Elder Law Update

2023 Florida Legislative Session
Recent Federal Legislation

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Plus some cases thanks to Amy Fanzlaw and Collett Small

Estate Planning

1. CS/SB 978/CS/HB 901- Secured Transactions

Chapter 222 contains several exemptions that protect certain assets from legal process in executing on a judgment absent a waiver, including homestead property, certain items of personal property, life insurance proceeds, the cash surrender value of life insurance and annuity contracts, disability insurance payments, and certain pension and retirement benefits, among others. These exemptions have historically been construed liberally in favor of the consumer against creditors' claims to exempt property.

When a consumer enters a security agreement offers assets as collateral, the contract generally describes which assets are offered as security. Historically, in Florida, a blanket offering of "all assets" as security has not been interpreted to include assets subject to the chapter 222 exemptions. Instead, an individual generally must take additional steps to offer certain exempt assets as collateral, such as a knowing, voluntary, and intelligent contractual waiver of homestead rights, or waiving the wages exemption in a separate document with mandatory language in 14-point font.

In 2019, a federal court decided that a debtor who obtained a line of credit and pledged as collateral "all assets and rights" also pledged his IRA accounts, despite the statutory exemption in chapter 222. See Kearney Constr. Co., LLC v. Travelers Cas. & Surety Co., 795 Fed. Appx. 671 (Fla. 11th Cir. Nov. 13, 2019). Although the debtor's IRA was not specifically listed in the agreement, the federal court concluded, without citing chapter 222, that the broad language of the contract encompassed all retirement accounts, including his IRA. Because federal law treats the use of any funds inside a tax-advantaged retirement account as a taxable distribution from that account, the federal court's determination that the debtor had pledged his IRA resulted in the risk that the IRA would lose its tax-advantaged status and subject the debtor to back taxes and penalties.

To address this, the bill provides that a general description only by type of collateral is an insufficient description to pledge as collateral, for the purposes of a security agreement, accounts and other entitlements as set forth in chapter 222, including funds held in an IRA and other tax-exempt accounts; life insurance policy proceeds or cash surrender value; annuity contract proceeds; funds held in qualified tuition programs, medical savings accounts, Coverdell education accounts, and hurricane savings accounts; disability income benefits; a deceased person's wages, travel expenses, and reemployment assistance or unemployment compensation payment; Social Security benefits; unemployment compensation; public assistance benefits; veterans benefits; alimony, support, or separate

maintenance; and stock or pension plans under specified circumstances. In order to include one of these assets in a security agreement, the asset must be specifically described and referenced as provided in § 679.1081. Effective upon becoming a law. Pending action by governor.

2. Ch. 2022-167, Laws of Fla. (SB 968)

Florida law, not the federal bankruptcy code, provides exemptions available to a Florida resident who files for bankruptcy. IRAs are among the exemptions available to Florida debtors, and this exemption is governed by § 222.21(2). In 2018, the Eighth Circuit bankruptcy appellate panel in In re Lerbakken, 590 B.R. 895 (BAP 8th Cir. 2018) stated that in order for a debtor to claim funds of an IRA as exempt pursuant to the federal bankruptcy code, the amount must be "retirement funds" and the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code. The appellate panel held that funds in 401(k) and IRA accounts awarded to a debtor as part of a property settlement agreement in a divorce proceeding were not the debtor's own "retirement funds."

In the 2022 legislative session, SB 968 was introduced as an initiative of the RPPTL Section to amend § 222.21(2)(c) to clarify that the interest of an ex-spouse in an IRA that is received in a transfer incident to divorce is exempt from the claims of the creditors of a transferee spouse. Any interest in any IRA or individual retirement annuity received in a transfer incident to divorce continues to be exempt from creditor claims after the transfer, regardless of the date the transfer was made. Effective upon becoming a law; signed by governor on June 6, 2022.

3. 2023 Tax Exemption Amounts

The gift tax annual exclusion is the amount an individual may gratuitously transfer to any number of individuals and certain types of trusts gift tax-free and without using any gift and estate tax exemption. The annual exclusion amount for 2023 is $17,000 ($34,000 per married couple). That means an individual may give up to $17,000 (or a married couple could gift a total of $34,000) in annual exclusion gifts to any child, grandchild, or any other person. The gift tax annual exclusion amount is per person, per year.

If a 2023 gift exceeds the $17,000 limit, that does not automatically trigger the gift tax. The gift and estate tax exemption is the amount that can be transferred during an individual's life or upon the individual's death without incurring gift or estate tax. For 2023, the gift and estate tax exemption is $12.92 million. Lifetime gifts that do not qualify for the gift tax annual exclusion will reduce the amount of gift and estate tax exemption available at death. This lifetime exclusion amount applies to gift tax, estate tax, and generation-skipping transfer tax. Importantly, unless further legislation is enacted, the

current gift and estate tax exclusion amount will be reduced by approximately one-half at the end of 2025 due to a sunset provision in federal law.

4. SECURE 2.0 Act

The SECURE 2.0 Act was signed into law in late 2022. Under the law before SECURE 2.0, individuals were required to take required minimum distributions (RMDs) from their retirement plan beginning at age 72. SECURE 2.0 increased the RMD age to 73 as of January 1, 2023. However, individuals who turned 72 in 2022 were required to take their first RMD by April 1, 2023. The bump in age to 73 was one of several new RMD rules. In 10 years, the RMD age will move to 75.

Other changes include eliminating RMDs for qualified employer Roth plan accounts. Previously, there was a difference in the rules that applied to Roth 401(k) accounts in employer plans versus Roth IRAs, which were not subject to RMDs.

SECURE 2.0 also allows employers to offer small financial incentives such as low-dollar gift cards) to help boost employee participation in workplace retirement plans.

Beginning in 2024, individuals may take early "emergency" distributions from retirement accounts to cover unforeseeable or immediate financial needs. The emergency distribution of up to $1,000 may be taken only once during the year but it will not be subject to the usual additional 10% tax that applies to early distributions. Individuals who choose not to repay the distribution within a certain time will be disqualified from taking other emergency distributions for three years. Penalty-free withdrawals on small amounts of money from retirement plans in cases involving domestic abuse are also now allowed.

Beginning in 2025, SECURE 2.0 expands automatic enrollment in retirement plans in order to increase participation. With some exceptions for small businesses, SECURE 2.0 requires 401(k) and 403(b) plans to automatically enroll eligible participants, who will then be able to opt out of participation if desired.

Currently, individuals 50 years or older may make catch-up contributions to their retirement plans up to certain limits. SECURE 2.0 increases those limits beginning in 2025 to the greater of $10,000 or 50% more than the regular catch-up amount for individuals 60, 61, 62, or 63 years of age. Also beginning in 2024, SECURE 2.0 will adjust for inflation the income cap for high wage earners who wish to make catch-up contributions.

Beginning in 2024, employers may make matching contributions to retirement plan accounts based upon a worker's student loan payment amount.

Also beginning in 2024, SECURE 2.0 changes 529 plan rules. In limited circumstances, some people may be able to rollover a 529 plan they have maintained for at least 15 years to a Roth IRA. Annual limits for the rollover would have to be within the annual contribution limit, and there will be a $35,000 lifetime limit on what can be rolled to the Roth IRA.

SECURE 2.0 also enable the creation of a searchable database to help people find "lost" retirement benefits. The retirement savings "lost and found" will be housed at the Department of Labor and be created within the next two years.

5. Thayer v. Hawthorn, No. 4D22-244, 2023 WL 2903993, ____ So. 3d ___ (Fla. 4th DCA Apr. 12, 2023).

A couple was married in 1978. They did not have any children together, but the wife had five adult children from a previous relationship. The wife originally owned the couple's homestead property in her sole name, but in 1987, she quit-claimed the property to herself and her husband as joint tenants with rights of survivorship.

In 2002, as part of their estate planning, both spouses, as grantors, executed a deed conveying a 50% interest as tenant in common to the wife's revocable trust and a 50% interest as tenant in common to the husband's revocable trust. The deed did not transfer the hereditaments, did not contain release language, and did not contain the spousal waiver language of § 732.7025, but it did provide that the trustees of each revocable trust had the "full power and authority to protect, conserve, sell, lease, encumber, or otherwise manage and dispose of the real property" (i.e., the statutory language required for transfers to trust under § 689.073).

Each trust provided that the trust assets were to be held for the surviving spouse's benefit. After the surviving spouse's death, the wife's trust was to be distributed to her five adult children, and the husband's trust was to be distributed 70% to the husband's brother and 30% to the wife's five adult children.

The husband disappeared in 2014 and was presumed dead in 2017. He was not survived by lineal descendants. The wife died in 2018 survived by her five adult children.

The issue was whether the wife, by signing the deed in 2002, waived her homestead rights in the 50% interest that was transferred to the husband's revocable trust. The appellate court noted that the burden is on the party asserting waiver to sustain their position since "language waiving a constitutional right must be able to be clearly understood as waiving the right."

The appellate court distinguished Stone v. Stone, 157 So. 3d 295 (Fla. 4th DCA 2014), because unless the deed in Stone, the deed in this case did not release the spousal rights in the property nor did it convey the property "together with all . . . hereditaments." Further, the appellate court held that the § 689.073 language was not the equivalent of a waiver of "all rights" under § 732.702(1) that would give rise to a homestead waiver. Reading this case together with Stone, it appears that absent deed waiver language of § 732.7025, specific language of release, waiver, or transfer of hereditaments is required for a deed to

constitute a waiver of homestead rights. (The fair disclosure requirement of § 732.702(2) was not discussed.)

6. <u>S&A Prop. Inv. Servs. LLC v. Garcia</u>, No. 3D22-835, ___ So. 3d ____, 3D22-835 (Fla. 3d DCA Mar. 15, 2023).

A married couple purchased non-homestead residential property as tenants by the entireties. Several years later, they transferred the property to an LLC in which the wife owned 51% and the husband owned 49% in order to insulate themselves from personal liability from owning the property personally. The transfer of the property was not intended to benefit anyone other than themselves, and the property was not encumbered at the time.

Prior to the transfer, there had been a 10% per annum increase cap on the property, but following the transfer, the property appraiser reassessed the property at its then full "just value," thus ignoring the prior 10% annual cap on increases in value. This resulted in a 160%+ increase in the property taxes. The LLC challenged this decision, arguing that the funding of the LLC was a mere transfer "between legal and equitable title," not a change of ownership, which is a prerequisite to the right to reassess property under § 193.1554(5). The trial court ruled in favor of the property appraiser, holding that nothing in the deed or the LLC's operating agreement indicated that the couple retained equitable title to the property.

On appeal, the appellate court held that the deed from the couple as tenants by the entireties to the LLC was a change of ownership because the LLC is a legal entity separate and distinct from the individual owners. As for the couple's argument that the deed was merely a change from "legal and equitable title," i.e., that legal title was owned by the LLC but the couple retained beneficial title, the appellate court stated that the couple's argument "misapprehends the effect of a quitclaim deed, Florida LLC law, and equitable ownership." (Query whether the appellate court would have ruled differently had the ownership of the LLC interest been identical to the ownership of the property prior to conveyance.)

Estate planners beware… Clients should be made aware of the costs of transferring non-homestead property, particularly where the built-up ad valorem assessment limitation may be significant.

7. Rev Rul. 2023-2

The grantor established an irrevocable trust and funded it with assets in a transfer that was a completed gift for gift tax purposes. The grantor retained a power over the trust that caused the grantor to be treated as the owner of the trust for income tax purposes. The grantor did not hold any power over the trust that would result in the inclusion of the trust

assets in his gross estate. Several years later, the grantor died, and at the time of his death, the fair market value of the trust assets had appreciated, the liabilities of the trust did not exceed the basis of the trust assets, and neither the trust nor the grantor held a note on which the other was the obligor.

The Revenue Ruling states that because transfers to an irrevocable trust are completed gifts at the time of the transfer, when the grantor does not hold a beneficial interest in or a retained power over the trust property, then the beneficiary is not "inheriting" these assets from the grantor on the grantor's death. Rather the beneficiary is receiving the assets from the trust, which does not constitute assets being "bequeathed" or "devised" by the grantor on the grantor's death. Therefore, the assets held under the trust do not receive a basis adjustment, and the beneficiary carries over the decedent's basis in the trust assets.

Note, some commentators believe that despite Revenue Ruling 2023-2, there is a solid argument that there is a basis adjustment to the fair market value of the assets of a grantor trust on the death of the grantor. The IRS would (obviously) disagree.

8. <u>Feldman v. Schocket</u>, No. 3D21-1509, ___ So. 3d ___ (Fla. 3d DCA Sept. 21, 2022).

During their marriage, husband and wife resided in their homestead property, which was owned by the wife in her sole name. The wife mortgaged the property to obtain a loan to fund her law firm, and the husband signed two mortgages, both of which contained waivers that he was joining in the execution of the mortgage "for the sole purpose of waiving his or her homestead rights under Article X, Section 4 of the Florida Constitution, and shall not be bound by the terms, conditions, or warranties contained in this instrument." Both mortgages were notarized, witnessed by two subscribing witnesses, and recorded.

A year later, the wife died, and her will directed that her personal representative sell her homestead, with the sales proceeds becoming part of her residual estate. Until the property was sold, the husband was given the right to reside in the property.

The husband continued to live in the property, and one month after his wife's death, the personal representative asked the husband to sign a spousal waiver so that the estate could pay the bills to maintain the house and the personal representative could be appointed. The terms of the spousal waiver specifically provided that the husband waived "any and all right title and interest" in the property and that any interest he may have in the property would be "exempt and/or excluded" from the wife's estate pursuant to § 732.401 and § 732.4015." The husband signed the waiver in the presence of two subscribing witnesses, but it was not notarized or recorded.

A few weeks later, the personal representative was appointed. The husband continued to reside in the property, and the estate maintained and paid all expenses relative to the property. Nine months later, Hurricane Irma rendered the property uninhabitable. The

personal representative notified the husband that he had found a potential buyer for the property, and the husband then filed a petition for determination of homestead status. The trial court ruled that the two mortgage waivers and the post-death spousal waiver were ineffective to override the constitutional homestead protection afforded to the husband, which rendered the wife's attempt to direct the sale of the property after her death ineffective.

The appellate court noted that in order to find that a surviving spouse has waived homestead protection, the evidence must demonstrate the surviving spouse's intent to waive the constitutional and statutory claim to homestead property. The two mortgage waivers failed to do that. The husband was also not provided with fair disclosure of the wife's estate at the time of signing the mortgage waivers, so the mortgage waivers violated the statutory requirements for a spousal waiver after marriage, per § 732.702. The appellate court held that post-death waiver also failed because there was no fair disclosure, § 732.702 fails to contemplate post-death waivers, and the constitutional homestead protections immediately vested in the husband upon his wife's death. The appellate court declined to consider the post-death waiver a disclaimer of the husband's interest in the homestead property because without notarization, it was not statutorily compliant.

9. <u>Isaacs v. Federal Nat'l Mortgage Ass'n</u>, No. 3D20-0604, ___ So. 3d ___ (Fla. 3d DCA Dec. 14, 2022).

Spouses were married in 1966. In 1974, they purchased a marital home, taking title as tenants by the entireties. Both resided there until the 1980s, when the husband separated from the wife. Even after separation, the husband often visited the marital home because the couple's two sons continued to reside there with the wife, and he continued to financially support the wife and take care of the maintenance on the marital home. In 1999, the husband bought a separate residence, taking title in his sole name, and it became his primary residence. The husband also executed a quit-claim deed transferring his interest in the marital home to the wife.

In 2005, the wife took a mortgage on the marital home. The mortgage contains a signature purporting to be the husband's signature, but the husband denies it is his signature. The wife continued to live in the marital home until her death in 2016. The probate court determined that the property was the wife's homestead and descended to the husband as surviving spouse. The mortgage went into default, and a foreclosure action was filed against the husband and the wife's estate. The husband raised the affirmative defense of forgery of his signature on the mortgage, and the lender countered, arguing that joinder was not constitutionally required because he had abandoned the homestead prior to the mortgage. The trial court agreed with the lender, and the husband appealed.

The appellate court recognized that under a prior constitutional scheme, a married owner could avoid the restraint on alienation of homestead if the spouse's abandonment of the homestead caused the owner to cease to be the "head of the family" and the property thus lost its homestead character. But this changed in 1985, when the constitutional definition of homestead in section (4)(a) was revised to include the property owned by a natural person constituting the residence of the owner or the owner's family. Since then, the restrictions against alienation and devise of homestead found in section (4)(c) apply to any "natural person" owning property that otherwise qualifies as homestead and, conversely, protect any spouse married to a natural person owning a homestead. In light of the definitional change of homestead, not only does a nonowner spouse's abandonment of homestead property fail to operate as a waiver of restrictions against devise, a nonowner spouse's abandonment does not constitute a waiver of the spousal joinder requirements with regard to the restraint on alienation. The husband's joinder on the mortgage was required.

10. Weisblat v. Feldman, No. 4D22-525, ____ So. 3d ____ (Fla. 4th DCA Apr. 5, 2023).

A and B took title pursuant to a warranty deed as joint tenants with rights of survivorship. Ten years later, A signed a quitclaim deed to himself, stating that the purpose of the quitclaim deed was to terminate the joint tenancy and create a tenancy in common. A few years later A died, and a few years after that, B conveyed her interest in the property to her daughter. A's estate claimed a one-half interest in the property arising from the quitclaim deed to himself, which prompted B's daughter to file a quiet title action for an order determining her to be the sole owner because B never signed the quitclaim deed.

The appellate court held that joint tenancy with right of survivorship could be, and was, terminated and a tenancy in common created by a unilateral conveyance by A, one of the joint tenants, of his interest to himself. No joinder or other action by B was required.

11. Parisi v. Quadri de Kingston, No. 3D22-793, ____ So. 3d ____ (Fla. 3d DCA Mar. 15, 2023).

Decedent and her long-time boyfriend were living in Argentina when the decedent became ill. Decedent owned a condominium in Miami, which was rented and professionally managed. Decedent wanted to sell the condominium, so the property manager contacted a law firm in Argentina to help him prepare a power of attorney that would allow him, as Decedent's agent, to sell it. A paralegal at the law firm gave the property manager language for a special power of attorney limited to the power to sell the condominium. The property manager gave the information to Decedent's boyfriend and an Argentine notary. Shortly thereafter, Decedent executed a special power of attorney, which was notarized by the Argentine notary and apostilled. The special power of attorney did not reflect witness

signatures, but allegedly, the notary's wife and Decedent's boyfriend witnessed the execution.

The executed special power of attorney was delivered to the property manager, who returned to the US with it. When Decedent did not get an offer on the property as high as she hoped, she continued to rent the property. At some point, the property manager had two individuals, both of whom were in the US when the special power of attorney was executed in Argentina, to sign the special power of attorney as "subscribing witnesses."

Decedent's health deteriorated. Using the special power of attorney, the property manager executed a quitclaim deed prepared by a law firm transferring the condominium to an entity wholly owned by Decedent's boyfriend. Decedent died intestate three days later in Argentina, the laws of which would entitle Decedent's mother to inherit her estate. One month later, the deed and the special power of attorney were then recorded, and the property manager continued to manage the property after transfer. The estate sought to quiet title to the property, seeking a determination that the special power of attorney was invalid and that the conveyance of the condominium was thus void.

The trial court ruled in favor of the estate, finding that § 709.2015 requires extraterritorial powers of attorney to have signatures of two subscribing witnesses to be valid. Decedent's boyfriend and the property manager appealed, and the appellate court affirmed. Section 709.2016(3) recognizes as valid powers of attorney that are executed in another state so long as when the power of attorney was executed, it complied with the laws of the state of execution. However, "state" is defined as a territory or other state of the United States---it does not include foreign sovereign countries. Further, chapter 709 requires strict compliance with execution requirements, not just substantial compliance.

Probate

1. Revisions to independent actions § 733.705

2. **HB 619/SB 278 - Florida Estate Tax**

   An initiative by RPPTL, HB619/SB278 would amend §§ 198.26 and 198.32 to provide that proof that an estate has paid the state estate tax or is exempt from the tax is not required for estates of decedents who die after December 31, 2004 so long as federal law pertaining to estate tax does not allow for a state death tax credit or a state generation-skipping transfer tax credit. Effective date July 1, 2023. Pending action by governor.

3. Fla. Prob. R. 5.040

Rule 5.040 describes the procedure, effect, and manner of service of formal notice. Generally, formal notice must be served by a method requiring proof of delivery, such as commercial delivery service with a signed receipt or any method used for service of process. However, when only in rem or quasi in rem relief is sought against a person and mail or commercial delivery service requiring a signed receipt is unavailable or delivery has been attempted and refused or unclaimed, then formal notice may be provided by first-class mail. In such a case, no signed receipt would be required

To address a potential inconsistency that might require proof of delivery when formal notice is made through U.S. mail even though no signed receipt would be required, Rule 5.040(a)(6) was amended to clarify that proof of delivery is not required when service is provided by U.S. mail, consistent with the rule.

The term "shall" was also replaced throughout with "must" or "will."

4. Fla. Prob. R. 5.330

Rule 5.330 lists those pleadings and papers that must be signed personally by the personal representative. One of those pleadings has been listed in subsection (g) as "petition for distribution and discharge." Rule 5.400 (Distribution and Discharge) allows for the personal representative to proceed with distribution unless objections to the plan are received. To eliminate the contradiction between the two rules, Rule 5.330(g) was amended to remove reference to "distribution."

5. Fla. Prob. R. 5.930

At the request of RPPTL, the Florida Probate Rules Committee developed a new rule, which contains a form affidavit for use by custodians of electronic wills for the admission of electronic wills.

Subsection (1) of this rule requires that the affiant check whether the affiant is a person or a representative authorized to sign on behalf of an entity.

Subsection (2) requires that the affiant has been informed of the death of the testator. It also requires that the affiant was the qualified custodian of the electronic will and requires the date of the electronic will.

Subsection (3) requires that the affiant include in which county the qualified custodian deposited the electronic will with the clerk of court and on which date.

Subsection (4) requires that the affiant indicate that the electronic record that contains the electronic will was in the custody of the qualified custodian at all times from a specific date until it was deposited with the clerk of court.

Subsection (5) requires that the affiant indicate, to the best of affiant's knowledge, that the electronic record that contains the electronic will was in the custody of the qualified custodian at all times prior to being offered to the court, in compliance with § 732.524, and was not altered in any way since the date it was created.

Subsection (6) requires that the qualified custodian indicate that it has either posted and maintained a blanket surety bond or has maintained a liability insurance policy or both.

The proposed form also includes the required provisions for online or in-person notarization.

6. <u>Lanford v. Phemister</u>, 338 So. 3d 1049 (Fla. 5th DCA 2022).

The decedent died testate, leaving her entire estate, including her primary residence, to a testamentary trust for the benefit of her sister during her lifetime, remainder to a charitable foundation trust. In separate final orders, the trial court ruled that the residence was the decedent's protected homestead and that the constitutional homestead protections inured to the trustee of the testamentary trust. Neither order was appealed.

The trial court then authorized the trustee to sell the homestead property. The trustee did. Two years later, when the sister died, the personal representative and trustee petitioned for fees and costs to be paid from the sales proceeds of the homestead. Without differentiating between fees and costs related to the estate versus those related to the trust, the trial court granted the petition, and an appeal was taken.

On appeal, the parties conceded that the decedent's sister was a protected heir for protected homestead purposes, but the personal representative insisted that the charitable trust was not a protected heir for constitutional homestead purposes. The appellate court stated that this argument missed the point because neither party appealed the final orders determining that the property was constitutionally protected homestead and that constitutional protection inured to it and the trust as beneficiary. Being bound by those prior orders, payment of the estate's fees and costs could not be paid from the sales proceeds of the homestead. However, fees and costs related to the testamentary trust administration were properly paid from the sales proceeds because trustees are statutorily authorized to pay trust expenses, its compensation, and its attorneys compensation from trust assets.

7. <u>Ballard v. Prichard</u>, 332 So. 3d 570 (Fla. 2d DCA 2021).

In 2002, a mother died testate survived by her husband and two adult sons, Son A and Son B. She owned her homestead in fee simple. She devised a life estate in the homestead to her husband with the remainder to Son A. Apparently, the mother's will was not probated at that time.

In 2017, Son B died, leaving one intestate heir, his daughter. In 2019, the husband died, having lived in the homestead until his death.

In 2020, Son A filed a petition for summary administration, offering his mother's will for probate and claiming entitlement to 100% of the homestead property. The daughter of Son B filed a petition to determine homestead, claiming a 50% interest in the homestead. Son A argued he was entitled to the homestead because he was named as the remainder beneficiary of the property under the terms of his mother's will, which he asserted was a valid devise of homestead because it was a life estate interest, the same interest that would descend to the husband in the absence of a valid devise. He also argued that the husband waived any objections to the devise of homestead by failing to raise any issue during his lifetime. The daughter of Son B argued that the devise of homestead was invalid and that the property descended as a life estate to the husband, remainder equally to both the sons, immediately upon the mother's death.

The trial court ruled that the homestead property was properly devised as a life estate to the husband with the remainder to Son A. The appellate court reversed, holding that equitable principles such as waiver or estoppel cannot nullify a constitutional homestead interest. Because the testamentary devise of the life estate to the husband was invalid, the homestead descended as to a life estate with the remainder interest to both sons equally, which vested on the moment of the mother's death.

8. <u>Rasor v. Estate of Rasor</u>, 337 So. 3d 346 (Fla. 4th DCA 2022).

A surviving spouse petitioned to admit a lost will to probate and sought the appointment of the decedent's son as personal representative. Simultaneously, the surviving spouse filed an Election to Take Elective Share and filed and served her Notice of Election to Take Elective Share.

Several months later, the will was admitted to probate, and the decedent's son was appointed personal representative. Shortly thereafter, he filed and served the Notice of Administration and a Notice of Elective Share. Within 20 days of service, he objected to the election, alleging that the surviving spouse was unduly influenced in making the election, and the other beneficiaries of the estate joined in the objection.

Meanwhile, the surviving spouse died, and her son was appointed representative of her estate. The surviving spouse's personal representative responded to the objection and argued it was untimely made because it was made more than 20 days after the surviving spouse had served the Notice of Elective Share. The trial court agreed and allowed the elective share.

The appellate court reversed, finding that the objection was timely. The 20 day deadline for filing an objection to elective share begins running when the notice of elective share is served. Although the surviving spouse had served the Notice of Elective Share months

earlier, shortly after her husband had died, Florida Probate Rule 5.630 requires the personal representative to serve the notice. Because the personal representative's duties do not begin until appointment, he was not required to object to the notice that the surviving spouse served on him.

9. Ordway v. Karibu Props., Inc., 339 So. 3d 424 (Fla. 3d DCA 2022).

Mom formed a corporation (Karibu I). Stock certificate #1 of Karibu I was issued to Mom for 100 shares, making her the sole shareholder. Later, Mom expressed an intention to gift her stock in Karibu I to her son. The son formed a second corporation (Karibu II) for the purpose of holding the gift of stock in Karibu I. Mom gave stock certificate #1 to her attorney and told her attorney to prepare stock certificate #2 for 100 shares to be issued to Karibu II. The attorney sent stock certificate #2 to Mom for her signature, noted in the stock ledger that he had done so, and put stock certificate #1 in Karibu's records book. Mom sent stock certificate #2 to the son.

Years pass, and Mom and the son tell the attorney that stock certificate #2 was lost. The attorney then prepared stock certificate #3 as a replacement and sent it to mom for signature. Mom signed it, but never gave it to her son. Her son then died, and Mom returned stock certificate #3 to her attorney and instructed her attorney to void it. Mom died thereafter.

The trial court determined that Mom (and her estate) owned all stock in Karibu I upon her death, relying upon a determination that the parties failed to comply with the corporate formalities of transferring stock, i.e., the failure to void stock certificate #1, the failure to execute a stock power, and the failure to file a federal gift tax return to document the gift. The appellate court reversed, holding that Mom had the requisite donative intent when stock certificate #2 was signed and delivered to the son. Even though stock certificate #2 was thought to be lost, the gift occurred at the time the initial delivery was completed and could not be rescinded by the unilateral actions of the mother thereafter.

10. Hannan v. Doyle, 337 So. 3d 1258 (Fla. 3d DCA 2022).

A beneficiary filed a complaint against the personal representative of his grandmother's estate. The grandmother's estate had been fully administered and closed at the time the beneficiary filed the complaint. The complaint alleged that that the personal representative had breached an oral agreement with him and her fiduciary duties by failing to pay him $16,000 to satisfy his interest in the probate estate.

The trial court dismissed the complaint with prejudice, finding that the beneficiary's complaint was barred by the probate code and res judicata. The appellate court affirmed.

Absent allegations of fraud, bad faith, or procedural irregularities, an action cannot be brought against a personal representative once the order of discharge has been entered.

11. Jones v. McKinney, 341 So. 3d 360 (Fla. 2d DCA 2022).

Loretta exploited and committed civil theft against Adelaide. Loretta then died. Adelaide (through her guardian and ultimately through her estate) filed a statement of claim against Loretta's estate. Loretta's personal representative objected, and Adelaide filed an independent action against the estate, securing a judgment for over $2 million. Adelaide recorded the judgment and obtained a statutory judgment lien on all of the estate's real property.

When Loretta's personal representative tried to sell the estate's real property, Adelaide asserted that her lien had priority and must be satisfied. The personal representative responded that the claim was a Class 8 general claim and had no priority over any other claims against the estate. The trial court disagreed, allowing Adelaide to execute on her lien, thereby giving her claim priority over all other claims against the estate. The trial court reasoned that the probate code allows enforcement of liens encumbering specific property.

The appellate court reversed, holding that recording a judgment creates a general lien on any real property of the debtor in the county where it is recorded, not a lien on specific property. Therefore, the exception in the probate code does not apply.

12. Tita v. Tita, 334 So. 3d 646 (Fla. 4th DCA 2022).

The decedent specifically devised his interest in an LLC to two of his children, and he devised the residue of his estate to his wife. The operating agreement of the LLC provided that the LLC had the right to purchase the interest of a deceased member from the deceased member's estate. The LLC exercised this right, thus converting the decedent's interest in the LLC to cash.

The wife argued that as a result of the LLC's buy-out, the specific devise of the LLC interest to the decedent's children failed and the sales proceeds thus became a part of the residue of the estate, which was to be distributed to her. The trial court disagreed, and the appellate court affirmed. A provision of an operating agreement of an LLC allowing the buy-out of a deceased member's interest does not nullify a specific devise of the LLC interest. The proceeds of the buy-out were properly distributable to the decedent's children, pursuant to the terms of the specific devise. The appellate court distinguished the facts of this case from one where the operating agreement restricts who may be devised membership interests.

13. Merli v. Merli, 332 So. 3d 1020 (Fla. 4th DCA 2022).

The decedent died intestate during the pendency of a dissolution of his marriage. Before his death, the decedent and his wife had entered into a partial marital settlement agreement, which divided certain assets and liabilities but specifically excluded alimony and a portion of the decedent's pension benefits. The partial marital settlement agreement also 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, final judgment of dissolution of marriage had not been entered at the time of the decedent's death.

The decedent's brother petitioned to serve as personal representative of the decedent's estate, contending that he had standing as the decedent's 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 his wife.

The decedent's wife counter-petitioned to serve as personal representative, alleging that she had preference as the decedent's surviving spouse and sole beneficiary. The wife moved for summary judgment, arguing that her marriage had not been dissolved and that the dissolution proceedings had been dismissed following the decedent's death.

The trial court agreed with the decedent's wife and appointed her personal representative of the estate. In so determining, the trial court found that the partial marital settlement agreement did not contain a waiver of spousal rights. The brother appealed, and the appellate court affirmed. Without a waiver of spousal rights, the wife was entitled to serve as personal representative.

14. **Rich v. Narog, No. 3D21-1631, 47 Fla. L. Weekly D1933, 2022 WL 4360601, ____ So. 3d ____ (Fla. 3d DCA Sept. 21, 2022).**

Shortly after the decedent's death, the personal representative opened a formal probate administration. More than two years after the decedent's death, the personal representative filed a verified Statement Regarding Creditors, attesting that the estate had no creditors who had or may have had claims against the estate. Fast forward six and one-half years and the personal representative filed a petition for discharge and a verified final accounting of all receipts and disbursements that had transpired in the estate within the nine years (nine years!) since the decedent's death. The accounting listed fifteen disbursements totalling $2.41 million to various creditors, including purportedly himself for a "boat loan" he made to the estate six years after the decedent's death.

The beneficiaries filed objections to the accounting, claiming among other things that the fifteen disbursements to various creditors were time-barred because none of the creditors had filed a statement of claim against the estate within the two-year statute of nonclaim. The beneficiaries claimed that payment of these disbursements was a breach of fiduciary

duty and they sought to surcharge the personal representative. The beneficiaries also argued that the personal representative failed to comply with the notice requirements of Rule 5.490(e) with regard to his claim.

The personal representative responded that the "boat loan" to himself came from the proceeds from the sale of a boat that was owned by the decedent's corporation, not the decedent, and was not made to "satisfy a claim against the decedent" within the meaning of § 733.710. The decedent's corporation, not the decedent, owed the debt. The personal representative maintained that the fourteen payments to other creditors were also not made to satisfy "a claim against the decedent" under § 733.710 because they were "in rem claims against corporate interests organized and operated outside the State of Florida." The personal representative maintained that those debts were owed to companies in which the decedent had an interest, which would have been reduced had the personal representative not paid the debts from the assets of the decedent's estate.

The trial court entered partial final summary judgment in favor of the beneficiaries, finding that all fifteen debts were personal to the decedent and that the personal representative wrongfully paid the debts from the estate's assets because the creditors did not timely file claims as required by statute. The trial court also found that the personal representative violated Rule 5.490(e) with regard to his claim against the estate. Based on these findings, the trial court surcharged the personal representative approximately $2.54 million for the debts that were paid.

On appeal, the appellate court considered whether, under Florida's new summary judgment standard, an affidavit by the personal representative was legally sufficient to create a genuine issue of material fact as to whether the boat loan was a liability or the decedent or the decedent's wholly owned corporation and whether estate assets were used to repay the boat loan. The court noted that under the former summary judgment standard, the affidavit would have been sufficient to create a genuine issue of fact, thus precluding entry of summary judgment, but Florida's new standard placed a higher burden on the personal representative. Under this new standard (which is the federal summary judgment standard), where (as here) the nonmoving party bears the burden of proof on a dispositive issue at trial, the moving party need only demonstrate that there is an absence of evidence to support the nonmoving party's case. Once the moving party satisfies this burden, the burden shifts to the nonmoving party, upon whom it is incumbent to come forward with evidence demonstrating that a genuine issue of fact exists as to an element necessary for the nonmoving party to prevail at trial. If the evidence presented by the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted.

Here, the personal representative's final accounting evidences that the personal representative repaid the boat loan from estate assets and, accepting his affidavit as true, the personal representative concedes that he intentionally commingled estate assets with non-estate assets by depositing the boat sales proceeds into the estate bank account.

Because the personal representative did not file a creditor's claim or comply with Rule 5.490(e), a presumption arose that surcharging the personal representative for the boat loan payment is proper, with the personal representative bearing the burden of proof at trial to establish that no surcharge is warranted. The personal representative had the burden to overcome the presumption by establishing, with evidence of sufficient weight and quality, that a reasonable fact-finder could conclude both that the loan was not a liability of the decedent and estate assets were not used to repay the loan. The personal representative's self-serving affidavit containing "bald assertions" was not enough, and the affidavit lacked specificity regarding critical details. Therefore, the affidavit was insufficient to create a triable issue of fact. Because the record was devoid of critical, significantly probative details to allow a reasonable fact-finder to conclude that the boat loan was an obligation of the decedent's wholly owned corporation rather than the decedent and that no estate assets were used to repay the boat loan, summary judgment on surcharge against the personal representative was proper.

15. <u>Caveglia v. Heinen</u>, No. 4D21-3624, ____ So. 3d ____ (Fla. 4th DCA Mar. 8, 2023).

The decedent, a resident of Louisiana, executed a Will in 2014. In 2015, he handwrote and signed another will, which stated that he was revoking prior wills, but it was not witnessed. The decedent moved to Florida a few years later and died a Florida resident. Unaware that any will had been executed, the decedent's daughter and son-in-law filed a petition for administration of an intestate estate and were appointed personal representatives.

Thereafter, the 2014 and 2015 wills were found. His girlfriend filed a petition to probate a later discovered will, i.e., the 2014 will. The personal representatives countered that the 2015 will revoked the 2014 will. The girlfriend responded that the 2015 will was invalid under Florida law because it was holographic and unwitnessed. The trial court sided with the girlfriend, removed the daughter and son-in-law as personal representatives, and appointed the individual nominated as personal representative under the 2014 will.

On appeal, the daughter and son-in-law argued that the 2015 will was valid under Louisiana law, where the decedent was domiciled at the time it was executed, and thus Louisiana law should determine whether the 2015 will revoked the 2014 will. The appellate court disagreed, recognizing that strict compliance with statutory requirements is a prerequisite for the valid creation or revocation of a will. Because wills are "ambulatory," revocation is not determined until the death of the decedent. While Louisiana recognizes holographic wills, Florida does not unless the instrument is witnessed with the same formalities required for any will, i.e., the testator and two witnesses all signing in the presence of one another. Florida also states that a will is revoked by a subsequent will or writing executed with the same formalities required for the execution of wills declaring the revocation. The 2015 will could be recognized neither as a valid will nor an instrument of revocation under Florida law. Florida law on the date of a domiciliary decedent's death determines the validity of wills and instruments of revocation. Summary judgment was proper.

16. Williams v. Williams, No. 3D21-2013, ___ So. 3d ____ (Fla. 3d DCA Jan. 18, 2023).

The facts in this opinion are sparse, if not nonexistent, in this opinion, so it is difficult to discern what led to the appeal without resorting to some degree of supposition. It appears, however, that in some manner, there was an attempt to reopen an estate administration that was fully administered (with the personal representative discharged) over 60 years ago. Sixty. Not a typo.

The appellate court held that absent allegations of procedural irregularities, fraud, or bad faith, the trial court did not err in refusing to reopen an otherwise duly administered estate. By the same token, because the administration was not properly before the probate court, the probate court had no jurisdiction to make further findings as to the lawful owner of property (which is apparently what the petitioner was attempting to do by reopening the 60-year-old probate administration).

17. Taulbee v. Kozel, No. 3D21-2238, ___ So. 3d ___ (Fla. 3d DCA Jan. 18, 2023).

D.A.K. was the only biological child of the decedent and his wife. The decedent executed a will naming his wife as sole primary beneficiary and D.A.K. as sole contingent beneficiary. The decedent's wife died, and the decedent became primary caregiver for D.A.K. Thereafter, the decedent was declared legally incapacitated, a guardian was appointed for him, and Department of Children & Families filed a petition for termination of parental rights. The decedent's guardian futilely searched for relatives with whom to place D.A.K., and ultimately the decedent's parental rights over D.A.K. were terminated. The decedent did not personally participate in those proceedings.

D.A.K. was ultimately legally adopted, and D.A.K.'s name was legally changed to reflect a new middle name and the last name of his adoptive parent. After that, the decedent died. The decedent's cousins, who were nominated under a codicil to the will to serve as personal representatives, and who were also the decedent's intestate heirs if the devise to D.A.K. failed, opened the probate administration and were appointed personal representatives. D.A.K. sought a judicial determination that he was the sole beneficiary under the will. The personal representatives objected, contending that although the decedent "intended for his son to take under his will, at the time of his death, and for some time before that, he did not have a son." The personal representatives basically argued that by changing his name, the individual now known as "D.A.K." ceased to exist. The trial court found for D.A.K., and the personal representatives appealed.

The appellate court noted that under chapter 63, adoption severs the ties between the adopted child and his prior parents, but it recognizes that the rights of inheritance shall be as provided in the Florida Probate Code. Inheritance under a will differs substantially from

inheritance at law. The testator's intent as expressed in the will controls the legal effect of the will's dispositions, and the will must be read and construed in its entirety.

Ignoring the fact that the decedent lacked the mental capacity to participate in the termination of parental rights proceedings, the decedent's will expressly included D.A.K. by name (albeit his former name). It is a legal fiction to say that D.A.K. ceased to exist just because his named was changed. Courts have universally given effect to the testator's intent even when a beneficiary is identified by a name different than his or her legal name in a testamentary document. While the adoption and the name change terminated the parental/child relationship and the biological rights flowing from that relationship, that did not affect or dilute the expressed intent of the decedent. The plain language of the will reflects that the decedent intended to benefit D.A.K., even though he knew him by a different name.

18. <u>Estate of Pounds v. Miller & Jacobs, P.A.,</u> 336 So. 3d 14 (Fla. 4th DCA Jan. 5, 2022).

The decedent died intestate in a motor vehicle accident. He was not married, but he did have a minor child, who was his sole heir.

Eleven days after the accident, the decedent's mother hired a law firm (Miller & Jacobs) on contingency to investigate and prosecute a wrongful death action on behalf of the decedent's estate, which had not yet been opened. Thirteen days after the accident, the minor child's mother hired a different law firm (Cunningham) on contingency to investigate and prosecute a wrongful death action. Cunningham sent a letter requesting insurance coverage information, but the record fails to reflect Cunningham took any other action.

A few months later, Miller & Jacobs obtained the bodily injury policy limits from four separate tortfeasors—a total of $145,000. These proceeds were deposited into Miller & Jacobs' trust account.

Around the same time, Cunningham filed a petition for administration of the decedent's estate on behalf of the minor child's mother. The child's mother was appointed as personal representative, and she sent a demand letter to Miller & Jacobs claiming that the law firm had no authority to represent the estate and that the funds collected were obtained by negligent representation. She demanded that the $145,000 proceeds be transferred to Cunningham's trust account immediately, but Miller & Jacobs declined.

The minor child's mother, as personal representative, filed a petition for a court order for the relinquishment of the proceeds, alleging among other things that Miller & Jacobs should not participate in any legal fees because she never signed a contingency agreement with that firm, despite the firm's numerous emails requesting her to do so. She also alleged

that the decedent's mother entered into a contingency agreement with Miller & Jacobs without her knowledge and consent.

The decedent's mother responded to the petition and moved for fees for Miller & Jacobs, alleging that when she signed a retainer agreement with Miller & Jacobs, she intended to seek appointment as personal representative. She argued that as a prospective personal representative, she had authority to execute a retainer agreement on behalf of the estate prior to appointment, so long as the estate would solely benefit from the settlement and no proceeds would be distributed to her personally. She further alleged that it Cunningham would be unjustly enriched if she were awarded fees because settlement was obtained through Miller & Jacobs' efforts, not Cunningham's. The decedent's mother also moved to set aside the minor child's appointment as personal representative and revoke her Letters of Administration. She alleged she was better suited to serve as personal representative and that the minor child's mother had not been appointed guardian of the property of the minor.

At a non-evidentiary hearing on the petition to relinquish the settlement proceeds, the trial court entertained numerous unsworn factual representations by counsel for both sides. Each side presented very different accounts of whether the minor child's mother had acquiesced to Miller & Jacobs involvement in the case. It was conceded, however, that a guardian for the property of the minor child had not been appointed. The motion to set aside the personal representative's appointment and revoke the Letters of Administration was not heard.

The trial court entered an order denying the minor child's relinquishment of the settlement proceeds by Miller & Jacobs in part. The court found that Miller & Jacobs was acting in good faith and pursuant to a contingency contract with the decedent's mother, who intended at the time to act as personal representative, and in so doing, had obtained a benefit for the estate. Therefore, the trial court awarded Miller & Jacobs a contingency fee from the $145,000 proceeds and ruled that the decedent's mother was entitled to a personal representative's fee of 3% of the net settlement proceeds for procuring a benefit to the estate prior to the appointment of a personal representative. The minor child's mother appealed.

On appeal, the minor child's mother asserted as a threshold matter that she was properly appointed as personal representative. However, the trial court had not yet ruled on that issue and it remained pending. While notice of the petition for administration or issuance of the Letters of Administration need not generally be given when the person seeking to be appointed is entitled to preference as personal representative, formal notice must be served on all known persons qualified to act as personal representative and entitled to preference as personal representative before Letters of Administration may be issued to someone without preference. Here, the minor child, as the sole heir, was entitled to select the personal representative, but because the minor child's mother had not been appointed the guardian of the child's property, she was not entitled to exercise the right to select the personal representative on behalf of her child. Therefore, she was not the apparent or

statutorily preferred personal representative of the estate. Until a guardian of the property of the minor child were appointed, no one had preference to serve as personal representative. The appellate court recognized that resolving the issue of who was entitled to serve as personal representative could very well affect the validity of Miller & Jacobs' contingency fee agreement.

The appellate court recognized that negotiations in a wrongful death action are anticipated prior to the estate administration is opened. Integral to this is the relation-back doctrine, which states that the powers of the personal representative relate back in time to give acts that benefit the estate the same effect as if they occurred after appointment. Therefore, a personal representative may ratify acts done by people on behalf of the estate when they would have been beneficial to the estate. However, the Bar rule requiring contingency fees to be reduced to writing signed by both the client and the attorney creates a practical difficulty when an attorney is hired to prosecute a wrongful death claim before a personal representative has been appointed to have authority to sign the contract. Here, because the person who reportedly hired Miller & Jacobs had not been appointed personal representative, and the personal representative had not signed the contingency fee agreement with Miller & Jacobs. Therefore, the relation-back doctrine did not save Miller & Jacobs' fee.

The appellate court remanded to the trial court to rule on the pending motion to revoke the Letters of Administration. If the trial court were to grant the motion, remove the minor child's mother as personal representative, and appoint the decedent's mother as personal representative, then Miller & Jacobs would be entitled to enforce the contingency fee agreement based upon the relation-back doctrine. Even if the trial court were to deny the motion, then Miller & Jacobs may still be entitled to some fees, although it would be limited to the reasonable value of its services based upon quantum meruit.

The appellate court reversed the award of 3% personal representative fees to the decedent's mother because even though her actions benefited the estate, she had not been appointed as personal representative so any award of fees to her was premature.

19. <u>Estate of McKenzie v. Hi Rise Crane, Inc.</u>, 325 So. 3d 1161 (Fla. 1st DCA 2021).

Before being appointed as personal representative, the personal representative filed a claim for worker's compensation benefits against the decedent's employer. The employer moved to dismissed because the claim was filed prior to the personal representative's appointment. The personal representative countered that the relation-back doctrine should apply. The Judge of Compensation Claims rejected the relation-back doctrine, ruling it did not apply. The appellate court reversed and remanded, specifically citing to the statutory provision codifying the relation-back doctrine.

20. PLR 202317005

Section 754 of the Internal Revenue Code provides that upon filing an election, the basis of partnership property is adjusted. The election applies with respect to all distributions of property by the partnership and to all transfers of interests in the partnership during the taxable year with respect to which the election was filed and all subsequent taxable years. There's a deadline for filing this election.

In PLR 202317005, the IRS granted an LLC an extension of time to make the § 754 election. The LLC represented that it had intended to make the election but had inadvertently failed to do so and had filed returns consistent with the § 754 election having been made. The IRS noted that the granting of the extension of time for making the late § 754 election was not a determination of whether the taxpayer was otherwise eligible to make a § 754 election.

Trust Administration

1. Ch. 2022-211, Laws of Fla. (CS/CS/CS/HB 1304) – Trust Proceedings

This initiative makes confidential all proceedings under chapter 736 or chapter 738 in which a family trust company, licensed family trust company, or foreign licensed family trust company is a party upon written notice to the clerk. In a statement of legislative intent, the Legislature specifically states that public disclosure of court recordings involving these proceedings would vitiate other protections granted to these companies and their constituents. Particularly to the extent such proceedings involve large sums of money or vulnerable people who could be targeted for exploitation or abuse, public disclosure of sensitive family and financial information could result in specific harm to beneficiaries and other interested parties in these proceedings. Effective date July 1, 2022.

2. Ch. 2022-96, Laws of Fla. (CS/SB 1368) – Trusts

This law amends the Florida Trust Code to extend the Rule Against Perpetuities (actually located in § 689.225, not chapter 736) from 360 years to 1,000 years for trusts created on or after the effective date of the bill; allows family trust companies, licensed family trust companies, and foreign licensed family trust companies to elect simplified period accounting, provided that the accounting contains sufficient notice of trust assets, debts, and transactions during the accounting period; allows the irrevocable terms of trusts for which family trust companies, licensed family trust companies, and foreign licensed family trust companies serve as trustees to permit accounting to qualified beneficiaries only at the termination of a trust, the end of a trustee's service, or upon demand of a qualified beneficiary; simplifies trust notices for family trust companies, licensed family trust

companies, and foreign licensed family trust companies; expands the scope of representation of a parent to include unborn descendants of an unborn child; extends the allowable life of a noncharitable trust to 1,000 years; and extends the authority of a trust to reimburse the grantor for certain tax liabilities to apply to a trust formed under the laws of a foreign jurisdiction if the trust has a principal place of administration in the state. Effective date July 1, 2022.

3. PLR 202216006

The IRS ruled that a proposed distribution of trust assets to six new trusts and the reformation of the new trusts to correct a scrivener's error would not result in unfavorable income, GST, gift, or estate tax consequences.

First, with regard to income tax, there was no gain recognition because the changes merely manifested the settlor's original intent. Second, there was no change in the GST inclusion ratio because the original trust authorized distributions to the new trust and the new trust did not extend the time for vesting of any interests. Third, no beneficiary made a taxable gift because the reformation did not change the beneficial interest of any beneficiary. Fourth, no estate tax because reformation pursuant to court order did not constitute a transfer within the meaning of IRC §§ 2036, 2037, or 2038.

4. <u>Freeman v. Berrin</u>, No. 2D21-1885, ___ So. 3d ___ (Fla. 2d DCA Dec. 2, 2022).

In 1984, several people invested in land in Lee County and created two land trusts under chapter 689. The majority interest owner was the trustee of both. In 1997, they combined the two land trusts into a single land trust called the Fiddlesticks Trust. improper application of chapter 736 to land trust action. In 2011, the majority interest owner of the land trust died, his interest passed to his estate, and a successor trustee was appointed. In 2018, the successor trustee sued the other beneficiaries and sought to foreclose liens on their beneficial interests for failure to pay their pro rata expenses.

The beneficiaries countered, alleging that the successor trustee breached his fiduciary and contractual duties by failing to provide an accounting and access to trust records, failing to provide records verifying advancements made by the successor trustee and the majority interest owner's estate on behalf of the Fiddlesticks Trust, charging unreasonable management fees, and failing to advise the beneficiaries of a condemnation action by the county. The beneficiaries sought the removal of the successor trustee and an order requiring an accounting. They also moved for a temporary injunction to remove the successor trustee under chapter 736, alleging breach of fiduciary duty. After a hearing, the trial court obliged.

On appeal, the successor trustee argued that the trial court erred in applying chapter 736's removal provisions to a chapter 689 land trust. The appellate court ruled that with very limited exception (none of which was applicable here), § 689.071(1) provides that chapter

736, Florida Trust Code) does not apply to land trusts, and the appellate court declined the beneficiaries' request to insert chapter 736 provisions into chapter 689. Notwithstanding this, chapter 689 does not bar application of equitable remedies. Given the trial court's findings that the successor trustee's conduct constituted a serious breach of trust, the record on appeal supported the trial court's finding that the beneficiaries proved entitlement to an injunction. The appellate court affirmed the trial court's inherent authority to grant equitable relief and made the findings necessary to grant a temporary injunction, which is a common law equitable remedy not displaced by chapters 736 or 689.

Probate & Trust Litigation

1. **Voyles v. Glavin, 335 So. 3d 200 (Fla. 5th DCA 2022).**

The brother of the decedent filed an action contesting the decedent's 2014 will on the theories of undue influence and lack of testamentary capacity, alleging that a prior will should be probated instead. The named personal representative under the 2014 will (who was the drafting attorney) hired several attorneys over three years to defend the will.

Shortly before trial, the brother terminated the will contest action by withdrawing all objections to the 2014 will. Nearly one month later, the personal representative filed a motion to tax fees and costs against the brother on the basis of equity applicable to chancery actions. The motion did not mention awarding fees as a sanction, under the inequitable conduct doctrine (that is, where fees are awarded against a part because of egregious or bad faith conduct), because of bad faith in litigation, or anything similar.

Approximately one week before the hearing on the motion to tax fees and costs, the personal representative filed 180 pages of billing invoices and affidavits from the attorneys she had hired during the will contest--again, no mention of sanctions, inequitable conduct doctrine, bad faith, or anything similar. On the day of the hearing, the personal representative filed additional authorities in support of her motion to tax fees and costs, which included the first reference to the inequitable conduct doctrine. The court signed the personal representative's proposed order (verbatim) awarding over $220,000 in fees against the brother, citing the inequitable conduct doctrine as the sole basis for the fees, not any of the authorities cited in the motion for fees.

Recognizing the trial court's inherent authority to impose fees as a sanction for bad faith conduct, the appellate court reversed, holding that (a) the court lost jurisdiction over the brother after he voluntarily dismissed his will contest, and (b) due process (notice and opportunity to be heard) is required prior to imposing fees as a sanction, and providing

notice just hours before the hearing that fees were being sought as a sanction was insufficient notice.

2. **Tien v. Estate of Tien, 337 So. 3d 107 (Fla. 3d DCA 2021).**

The nominated personal representative filed a petition to admit his father's will to probate. The personal representative's brother filed a caveat and answer contesting the admission of the will to probate, alleging lack of testamentary capacity and undue influence. The brother also sought an accounting and the deposit of the estate assets into the court registry, but he did not file any independent causes of action.

The personal representative then voluntarily dismissed the petition to admit the will to probate, and the court entered a final order of dismissal. The brother unsuccessfully contested the dismissal and then appealed, arguing that the voluntary dismissal was improper in light of his caveat and answer. The appellate court recognized that while the right to take a voluntary dismissal is near absolute, a voluntary dismissal cannot prejudice a pending counterclaim. Here, the brother's filings lacked an independent cognizable cause of action, so the personal representative was entitled to abandon his petition for administration, and the trial court had no authority to deny the voluntary dismissal, which was effective upon service.

3. **Tendler v. Johnson, 332 So. 3d 521 (Fla. 4th DCA 2021).**

Tendler was the brother of the decedent. At the time of his death, the decedent was the beneficiary of a trust established by another family member, and he was given a special power of appointment over the assets remaining in the family trust. The special power of appointment allowed the decedent to appoint the assets to anyone other than himself, his estate, or the creditors of either. If the decedent failed to exercise the special power of appointment, then the family trust assets would be distributed to Tendler.

The decedent's will was admitted to probate and two personal representatives were appointed to administer his estate. The decedent's will included a provision purporting to exercise the special power of appointment by distributing the assets to the trustee of his revocable trust to satisfy over 20 monetary devises, with the remainder to be distributed as part of the decedent's general trust estate. Tendler was served with the Notice of Administration, providing him a three-month time period in which to object to the validity of the will. Tendler did not object.

The trustee of the family trust refused the personal representatives' request to transfer the family trust assets to the trustee of the decedent's revocable trust, questioning whether the exercise of the power of appointment to the decedent's revocable trust was proper. In response, the personal representatives' filed a petition for instructions and served Tendler by formal notice. Tendler timely responded that the purported exercise of the special power

of appointment was not proper because it attempted to appoint the assets to the decedent's revocable trust, where they could be used to satisfy the claims of the decedent's estate. The personal representatives responded that Tendler's claim was untimely because it was not asserted within three months following service of the Notice of Administration.

The trial court agreed with the personal representatives and found Tendler's response to be untimely. The trial court reasoned that any challenge to the validity of the will must be made within three months of service of the Notice of Administration. On appeal, the appellate court reversed, holding that Tendler's response was not a challenge to the validity of the will but rather seeking to construe a provision of the will.

4. <u>Gundlach v. Estate of Gundlach</u>, 339 So. 3d 997 (Fla. 4th DCA 2022).

Decedent executed a will naming his two sons, William and Jon, as co-personal representatives of his estate. In his will, he devised half of his assets to Jon outright and the other half to a testamentary trust for the benefit of William and William's five children, which provided that Jon, as trustee, would distribute income to William for life as needed for medical care, the balance of income paid to William's five children, and all assets remaining upon William's death outright to William's five children.

The will explained that the decedent chose to create a testamentary trust after William's first wife (and mother of his five children) died, remarried a second woman with children from another relationship, and signed a prenuptial agreement with his second wife that said William could give any assets he had to his second wife. According to the will, the decedent feared that any assets devised to William directly could be transferred to William's second wife and then diverted to her children, thus disinheriting the decedent's grandchildren.

The will further provided that if at any time William was not married due to death or divorce, then the trust would terminate and all trust assets would be distributed outright and free of trust to William, provided he entered into an irrevocable agreement with his five children agreeing to convey all inherited assets only to his biological issue.

After the decedent died, upon petition by William and Jon, the will was admitted to probate and they were appointed personal representatives. Subsequently, William filed a petition for "construction and declaration of rights," seeking a determination as to the validity of the testamentary trust, construction of the testamentary trust, and a declaration of rights under the testamentary trust under chapter 736. Williams argued that the condition that he not be married in order to receive an outright bequest was unlawful and contrary to public policy.

William's five children and Jon, as co-personal representative, moved to strike William's petition, arguing that even though the petition was labeled as a trust construction matter, it really sought to declare specific provisions of the will invalid, and therefore, the petition

was untimely under the Florida Probate Code because it was not filed within three months of his receipt of the Notice of Administration. The trial court agreed and dismissed William's petition as untimely.

On appeal, the appellate court cited Tendler v. Johnson extensively. As in Tendler, even though the petition asked the court to construe a provision of the will, that did not amount to a challenge of the validity of the will under the meaning of the Florida Probate Code. William's petition challenged the effectiveness of the provision of the will concerning the condition regarding marriage, but that was not the same as a challenge to the validity of the will, which, as Tendler explains, refers to the technical requirements for a will to be probated. Accordingly, the Florida Probate Code did not bar William's petition, and the trial court erred in dismissing it as untimely.

5. **Wallace v. Torres-Rodriguez, 341 So. 3d 374 (Fla. 3d DCA 2022), rev. denied, No. SC22-853, ___ So. 3d ____ (Fla. Sept. 16, 2022).**

After the husband was diagnosed with a degenerative neurological condition, he and his wife established an irrevocable joint trust and entered into a postnuptial agreement requiring the surviving spouse to convey all joint marital assets into the irrevocable joint trust within sixty days of the death of the first spouse to die. The postnuptial agreement also prohibited either spouse from transferring joint marital assets while both of them were alive without the joinder of the other spouse. The agreement authorized their children to take all actions to rescind transfers in violation of the agreement. During their marriage, nearly all of the couple's assets were held as tenants by the entireties.

A few years later, the wife died, and the couple's son was appointed personal representative of her estate. A few days after the wife's death, the husband confided in their son that he had had a girlfriend for the past 14 years (both before and after the execution of the irrevocable joint trust and the postnuptial agreement). The husband also told his son that not only had he paid his girlfriend for sex, but unbeknownst to his wife, he had transferred millions of dollars to her since the joint irrevocable trust and postnuptial agreement had been signed. Amazingly, the husband filed federal gift tax returns evidencing $2 million of transfers.

The son, as trustee of the joint irrevocable trust, sued the girlfriend to recover the millions of dollars of property transferred to her in contravention of the postnuptial agreement. The trial court found that a constructive trust should be imposed on some (but not all) of the transfers because the girlfriend was unjustly enriched. The trial court allowed the girlfriend to keep some of the assets because it found that the girlfriend detrimentally relied upon the husband's generosity and thus failed to use the assets to get an education or job to better herself, as was intended by the husband.

The appellate court held that imposition of the constructive trust was proper. The property, which was tenants by the entireties, was improperly transferred by the husband without the wife's knowledge or consent. The husband had no legal authority to transfer the assets, the girlfriend had no legal right to receive them, and both of them knew what they were doing was wrong. Therefore, a constructive trust is the proper remedy. The appellate court further held that the trial court misapplied the equitable defense of detrimental reliance because that defense applies only where receipt of a benefit has led a "recipient without notice to change position in such a manner that an obligation to make restitution of the original benefit would be inequitable to the receipient." Here, the girlfriend knew she was receiving property that legally belonged to the wife. Therefore, the trial court erred in allowing the girlfriend to keep any of the assets.

6. <u>Sierra v. Sierra</u>, 347 So. 2d 422 (Fla. 3d DCA 2022).

The issue on appeal was whether the trial court erred in excluding real property from the probate estate. Prior to this appeal, Saul had appealed the trial court's order granting a motion for sanctions, in which the trial court had found that including the property in the probate estate had no basis in law whatsoever. That appeal was dismissed for failure to comply with the appellate court's orders.

The appellate court stated that the current appeal did not appeal any order that determines an estate's interest in any property. Rather the orders on appeal merely implement the determination made in the order granting the motion for sanctions, which was appealed through the prior (dismissed) appeal. Therefore, the instant appeal was an impermissible "second bite at the apple" and a piecemeal attempt to litigate issues that should have been raised, if at all, in the prior dismissed appeal.

7. <u>Trombino v. Echeverria</u>, 348 So. 2d 1150 (Fla. 4th DCA 2022).

In 2006, Mom and Dad each established revocable trusts and jointly established an irrevocable family trust. The trust agreements provided that when one parent died, some assets would be distributed to the other parent, with the balance held in the family trust. When both parents died, all assets would be added to the family trust, which would then be distributed to Daughter and Son.

Dad died in 2009. In 2016, Mom owned residential property on the beach in her revocable trust, and she transferred it to herself for a life estate, with the remainder to Daughter. Mom resigned as trustee of all trusts shortly thereafter, and Daughter became trustee. Mom died a few years later, in 2021.

After Mom's death, Daughter listed the beach property for sale, and Son sued Daughter, individually and as trustee, for accountings of the trusts and damages for breach of fiduciary duty, alleging that Daughter's mismanagement of the trusts squandered his inheritance. Although his allegations were not related to the beach property, he asked the court to require Daughter to deposit the sales proceeds from the beach property into a restricted depository account pending resolution of his action against Daughter. He said Daughter was planning to move to the mountains and he did not want to "chase her down" to collect on his judgment when he prevailed.

The trial court granted Son's order, and the appellate court reversed. A court cannot restrict a defendant's assets solely to ensure collection of a potentially money judgment, even if the assets may be dissipated before judgment is entered. Neither § 69.031 (restricted depository in estate administration) nor § 736.1001 (money damages as a remedy for breach of trust) provides an exception to that general rule.

8. <u>Moody-Alchin v. Barton</u>, 337 So. 3d 1269 (Fla. 5th DCA 2022).

Barton was the guardian for Ursula. Moody-Alchin was appointed personal representative for Ursula's estate. Moody-Alchin filed an objection to Barton's petition for discharge as guardian, in which Moody-Alchin sought the production of certain documents and opined that given the amount of money Barton spent in a relatively short period of time, Barton "recklessly managed and potentially dissipated the guardianship estate."

Somehow and in some way (the opinion is not clear on the procedure here), Moody-Alchin continued to pursue claims against Barton as the decedent's guardian, including claims based on fraud. Barton moved for summary judgment, arguing that Moody-Alchin's claims were barred by res judicata based upon the objection Moody-Alchin filed against Barton's petition for discharge as guardian. The trial court agreed with Barton and entered summary judgment in her favor.

On appeal, Moody-Alchin argued that her claims were not barred by res judicata because there was no identity in the causes of action. The appellate court agreed, holding that seeking the production of documents in the guardianship proceeding is not the same thing as the fraud claims in the instant action. Thus, to the extent Moody-Alchin's claims were based on fraud, they were not barred by res judicata.

9. <u>Carter v. Rambaum</u>, No. 2D22-219, ___ So. 3d ___ (Fla. 2d DCA Mar. 10, 2023).

Two sisters entered into a contingency fee agreement with a law firm to represent them in a dispute against their brother over the ownership of their deceased father's homestead property. After a four-day jury trial, the siblings settled the case, and final judgment was

entered in 2011 ratifying the settlement. As a result of the settlement, the sisters were declared the fee simple owners of their father's homestead property, and it was agreed that their attorney's fees and costs would be paid from the proceeds of the eventual sale of the homestead property.

Before the property could be sold, one of the sisters died. The law firm filed a statement of claim against her estate for its fees and costs under the contingency fee agreement. The statement of claim was challenged by the estate, resulting in two separate prior appeal. In the first appeal, the estate challenged entry of final summary judgment in favor of the law firm on its declaratory action determining that the firm's claim was a valid secured equitable lien against the homestead; the appellate court affirmed. In the second appeal, the estate challenged the probate court's order determining that the claim for attorney's fees was to be computed based on the gross recovery of the sale of the homestead property valued on the date of sale; again, the appellate court affirmed.

The homestead property eventually sold for $2.7 million. The law firm claimed that in addition to the contingency fees of over $809,000, it was entitled to additional attorney's fees equal to 5% of the judgment for work performed in the two appeals that arose out of the probate case. The law firm relied upon a provision in the contingency fee agreement that allowed additional compensation of 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

The estate objected and sought a determination that the provision of the contingency agreement did not apply. The trial court disagreed, ruling that the various challenges by the estate to defeat payment of the firm's attorneys fees constitute post-judgment actions that required substantial legal work by the firm to recover the fees owed to it under the judgment it obtained in the homestead action. The estate appealed.

The appellate court determined that according to the fee agreement, the scope of the firm's representation was limited to representing the sisters in the homestead action to recover the homestead, which they claimed was wrongfully deeded to their brother. The agreement stated that the firm was entitled to a percentage of the gross amount recovered for the sisters, which everyone agreed was a structured percentage of the sales price of the homestead property, plus an additional 5% of the recovery obtained if any appeal was filed or any post-judgment or other action was required in order to obtain recovery on the judgment. The only recovery the firm obtained for the sisters was the recovery of the homestead property pursuant to the 2011 final judgment. No appeals were necessary to secure recovery on the judgment of the homestead property, nor did the firm perform any post-judgment work on behalf of the sisters to aid in their recovery on the judgment. Instead, the firm was seeking recovery of its own attorneys fees for litigating the issue of its right to an equitable lien against the homestead property and as to the establishment of the amount, neither of which were covered by the terms of the contingency agreement.

Moreover, filing a statement of claim against the estate could not in any way be construed within the scope of work contemplated in the agreement, which limited the scope of the firm's representation to obtaining recovery for the client---the sisters. Rather, the statement of claim and all work thereafter, including the two appeals, was expended in recovery payment of fees pursuant to the contingency agreement, which benefited the law firm alone. Because the efforts in question were not performed in obtaining a recovery for the clients, the trial court erred in awarding an additional 5% attorneys fees under the contingency fee agreement.

10. <u>Park v. Park</u>, 334 So. 3d 739 (Fla. 5th DCA 2022) (special concurrence).

When Mom died leaving five sons, one of her sons, with the assistance of counsel, filed a petition for summary administration proposing an equal five-way split of the estate's only asset, the decedent's home. One of the sons objected to certain portions of the petition, claiming that he personally paid for funeral expenses and expenses related to the maintenance and repair of the home, none of which had been reimbursed to him by his four brothers. The son also objected to the extent that the petition requested that the attorney be paid from the estate's assets.

Notice of a telephonic hearing on petitions for summary administration and determination of homestead was served on all five brothers. The notice provided a telephone number to use to call in to the hearing.

The son claimed that on the day of the hearing, he called the designated number but he was not made a part of the hearing. He claimed that the judge's judicial assistant advised him that she did not know how he could participate in the hearing. He further claimed that he later learned that if more than one person was to participate in the hearing, all participants must first join in a conference call and then together call the designated telephone number reflected in the notice of hearing so that all participants would be on a single line of the judge's phone system. This information was not in the notice of hearing, although it apparently was on the judge's web page.

Following the telephonic hearing, the court entered an order dividing the estate equally among the four brothers. The court made no mention of the son's objections. Appearing pro se, the son appealed, arguing he was denied due process because he was not actually given opportunity to participate in the telephonic hearing because the instructions in the notice of hearing were inadequate. The record on appeal was incomplete, and the trial court's order was affirmed without prejudice to pursue a motion pursuant to Florida Rule of Civil Procedure 1.540(b). In a special concurrence, it was noted that if the facts were indeed as the son asserted, then the notice of hearing was inadequate and deprived him of the right to be heard. The facts—and the possible denial of due process—could be explored and addressed in a Rule 1.540(b) hearing, if so pursued.

11. Eadie v. Gillis, No, 5D21-3054, ___ So. 3d ___ (Fla. 5th DCA Nov. 18, 2022).

In dissolution proceedings, the trial court imposed a charging lien that attached to, among other property, the wife's homestead. The wife had consented to a provision of the charging lien attaching to her property when her previous attorney withdrew from the case, but her consent did not matter because a homeowner cannot waive homestead exemption rights in unsecured agreement. Therefore, the case was remanded with instructions to the trial court to strike that portion of the charging lien incorporated in the final judgment to the extent that it attached to the wife's homestead.

In a special concurrence with opinion, the concurring judge wrote to condone the practice of a trial court adopting a virtually verbatim version of a final judgment proposed by one party that results in a "conspicuously one-sided final judgment." While inviting proposed final judgments is not improper, "it is incumbent upon the trial court to carefully review both proposed judgments, not from the perspective of each advocate but from the viewpoint of a neutral arbiter. Wholesale adoption of a final judgment, particularly one as lopsided as the one entered in this case, raises serious concerns and should be avoided. Trial courts would be well advised to indicate findings of fact and conclusions of law on the record when possible and, if desired, direct submission of a final judgment in accordance with those findings."

12. In re Trust of Adean E. Wines, No. 5D22-1919, ___ So. 3d ___ (Fla. 5th DCA Feb. 3, 2023).

Robert and Adean created, funded, and were co-trustees of a family trust. When Robert died, Adean became the sole trustee. She then amended the family trust so that upon her death, the assets would be distributed to her son, Robert Jr., or his trust, if living, or if deceased, then to his daughters (Adean's granddaughters), Bobbye and Mary Ann. Adean later amended the family trust again so that upon her death, the assets would be distributed only to Robert Jr.'s trust (not to him), and if Robert Jr.'s trust was not in existence at the time of Adean's death, then to Laurie, if living, or if deceased, then to Mary Ann, if living, or if deceased, then to Bobbye. Robert Jr. then died. The opinion does not explain if Laurie had any relation to the other parties, but she was named as the successor trustee and sole beneficiary of Robert Jr.'s trust as well as nominated personal representative of Robert Jr.'s estate.

In 2022, Bobbye filed a verified petition seeking to be appointed as trustee of the family trust. She alleged that her grandmother, Adean, was incapacitated and had not actually served as trustee for several years, during which time her father, Robert Jr., had served as trustee until he passed away. Bobbye's petition did not seek Adean's removal as trustee and it did not attach any evidence as to her incapacity. No other parties were named in the

action, and there was no service on process on anyone, including Laurie. However, Bobbye's attorney did send a copy of the petition by regular first-class mail to Laurie's attorney "for his records," stating "do not hesitate to contact me with any questions." Apparently, Laurie's attorney did nothing with this petition, and nobody was served by certified mail, registered mail, or express delivery service.

One month later, without a hearing, the trial court granted the petition and appointed Bobbye as trustee of the family trust. The only person who received a copy of the order was Bobbye's attorney.

Bobbye then filed a second pleading in which she sought to have the second amendment to the family trust declared to be invalid for lack of testamentary capacity. If successful, this would have eliminated Laurie as a beneficiary. Laurie learned that Bobbye had been appointed trustee of the family trust only when Bobbye's attorney mailed her attorney a copy of this second pleading.

Within weeks, Laurie filed and served a motion to set aside the order appointing Bobbye as trustee of the family trust. She argued that the lack of service of process and any noticed hearing rendered the court's order void because she was an interested and indispensable party given her apparent standing as a contingent beneficiary and she was denied due process. The trial court recognized that Laurie was an interested party but denied her motion, finding that she had actual notice of the petition and could have objected if she wanted.

On appeal, the appellate court recognized that chapter 736 provides that trust proceedings are commenced by filing a complaint and are governed by the Florida Rules of Civil Procedure. Here, Bobbye's petition did not name any adverse parties, unlike a typical complaint, and she neither obtained nor served a summons on anyone. The indispensable parties in a trust action are the trustee, the settlor, and the beneficiaries, and indispensable parties must be joined and served with process as provided by law. The trial court recognized that Laurie was entitled to be notified that Bobbye had filed a petition seeking appointment as trustee, but it erred in finding that Laurie's actual notice of the petition (accomplished by mail on her counsel) was sufficient notice. Actual notice of a lawsuit is not a substitute for proper service of process. Further, the order should not have been entered without notice or hearing. Bypassing these due process requirements led to an entry of an order treating Adean as though she were dead, even though she was very much alive, appointing a successor trustee without removing Adean as current trustee, and doing all of that without any evidentiary support for the bald allegation that Adean was incapacitated.

The appellate court quashed the order appointing Bobbye as successor trustee and reversed and remanded the case for further proceedings "with appropriate pleadings, joinder, service of process, notice, and the opportunity for all indispensable parties to meaningfully and timely participate." Further, Laurie was granted an award of appellate attorney's fees.

13. <u>Matthiesen v. Estate of Masri</u>, 343 So. 3d 124 (Fla. 3d DCA 2022).

This case emanates from a dispute among siblings following their mother's death. One of the children was appointed personal representative and was retained by probate counsel in the estate administration and, after the proceedings turned adversarial, separate probate litigation counsel. Five years of contentious litigation ensued, after which the personal representative moved for payment of personal representative fees to her and payment of her litigation counsel's fees and costs in benefiting the estate.

The beneficiaries objected to the personal representative fees, arguing that the personal representative repeatedly breached her fiduciary duties and caused the estate to incur unnecessary expense. The beneficiaries sought to have the personal representative's litigation counsel's fees and costs allocated against the personal representative's beneficial interest of the estate, and the personal representative sought to have those fees allocated against the beneficiaries' share.

Litigation on these post-administration issues continued for yet another year, and a final hearing was finally set. At this point, the personal representative had new litigation counsel, who moved for a continuance of the hearing to have more time to prepare, but this motion was denied. Shortly thereafter, less than two weeks prior to the final hearing, the attorney representing the personal representative in the estate administration moved to withdraw, stating that the issues at the final hearing were beyond the scope of his retainer. This motion was granted.

The trial court awarded attorney's fees to the personal representative's administration and litigation attorneys, ordering that some of those fees be allocated against the personal representative's beneficial interest in the estate. The court also found that the personal representative was not entitled to fees. The personal representative appealed the trial court's orders allowing her administration counsel to withdraw and denying her fees for serving as personal representative. The personal representative also appealed the reasonableness of the award of fees to her litigation counsel.

The appellate court held that the trial court did not abuse its discretion in allowing administration counsel to withdraw and denying the motion to continue the hearing, citing authority that approval of a motion to withdraw should be rarely withheld and that a withdrawal does not give the client an absolute right to a continuance.

The appellate court further held that the trial court did not abuse its discretion in denying an award of personal representative fees, citing authority that it is withing the court's discretion to deny fees to a personal representative who does not give proper attention to his or her duties.

With regard to the reasonableness of the award of fees to her litigation counsel, the appellate court reversed and remanded because the trial court failed to articulate its findings on the Rowe factors.

Guardianship

1. **Ch. 2022-218, Laws of Fla. (CS/CS/CC/HB 1349) – Guardianship Reporting**

   This law requires the Clerk of Court Operations Corporation (CCOC) to create a statewide guardianship database to facilitate improving court oversight in guardianship cases. It must be operational on or after July 1, 2023, include registration status of professional guardians and their substantiated disciplinary history, and include a guardian's compliance with statutory qualified and the status of required reports under chapter 744. The database is searchable, and access to it is limited to members of the judiciary, their direct staff, and court and clerk personnel authorized by a judge. The CCOC must upload certain information to a website accessible to the general public and generate monthly reports of data published on the website.

2. **HB1119/SB1098 - Do Not Resuscitate (DNR) – Withholding or Withdrawal of Life-Prolonging Procedures**

   The Elder Law Section worked extensively on this bill. The original bill was amended with language proposed by the Elder Law Section, which worked with bill sponsors Berfield and Burton, RPPTL, and Florida State Guardianship Association. As amended, the bill authorizes a court to delegate the right to consent to the withholding or withdrawal of life-prolonging procedures of incapacitated persons in certain circumstances; requires that initial and annual guardianship plans, respectively, state whether any power under the ward's preexisting order not to resuscitate or advance directive is revoked, modified, suspended, or transferred to the guardian; and authorizes a guardian to petition a court for approval to consent to withhold or withdraw life-prolonging procedures under certain circumstances. Effective date July 1, 2023. Pending action by the governor.

3. CS/SB 232/HB 603 - Exploitation of Vulnerable Persons

   Specifying conditions under which a person commits exploitation of a person 65 years of age or older. Providing criminal penalties for violations of the act. Specifying that not knowing the age of a victim is not a defense to such crime. Authorizing persons who are in imminent danger of exploitation to petition for an injunction for protection. Providing time limitations for commencing prosecution for violations. Effective date October 1, 2023.

4. CS/CS/SB 226/HB 813 – Support for Dependent Adult Children

   Providing that civil suits to establish support for dependent adult children may be filed only in a certain court by specified individuals. Requiring support to be paid to the dependent adult child or other specified persons or a special needs trust. Specifying that a child support order does not terminate on the child's 18th birthday in certain circumstances. Requiring the court to consider certain factors when determining the amount of support for a dependent adult child. Proving an additional circumstance under which a guardian advocate must be represented by an attorney in guardianship proceedings.

   Effective date July 1, 2023.

5. <u>Guibord v. Guardianship of Ford</u>, 338 So. 3d 928 (Fla. 4th DCA 2022) (on rehearing).

   After the trial court issued an order determining incapacity and appointing a Plenary Guardian, the Ward's daughter filed a motion for rehearing based on newly discovered evidence of a witness who would offer a firsthand account of prior physical abuse of the Ward by the appointed Guardian. Unfortunately, the Ward died before the trial court ruled on the motion for rehearing. The Guardian filed a response opposing the motion. The trial court denied the motion without a hearing and concluded that the motion was moot due to the death of the Ward. The Ward's daughter appealed asserting multiple trial court errors, including failing to properly apply the presumption of undue influence involving self-dealing, failing to comply with guardianship statutes in appointing the Guardian, precluding and ignoring evidence, and relying on improper expert testimony outside the witness's expertise.

   The appellate court affirmed in part and remanded for further proceedings.

   The appellate court affirmed the trial court's rulings regarding the final order determining incapacity and appointing the Plenary Guardian and found that the trial court properly reached the appropriate legal conclusion based upon the evidence presented. However, the appellate court reversed and remanded as to the issue of mootness. In its opinion, the appellate court reminded guardianship judges that the death of the Ward renders a motion for rehearing moot as to the incapacity determination and the appointment of the Guardian of the person as a Guardian of the person is discharged without further proceeding upon filing a certified copy of the Ward's death certificate." ; *see also* Fla. Prob. R. 5.680(a)

   However, the Ward's death does not render a motion for rehearing moot as to the appointment of a Guardian of the property if the Guardian of the property handled the Ward's property for a period of time or engaged in any transactions affecting the Ward's

property to a significant degree. That is because collateral legal consequences may flow from the appointment of the Guardian of the property. For example: the Guardian of property is not discharged upon the Ward's death, but must continue the administration until a petition for discharge is granted and his or her final accounting is approved. *See* F.S. 744.531. F.S. 744.441(16), allows a Guardian, with court approval, to pay "reasonable funeral, interment, and grave marker expenses for the Ward from the Ward's estate, up to a maximum of $6,000." Upon applying for discharge, the guardian may also "retain from the funds in his or her possession a sufficient amount to pay the final costs of administration, including guardian and attorney's fees regardless of the death of the Ward, accruing between the filing of his or her final returns and the order of discharge." F.S. 744.527(2) – ward's death renders moot any issues re incapacity or guardianship of person, but not guardianship of property

6. Guardianship of Sanders v. Chaplin, 334 So. 3d 723 (Fla. 1st DCA 2022).

   – no benefit to ward required for guardianship fees

7. **Araguel v. Bryan, 315 So. 3d 1241 (Fla. 1st DCA 2021).**
   In October of 2019, Ms. Araguel became unable to care for herself. As a result, both of her children, Patrick and Leslie, petitioned the trial court to become her Emergency Temporary Guardian and the Guardian of her person and property. Instead of appointing either of the children, the trial court appointed a professional Emergency Temporary Guardian.

   The Ward suffered a stroke and while she was in the hospital, some family members published photos of her in the hospital on social media. Concerned about the Ward's right to privacy, the Guardian sought a protective order prohibiting the Ward's children from depicting, discussing, or disseminating the Ward's medical condition or financial information with anyone except their counsel or each other.

   A hearing was held on July 14, 2020, and a protective order was entered on July 23, 2020. Unfortunately, the Ward passed away July 20, 2020, just 3 days before the trial court issued the protective order. On August 14, 2020, Patrick (son of the now deceased Ward) petitioned the trial court to reverse and dissolve the protective order noting that it was issued three days after the Ward's death and arguing inter alia that it prohibits him from discussing important matters with the personal representative identified in his mother's will. The trial court amended the injunction to expire on August 31, 2020, but generally denied the motion.

   On appeal, Patrick argued that the possibility of being held in contempt for his conduct while the order was in effect is a collateral legal consequence. The appellate court noted that moot cases may be decided on their merits when collateral legal consequences flow from the issues raised. However, in this case the potential consequence is too speculative to justify an exception, as it is undisputed that there is no pending motion seeking to hold

the appellant in contempt of the now-expired order. The appellate court dismissed the appeal for mootness because the order had expired on its own terms.

Araguel v. Bryan, 343 So. 3d 1236 (Fla. 1st DCA 2022).

The Decedent's son Patrick filed a petition for administration for his mother's estate and requested the appointment of Jerry Sanders, the nominee named in Decedent's will, as the personal representative. The Decedent's other son Lesley objected to Sanders's appointment as he believed Sanders displayed an adverse interest to the estate. After a hearing, the probate court entered an order denying the appointment of Sanders as personal representative. Although the probate court found that Sanders was qualified, the court determined that there were tangible and substantial reasons to believe that damage would accrue to the estate if Sanders were appointed because he had an adverse interest to the estate. The probate court specifically found that Sanders would be a material witness regarding whether certain property was an estate asset based on a conversation he had with the Decedent. Sanders also knew that Patrick had used an invalid durable power of attorney, which did not have the required number of witness signatures, to handle the decedent's affairs.

The appellate court, citing F.S. 733.301(1)(a), noted that trial courts are without discretion to deny the appointment of a Decedent's nominate personal representative unless the nominee is disqualified under the statute or the statute grants discretion. Based on analysis of the statute, the court found that the trial court erred as it did not have the discretion to deny the appointment of Sanders because he was qualified under the statute to serve as personal representative.

In its opinion, the appellate court made the distinction between cases regarding the appointment of a personal representative in an intestate estate versus the appointment of a nominated personal representative in a testate estate. The appellate court also noted that there was no evidence of an occurrence which clearly would have changed the testator's mind had she been aware of the alleged event. The court rejected the trial court's use of discretion in denying the appointment of Sanders and reversed the order and remanded with directions to appoint Sanders as personal representative.

Araguel v. Bryan, 344 So. 3d 604 (Fla. 1st DCA 2022).

Ms. Araguel (the Ward) had three IRAs and appointed her sons, Patrick and Leslie, as beneficiaries. Shortly after the Ward's death, the Emergency Temporary Guardian sought authorization from the court to retain some of the Ward's assets, including three of her IRAs, to pay the guardship estate fees and costs, which included fees for the Guardian and his attorney pursuant to F.S. 744.527(2). This statute allows a Guardian applying for discharge to retain from the funds in his or her possession a sufficient amount to pay the final costs of administration, including Guardian and attorney's fees regardless of the death

of the Ward, accruing between the filing of his or her final returns and the order of discharge. Patrick objected because F.S. 222.21(2)(a) exempted IRAs from the claims of all of the Ward's creditors and, by operation of the third-party contract, the IRAs passed directly to the IRA beneficiaries upon the Ward's death.

The ETG argued that F.S. 744.527(2) allowed him to retain the Ward's property until discharge. He further argued that the Guardianship estate was not a creditor of the Ward because the estate was authorized to obtain payment prior to turning over the Ward's property to the party entitled to receive it. The trial court sided with the ETG and granted the motion.

The appellate court reviewed the appeal de novo because it involves the interpretation of a statute. In its analysis, the court looked at the plain language of the statute to determine the legislative intent. The court looked at how the retirement accounts could be retained by the Guardian given their contractual nature and the lack of law that operationally provides for the retention by the Guardian.

F.S. 222.21 (2020) pertains to the exemption of retirement accounts from creditors. It reads, in relevant part:

> (2)(a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:
> . . . .
> (d) Any fund or account described in paragraph (a) is not exempt from the claims of an alternate payee under a qualified domestic relations order or from the claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution as provided in part II of chapter 732 . . . .

The appellate court reasoned that because the language used in F.S. 222.21(2) is not confusing or ambiguous and the terms claims and creditors are not defined, the court is required to give the language its plain and ordinary meaning. Based on the plain meaning of the terms "claim" and "creditor," the fees and costs associated with the guardianship estate fall within those terms. The ETG has argued that the term "claim," as defined in F.S. 731.204(4) and F.S. 744.1025, should apply. However, F.S. 731.204 specifically states when the definition applies, and it does not include a citation to F.S. 222.21. Since F.S. 222.21(2) does not call for an exemption for guardianship estate fees and costs, those claims cannot attach to the Ward's IRAs. Even though F.S. 744.527(2) allows a Guardian to retain the funds in his possession, there is no evidence that the IRAs remained in the ETG's possession by operation of law or by the third-party contract. IRAs pass directly to

their beneficiaries at the time of the owner's death. As a result, the IRAs should have passed to the beneficiaries at the time of the Ward's death. Since F.S. 744.527(2) does not explicitly place a lien on the property that is in a Guardian's possession, it cannot override the Legislature's explicit direction to exempt IRAs from such claims. Accordingly, the appellate court reversed that portion of the trial court's order pertaining to the IRAs and affirmed all other aspects of it.

Araguel v. Bryan, ____ So. 3d ____ (Fla. 1st DCA 2023).

The court upheld the lower trial court ruling without an opinion.

8. **Foster v. Guardianship of Foster, Nos. 4D21-2229, 4D21-2263, ___ So. 3d ___ (Fla. 4th DCA Jan. 4, 2023).**

Consolidated appeals from a Guardian and an adult Ward.

The Ward is a developmentally disabled adult diagnosed with a autism spectrum disorder which impacts his ability to expressly communicate his wishes regarding the level of contact which he desires to maintain with his family. After a highly contentious divorce between the Ward's parents, the mother petitioned and was appointed as Guardian. Then, as Guardian, she refused to allow the father to communicate or visit with the Ward. The father filed a petition for judicial review pursuant to F.S. 744.3715 (2016), arguing that the Guardian had denied him visitation. The father claimed that the Guardian violated F.S. 744.361(13)(b), (2016), which requires a Guardian to allow the Ward to maintain contact with family and friends unless the Guardian believes that such contact may cause harm to the Ward.

The court conducted several days of evidentiary hearings to determine the Ward's wishes. Several of the Ward's teachers and former therapists testified to their association with the Ward and their opinion that the Ward could appropriately verbalize his desires. They all testified that he did not wish to see his father. The court then paused the hearings and ordered that the Ward be examined by a qualified and licensed speech pathologist who could determine whether "no" meant "no" when the Ward stated he did not want to visit with his father. After examining the Ward, the speech pathologist determined that the Ward wanted to visit his father. The majority of the witnesses, all of whom had worked with the Ward for years and knew him well, determined that he did not want to visit with his father, while the speech pathologist who saw the Ward once determined that he did express a desire to visit the father.

The trial court granted the father's petition, adopting the speech pathologist's conclusion that the Ward wanted to see his father and set out a plan of visitation. To implement visitation, the court established a monitoring system but it left the determination of whether

visits would continue to the speech pathologist whom the court had appointed to examine the Ward. From this order, both the Ward and the Guardian appealed. They both contend that the court had no authority to order visitation between the Ward and the father.

The appellate court found that the trial court could facilitate contact between the Ward and his father consistent with F.S. 744.3215 and F.S. 744.361(13),and thus affirm the trial court's order because a guardian is required to allow the ward to maintain contact with family and friends unless the guardian believes such contact may cause harm to the ward. In this case, the Guardian did not show any possible harm to the Ward.

Of note is a separate opinion written by Justice Warner concurring in part and dissenting in part. Justice Warner opined that the statutes do not confer the power to compel or deny visitation to a third party, like a speech pathologist, as the trial court ordered and that the determination of whether visits continue rests with the trial court. She writes that while the court may take advice from experts and monitors, the court ultimately must make these determinations. She agrees that the court had authority to order the father's visitation of the Ward, but dissents from the majority's decision to affirm the delegation of authority to the speech pathologist to decide whether visitation will continue.

9. **<u>Abrams v. Waserstein</u>, 349 So. 3d 493 (Fla. 3d DCA 2022).**

Abrams challenges an Order pertaining to sale of Ward's homestead. Trial court holds that Abrams is a non-interested person due to her prior conduct. Appellate court affirms and also states that the order she's appealing is a non-appealable order. **This instant case is regarding the order denying Abram's petition for auth. to occupy Ward's homestead,** which Abrams says she can appeal pursuant to FL Rules of Appellate Procedure 9.130(a)(3)(C)(ii) because the Petition is regarding immediate right to possession of homestead property

The Ward's home is dilapidated and the Ward will not be returning to live in the Court. Abrams apparently wanted to live in the home and wanted the Ward's funds to pay for renovation to make it habitable. Court ultimately entered an order ("Order #1") saying that the home would be sold and the proceeds used to pay for the Ward's expenses. Abrams is free to purchase the home on her own. 2 months later, the trial court entered an order expressly directing the homestead property to be sold ("Order #2"). Abrams appeals Order #2

In order to be appealable under 9.130(a)(3)(C)(ii), the order must **directly determine** the **immediate** right to possession of property. Order #2 does not directly determine the possession of the homestead property and instead simply reaffirms Order #1 and other previously entered orders, some of which were entered over a year before Order #2. All of those relevant orders said that Abrams couldn't occupy the homestead property. The trial court also found that Abrams is not an interested person under the FL Probate Code "due

to her own improper conduct" and therefore lacked standing to appeal these orders in the first place. Appellate court affirms

Affirm trial court. Dismiss.

The appellate court dismissed an appeal for lack of standing, finding that the trial court's stripping of the appellant's "interested person status" also stripped her of that status for purposes of appeal. The appellant had previously had her status as an interested person in the guardianship matter stripped due to her previous inappropriate behaviors. Amazingly, appellant appealed yet again, resulting in yet another published opinion dismissing her appeal for lack of jurisdiction. See Abrams v. Waserstein, 3D22-179, ____ So. 3d ____ (Fla. 3d DCA Apr. 19, 2023) (noting that it was appellant's fifth appeal challenging orders pertaining to her mother's property).

10. Leposky v. Ego, 348 So. 3d 1160 (Fla. 4th DCA 2022).

Appellant Leposky appeals a nonfinal order which froze four of his bank accounts along with any other accounts at AmEx and Regions. The order was entered by petition of Leposky's wife's court appointed guardian, Appellee Ego. Reversed.

Lepoksy's wife was placed in an ALF after a stroke. While at ALF, she filed for divorce and Leposky initiated guardianship proceedings which resulted in a court appointed limited guardian, Ego. Trial court then entered an order requiring Leposky's assets to be reported to the court (joint AmEx account) which he refused to do as he closed the account after his wife's stroke. Ego filed an unverified emergency petition to freeze Leposky's assets in which she alleged that he transferred funds from a joint account to try to hide joint funds. At the emergency hearing, the trial court "refused to allow [Leposky] to testify or present evidence" and then orally granted Ego's motion based on "the record" and "extensive history of the case". It then entered a written order which contained none of the 4 prongs necessary for a temporary injunction nor contained a bond.

Though the court's order never explicitly said "temporary injunction", the order was clearly a temporary injunction therefore the requirements of a temporary injunction apply here: (1) Irreparable harm will result if temp injunction is not entered, (2) Adequate remedy at law is unavailable, (3) Substantial likelihood of success on the merit, (4) Entry of temp injunction will serve public interest. In this case, the Order didn't have any factual allegations to support entry of temp injunction, the guardianship court violated Leposky's due process rights by not allowing him to testify or present evidence as to why the temp injunction should not be issued, and the Order had no factual findings to support any of the prongs necessary for a temp injunction

Reversed and remanded

A guardian's emergency motion to freeze previously joint assets constituted a motion or temporary injunction and thus requires evidence and analysis under the four-part temporary injunction test. A party moving for temporary injunction must prove (1) irreparable harm without an injunction, (2) adequate remedy at law is unavailable, (3) substantial likelihood of success on the merits, and (4) an injunction serves the public interest. The court is required to make factual findings as to each prong of the analysis.

Longterm Care Planning & Public Benefits

1. Federal Benefit Rate - $941

2. ICP income limit - $2742 ind., $5484 couple

3. Community Spouse Resource Allowance - $148,620

4. Home Equity Interest Limit - $688,000

5. Transfer of Asset Divisor - $10,809

6. SB 2500 – Appropriations

   Individuals who receive Medicaid benefits under the Institutional Care Program are allowed to retain a personal needs allowance, which is a portion of their monthly gross income, to use for any purpose they desire. Generally, this amount is used to supplement individuals' care and/or standard of living by purchasing items and services that are not provided through the Medicaid program. The personal needs allowance is increasing from $130 to $160. Effective date _____. Pending action by governor

7. SECURE 2.0 – changes to IRAs & SNTs

8. Increase of annual funding of ABLE accounts to $17k/yr

9. Age limit of disability onset for ABLE increasing to 46 (eff. 2026)

10. Gallardo v. Marstiller, No. 20-1263, 596 U.S. ___ (June 6, 2022).

Petitioner Gianinna Gallardo, a Medicaid recipient, appealed an order of the eEleventh Circuit Court that found Florida had a right to recover from portions of a settlement for future medical expenses in compliance with the Medicaid Act requirements.

Gallardo suffered catastrophic injuries when she was hit by a truck as she stepped off her school bus. The injuries resulted in her being in a persistent vegetative state. Gallardo, through her parents, sued the truck's owner and driver, as well as the Lee County School Board. She sought compensation for past medical expenses, future medical expenses, lost earnings, and other damages. That litigation resulted in a court approved settlement for $800,000, with $35,367.52 expressly designated as compensation for past medical expenses. The settlement did not specifically allocate any amount for future medical expenses.

The Medicaid Act requires participating states to pay for certain individuals' medical costs and to make reasonable efforts to recoup those costs from liable third parties, 42 U.S.C. 1396k(a)(1)(A). Under Florida's Medicaid Third-Party Liability Act, a beneficiary who accepts medical assistance from Medicaid automatically assigns to the state any right to third-party payments for medical care; Florida was entitled to $300,000, presumptively representing the portion of the recovery allocated for past and future medical expenses.

Florida's Medicaid agency paid $862,688.77 to cover Gallardo's past medical expenses and, in an attempt to recover reimbursement for its payments pursuant to Florida law, the State of Florida asserted a lien over the compensation for past medical expenses, which Medicaid paid as well as the compensation for future medical expenses.

Gallardo filed a suit asking the court to enjoin the state from asserting its lien over the portion of her settlement compensating for future medical expenses and to declare that Florida's reimbursement statute violates the Medicaid Act general prohibition against seeking reimbursement from a beneficiary's "property," §1396p(a)(1). The district court ruled for Gallardo, finding that the Medicaid Act preempted the Florida law to the extent that the law allows the State to satisfy its lien for past medical expenses from the portion of the beneficiary's recovery that compensates for future medical expenses. The U.S. Court of Appeals for the Eleventh Circuit reversed.

The U. S. Supreme Court ruled favor of Marstiller and affirmed the Eleventh Circuit. It found that Florida properly sought reimbursement from settlement payments allocated for future medical care and, through the enactment of its Medicaid Third-Party Liability Act, complied with Medicaid's anti-lien provision, which prohibits states from recovering medical payments from a beneficiary's property. Further, the court found that Florida's act was a statutory exception provided for because the act required an assignment of the right . . . to receive payments [from third parties] for medical care, expressly authorized by the terms of §§1396a(a)(25) and 1396k(a).

The relevant distinction is between medical and nonmedical expenses, not between past and future medical expenses. Section 1396k(a)(1)(A) does not authorize a "lifetime assignment" covering any rights acquired in the future, but covers only rights the individual possesses while on Medicaid.

11. Hughes v. Agency for Persons with Disabilities, 342 So. 3d 832 (Fla. 1st DCA 2022).

    Re: reallocation of service hours under iBudget Waiver

12. Beasley v. Agency for Persons with Disabilities, 339 So. 3d 477 (Mem) (Fla. 1st DCA 2022).

Petitioner Calvin Beasley filed an emergency petition for a Writ of Prohibition regarding an order, which granted Respondent's, the *Agency for Persons With Disabilities,* Motion for Beasley to appear remotely at an annual review hearing on his continued involuntary admission to residential services conducted under F.S. 393.11(14). The Court treated the emergency petition as a petition for writ of certiorari seeking review of a non-appealable, non-final order that granted Respondent's motion under Fla. R. App. P. 9.040(c) which states that if a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy. The appellate court dismissed the petition because the Petitioner failed to make a preliminary showing of irreparable harm.

13. M.B. v. Agency for Persons with Disabilities, No. 4D22-814, ___ So. 3d ___ (Fla. 4th DCA Jan. 4, 2023).

    – hearing officer erred in denying eligibility for iBudget Waiver because of "possibility" that autism arose from schizoaffective disorder

14. In-Kind Support & Maintenance Calculations: Proposed rule change to 20 CFR 416.1130, 20 CFR 416.1102, and related rules

In-kind Support and Maintenance ("ISM") is unearned income received by Supplemental Security Income ("SSI") applicants and recipients in the form of food or shelter from anyone living within or outside their households. If ISM is received, then the monthly SSI payment is reduced by approximately one-third of the federal benefit rate. The rationale of this reduction is that individuals receiving food or shelter assistance need less help fulfilling their basic needs than those without such support.

Social Security Administration ("SSA") has proposed to change its regulations to remove food from the calculation of ISM and add conforming language to its definition of income, excluding food from the ISM calculation. As a result, SSI applicants would no longer be required to provide information about food expenses to consider in SSA's ISM calculations. Further, distributions to third parties from special needs trusts for food would no longer affect SSI applicants' benefits.

The proposed rule is found at Omitting Food from In-Kind Support & Maintenance Calculations, 88 Fed. Reg. 9779 (Feb. 15, 2023) (to be codified at 20 C.F.R. pt. 416). The comment period closed on April 17, 2023.

15. **CS/SB 1542/SB 1540/HB 1567/HB 1569 – Elder & Vulnerable Adult Abuse Fatality Review Teams**

Revises provisions related to elder and vulnerable adult abuse fatality review teams, including the scope of such review teams to include a review of fatal and near-fatal incidents of abuse, exploitation, or neglect of vulnerable adults in addition to elderly persons. Authorizes elder abuse fatality review teams existing on a specified date to continue to do so and requiring them to comply with specified provisions. Revises annual reporting requirements, and provides that communications, information, and records produced or acquired by a review team are not subject to discovery or introduction to evidence in certain proceedings. Effective date July 1, 2023. Pending action by governor.

16. **HB 299/SB 1182 - Education and Training for Alzheimer's Disease and Related Forms of Dementia**

Requires the Department of Elderly Affairs to offer education about Alzheimer's disease and related forms of dementia to the general public. Employees of covered providers, health agencies, nurse registries, companion/homemaker providers, nursing homes, assisted living facilities, adult family-care homes, and adult day care centers must complete specified training. Effective date July 1, 2023. Pending action by governor.

17. **HB 693/SB 1504 - Administration of the Program of All-inclusive Care for the Elderly (PACE)**

Changes Program of All-Inclusive Care for Elderly (PACE) oversight (out of Department of Elderly Affairs and just under Agency for Health Care Administration) by deleting provisions requiring AHCA to consult with DOEA regarding PACE administration. It also allows for more than one PACE organization to operate in each region by deleting language restricting a defined geographic service area to one PACE organization. Effective date July 1, 2023. Pending action by governor.

18. HB 831/SB 1084 – Pilot Program for Individuals with Developmental Disabilities

Requires Agency for Health Care Administration (AHCA) to implement a pilot program for individuals with developmental disabilities in certain Statewide Medicaid Managed Care regions in order to cover comprehensive services. Authorizes AHCA to seek federal approval as needed to implement the program. Requires AHCA to make specified payments to certain organizations for comprehensive services for individuals with developmental disabilities. Requires AHCA to submit the results of the evaluation to the

governor and the legislature. Effective upon becoming a law. Pending action by the governor.

19. HB 1517 – Agency for Persons with Disabilities

    This bill creates a workgroup to provide a continuum of guidance and information for individuals with developmental disabilities and their families. It requires the Agency for Persons with Disabilities to make eligibility determinations within specified timeframes, and it provides requirements for developmental disabilities home and community-based Medicaid waiver programs. Also amends several provisions of chapter 393… Effective date July 1, 2023. Pending action by governor.

Marchman Act/Baker Act

1. R.S. v. C.P.T., 333 So. 3d 1190 (Fla. 5th DCA 2022).

   – trial court departed from role as neutral arbiter, which violated due process rights

2. **Gordon v. State of Florida, No. 4D22-1465, ___ So. 3d ___ (Fla. 4th DCA Jan. 4, 2023).**

   Gordon appeals from the trial court's order directing that he be subject to involuntary inpatient placement and be appointed a Guardian Advocate. Gordon argues the trial court lacked clear and convincing evidence that, because of his mental illness, he "is incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself …, and such neglect or refusal poses a real and present threat of substantial harm to his … well-being" or "there is a substantial likelihood that in the near future he … will inflict serious bodily harm on [him]self or others, as evidenced by recent behavior causing, attempting, or threatening such harm." F.S. 394.467(1)(a)2.

   On appeal the state conceded that the circuit court lacked clear and convincing evidence to support its finding that the appellant met F.S. 394.467(1)(a)2.'s requirements for involuntary patient placement.

   The appellate court agreed with the state's concession of error, reversed the circuit court's order, and remanded for the circuit court to enter an order denying the petition for involuntary patient placement. The case appears to stand for the proposition that the existence of mental illness alone does not necessarily prove individual is incapacity of

surviving alone, etc or that there is a substantial likelihood that he will inflict serious bodily harm to self or others.

3. K.M. v. State of Florida, No. 2D22-564, ___ So. 3d ___ (Fla. 2d DCA Apr. 14, 2023).

– police officer's subjective interpretation of a text that stated "This is it. Once you're done reading this, I will be gone" was insufficient by itself to subject individual to involuntary physical seizure under the Baker Act. Must prove both elements.''

ADA/Age Discrimination

October 2022 (Summerlin v. L3 Communications Integrated Systems)

Miscellaneous

1. **In re Name Change of Sheikera Williams, ___ So. 3d ___ (Fla. 4th DCA 2022).**

   The petitioner filed a facially sufficient petition to change her name. The trial court denied it without any factual findings. The petitioner appealed. The appellate court reversed the denial, holding that when a court denies a facially sufficient petition for name change, it must provide a factual basis for doing so.

2. **SB 770/HB 861 - Residential Loan Alternative Agreements**

   MV Realty, a Florida-based company, offers homeowners $300 to $5,000 as a cash loan alternative in exchange for an agreement to use the company as an exclusive listing broker, even though the homeowners may not currently be anticipating sale. After accepting payment, homeowners discover that MV Realty files a 40-year lien on the property that requires paying 3% of the value of the home to MV Realty, regardless of whether the company ever provides any real estate listing services.

   As an apparent fix for this, HB/SB 770 was proposed in the 2023 Legislative Session. It provides that an option to enter into a listing agreement for residential real property may not exceed six month. Any violations of that term will be deemed to be an unfair or deceptive trade practice according to chapter 50, part II. Effective date July 1, 2023. Pending action by governor.

The Attorney General's office has also filed a complaint for injunctive and monetary relief against MV Realty and its principals for deceptive, unfair, and unconscionable business practices.

3. HB 7063 (HB 29/SB 114) Elimination of Sales Tax for Incontinence Supplies

HB 7063 provides tax-related provisions designed to benefit both families and businesses. Among the provisions are, inter alia, the following.

With regard to sales tax, it creates permanent exemptions for adult incontinence products, oral hygiene products, specified baby/toddler products and clothes, machinery and equipment to produce renewable natural gas, agricultural fencing, and small private investigative agency services. It provides a one-year exemption for certain Energy Star-certified appliance and gas ranges. It creates several tax holidays with a variety of themes, including back-to-school, disaster preparedness (including for pets), recreational items and activities, and tools needed in skilled trades (affectionately called "Tool Time," as in Tim "the Tool Man" Taylor).

With regard to property taxes, it makes several changes to expand, clarify, or correct provisions related to homestead benefits for permanently and totally disabled veterans, first responders, and their surviving spouses. It allows educational facilities to qualify for an exemption if they have a bona fide 98-year lease with nominal payments, and it makes various technical changes to several sections of existing law.

With regard to corporate income tax, it adopts the Internal Revenue Code in effect on January 1, 2023 to maintain conformity with federal provisions, and it creates a tax credit for homebuilders that purchase and install residential graywater systems and for companies that purchase machinery for use in the production of human breast milk fortifiers.

There are several effective dates scattered throughout this bill. Unless otherwise provided, the effective date is July 1, 2023. Pending action by governor.

4. CS/CS/HB 19 - Education Proxy

Amends 1003.5716 to provide that individual education plans ("IEPs") for students with disabilities shall include information to the student and his or her parents on self-determination and the legal rights and responsibilities regarding the educational decisions that transfer to the student upon attaining the age of 18. The information must include the ways in which the student may provide informed consent to allow his or her parent to continue to participate in educational decisions, include informed consent to grant permission to access confidential records, powers of attorney, guardian advocacy, and guardianship. Effective date July 1, 2023. Pending action by governor.

5. **HB 1419/SB 1436 – Real Property Fraud**

   Requires the clerk of the circuit court to create, maintain, and operate an electronic portal opt-in recording notification service, and clarifies that an action to quiet title after a fraudulent attempted conveyance may be brought under chapter 65. Effective date July 1, 2023. Pending action by governor.

6. SB 7000 OGSR/Current or Former Public Guardians (confidential info) - OGSR/Current or Former Public Guardians; Amending a provision which provides an exemption from public records requirements for certain identifying and location information of current or former public guardians, employees with fiduciary responsibility, and the spouses and children thereof; defining terms; narrowing the scope of the public records exemption for current public guardians and employees with fiduciary responsibility and former public guardians and employees with fiduciary responsibility, respectively; removing the scheduled repeal date of the exemption, etc.