Spring Case Law Update

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1. ***Bivins v. Rogers*, ___ F.Supp. ___ (S.D. Fla. 2016). The Federal Southern District says recent change to F.S. Sec. 90.5021 overrides previous case law and legislatively abolished the fiduciary exception to attorney-client privilege.**

Bivins involved a contested guardianship matter that, as night follows day, then became a contested probate proceeding when the ward died. After the ward's death, his son was appointed personal representative of his estate and in that capacity he sued the guardian's attorneys for malpractice, alleging that they "did not properly administer the guardianship to maximize its assets." As PR, he demanded access to the confidential files of the guardian's attorneys. They refused, asserting the attorney-client privilege. Prior to the passage of F.S. Sec. 90.5021, there was arguably a common-law "fiduciary exception" to the attorney-client privilege. That exception allowed so-called third-party beneficiaries of the lawyer's services to demand access to privileged communications between the lawyer and his client. The rationale for the exception was that if the attorney-client communication had to do with normal administration issues, the beneficiaries of a guardianship/estate/trust estate were the intended third-party beneficiaries of that work, so they're entitled to the information. If the communication had to do with the fiduciary's own self-interest, such as in a suit for breach of duty, then the fiduciary is the sole intended beneficiary of that work, and those communications were privileged. The fiduciary exception was an ambiguous rule that created great uncertainty for fiduciaries and their attorneys and inhibited the free flow of information between fiduciaries and their attorneys. In 2011 Florida legislatively abolished the fiduciary-exception rule by adopting new F.S. 90.5021. In this case, the PR challenged the privilege assertion on multiple grounds, including: (1) that the Florida Supreme Court's refusal to adopt F.S. 90.5021 for procedural purposes meant the statute wasn't valid and (2) that it was illogical to allow him to sue the guardian's attorneys for malpractice and at the same time to block his discovery requests on privilege grounds. The Court rejected both arguments. With regard to the first argument, the Court noted that while the Florida Supreme Court did decline to adopt the new provision of the Evidence Code as a rule of evidence for procedural purposes, it did so because the Court "question[ed] the need for the privilege to the extent that it is procedural" and not because the statute was unconstitutional or otherwise unlawful. The Florida Supreme Court's decision not to adopt Section 90.5021 because it questioned the need for the privilege "to the extent that it is procedural" did not invalidate the statute. With regard to the second argument appealing to logic, the Court noted that while the argument is arguably logical, a trial court cannot simply ignore the applicable existing law. Whether it was prudent or not for the Florida legislature to enact Section 90.5021 was not within the purview of the court. The Court held that Section 90.5021 is clear and unambiguous, and the statute supersedes the pre-2011 case law.

Application: It is not good public policy to create incentives for guardians, personal representatives or trustees to not talk to their attorneys. Fiduciaries are more informed about their duties and perform better for those they serve when they are fully aware of their legal obligations and get good legal advice as needed. In adversary proceedings this is not just advisable but vital. This case affirms the privilege and the public policy behind it.

2. ***Rose v. Sonson*, ___ So. 3d ___ (Fla. 3d DCA 2016). The Third DCA affirms Judge Genden and holds that the 2009 change to F.S. Section 732.108(2)(b) only applies prospectively (preserving the status quo for all probate paternity claims time barred as of 2009).**

Rose, the putative child of the decedent Sonson, appealed Judge Genden's order granting the estate's motion to dismiss with prejudice Rose's paternity claim. Rose was born out of wedlock on December 25, 1964. At the time Rose was born, and until October 1986 when section 742.011 of the Florida Statutes was amended, only the mother of a child born out of wedlock could bring suit to establish paternity. While Rose's mother told him at a young age that Sonson was his father, she did not attempt to have Sonson's paternity established in Florida either before Rose attained majority on December 25, 1982, or before section 742.011 was amended in 1986. In 1986 when section 742.011 was amended to allow both putative children and putative fathers to bring suit to establish paternity, section 95.11(3)(b) of the Florida Statutes was amended to impose a four year time limit to "run from the date the child reaches the age of majority" on such actions. While only a short time remained under this provision for Rose to bring suit to establish paternity, he did not do so. Sonson died intestate in 2012, leaving behind two daughters and a son. In 2013, the daughters filed a petition for administration of Sonson's intestate estate in probate court. Rose filed a counter-petition to determine beneficiaries, claiming to be a surviving son of the decedent and therefore a rightful intestate heir of the estate. He was denied by the probate court and the Third DCA affirmed that court order on three grounds: (a) because his paternity claim had been extinguished by section 95.11(3)(b), the applicable statute of limitations, by the time it was filed; (b) because the 2009 amendment to section 732.108(2)(b) of the Florida statutes, which eliminated application of section 95.11(3)(b) to paternity determinations in probate proceedings relating to intestate succession, does not apply retroactively; and, (c) even if the 2009 amendment to section 732.108(2)(b) were retroactive in application, it could not breathe new life into Rose's previously extinguished claim. In most determination of heir disputes, the putative heir doesn't have to litigate his status until the estate is commenced. This case shows that's not true of paternity actions. Any children the decedent had while married are automatically eligible to be considered his intestate heirs. Out of wedlock children who have not had their paternity established prior to the decedent's death must attempt to establish their paternity prior to having any rights under intestacy. A putative heir can bring a paternity action but only if it is not time-barred.

Application: The ruling in this case means that most paternity actions in probate are going to be time barred. The reason is that the 2009 change to F.S. Sec. 732.108(2)(b) is not retroactive. It only applies to cases not barred as of 2009. So if you were age 22 or older in 2009 you're forever time barred from adjudicating paternity in a Florida probate proceeding.

3. ***Anderson v. McDonough*, 189 So. 3d 266 (Fla. 2d DCA 2016). The Second DCA confirms F.S. Sec. 733.106 does not authorize personal liability for fees; rather, the statute authorizes only an award of fees to be paid from the estate or specifically from a person's share of the estate.**

Appellant here was ordered to pay fees and costs to his mother's estate following an unsuccessful will contest. The fee award was granted pursuant to F.S. 733.106 (which provides that the court can direct from what part of an estate fees are to be paid) even though the appellant did not receive anything from the estate. The estate argued that the fee award was authorized under the statute or that the fee award was a sanction for bad faith litigation pursuant to the *Bitterman* case (the inequitable conduct doctrine) or under F.S. Sec. 57.105. The Second DCA found that neither F.S. 57.105 nor the inequitable conduct doctrine applied here, since the estate failed to properly invoke the procedures of F.S. 57.105 and there was not a finding of bad faith by the trial court. The Court further held that F.S. Sec. 733.106 does not authorize the imposition of a fee award beyond what may be paid from a person's share of the estate, and does not create personal liability for attorney's fees. As a result, the Court reversed the fee award in its entirety.

Application: The decision clarifies the law regarding taxing fees and costs under the authority of F.S. Sec. 733.106. It also confirms the necessity for laying the proper predicate for any fee ruling that relies on F.S. Sec. 57.105 or the inequitable conduct doctrine as the basis for fees.

4. ***Howard v. Howard*, 193 So. 3d 987 (Fla. 4th DCA 2016). The Fourth DCA explains what constitutes a finding of "good cause" to proceed with an incapacity or guardian advocate proceeding without the potential ward present and the requirements for a written order appointing guardian advocates.**

The father, mother, and brother of Katherine Howard, the ward, collectively petitioned to declare the ward incapacitated and, at the same time, appoint them as the guardian advocates of the ward. Petitioners sought to remove the ward's right to personally apply for government benefits, to have a driver's license, and to travel. The petition also sought to delegate the following rights to the ward's limited guardian advocates: to contract, to sue and defend lawsuits, to apply for government benefits, to manage property or to make any gift or disposition of property, to determine the ward's residence, to consent to medical and mental health treatment, and to make decisions about the ward's social environment or other social aspects of the ward's life. The court held a hearing on the petition. The ward did not attend the hearing. The ward's attorney stated that the ward had communicated to him that she did not want to attend. But the attorney declined to waive her presence and requested additional time to speak with her. Petitioners' attorney argued that the ward had waived her right to attend the hearing. The court, after noting that there was no guarantee the ward would ever choose to attend the hearing, held the hearing in the ward's absence. The court heard testimony on the petition and received doctors' reports into evidence. The court then granted the petition in full, and appointed the ward's father, mother, and brother as her guardian

advocates. On appeal the ward argued that the court failed to make a finding of good cause when it proceeded with the hearing without her being present, as required by F.S. Sec. 393.12(6)(c). The 4th DCA held that F.S. Sec. 393.12 required the court to make a finding that the ward's waiver of her right to appear was made knowingly and voluntarily. This can be done through reliance upon waiver communicated by counsel, by examining the ward on the record, or by examining third parties who know the ward. Here, since the trial court had heard from the ward's attorney who stated that the ward did not want to attend, the Fourth held that the trial court had implicitly considered the ward's decision not to appear as good cause to hold the hearing in her absence. The Fourth DCA also considered whether the order appointing the ward's family as her guardian advocates satisfied the requirements of F.S. Sec. 393.12(8). The Court found that because the trial court failed to make findings as to the nature and scope of the ward's lack of decision-making ability, and failed to make a finding as to the specific legal disabilities to which the ward was subject, the order did not comply with F.S. 393.12.

Application: As with incapacity hearings under Chapter 744, Florida's appellate courts have recently been scrutinizing procedural protections for alleged incapacitated persons and affirming the necessity for following the prescribed statutory procedures. Practitioners are advised to make sure they properly document the trial court's findings of fact and holdings of law in Chapter 744 and 393 hearings and that they advise the court of the necessity of making the appropriate record so court orders are affirmed if appealed. Counsel representing alleged incapacitated persons must carefully consider whether waiver of their client's presence has been made by the client, or is in the client's best interests if the client does not communicate his or her intent on that issue. If waiver is not intended, then counsel should have the client ready to attend the hearing or attempt to obtain a continuance so the client can appear whenever the client is available to attend.

5. ***Linde v. Linde*, 199 So. 3d 1102 (Fla. 3d DCA 2016). The Third DCA affirms Judge Shapiro and sets limits on the introduction of a Ward's prior medical records at Ward's suggestion of capacity hearing.**

In early 2014, Arthur Linde and his two sisters filed an emergency guardianship petition pursuant to F.S. Sec. 744.3201 with regard their father, Barrett Linde, and Arthur was subsequently appointed as ETG. Pursuant to section 744.331, the trial court appointed a three-person examining committee to assist the court in its determination as to whether to appoint a guardian for Ward. Following the unanimous findings of the examining committee of limited incapacity, the parties entered into a mediated settlement agreement on April 2, 2014. In the settlement agreement, Barrett and Barrett's wife stipulated to the examining committee's finding of limited incapacity and to the admissibility of the examining committee's report in the guardianship proceedings. On May 6, 2014, the trial court accepted the parties' stipulation and entered an order adjudicating Barrett as having limited capacity. The trial court removed some of Barrett's rights, including the rights to contract, manage property, sue, and marry. The trial court retained Arthur as ETG and proceeded to a hearing for permanent guardian appointment. However, on May 30, 2014, Barrett and his wife filed a motion for

disqualification of the trial judge, which the trial judge granted. Barrett and his wife then filed a suggestion of capacity with the successor judge (Judge Shapiro), requesting a restoration of Barrett's rights. The ETG filed a timely objection to the suggestion of capacity, and the trial court appointed an independent physician to examine Barrett and report on his capacity pursuant to F.S. Sec. 744.464. Before the examination took place, Barrett and his wife filed an emergency petition for an injunction to prevent ETG from communicating with the court-appointed physician. The trial court granted the injunction, prohibiting any contact between the independent physician and all counsel and parties other than Barrett and his wife. The independent physician diagnosed Barrett as having bipolar disorder and a neurocognitive disorder but found Barrett capable of exercising all of the rights that had previously been removed pursuant to the stipulation and subsequent order. After the independent physician issued his report, Barrett and his wife filed a motion in limine to exclude all evidence of Ward's mental health prior to the filing of Ward's suggestion of capacity, including the examining committee's report, Barrett's medical history and background, and all the circumstances leading up to the filing of the incapacity petition. The trial court granted the motion and eventually entered an order after trial that fully restored Ward's rights. The ETG argued that the trial court's injunction impermissibly prevented the court-appointed independent physician from having access to and considering all relevant information regarding Ward, and that the order granting the motion in limine prevented the ETG from presenting critical evidence bearing on Ward's capacity. The trial court held, and the Third DCA affirmed, that with regard to suggestion of capacity proceedings under F.S. Sec. 744.464, the issue to be determined is whether the ward is currently capable of exercising some or all of the rights which were removed. The required medical examination procedure is that the trial court must appoint a physician to conduct an examination of the ward and file a report within twenty days of appointment. This is a different and less intensive procedure than initial incapacity determinations under F.S. Sec. 744.331. That statute appoints three separate examiners and states that each member of the examination committee must have access to prior examination reports of the alleged incapacitated person. No such requirement is contained in the statute suggestion of capacity. In fact, the Court noted, section 744.464(2) neither incorporates section 744.331's examination requirements, nor contains any other specific requirements for the independent physician's examination. The Third DCA declined to graft section 744.331 procedures onto section 744.464 or to read requirements into the statute that were not expressly set forth.

Application: The purpose of the suggestion of capacity evidentiary hearing is for the trial court to determine whether the ward has regained capacity so that rights previously removed from the ward should be restored. F.S. Sec. 744.464(3). The burden is on the ward to establish by a preponderance of the evidence whether "the ward is currently capable of exercising some or all of the rights which were removed." This case makes clear that the determination is a snapshot in time as of the present date and that the court does not abuse its discretion in limiting evidence and testimony related to prior incapacity proceedings.

6. ***Hampton v. Estate of Allen*, 198 So. 3d 954 (5th DCA 2016). The Fifth DCA confirms that "benefit to the estate" for purposes of a fee award under F.S. Sec. 733.106 is broader than mere monetary benefit.**

Jordan filed suit against the Estate of Allen, seeking specific performance of a real estate sales contract that was pending at the time of Allen's death. Hampton, the specific devisee of the real estate under Allen's will, filed a Motion for Authority to Defend Civil Action. The trial court granted the motion, reserving Hampton's right to petition the court for reimbursement of the attorney's fees and costs "based on providing a benefit to the estate." Hampton successfully defended the estate, resulting in the dismissal of that action. Thereafter, she filed a petition for attorney's fees against the Estate under F.S. Sec. 733.106(3), seeking reimbursement of attorney's fees and costs incurred in defending Jordan's action. The trial court denied the claim, concluding that "the dismissal of the specific performance action did not enhance or increase the assets of the estate and no benefit was bestowed upon or received by the estate." Section 733.106(3) provides: "Any attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." This language has been interpreted as requiring that an attorney's services "benefit" the estate. *See Samuels v. Estate of Ahern*, 436 So. 2d 1096, 1097 (Fla. 4th DCA 1983). The Fifth DCA noted that Florida courts have interpreted "benefit" to include "services that enhance the value of the estate, as well as services that successfully give effect to the testamentary intention set forth in the will." *See Estate of Shefner v. Shefner-Holden*, 2 So. 3d 1076, 1079 (Fla. 3d DCA 2009). The Court held that in successfully defending against the specific performance action, the probate real estate was transferred to Hampton in accordance with Allen's intent, as embodied in his will. As such, Hampton's request for attorney's fees should have been granted and the trial court was reversed.

Application: Fee petitions under F.S. Sec. 733.106(3) can encompass a wide variety of legal services so long as a legitimate argument can be made that the services rendered provided a benefit to the estate. The benefit provided is not limited to a pecuniary calculation limited to increasing the estate's assets.

7. ***Vasallo v. Bean*, ___ So. 3d ___ (Fla. 3d DCA 2016). The Third DCA upholds Judge Shapiro and holds that estate planning attorney can be forced to testify in a will contest case about testator's statements regarding his intent.**

This case was a will contest in which four of the testator's children were cut out of her will in favor of a fifth child. The probate court entered an order compelling the testator's estate planning attorney "to answer counsels' questions at deposition relating to the testator's 'reasons for disinheriting' the other children." The ruling was based on the exception to attorney-client privilege found in F.S. Sec. 90.502(4)(b), which provides as follows: "(4) There is no lawyer-client privilege under this section when . . . (b) A communication is relevant to an issue between parties who claim through the same deceased client." The 3d DCA denied a petition for writ of certiorari, stating that petitioner had failed to establish that the trial court's order constitutes a departure from the essential requirements of the law. The Court cited the statutory privilege exception

and noted that when multiple parties claim through the same decedent, as in a will contest or a challenge to testate or intestate succession, each party claims to best represent the interests of the deceased. To allow any or all parties to invoke the lawyer-client privilege prevents the swift resolution of the conflict and frustrates the public policy of expeditiously distributing estates in accordance with the testator's wishes. The Court also cited *In re Estate of Marden*, 355 So. 2d 121, 127 (Fla. 3d DCA 1978) (holding that "[a]n attorney's testimony about a Will drafted by him, after the death of the testator, is not ordinarily privileged."). The Court also noted that the evidence rule trumps the lawyer's ethical duties of confidentiality under Rule 4–1.6, Rules Regulating the Florida Bar. *See* R. Regulating Fla. Bar 4–1.6, cmt. ("The attorney-client privilege [section 90.502] applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality [rule 4–1.6] applies in situations other than those where evidence is sought from the lawyer through compulsion of law").

Application: Under certain circumstances estate planners can ethically and voluntarily disclose confidential information related to a deceased client's estate plan to third parties to forestall litigation under Ethics Advisory Opinion 10-3. This case relates to non-voluntary disclosure and confirms the general rule in will contests that attorney-client privilege and client confidentiality is trumped by the exception under F.S. Sec. 90.502.(4)(b).

8. ***In re: Guardianship of Beck*, 204 So. 3d 143 (Fla. 2d DCA 2016). The Second DCA holds that counsel for an emergency temporary guardian and counsel for a ward under an ETG are entitled to fees even when there was no later determination that the ward was actually incapacitated and no later appointment of a plenary or limited guardian.**

On March 24, 2014, Gribler filed a petition for appointment of a guardian of the person and property of Beck. Gribler also filed a petition seeking appointment of an emergency temporary guardian. The trial court considered the ETG petition and thereafter entered an order appointing Yates the emergency temporary guardian of Beck's person and property. On June 3, 2014, Beck passed away. The parties agreed that his death rendered moot any further guardianship proceedings. Thereafter, three petitions seeking reimbursement for attorney's fees and costs were filed with the trial court: (1) a petition seeking attorney's fees for services provided to Gribler as petitioner; (2) a petition seeking attorney's fees for services rendered to the ETG; and (3) a petition seeking attorney's fees by the attorney ad litem for Beck. Each petition alleged entitlement to an award of fees and costs under F.S. Sec. 744.108(1). After a hearing, the trial court entered a final order denying the petitions. It held that F.S. Sec. 744.108(1) did not permit an award of fees and costs to the attorneys because the statute is "limited to situations where a judicial determination of incapacity is found by the court . . . and an appointment of a [plenary or limited] guardian over a ward is ordered." The Second DCA reversed and noted that the issue was whether the petitioners in this case had rendered services to a ward or had rendered services to a guardian on the ward's behalf. If so, they were entitled to attorney's fees or cost reimbursement under the statute. The Court then went on to hold that an emergency temporary guardianship is a type of

guardianship under Chapter 744 and so is included for compensation purposes under F.S Sec. 744.108. For the purposes of F.S. Sec. 744.108, an ETG is a "guardian" and an alleged incapacitated person under an ETG is a "ward." The Court held that the case of *In re Guardianship of Klatthaar*, 129 So. 3d 482 (Fla. 2d DCA 2014) was inapposite since *Klatthaar* involved a matter where the court declined to appoint an ETG.

Application: This case confirms and clarifies what most practitioners believed was the law but perhaps was not as clearly stated as in this case. Other decisions have presumed, without necessarily stating explicitly, that fees under section 744.108(1) would be available in such circumstances. *See In re Guardianship of Snell,* 915 So. 2d 709, 710 (Fla 1st DCA 2005) (reversing order awarding fees to emergency temporary guardian under section 744.108(1) in case where there was no determination of incapacity based on discrepancies in the order but without questioning that the emergency temporary guardian was entitled to fees under the statute); *Faulkner v. Faulkner,* 65 So. 3d 1167, 1169-70 (Fla. 1st DCA 2011) (holding that an emergency temporary guardian is a guardian for purposes of the attorney's fee provisions of section 744.331(7)).

9. ***In re: Nancy Jane Cole*, Slip Copy, 2016 WL 5173215 (Bkrtcy. M.D.Fla. 2016). The Middle District Bankruptcy Court holds that a tie with regard to homestead creditor protection goes to the debtor.**

For several years before filing for bankruptcy, the Debtor lived in a home located in Sarasota, Florida. That home was titled in the name of a living trust created by the Debtor's mother. The Debtor was a beneficiary under her mother's living trust and, under its terms, would inherit a one-third interest in the property when her mother passed away. Shortly after the bankruptcy case was filed, the Debtor's mother passed away. The Debtor amended her filing to list her one-third interest in the Brookhaven Drive property and claim it as exempt homestead since she currently lived in the property and intended to continue living there. The bankruptcy trustee objected to the Debtor's claim of exemption with respect to the property. The Trustee did not dispute that the Debtor had an ownership interest in the property, that she had lived there for three years prior to the bankruptcy petition and that the Debtor intended to live there permanently. The Trustee's sole objection was that the Debtor could not use the homestead exemption to extinguish the Trustee's arguably preexisting lien. Under Bankruptcy Code § 544(a), the Trustee has the status of a hypothetical judgment lien creditor as of the petition date. Although the Debtor lived in the property as of the petition date, the Trustee argued the Debtor could not claim it as homestead since she had no ownership interest in the property at that time. The Debtor did not acquire an interest in the property until her mother passed away, and her mother was still alive as of the petition date. The Trustee argued the Debtor was attempting to use the homestead exemption, which did not ripen, in her view, until after the petition date, to extinguish a lien that existed on the petition date. The bankruptcy court did not buy the Trustee's argument and noted that while the Trustee's hypothetical judgment lien existed as of the petition date, it could not attach to the property until the Debtor acquired an interest in it— i.e., when her mother passed away after the petition date. So the Trustee's hypothetical lien on the property was not a preexisting lien. In this case the lien and the Debtor's homestead exemption attached to the property at the same time.

The court noted that the Florida Supreme Court, in *Milton v. Milton*, 58 So. 718 (Fla. 1912), had held that an heir who took title to property upon his mother's death was able to assert the homestead exemption as to judgments entered against him before his mother's death. The court stated that *Milton* stands for the proposition that the rule that the homestead exemption cannot be used to extinguish preexisting liens does not apply where an heir, who has existing judgment creditors, inherits homestead property. The Court concluded that under the decision in *Milton*, a tie goes to the heir.

Application: Homestead, our venerable legal chameleon, is an always-reliable source of mind-bending twists and turns. This case adds a little more clarity to the creditor exemption analysis in the inheritance context.

10. ***United Bank v. Estate of Frazee*, ___ So. 3d ___, (Fla. 4th DCA 2016). The Fourth District tackles an e-filing snafu and holds that Florida attorneys are bound to e-filing by the Florida Rules of Judicial Procedure so paper-filed claims were deemed untimely filed when supplemented after the claims deadline by later e-filing.**

Frazee died on December 24, 2012. A probate was commenced and notice to creditors was filed and published for the first time on February 14, 2013. Additionally, on April 11, 2013, United Bank was served a copy of the notice by certified mail. Thus, under F.S. Sec. 733.702(1), the bank's deadline to file a claim was May 15, 2013. On May 10th, the bank's counsel in West Virginia, who is a member of the Florida Bar, mailed two statements of claims to the Clerk of Court by certified mail. The Clerk received the claims on May 14th. On May 23rd, the Clerk apparently notified bank's counsel that the claims had to be filed electronically. That same day, the bank submitted the claims through the e-filing portal. On June 10th, the Clerk notified the bank that it had improperly filed the two statements of claims as a single filing. The next day, the bank re-filed the claims separately through the e-portal. On June 22nd, the claims were finally accepted as filed, listing a filing date of May 23rd. Over a year later, the bank moved the court to find the claims to have been timely filed. It argued that its claims should be considered as having been filed on May 14th, the date they were received by the Clerk, based on Florida Rule of Judicial Administration 2.520(f), and argued that this rule clearly and unambiguously states that the Clerk cannot reject improper paper filings. The Estate responded, arguing that e-filing became mandatory statewide in Florida on April 1, 2013, thus requiring that the claims be filed electronically. Although Rule 2.525(d) lists exceptions to the e-filing requirement, the Estate maintained that none were applicable. The Estate also argued that Rule 2.520(f) only applies to errors in formatting and other technical rules, as it had in the pre-e-filing version of the rule, not as a loophole allowing parties to circumvent the e-filing requirement. The probate court declined the bank's motion based on Florida Rules of Judicial Administration 2.520 and 2.525 regarding the mandatory nature of electronic filing. The Fourth DCA agreed that the rules do not require the Clerk of Court to accept paper filings from an attorney, except in very specific circumstances, and affirmed. It confirmed the trial court's observation that the bank's interpretation of Rule 2.520(f) would essentially add another exception to the rule by allowing paper filing for everyone, so long as they later

resubmitted the filing electronically. Such a broad exception was held inconsistent with the mandatory nature of the e-filing requirement and the limited list of exceptions.

Application: The Court noted that one of the eight exceptions the rule provides for paper filing is if the court deems that "justice so requires." Fla. R. Jud. Admin. 2.525(d)(8). The probate court in this case concluded that justice did not require it to allow for paper filing where the late filing was the result of negligence or lack of knowledge by a licensed Florida attorney. This is a cautionary shot across the bow to probate lawyers to stay up to date regarding not just the Probate Rules but also the Florida Rules of Judicial Administration and their impact on our interaction with the court.

11. ***Hilgendorf v. Estate of Coleman*, ___ So. 3d ___, (Fla. 4th DCA 2016). The Fourth DCA holds that, under the facts of this case, a trustee has no duty to account to the estate or the beneficiary for the years during which the decedent's trust was revocable.**

In 2000, Coleman created a revocable trust, the income and principal of which were to be paid to her for her benefit. She appointed herself as trustee and her granddaughter, Smith, as successor trustee. After Coleman's death, the trust divided the trust assets into four equal shares. One share included appellant Hilgendorf. Before her death, Coleman voluntarily resigned as trustee, and Smith succeeded her. Despite the change in trustee, Coleman continued to manage and control the trust assets and use them as her own, as she had always done. The trust language did not require accountings to the grantor but merely stated that the books and records of the trust would be open and available for inspection by the grantor or any beneficiary of the trust (the opinion doesn't say whether this language meant "current" beneficiary of the trust). After Coleman's death, the trust became irrevocable and required that the successor trustee provide an accounting of the trust to each beneficiary at least annually. Coleman died in 2007. Smith and Hilgendorf were appointed co-personal representatives of the estate. The trust was the sole residuary beneficiary of the estate. There was a falling out between the two Co-PRs and Hilgendorf filed suit against Smith, as trustee, for a pre-death accounting of the trust for the years that Smith was trustee prior to Coleman's death. The trial court dismissed the suit and the Fourth DCA affirmed. The Court noted that F.S. Sec. 736.0603(1) states that "[w]hile a trust is revocable, the duties of the trustee are owed exclusively to the settlor." This codified prior law, which held that a trustee owes duties to the settlor/current beneficiary of a revocable trust and not to contingent beneficiaries. The Court then went on to hold that while the case of *Brundage v. Bank of America*, 996 So. 2d 877 (Fla. 4th DCA 2008) authorizes a beneficiary to sue for breach of a duty that the trustee owed to the settlor which was breached during the lifetime of the settlor and subsequently affects the interest of the beneficiary, this case did not involve such an allegation of breach of duty. Hilgendorf did not sue for the violation of a specific provision of the trust but rather only sought an accounting, which was not required by the trust or statute. F.S. Sec. 736.0813, which provides for the duty of the trustee to provide trust accountings to qualified beneficiaries, specifically does not apply while a trust is revocable and a statutory duty to account to the qualified beneficiaries does not arise until a trust becomes irrevocable.

Application: Under the analysis of this case, a suit by post-death beneficiaries solely for an accounting for pre-death activities of the trustee of a revocable trust is a likely loser. A suit alleging a breach of duty related to a specific provision of the trust that affects the post-death beneficiary could go forward. The law favors and requires accountings once a trust is irrevocable but favors privacy during the revocable period of the settlor's lifetime.

12. ***Dandar and Dandar & Dandar, P.A. v. Church of Scientology Flag Service Organization, Inc.*, 190 So. 3d 1100 (Fla. 2d DCA 2016).**
The Second DCA holds that the trial court did not have jurisdiction to entertain a subsequent motion to enforce settlement agreement when the case was voluntarily dismissed with prejudice and the Court did not reserve jurisdiction to enforce the agreement.

Litigation between the parties to this case began in 1997, when Kennan G. Dandar and the law firm of Dandar & Dandar, P.A. (collectively "Dandar"), represented the Estate of Lisa McPherson in a wrongful death action against the Church of Scientology. A confidential settlement agreement was reached in that case in 2004, which Dandar signed in his individual capacity, and the parties filed a joint stipulation of voluntary dismissal with prejudice. Dandar pledged in the agreement that he would not be involved in any adversarial proceedings against the Church under any circumstances at any time. In 2009, Dandar then filed a complaint on behalf of another plaintiff against the Church. The Church sought an order in the action that had been settled and dismissed to enforce the settlement agreement and Dandar argued that the Trial Court lacked jurisdiction. At the trial court, the Church successfully moved to enforce the agreement against Dandar and was awarded attorney's fees and costs in the amount of $1,068,156.50, plus postjudgment interest. The trial court found that it had jurisdiction to enforce the settlement agreement based on language within the agreement that provided "the circuit court ... shall retain jurisdiction to enforce the executory terms of this Confidential Settlement Agreement which shall be filed under seal if enforcement becomes necessary." The Second DCA held that the trial court did not have jurisdiction to entertain the Church's motion after the Church had previously dismissed its cause of action with prejudice. The Court then reversed the judgment.

Application: This case highlights the difference between presenting a settlement agreement to the trial court for approval prior to dismissal of an action and cases where the parties voluntarily dismiss the action without an order of the court pursuant to Florida Rule of Civil Procedure 1.420. As the Second DCA held here, a voluntary dismissal under rule 1.420(a) divests the trial court of continuing jurisdiction over the case. In order to allow the court to retain jurisdiction, the parties, prior to dismissal, may present the settlement agreement to the trial court for approval and the trial court then enters an order of dismissal predicated on the parties' settlement agreement, the trial court retains jurisdiction to enforce the terms of the settlement agreement. Alternatively, the parties could have obtained an order of dismissal incorporating the settlement agreement or an order reserving jurisdiction to enforce the terms of the agreement. However, in this case the trial court could not rely on its inherent power to enforce its own orders since there is no judgment or order for the court to enforce. In

this instance, the Church's appropriate remedy was to pursue a new breach of contract action to enforce the settlement agreement.

13. ***JBK Associates, Inc. v. Sill Bros, Inc.*, 191 So. 3d 879 (Fla. 2016). The Florida Supreme Court confirms that a debtor did not destroy the protected status of funds from the sale of his homestead by placing them in non-high risk mutual funds and stocks.**

In 2010, JBK obtained a final judgment against Sill in the amount of $740,487.22. In 2013, Sill and his wife sold their marital home due to divorce and Sill placed his portion of the homestead proceeds in a "FL Homestead Account" with Wells Fargo. The bank split the funds into three subaccounts: one cash account and two securities accounts containing mutual funds and unit investment trusts. In 2014, JBK served garnishment writs on Wells Fargo to collect on the judgment from Sill's accounts. Sill moved to dissolve the writ asserting that the funds were entitled to homestead protection. The trial court agreed and JBK appealed to the Fourth DCA. The Fourth District found that the investment in securities was not so inconsistent with the purposes of homestead for the funds to lose their protected status under the Supreme Court decision in *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201 (Fla. 1962). Florida's homestead exemption provides protection not only for the physical homestead property, but also for both the cash and non-cash proceeds from a voluntary sale of the homestead as well. "However, the following requirements must be met for sale proceeds to maintain the same protection from creditors as the original homestead: (1) there must be a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; (2) the funds must not be commingled with other monies; (3) the proceeds must be kept separate and apart and held for the sole purpose of acquiring another home." *Orange Brevard*, 137 So. 2d at 206. The Fourth District found that Sill did not commingle the proceeds with other funds and there was no evidence that the securities in Sill's account were particularly risky or kept separate and apart from Sill's other funds. Sill ultimately did use the proceeds to purchase a new home. The case made its way to the Florida Supreme Court and the Supreme Court affirmed the Fourth's opinion and held that Sill had not violated the requirements of the *Orange Brevard* case (which the Court reaffirmed as good law). The Court observed that in today's economic climate, when traditional bank accounts do not earn any significant amount of interest, placing sale proceeds in the type of common and relatively safe investment accounts at issue did not demonstrate an intent so different from reinvestment in a new homestead within a reasonable time as to violate *Orange Brevard*. Finally, the Court held that "any decision contrary to the one we make here would require judgment debtors to place homestead sale proceeds in non-interest-earning mediums only — perhaps an escrow account or even a jar under one's bed — and we decline to read Florida's homestead exemption provision so narrowly, especially given the liberal construction this area of Florida law typically enjoys."

Application: This case is part of the strong body of case law liberally interpreting Florida's homestead creditor protections. It gives comfort to debtors who seek to invest the sales proceeds in investments that will at least garner some positive return above that available for cash accounts only while the debtor then shops for a new residence.

14. ***Ames v. Ames*, 204 So. 3d 132 (Fla. 4th DCA 2016). The Fourth District holds that an ex parte temporary injunction in a constructive trust matter may be entered and a temporary injunction then maintained as a constructive trust, without specific identification of assets, if the opposing party refuses to respond to discovery or present evidence regarding the location of the assets.**

Here, a father sued his two sons claiming breach of fiduciary duty under a power of attorney, fraud, and unjust enrichment after one of the sons utilized a power of attorney to liquidate more than $1 million of the father's investment account and used a power of attorney to sell the father's condominium and keep the proceeds. The sons claimed those assets were given as gifts to the sons. The Probate Court, in a case that was not a probate or guardianship case, but rather a breach of fiduciary matter related to a durable power of attorney[1] entered an ex parte temporary injunction freezing all of the sons' assets, on the grounds that the father's assets, which were needed for his survival while showing signs of dementia, were being dissipated and a money judgment entered later would not suffice. After the ex parte freeze was entered, the trial court then held an evidentiary hearing regarding the injunction but the sons refused to appear at the hearing, refused to provide any discovery to the father, and failed to indicate where the father's money had been transferred after the transactions. The Fourth DCA affirmed the entry of the ex parte injunction and its maintenance after the evidentiary hearing and determined that a constructive trust remedy here was appropriate. Ordinarily, a constructive trust can be impressed only if the trust *res* is specific, identifiable property or if it can be clearly traced in assets of the defendant. *See Finkelstein v. Se. Bank, N.A.*, 490 So. 2d 976, 983 (Fla. 4th DCA 1986). In this case, the father served a notice of production inquiring about the subject assets after the sons moved to dissolve the injunction, but no information was ever provided by the sons. The sons also refused to provide depositions in this matter. The Fourth held that these efforts were sufficient to meet the requirements of *Finkelstein*.

Application: Assuming this was not a mental health incapacity case or guardianship matter, this case seems to be an extension of the broad equitable power a Probate Court has to enter ex parte injunctions merely to preserve the status quo and to protect vulnerable adults. *See also Estate of Barsanti,* 773 So. 2d 1206 (Fla. 3d DCA 2000). The case is a powerful weapon to assist attorneys seeking to assist clients who are potentially being exploited by an agent under a power of attorney who is breaching his duty.

[1] The case does not contain many facts and this is my speculation from reading the opinion. If the trial court case was a mental health incapacity matter, or a guardianship case, then I don't think the holding is unusual or groundbreaking since the Probate Court in guardianship cases already has broad equitable powers to freeze assets on an ex parte basis. *See Ripoll v. Comprehensive Personal Care Services, Inc.* 963 So. 2d 789 (Fla. 3d DCA 2007).

15. ***Nelson v. Nelson*, ___ So. 3d ___ (Fla. 2d DCA 2016). The Second DCA holds that an irrevocable trust, even if established solely for creditor protection or estate planning purposes, is not a marital asset for equitable distribution purposes and cannot be reformed without consent or participation by all trustees and beneficiaries.**

This case involves property funded into an irrevocable trust. Such trusts are used to allow families to transfer wealth over multiple generations free from creditors, certain taxes, and potentially, ex-spouses. The recent case of *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013), held that such trusts can be pierced in favor of enforcement of alimony and child support orders. The court here was faced with the more drastic question of whether an irrevocable trust can be terminated and divided pursuant to equitable distribution in a divorce case, as was argued by the husband in this case. The trial court held that the trust was subject to equitable distribution but the Second DCA reversed and held that a divorce court cannot force you to terminate your irrevocable trust and split the assets with your divorcing spouse. The Court determined that assets, even if initially marital in nature, don't retain their marital-asset status once they've been gifted away, as happened when the irrevocable trust was funded. The irrevocable trust is an entity distinct from either the husband or wife. Alternatively to equitable distribution, the husband sought to reform the trust by stating that the trust was solely to create an estate planning mechanism intended to protect the home from claims made by his heirs in the event he were to predecease the wife during their marriage. The husband then argued that since that purpose no longer existed, the trust was subject to reformation pursuant to the Florida Trust Code. The Court rejected the reformation argument, noting that reformation pursuant to F.S. Section 736.04113 could only be initiated by a trustee or beneficiary of the trust, not the initial settlor. The court also rejected application of common law authority to modify or terminate an irrevocable trust, citing to absence of consent from all beneficiaries of the trust.

Application: Irrevocable trusts do protect assets in the context of a divorce, but only as to equitable distribution and not as to alimony and child support claims. Alimony claims can be addressed through marital agreements and such agreements may further eliminate potential litigation such as this case. In addition, the Florida Trust Code and case law provide many tools to modify or reform even irrevocable trusts but those remedies have very specific requirements and if you fail to meet one of the requirements a remedy such as reformation will be unavailable.

16. ***Edwards v. Maxwell*, ___ So. 3d ___ (Fla. 1st DCA 2017). The First DCA holds that beneficiaries of purely discretionary trusts do not have standing to contest adoptions adding beneficiaries to the trusts.**

In 2004 Edwards adopted a son named Kuiper. This had the legal effect of adding Kuiper to the class of eligible beneficiaries for three irrevocable discretionary trusts created by the great-grandparents of Edwards' biological son, Maxwell. Maxwell filed suit in 2014 claiming the adoption was a sham that diluted his interest in the trusts. Maxwell argued he should have received notice of the adoption in 2004, which would have given him an opportunity to fight it in court. The trial court agreed and vacated

Kuiper's adoption order. The First DCA reversed and held that since beneficiaries of purely discretionary trusts don't have any fixed or certain property rights in such trusts, they don't have legal standing to challenge adoptions of new potential beneficiaries in court. In this case, as a practical matter, Maxwell couldn't demonstrate that Kuiper's adoption had an economic impact on him. Without a direct, financial, and immediate interest in the trusts, he lacked standing to set aside the 2004 adoption because he wasn't entitled to notice in the first place.

Application: Under F.S. Section 732.608, adoptions can be used to add individuals to the class of eligible beneficiaries of irrevocable trusts. Adoptees are treated by the statute as descendants of their adoptive parents for inheritance purposes. Regarding the holding in this case, it seems to me that if Maxwell had been vested as beneficiary as to a certain right, for example, some percentage interest or set share in the trust principal, then the result in this case would have been different.

17. ***Depriest v. Greeson*, ___ So. 3d ___ (Fla. 1st DCA 2017). An estate is not liable for a car accident under the dangerous instrumentality doctrine when the accident occurs prior to the estate being opened, according to the First DCA.**

The issue in this case was an estate's potential liability for a car accident under the dangerous instrumentality doctrine. The decedent lived with his daughter prior to his death. His car and its keys were kept at the daughter's house and she occasionally drove the car with his permission. About a month after the father's death, the daughter was driving his car and got into an accident. No probate estate had yet been opened and the decedent's nominated personal representative was a step-son who lived out of state. As a general matter, an estate can get sued if the decedent's car is involved in an accident. The liability arises from Florida's "dangerous instrumentality doctrine," which is a creature of common law that "imposes ... vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). An owner voluntarily entrusts a vehicle to another when he gives that person authority to operate the vehicle by "either express or implied consent." *Id*. Normally express consent is not applicable in a probate context, as it was not applicable here. The issue is implied consent. The First DCA noted that implied consent cases courts focus on factors such as what a car owner knows about the driver's prior use of the vehicle, the location and accessibility of the keys, the nature of any familial relationship between owner and driver, and the conduct of the parties after an accident occurs. Here, the Court held that implied consent was not applicable because a personal representative has no legal duties prior to his appointment. Therefore, the step-son in this case had no duty to prevent his step sister from driving her deceased father's car. The relation-back doctrine was also held not to apply here since that would create a duty to act prior to appointment. Such a duty is contrary to the distinction between authority and duty under F.S. Section 733.601.

Application: This would be a harder case if a personal representative had actually been appointed when the accident occurred. Once appointed, the personal representative

should take steps to control the decedent's car and prevent anyone from using it without express authorization (such as to take it to a dealer for sale). If the personal representative doesn't take steps to prevent people from driving the decedent's car, consent potentially could be implied in case of an accident.

18. ***Spradley v. Spradley*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA reminds to be careful about references to "the estate," since the personal representative, in a representative capacity, is actually the proper party to litigation against the estate.**

This case is a reminder that under Florida law there is no such thing as a separate legal entity known as an "estate." It is the personal representative of the estate, in a representative capacity, that is the proper party to legal actions on behalf of the estate. In his complaint, Spradley alleged that the estate of his mother, Fuller/Waters and his brothers, Derrick and James Spradley, converted his property. However, his complaint merely named his mother's estate and the brothers as the defendants and did not sue the personal representative of the estate or even allege a probate administration had been opened. Spradley's complaint was dismissed as legally insufficient under F.S. Section 57.085(6) and that dismissal was upheld on appeal. However, the Second DCA held that Spradley should be allowed to amend his complaint to correct the defects if possible.

Application: This is one of those legal points for which there seemingly should be numerous cases to cite but the Second DCA noted that there does not seem to be a Florida case directly on point. The Court did then go on to say that "it is well-settled that "an 'Estate' is not an entity that can be a party to litigation. It is the personal representative of the estate, in a representative capacity, that is the proper party." The Court then cited the following law in support of the proposition: "*Ganske v. Spence*, 129 S.W.3d 701, 704 n.1 (Tex.App. 2004) (citations omitted); see also § 733.608, Fla. Stat. (2016) (describing the general power of the personal representative); Reopelle v. Reopelle, 587 So. 2d 508, 512 (Fla. 5th DCA 1991) (highlighting that only the personal representative of a decedent's estate would have the right to intervene in litigation for the benefit of all the beneficiaries of the decedent's estate); 31 Am. Jur. 2d Executors and Administrators § 1141 (2016) ("Since estates are not natural or artificial persons, and they lack legal capacity to sue or be sued, an action against an estate must be brought against an administrator or executor as the representative of the estate."); 18 FLA. JUR. 2D DECEDENTS' PROPERTY § 721 (2016) (same)." If you have this issue in a case, now you HAVE a current case and some law to back you up.

19. ***Cohen v. Shushan*, ___ So. 3d ___ (Fla. 2d DCA 2017). The Second DCA, in a scholarly opinion, affirms that you must follow formal legal requirements to be married. This includes foreign marriages you seek to have recognized in Florida. You are either married or you are not.**

The issue in this case was whether a couple was ever lawfully married under Israeli law, such that the survivor was eligible for benefits as a surviving spouse under the Florida Probate Code. The probate court concluded that Shushan and the decedent, Cohen, were

in a recognized legal union in Israel at the time of Mr. Cohen's passing. The legal union was that of “reputed spouse.” Thus, according to the probate court, under F.S. Section 732.102. Shushan was entitled to a surviving spouse's share of Cohen's intestate estate. Cohen's daughter appealed the order. The Second DCA held that the probate court erroneously conflated a domestic union under Israeli law with marriage under Israeli law and reversed. The facts showed that Cohen formed a romantic and enduring relationship with Shushan. Beginning in 1990, Cohen and Shushan lived together as a couple in Israel and remained together until Cohen's passing in 2013. Shushan and Cohen had four children together, ran Israeli businesses together as partners, and held themselves out as husband and wife to their friends and family. To all appearances, they seemed a married couple, and, they may very well have thought themselves to be each other's spouse. But they never participated in a religious wedding through any religious authority recognized under Israeli law. In the probate litigation, the daughter did not dispute that Shushan was indeed her late father's "reputed spouse" in Israel, but she argued that legal status was not one the Israeli state recognizes as marriage. Because Israel's law limits marriage to a union formed under the auspices of a recognized religious authority, Shushan was never Mr. Cohen's married spouse, according to the daughter. At trial, the litigants, as well as their testifying experts, referred to Shushan's domestic relationship with the decedent alternatively as "common law spouse," "reputed spouse," or a "spouse known in public." The legal issue was whether Israeli law recognized a “reputed spouse” relationship as “marriage.” When you boil down the testimony, both sides' experts essentially testified that while the Israeli State recognizes common law/reputed spouse as equal to marriage with regard to many rights, the two relationships—marriage and reputed spouses—remained distinct under Israel's law. Reputed spouses were further explained as a civil relationship but the testimony confirmed there is no civil marriage in Israel but rather only religious marriage is recognized. The Second DCA construed the issue *de novo* as a question of law on appeal and held that the Israeli reputed spouse relationship is not marriage under Florida law for the purposes of F.S. Section 732.102 so Shushan is not entitled to the benefits of a surviving spouse. In its holding, the Court entered into a very detailed discussion of the nature of the marital relationship, its uniqueness, the fundamental rights involved, and the importance of being able to distinguish a marital relationship from other relationships that look similar but are not in fact marriage. The Court noted that due to the societal importance and personal significance of marriage, the law strives to keep as clear as possible what the points of entry into a marital relationship are so that the public can readily discern who has entered into a marriage union and who has not. In its summary the Court noted that the status of a reputed spouse relationship cannot be identical to the status of a married spouse's relationship because, under Israeli law, reputed spouses are not married and can informally end their relationships at any time without even seeking a divorce. Marriage, under the law, is not simply a bundle of rights and privileges; it is also a status. The Court explained that if it were to hold otherwise and approximate a reputed spouse relationship as "close enough" for purposes of marriage, our courts would simultaneously diminish, “the uniqueness of the marital status in the affairs of society and do offense to a sovereign nation's authority to define, for itself, the precise boundaries of marriage within its own jurisdiction.

Application: This case is an excellent explanation of the distinction between legal marriages and common law marriages, and why Florida law favors the former. It is also an explanation for why a surviving spouse has so many rights in the probate context.

20. ***Yergin v. Georgopolis,*** **___ So. 3d ___ (Fla. 3d DCA 2017). The Third DCA explains the procedure for litigating entitlement to unclaimed property.**

Richard Yergin took out a life insurance policy on himself, and named as the beneficiary Georgopolos, who was listed as Richard's mother. The policy and the $41,687.74 it paid out on Richard's death in 1997, however, were unknown to Georgopolos and Richard's heirs. They didn't know about the money when Richard died or when Richard's estate was probated in 1998. The money was finally discovered by the parties in 2015. By then, the insurance company had turned over the funds to the Florida Department of Financial Services. In 2015, Glen Yergin, Richard's half-brother, petitioned to reopen Richard's estate, appoint himself the personal representative, and for a declaration from the probate court that the insurance money: (1) was a failed transfer because Georgopolos was not Richard's mother as stated on the policy; and (2) belonged to the estate. Georgopolos made a claim for the funds with the financial services department, and moved to dismiss the petition, which the probate court granted. The Third DCA affirmed since it was undisputed that the brother did not file a claim with the financial services department. The issue in the case was whether a personal representative that seeks to obtain money or property delivered to the financial services department as unclaimed must first file a claim with the department, and exhaust administrative remedies, before it can file a lawsuit or petition in the probate court to determine ownership of the property. The brother contended that the probate court must decide first because Florida law gives it exclusive jurisdiction to determine whether property is part of an estate. This appears to be a logical argument but the Court noted that Florida's constitution and statutes give the financial services department jurisdiction to make determinations as to unclaimed property deposited in the state treasury. *See* ART. IV, § 4(c); § 717.124(1), Fla. Stat. (2015). The Court held that while Florida law does generally give jurisdiction to the Probate Court to determine all matters related to the settlement of estates and determination of estate property, it is "consistent with [the] legislative intent" to give jurisdiction to the circuit court over the settlement of estates, and jurisdiction to the financial services department over unclaimed property, "any estate or beneficiary . . . of an estate seeking to obtain property paid or delivered to the department . . . must file a claim with the department." § 717.1242(1), Fla. Stat. (2015). Only after a claimant has exhausted the administrative procedures with the financial services department may it seek relief in the circuit court.

Application: This issue is a bit of a trap for the unwary. Even if a probate court erroneously enters an order with regard to unclaimed property, if the financial services department procedures have not been followed the government will not comply with the probate court order and will be within its rights to ignore the order. As the Court notes, the Legislature has set forth an extensive administrative procedure for seeking unclaimed property. That procedure must be followed and contains timelines for

determination of rights and administrative hearings. The administrative process must be followed to conclusion prior to seeking any court determination of rights.

21. *In re Estate of Arroyo v. Infinity Indemnity Insurance Company*, ___ So. 3d ___ (Fla. 3d DCA 2017). The Third DCA reminds us that a claim against a decedent's insurer is not necessarily barred by the two-year nonclaim provisions of F.S. Section 733.710.

This case had somewhat of a complicated fact pattern involving the failure of the decedent's insurer to defend him and the events that then ensued. Arroyo died in 2009. In 2011 Reyes filed a negligence lawsuit against the estate personal representative, related to a personal injury allegedly caused by the decedent, but never filed a written claim in the probate court. Although the estate tendered the defense of the negligence claim to Infinity, Infinity declined to defend the claim. In 2013, the estate settled the negligence lawsuit by entering into a Coblentz agreement with Reyes, in which Reyes and the estate agreed to the entry of a consent judgment, Reyes agreed not to execute the judgment against the estate, and the estate assigned any rights it had against Infinity to Reyes. After Reyes and the estate entered into the agreement and obtained the consent judgment, Reyes sued Infinity in circuit court pursuant to the assignment of rights provision in the Coblentz agreement, alleging in part that Infinity had demonstrated bad faith by failing to defend the estate in the negligence lawsuit. The issue in this case was whether Reyes was barred from suing the decedent's insurer when any probate creditor claims he might have had were time-barred. The Third DCA held that Reyes could sue the decedent's insurer. The Court concluded that "although . . . Reyes did not file a claim against the Estate in the probate court within the two-year limitations period, [his judgment] is enforceable against Infinity if coverage is established and there was no fraud or collusion. Our conclusion is fully supported by ... the Fourth District Court of Appeal's decision in *Pezzi v. Brown*, 697 So. 2d 883 (Fla. 4th DCA 1997)." In *Pezzi*, the Fourth District held that the plaintiff's failure to comply with F.S. Sections 733.702 and 733.710 did not place limitations on the plaintiff's ability to recover against the decedent's insurer. *Id*. at 886. The jurisdictional limitation under section 733.710 "is specific to the decedent's estate, the personal representative, and the beneficiaries; the limitation does not extend to the decedent's insurance policy." *Id*. at 885.

Application: This case is a reminder that of the principle that almost every rule has an exception. Further, it illustrates that statutes restricting access to the courts will be narrowly construed in a manner favoring access. Since the plaintiff here was not seeking recovery from the estate's assets, the personal representative individually, or the beneficiaries, nothing in the Probate Code precluded him from bringing his cause of action and recovering to the extent that the decedent was covered by liability insurance.