conflict and Confusion for the Personal Representative

When both the trustee and the trust beneficiary assert conflicting positions in the probate proceeding, the personal representative is placed in an untenable position. The personal representative is not authorized to mediate disputes between trustees and beneficiaries, and doing so risks liability and inconsistent treatment of the same devise.

C. Availability of Remedies for Trust Beneficiaries

Trust beneficiaries are not without recourse. If they believe the trustee has failed to protect the trust's interest in the estate—for example, by failing to object to an improper accounting or by failing to pursue a claim—they may:

- Compel the trustee to act;
- Seek the trustee's removal;
- Petition for surcharge or other equitable relief.

These remedies are more appropriate than disrupting the estate's orderly administration.

## POLICY JUSTIFICATION

The trustee is the fiduciary charged with representing the trust's interest in all matters, including the administration of the estate from which the trust receives property. Florida law should respect and reinforce that role.

A helpful analogy is the treatment of minor or incapacitated beneficiaries. In those cases, courts communicate through a legal representative or guardian, not directly with the minor. Similarly, where a trust is the devisee, the trustee should be the party served and permitted to object—not the trust's beneficiary.

This structure promotes orderly administration and prevents personal representatives from being drawn into internal trust disputes they are not equipped or authorized to resolve.

## RECOMMENDED REFORM

A targeted statutory or rule amendment would clarify the appropriate party to participate in estate proceedings where a devise is made to a trust. One possible approach:

> "Where a devise is made to a trust or trustee, the trustee shall be deemed the interested person with respect to that devise."

This language provides a bright-line rule consistent with the statutory definition of beneficiary and avoids burdening the estate proceeding with derivative interests more properly addressed in trust litigation.

## CONCLUSION

Expanding standing to trust beneficiaries in probate proceedings undermines settlor intent, complicates administration, and imposes burdens on personal representatives that the current legal framework—statutory and procedural—does not support. Florida law should be clarified to confirm that, when a devise is made to a testamentary trust, only the trustee is entitled to participate as an "interested person" in the estate proceeding.

This reform would restore clarity, improve efficiency, preserve fiduciary integrity, and protect the structure the settlor intended.

Prepared by ChatGPT for Discussion – July 2025