

ESTATE PLANNING COUNCIL OF GREATER MIAMI

CASE LAW UPDATE

April 16, 2015

Thomas M. Karr
Gunster, Yoakley & Stewart, P.A.
600 Brickell Avenue, Suite 3500
Miami, FL 33131
(305) 376-6014
tkarr@gunster.com

Estates and Trusts

1. *In re Amendments To Florida Evidence Code*, --- So. 3d ----, 39 Fla. L. Weekly S501 (Fla. 2014). The Florida Supreme Court refuses to adopt as unnecessary Section 90.5021 of the Florida Statutes establishing a fiduciary lawyer-client privilege to the extent that it is procedural.
2. *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014). The Daubert standard governing the admissibility of expert testimony does not apply retroactively.
3. *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492 (Fla. 3d DCA 2014). The Daubert standard governing the admissibility of expert testimony is procedural in nature and therefore applies retrospectively to pending cases.
4. *Minassian v. Rachins*, 152 So. 3d 719 (Fla. 4th DCA 2014). Florida law permits the appointment of a trust protector to modify or amend the terms of a trust to correct ambiguities or correct drafting errors that defeat the settlor's intent.
5. *Aldrich v. Basil*, 136 So. 3d 530 (Fla. 2014). Section 732.6005 governing rules of construction and intention of testators does not require the construction of a will as disposing of property not named or in any way described in the will despite the absence of any residuary clause, or any other clause disposing of the property where the decedent acquired the property in question after the will was executed; after required property not specifically disposed of by the decedent's will passes by intestacy.
6. *Kritchman v. Wolk*, 152 So. 3d 628 (Fla. 3d DCA 2014). Trustee breached its trust for failure to comply with settlor's pre-death instruction to pay educational expenses of beneficiary not named in trust as educational expense beneficiary.
7. *Wilson v. Wilson*, 138 So. 3d 1176 (Fla. 4th DCA 2014). Cremated remains are not property as defined by § 731.201(32) of the Florida Probate Code.

8. *Souder v. Malone*, 143 So. 3d 486 (Fla. 5th DCA 2014). Regardless of whether a creditor is reasonably ascertainable or not, a creditor must seek an extension of time to file its claim late if filed later than the 3 month period after the first publication of the notice to creditors.

9. *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014). The disposition of real property pursuant to a homeowner's will is an impermissible devise for homestead purposes when the homeowner transferred the property to a QPRT that reverted back to the homeowner's estate because the homeowner failed to survive the term of the QPRT; the execution of a deed by a homeowner that conveys real property "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining" is a waiver of the homeowner's homestead rights in the property.

10. *Corya v. Sanders*, 39 Fla. L. Weekly D2298 (Fla. 4th DCA Nov. 5, 2014), opinion withdrawn and superseded by 155 So. 3d 1279 (Fla. 4th DCA 2015). In action for accounting, statutory laches under § 95.11(6) bars a beneficiary's right to an accounting for the years predating the 4 year period before the filing of the action.

11. *Lyons v. Lyons*, 155 So. 3d 117a (Fla. 4th DCA 2014). Surviving spouse does not have standing to challenge the validity of a quit claim deed conveying the deceased spouse's interest in the property even when the deceased spouse did not sign the deed conveying the property interest.

12. *Blechman v. Estate of Blechman*, 40 Fla. L. Weekly D149 (Fla. 4th DCA Jan. 7, 2015), withdrawn and superseded by --- So. 3d --- 2015 WL 150021 (Fla 4th DCA Apr. 1, 2015). Decedent's 50% interest in an LLC was not a probate asset because the membership interest immediately vested in the decedent's children upon his death pursuant to the terms of the LLC's operating agreement.

13. *Estate of Maher v. Iglukova*, 138 So. 3d 484 (Fla. 3d DCA 2014). A child legitimized by a determination of paternity after the execution of a will is not a pretermitted child.

14. *Felice v. Sutherland Pullen Law, PLLC*, --- So. 3d ---, 39 Fla. L. Weekly D2232 (Fla. 2d DCA Oct. 24, 2014). A charging lien for nonpayment of attorney's fees cannot be imposed against homestead property.

15. *Brown v. Brown*, 149 So. 3d 108 (Fla. 1st DCA 2014) Pay on death accounts subject to § 655.82 of the Florida Statutes belong to the named beneficiary or beneficiaries upon the death of the party or parties who have the present right in the account and there is no rebuttable presumption that would allow a court to find otherwise.

16. *Peck v. Peck*, 133 So. 3d 587 (Fla. 2d DCA 2014). A settlor and all beneficiaries may consent to the termination of an "irrevocable" trust even when the trust's purposes remain unfulfilled.

Appeal

17. *Karr v. Vitry*, 135 So. 3d 372 (Fla. 5th DCA 2014). Order denying motion for discharge of guardian is not a final order, but appealable under Florida Rule of Appellate Procedure 9.170(b).

Due Process/Procedure

18. *Blechman v. Dely*, 138 So. 3d 1110 (Fla. 4th DCA 2014). Order granting ore tenus motion to remove personal representative reversed for lack of due process and lack of an evidentiary hearing; civil contempt order reversed for failure to contain purge provision; criminal contempt order reversed for failure to comply with requirements of Rule 3.840 of the Florida Rules of Criminal Procedure.

19. *Snider v. Metcalfe*, 157 So. 3d 422 (Fla. 4th DCA 2015). Trustee's filing of motion to dismiss that did not raise personal jurisdiction defense and trustee's response to plaintiff's discovery request and service of a notice of intent to use trust funds to pay attorney's fees and costs did not operate as a waiver of trustee's right to amend its motion to dismiss to add personal jurisdiction defense because the original motion to dismiss had not yet been heard by the trial court.

20. *Kozinski v. Stabenow*, 152 So. 3d 650 (Fla. 4th DCA 2014). A petition to determine the reasonableness of compensation paid to a personal representative or trustee and to enter a surcharge or disgorgement order as warranted is an adversary proceeding requiring the service of formal notice under the Florida Probate Rules in order for the probate court to have personal jurisdiction over the personal representative or trustee individually.

21. *Weiser v. Weiser*, 132 So. 3d 309 (Fla. 4th DCA 2014). Trial court's denial with prejudice of motions on the grounds that they were not reached by the court during the time allotted for them to be heard is denial of party's due process right and is fundamental error.

22. *Stockinger v. Zeilberger*, 152 So. 3d 71 (Fla. 3d DCA 2014), reh'g denied (Dec. 22, 2014). Court order requiring claimants against an estate to appear for deposition before they can proceed with their claims, which also states that the failure to do so may result in the dismissal of their claims was not irreparable harm for purposes of invoking the certiorari jurisdiction of the appellate court.

23. *Andrews v. Estate of Andrews*, 149 So. 3d 760 (Fla. 5th DCA 2014). Petitioner seeking a declaration that a person is deceased who has been absent from the place of his or her domicile for a continuous period of five or more years is entitled to an evidentiary hearing.

24. *Hanchey v. Leaffer*, 138 So. 3d 1091 (Fla. 2d DCA 2014). Trial court order adopting the report and recommendations of a magistrate departed from essential requirements of the law because trial court failed to conduct an evidentiary hearing on timely filed exceptions to magistrate's report and recommendations denying a ward's wife from having contact with her incapacitated husband. Trial court order adopting the report and recommendations of a magistrate without an evidentiary hearing on timely filed exceptions to a magistrate's report and recommendation authorizing guardian to initiate legal proceedings against incapacitated's wife

did not depart from essential requirements of the law.

25. *Weiser v. Weiser*, 137 So. 3d 545 (Fla. 4th DCA 2014). Disbursement listed on final accounting that was subject of a motion to ratify distributions by a plenary guardian put the recipient on sufficient notice for due process purposes that the disbursement was at issue such that the trial court's disapproval of the disbursement was not a violation of the recipient's due process rights.

26. *JP Morgan Chase Bank v. Est. of Neu*, 133 So. 3d 1068 (Fla. 4th DCA 2014). Absent extraordinary circumstances, the rule of priority provides the trial court that first exercises jurisdiction over the disposition of sale proceeds of a trust asset with the exclusive right to hear all issues or questions relating to the disposition of the sale proceeds and subsequent action must be stayed pending resolution of same.

27. *Biden v. Lord*, 147 So. 3d 632, 2014 (Fla. 1st DCA 2014). Post judgment intervention is not permitted unless the intervening party can show intervention would in no way injuriously affect the original litigants and allowing intervention would further the interest of justice.

28. *Vazza v. Estate of Vazza*, 144 So. 3d 698 (Fla. 4th DCA 2014). Order requiring return or reimbursement to the estate of allegedly improperly distributed funds reversed for failure to hold an evidentiary hearing.

29. *May v. Salter, et al.* 139 So. 3d 375 (Fla. 1st DCA 2014). Order granting motion to dismiss on grounds of res judicata reversed on claims alleging deficiencies in the final accounting of a trustee when the final accounting had not been completed until after the filing of the amended complaint in the previous litigation.

30. *In Re: Amendments to the Florida Probate Rules*, 139 So. 3d 875 (Fla. 2014). Florida Supreme Court adopts several changes to the Florida Probate Rules minimizing the amount of unnecessary sensitive personal information to be included in documents filed with the courts.

31. *Mack v. Polsby*, 129 So. 3d 1169 (Fla. 3d DCA 2014). Trial court has jurisdiction over action contesting validity of a revocable trust created by order of a guardianship court where plaintiffs were not given notice of the petition to create the trust.

32. *Finnegan v. Compton*, 154 So. 3d 370 (Fla. 4th DCA 2014). Application of amended Probate Rule 5.025(d)(2) providing that an award of attorney's fees in a probate or guardianship proceeding follows procedures established for such proceedings rather than the civil proceedings under Rule of Civil Procedure 1.525 applies only to proceedings commenced on or after September 28, 2011, the effective date of the rule amendment, and only to proceedings that were pending on the effective date, but only as to judgments, orders or notices that were filed on or after that date.

33. *Stone v. Stone*, 132 So. 3d 377 (Fla. 4th DCA 2014). According to Florida Probate Rule 5.025(d)(2) motions for attorney's fees and costs in adversary probate proceedings

are not required to be served within thirty days after the filing of the judgment as provided in Rule 1.525 of the Florida Rules of Civil Procedure.

Guardianship

34. *Katke v. Bersche*, 39 Fla. L. Weekly D2441 (Fla. 5th DCA Nov. 20, 2014). Withdrawal of original petition to determine capacity that is accepted by the trial court divests the trial court of jurisdiction to consider second petition to determine capacity filed in the same case.

35. *Romano v. Olshen*, 153 So. 3d 912 (Fla. 4th DCA 2014). A guardian may access joint brokerage account owned of the ward and his or her spouse to pay the ward's necessary living expenses.

36. *Rawl v. Rawl*, 133 So. 3d 1179 (Fla. 2d DCA 2014). Section 744.331 of the Florida Guardianship Code does not specifically prohibit an alleged incapacitated's attorney from contacting an examining committee member to request a reassessment of the alleged incapacitated.

37. *Guardianship of Klatthaar v. Scott*, 129 So. 3d 482 (Fla. 2d DCA 2014). Attorney's fees and examining committee fees cannot be assessed against an alleged incapacitated person unless the court establishes a guardianship.

38. *White v. Guardianship of Lubin*, 150 So. 3d 1256 (Fla. 2d DCA 2014). Time spent by a guardian reviewing and paying a ward's bills is compensable under the Guardianship Code for which a guardian is entitled to reasonable compensation.

39. *Koshenina v. Buvens*, 130 So. 3d 276 (Fla. 1st DCA 2014). Guardianship Court shall appoint the person designated by the ward as a preneed guardian unless the ward lacked sufficient capacity to do so at the time she executed the preneed guardian designation or to do so would be "contrary to the best interests of the ward."

40. *Rene v. Sykes-Kennedy*, 156 So. 3d 518 (Fla. 5th DCA 2015). Guardianship court has the authority to enter an order approving amendment of an incapacitated's revocable trust to appoint the guardian as trustee.

41. *Mouliom v. Northeast Florida State Hospital*, 128 So. 3d 979 (Fla. 1st DCA 2014). Patient can waive right to be present at hearing on continuing patient's involuntary inpatient placement under the Baker Act if through proper inquiry the judge can certify that the waiver was knowing, intelligent, and voluntary.

42. *Bivins v. Rogers*, 147 So. 3d 549 (Fla. 4th DCA 2014). The guardian of the ward is the only party authorized to initiate a petition to change the residence of the ward.

43. *Mills v. Mills*, 140 So. 3d 1145 (Fla. 1st DCA 2014). Motion for involuntary dismissal of incapacity proceeding at the close of the petitioner's case must be denied if competent substantial evidence has been presented that would sustain a judgment in favor of that party even if the evidence is conflicting; trial court may not weigh evidence on a determination

of a motion for involuntary dismissal at the close of the petitioner's case and must consider the evidence presented in a light most favorable to the non-moving party.

Miscellaneous

44. *Dingle v. Dellinger*, 134 So. 3d 484 (Fla. 5th DCA 2014). Privity of contract is not required between an attorney drafting a quit claim deed and the intended recipients of the property in order for the intended recipients to be able to sustain a malpractice action against the attorney for his or her alleged negligent drafting of the documents necessary to effectuate the conveyance of the property.

45. *Bookman v. Davidson*, 136 So. 3d 1276 (Fla. 1st DCA 2014). A successor personal representative has standing to bring an action for malpractice against an attorney that was retained by predecessor to provide services for the administration of the estate.

46. *Gren v. Gren*, 133 So. 3d 1066, (Fla. 4th DCA 2014). Once arbitration is ordered on successor trustee's motion to compel arbitration, the timeliness of the demand for arbitration is a fact question reserved for the arbitrator, not the trial judge.

47. *Chace v. Loisel*, --- So. 3d ----, 2014 WL 258620, 39 Fla. L. Weekly D221 (Fla. 5th DCA Jan. 24, 2014). Facebook "friend" request sent by trial judge to litigant is an improper initiation of an ex-parte communication with the litigant and is prohibited by the Code of Judicial Conduct and serves as adequate grounds for disqualification of the trial judge.