Estate Planning Council of Greater Miami
Annual Case Law Update
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1. *Him v. Firstbank Florida*, 89 So. 3d 1126 (Fla. 5th DCA 2012)

The appellant executed a power of attorney appointing his attorney in fact to act on appellant's behalf to purchase a condominium. Thereafter, the attorney in fact used the power of attorney to execute closing documents to purchase the condominium, including a promissory note and mortgage with the lender.

The lender then brought suit for breach of guaranty against the appellant. Instead of serving the appellant, the lender served the attorney in fact with the complaint.

The appellant did not respond to the complaint and a default was entered against him. He then moved to quash service of process, asserting he did not authorize the attorney in fact to accept service. The trial court denied the motion.

The appellate court reviewed the power of attorney and noted it was a specific power of attorney relating to the purchase of the condominium. It did not expressly authorize the attorney in fact to accept service of process. Given this fact, coupled with the principle of law that powers of attorney must be strictly construed, the appellate court reversed.

The appellate court also denied the lender an evidentiary hearing – ruling that any ambiguity is resolved by the rule of strict construction (in this case, against the lender).

2. *Juega v. Davidson*, 105 So. 3d 575 (Fla. 3d DCA 2012)

The decedent died testate survived by his son and brother. A Spanish citizen was appointed by the Spanish court to serve as the administrator of the decedent's estate.

The administrator asserted that he controlled a corporation of which the decedent was the director. The administrator proceeded to file suit on behalf of the corporation against the decedent's brother over a $5 million loan made by the corporation to the brother prior to the decedent's death. The administrator also joined the lawsuit as a plaintiff asserting claims for civil theft and conversion on behalf of the estate against the brother.

Eventually, the Spanish court found that the decedent's son was the sole heir and closed

the estate and the administrator was discharged. Following the discharge, the administrator filed a fourth amended complaint in the action involving the loan to the corporation, and the brother filed a motion to dismiss, arguing among other things, that the administrator lacked standing because he was no longer the administrator of the decedent's estate. The brother alleged that the real party was the son because he was the sole heir.

In opposition to the motion to dismiss, the son filed an affidavit in support of the administrator's standing, stating that the administrator was the son's agent in prosecuting the lawsuit. The trial court accepted the brother's arguments and dismissed the administrator from the lawsuit. This issue was appealed and the appellate court reversed – holding that the administrator had standing as the son's agent.

Thereafter, the brother filed a counterclaim against the administrator in his individual capacity alleging conspiracy and conversion. The administrator filed a motion to dismiss the counts against him in his individual capacity with a supporting affidavit asserting that he had no contacts with Florida other than as the administrator of the decedent's estate and director of the decedent's corporation.

The trial court denied the motion to dismiss and the administrator appealed.

The appellate court noted first that the administrator could not be named individually in the counterclaim because his participation in the underlying case was in his capacity as administrator, director of the corporation, and agent of the son. He was never a party to the lawsuit in his individual capacity.

In addition, the appellate court held that Section 734.201(3), Fla. Stat. (Jurisdiction by act of foreign personal representative) was inapplicable since there was no probate proceeding opened in Florida. According to the appellate court, Section 734.201(3) provides for personal jurisdiction over a foreign personal representatives when they are involved in a probate proceeding in Florida – not in a civil proceeding as here where the administrator was simply filing a lawsuit on behalf a corporation, a foreign estate, and later as the agent of the son.

Finally, the appellate court noted that the requirements for acquiring personal jurisdiction over the administrator under Section 48.193 (Florida's Long Arm Statute) and *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499 (Fla 1989) were not satisfied or properly pled. These include conducting business here, committing a tort here, breaching a contract that was suppose to be performed here, etc. (*See* Section 48.193) as well as having sufficient minimum contacts with the state of Florida (*Venetian Salami*).

3. *Miami Children's Hospital Foundation, Inc. v. Estate of Hillman*, 101 So. 3d 861 (Fla. 4th DCA 2012)

The decedent died leaving a will that poured over to her trust. Her estate was then administered. When the estate was ready to be closed, a notice of final accounting and petition for discharge were sent to the Miami Children's Hospital Foundation (MCHF) and Miami Care Foundation (Miami Care).

Miami Care and Dr. Wolfe, who was formerly a director at MCHF but who at the time of the dispute was a director at Miami Care, objected to the petition for discharge and final accounting because they believed that Miami Care is the proper beneficiary – not MCHF – of the decedent's trust. As a result, the personal representative filed a petition to determine beneficiary attaching the trust agreement and an amendment, which provided a gift to MCHF – not Miami Care.

MCHF filed a response to the petition to determine beneficiary arguing that the trust documents only refer to MCHF – not Miami Care, and that Miami Care did not even exist at the time the trust documents were created, and also that the trust documents could have been amended after Miami Care's creation if that was the decedent's desire.

The trial court ruled that the trust documents were ambiguous because of the fact that the decedent wanted Dr. Wolfe to have the ability to control the gift and he was now with Miami Care. It held that the proper recipient was Miami Care.

The appellate court, using the plain language of the trust documents naming MCHF, reversed and held that there was no ambiguity, and that the documents clearly named MCHF. It noted that it is not the intention of the testator that he had in his mind that should govern but rather the intention as expressed in the instrument.

4. *Welch v. Dececco*, 101 So. 3d 421 (Fla. 5th DCA 2012)

After the decedent died, his nephew sought an order declaring that certain stocks were transferred to him as *inter vivos* gifts, and thus were not part of the estate. The trial court concluded that the decedent failed to transfer the stocks to the nephew citing the fact that the stocks were still registered in the name of the decedent.

The appellate court listed the elements of an *inter vivos* gift as 1) present donative intent; 2) delivery; and 3) acceptance. It held that the stock registration may be a factor in deciding whether the gift was an *inter vivos* gift but that that alone was not dispositive of the issue. It remanded the case so that the trial court could clarify whether it reviewed all the facts, and if not, to reconsider its ruling in light of the appellate decision.

5. *Brennan v. Honsberger*, 101 So. 3d 415 (Fla. 5th DCA 2012)

In 2001, the decedent executed a will leaving his estate to his four children in unequal shares. In 2002, he executed another will giving his home he owned in Canada to the tenant who had rented it for 24 years and all other assets were given to his brother. The brother disclaimed his interest in the estate.

In 2007, the decedent passed. A petition for administration was filed to admit the 2001 will, even though it recognized the 2002 will but asserted that no original of that will could be located. The Canadian tenant objected to the 2001 will and petitioned to established the 2002 will as a lost will.

The trial court held an evidentiary, found that the decedent truly wanted to leave the house to the tenant, and admitted the 2002 will subject to a final determination regarding whether the copy of the 2002 will was a correct copy. The proponents of the 2001 will filed a motion for rehearing arguing that if the purported 2002 will was a correct copy, it needed the testimony of at least 1 disinterested witness proving the execution and content of the 2002 will. The trial court initially granted the motion for rehearing in part but then denied it after the tenant submitted the affidavits of the two witnesses to the 2002 will attesting to its execution.

The 2001 will proponent appealed that issue, and the appellate court reversed the admission of the 2002 will because the tenant failed to overcome the presumption that the will had been destroyed by the decedent with the intent to revoke it. Wills that cannot be located are presumed to have been destroyed by the testator. The appellate court remanded the case to allow the trial court to conduct an evidentiary hearing to afford the tenant the opportunity to prove the content of the will.

On remand, an evidentiary hearing was held where the two witnesses to the 2002 will testified about its execution consistent with their affidavits. However, neither testified regarding its content. The trial court admitted the 2002 will after the evidentiary hearing.

The appellate court reversed because no disinterested witness testified as to the contents of the 2002 will (pursuant to Section 733.207).

6. *Shen v. Parkes*, 100 So. 3d 1189 (Fla. 4th DCA 2012)

The alleged incapacitated person (AIP) had a petition for incapacity filed against her. She filed an answer denying the allegations, and an examining committee was appointed to examine her.

At the incapacity hearing conducted by a general magistrate, the trial court admitted the examining committee's written reports which stated that the AIP did not have capacity and needed a limited guardianship despite hearsay objections by the AIP. None of the examining committee members testified, and no other witnesses provided a basis for the court's

determination of incapacity.

The general magistrate recommended that the AIP have a guardianship, and the AIP objected based on the use of the examining committee's reports. The trial court denied the objections and accepted the recommendations of the general magistrate.

The appellate court reversed because the evidence supporting the trial court's ruling was hearsay. The court also noted that no hearsay exceptions were asserted and none appeared to apply. It went on and explained that the Florida Evidence Code applied to guardianship proceedings. The case was remanded so that new examinations could be held before an adjudicatory hearing could be held.

[But also see *Rothman* (below) and Section 744.331(4) (if majority of examining committee reports find no incapacity, the action must be dismissed). This matter is being studied by the RPPTL Section.]

7. *Platt v. Osteen*, 103 So. 3d 1010 (Fla. 5th DCA 2012)

The decedent died and a petition for administration was filed seeking to admit the decedent's will to probate and for appointment of a personal representative. A caveator filed a caveat, and answer and objection to the petition for administration. However, without adjudicating the objection, the probate court admitted the will to probate and appointed the personal representative.

The appellate court reversed noting that objections to a petition for administration must be adjudicated before admitting the will.

8. *Ferguson v. Carnes*, 2013 WL 1316345 (Fla. 4th DCA 2013)

Son and daughter entered into an oral agreement where if one was disinherited by their mother, the other would share equally whatever they received from their mother's estate.

Eventually the mother disinherited the son and designated the daughter as the sole beneficiary. The daughter then refused to divide her bequests with the son, and he filed a lawsuit to enforce the oral contract.

Daughter then filed a motion for summary judgment arguing the lawsuit fails because the oral contract lacked consideration. The trial court agreed and granted summary judgment in favor of the daughter.

The appellate court reversed and noted the well settled principle of law that a promise, no

matter how slight, can constitute sufficient consideration as long as a party agrees to do something it is not bound to do. In this case, the consideration was the son's promise to share half of his inheritance with the daughter should he be left in the will and the daughter disinherited.

9. *Taplin v. Taplin*, 88 So. 3d 344 (Fla. 3d DCA 2012)

A trust beneficiary sued his father and another person, individually and as co-trustees of a trust in which he was a beneficiary, for an accounting, breach of trust, removal of trustee, and surcharge. The trustees responded that the lawsuit was barred by the six month statute of limitations as set forth in Section 737.307 (now Section 736.1008) because an accounting had been received and the four year period in Section 95.11(3)(o) based on the intentional tort of breach of trust (Section 737.307 references Chapter 95's statute of limitations). The trustees argue that the complaint itself was written in a manner which showed that an accounting had been received by the trust beneficiary. The trial court agreed and granted the motion to dismiss with prejudice.

The appellate court dissected the arguments concerning both statutes of limitations. First, with regard to Section 737.307, it rejected the argument that the pleadings by the trust beneficiary showed that he received an accounting because the complaint specifically alleges the trustees failed to provide the beneficiary with an accounting (and in fact, the trustees' counsel agreed that the complaint as written if fairly read asserts the beneficiary never got an accounting at all). Thus, the limitation in Section 737.307 which shortens the time to bring an action for breach of trust did not apply because no accounting was received. In addition, because no accounting was received and the trustees did not make the trust records available to the beneficiary, the appellate court also rejected the four year statute of limitations set forth in Section 737.307. Section 737.307 has two sets of limitation period, neither of which are applicable because no accounting had been received and no records made available to the trust beneficiary.

Finally, the appellate court addressed the argument that the four year limitation period in Section 95.11(3)(o) applies because breach of trust is an intentional tort. The court noted that at common law, a statute of limitations is inapplicable to shield trustees from their responsibilities. It also recognized that in this situation, the trust is continuing. Because the trustees failed to provide a final accounting and allowed the trust beneficiary to examine the trust records, Section 95.11(3)(o) did not apply (*see* Section 737.307), and instead the common law principle that a statute of limitations period is inapplicable to shield trustees from their responsibilities in a continuing trust applies.

[Also, the court noted that breach of trust is an intentional tort but breach of trust can also be the result of negligence.]

10. *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012)

The settlor created a trust in 2000 and later purchased two life insurance policies each in the amount of $250,000. The life insurance policies named the settlor's trust as the beneficiary. In 2004, the settlor amended his trust and the amendment had language that the trustee was to use the trust funds to pay the settlor's personal representative for the estate obligations including the settlor's enforceable debts. The settlor's children were named as residual beneficiaries in both the trust and the amendment.

After the settlor's death, his brother, the trustee, filed a petition to determine that the life insurance proceeds payable to the trust were exempt from all "death obligations" and unavailable to the settlor's estate or its creditors.

The trustee relied on Section 222.13(1), which states in pertinent part:

> Whenever any person residing in the state shall die leaving insurance on his or her life, the said insurance shall inure exclusively to the benefit of the person for whose use and benefit such insurance is designated in the policy, and the proceeds thereof shall be exempt from the claims of creditors of the insured unless the insurance policy or a valid assignment thereof provides otherwise.

Relying on the language from the trust and Section 733.808(1) (death benefits including insurance policies may be paid to the trustee to be disposed of according to the terms of the trust), the trial court held the life insurance proceeds were to be used to satisfy the estate's obligations and creditor's claims.

The appellate court agreed in affirming, noting that Section 222.13(1) makes an exemption from creditors available to the decedent for life insurance proceeds but that it does not require the policy owner to take advantage of the exemption. As such, one can waive the exemption provided in Section 222.13(1). The appellate court also reject the trustee's other arguments equating the life insurance proceeds with homestead noting that Section 733.808(1) allows life insurance proceeds to be distributed pursuant to the terms of the trust.

After the trial court ruled against the trustee, he filed a supplemental petition for reformation of the trust to express the settlor's purported intent that the life insurance proceeds be exempt of estate obligations and used solely for the settlor's children. The trial court held an evidentiary hearing and found that the trustee failed to prove entitlement to reformation. The trustee also appealed this ruling and the appellate court noted that reformation requires clear and convincing evidence, and found that there was not enough evidence to show the trial judge committed error. While the evidence showed that the settlor cared for his daughters, it also could have shown that the primary purpose of the life insurance policy was to provide liquidity if needed in order to maintain and preserve real properties and businesses for the estate so that assets of the trust could be sold in some orderly fashion (as opposed to selling assets quickly to

raise capital to pay creditors).

11. *Rothman v. Rothman*, 93 So. 3d 1052 (Fla. 4th DCA 2012)

A grandson petitioned to have his grandfather declared incompetent. The trial court appointed an examination committee who evaluated the AIP prior to his temporary move to Israel. As a result of that first evaluation, two members of the committee found the AIP capacitated and the third member found him with limited capacity.

The second set of evaluation took place after the AIP came back from Israel. Similar to the first set of reports, two members found the AIP capacitated and the third found limited capacity.

As a result, the AIP sought to dismiss the proceeding under Section 744.331(4), which states that if a majority of the examining committee members concluded that the AIP is not incapacitated in any respect, the court shall dismiss the petition.

The trial court denied the motion to terminate on the grounds that Section 744.331(4) is unconstitutional. The grandson made the argument that reading the statute literally would violate basic tenants of statutory construction, constitutional tenants of judicial power, procedural due process, substantive due process and access to the courts. The appellate reversed and held that Section 744.331(4) must be strictly construed and that it was not unconstitutional. Based on the majority of the examining committee reports and Section 744.331(4), the petition to determine incapacity must be dismissed.

[But what about *Shen v. Parkes*? Aren't the reports hearsay?]

12. *Glenn v. Roberts*, 95 So. 3d 271 (Fla. 3d DCA 2012)

Decedent wrote a will stating:

> I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and nature, and wheresoever the same may be situate unto my friend, TERRY GLENN, having full confidence he will honor all requests made to him by me prior to my death as to friends whom I desire he benefit.

The will also stated that only those named in the will were beneficiaries and that the decedent had not unintentionally omitted any beneficiary.

The nominated personal representative petitioned to open the estate. Shortly thereafter, the decedent's only grandchild moved to set aside the will on the grounds that it was an oral

instruction and thus did not meet the statutory requirement that a will be in writing pursuant to Section 732.502. The grandchild filed a motion for judgment on the pleadings and the trial court granted it.

The appellate court reversed and distinguished this case from *Estate of Corbin v. Sherman*, 645 So. 2d 39 (Fla. 1st DCA 1994). In *Sherman*, that will devised property to an individual "to dispose of as she has been instructed to do by me." The *Sherman* court held that such a devise was improper because Florida does not recognize oral wills or provide for incorporation of oral instructions. Here, the appellate court held that there was no oral will or instructions because the language of the decedent's will devised the estate assets to the nominated personal representative. Such a devise was valid. The will's additional language is precatory – not mandatory – in desiring that the nominated personal representative follow the wishes of the decedent. In other words, the residual estate was devised to the nominated personal representative who then has the discretion of honoring the decedent's requests.

The appellate court also noted that the will's language which stated that no one has been unintentionally omitted supported its reading of the will because it showed the decedent devised her assets intentionally to the nominated personal representative (and not to anyone else per the alleged oral instructions).

13. *Beekius v. Morris*, 89 So. 3d 1114 (Fla. 4th DCA 2012)

A settlor created a trust which provided that she and her daughter would be co-trustees. The trust had language that stated if one co-trustee was determined incapacitated, the remaining co-trustee would serve alone. Thereafter, the daughter petitioned to have the mother determined incapacitated. The mother's son also filed a competing petition. The trial court ultimately named the son as guardian for the mother.

The son then filed several motions in the guardianship proceeding to remove the sister as trustee and to compel her to relinquish trust assets. In response, the daughter made a limited appearance only in her individual capacity to argue that the probate court lacked jurisdiction over the trustee and trust property in the guardianship proceeding. The daughter participated in the guardianship proceeding only to remove the son as guardian and to engage in discovery.

The son then filed an emergency motion to enjoin the daughter, as trustee, from selling the mother's home. Without notice or hearing, the probate court entered an *ex parte* order prohibiting the sale of the mother's home by the trustee daughter and ordered her to transfer the home to the son.

On appeal, the daughter argued that the trial court did not have jurisdiction over her and the appellate court agreed and reversed because the trustee was never a party to the guardianship proceeding. Her role in the guardianship proceeding was in her individual capacity, not as

trustee. Also, the original pleadings never raised any claim over the trust or its property.

14. *Smith v. DeParry*, 86 So. 3d 1228 (Fla. 2d DCA 2012)

The decedent established a pet trust in his lost codicil for his two dogs in the amount of $40,000. The co-personal representatives petitioned to establish the lost codicils, and the guardian ad litem for the decedent's grandchild, who was a minor, challenged the petition to establish lost codicil.

One of the co-personal representative was also named as trustee for the pet trust. Before the petition to establish lost codicil was addressed by the court, he had transferred the $40,000 to himself as trustee. The other co-personal representative was the decedent's long time lawyer. He had taken possession of the lost codicil after it was executed and lost it.

At the evidentiary hearing, the court heard extensive testimony from the co-personal representatives about how the decedent wanted to give the $40,000 to set up the pet trust. The co-personal representatives offered a copy of the lost codicil that was still on the hard drive of the decedent's lawyer/co-personal representative, their own testimony, the testimony of an employee of the decedent's lawyer, and the testimony of a witness to the execution of the codicil.

After the hearing, the trial court denied the petition to establish lost codicil. The trial court made its ruling based on: 1) that the copy of the codicil from the hard drive was not a correct copy; and 2) that personal representatives of the estate cannot be considered disinterested witnesses.

The appellate court upheld the trial court's ruling based on the tipsy coachman doctrine but rejected the legal reasoning by the trial court. First, the appellate court held that an identical copy from a computer hard drive is a "correct copy" under Section 733.207, even if it is not executed. The appellate court reasoned that the Florida Supreme Court's holding in *Estate of Parker (Parker II)*, 382 So. 2d 652 (Fla. 1980) (rejecting preliminary, handwritten draft) did not preclude computer copies. Also, it noted that *Parker II* was decided in 1980 when personal computers were in their infancy. Now, new technology has allowed copies to be made and there is no reason to limit correct copies to carbon copies or photostatic copies. Second, the appellate court held that personal representatives could in fact be "disinterested witnesses" pursuant to Section 733.207. It rejected the trial court's ruling that because personal representatives are "interested persons" under Section 731.201(23), they cannot be disinterested witnesses. However, the appellate court ruled that the co-personal representatives were not disinterested witnesses based on the facts in this case. The co-personal representative/lawyer for the decedent was interested since he lost the codicil and was possibly subject to a malpractice action and/or breach of fiduciary duty for the transfer of the $40,000. The co-personal representative/trustee witness had a stake as trustee (he conceded this issue to the appellate court). Also, the other witnesses could not testify regarding the contents of the codicil as required by Section 733.207 as

they had no knowledge. Accordingly, since no disinterested witness was able to testify about the content of the lost codicil, it could not be admitted – not for the reasons the trial court held.

15. *Losh v. McKinley*, 86 So. 3d 1150 (Fla. 3d DAC 2012)

The AIP, a 93 year old widow, fell at her home and injured her tail bone. She went home and obtained 24 hour care. She paid for her daughter to visit her at home, and the daughter stayed for 10 days. During this time, the AIP was on medication and was in a weakened state from her fall and after spending 60 plus days in a hospital or rehabilitation facility. After staying with the AIP for 10 days, the daughter petitioned to have the AIP determined incapacitated.

As a result of the petition, the court appointed the three member examining committee to evaluate the AIP. Two of the examining members recommended no guardianship with the third recommending a limited guardianship. Thereafter, the court replaced one member due to a conflict and ordered a second evaluation. The new evaluations resulted in two members recommending a limited guardianship while one member recommending no guardianship.

At the evidentiary hearing, all three examining members testified. In addition, the AIP also testified and explained in detail about her family, finances, property, health status, and medications she was on. She testified as to why she had separate bank accounts, why she did not carry insurance on her properties, and how she managed her finances.

At the conclusion of the evidentiary hearing, the trial court expressed concern about the AIP's vulnerability and entered an order determining limited capacity only allowing her to retain the right to vote, determine residency, spend up to $1500 and fire her caregivers. As examples of her incapacity, the trial court cited the fact that the AIP delayed medical treatment for her broken tailbone and cataracts, has been late in paying her bills, did not carry liability insurance on real estate, keeps money in a low interest bearing account, and allows others to write checks for her.

The appellate court held that the facts do not support a ruling that the AIP was incapacitated and reversed. It noted that the standard is a clear and convincing standard, and that the strongest evidence of the AIP's capacity was her own testimony where she testified extensively about her personal and financial affairs.

16. *Jacobson v. Sklaire*, 92 So. 3d 228 (Fla. 3d DCA 2012)

The decedent created a trust where he named his daughters as co-trustees. The trust contained a gift to the decedent's wife in the amount of $475,000. After the decedent died, the co-trustees refused to distribute the gift to the wife.

The wife filed a lawsuit to compel distribution. The co-trustees counterclaimed asserting

lack of capacity, undue influence, fraud, etc. The trial court dismissed the counterclaim with prejudice. Thereafter the wife prevailed at the trial and was awarded costs and fees from the trust. The co-trustees appealed the final judgment and the Third DCA affirmed.

After the initial appeal, the co-trustees agreed to pay the wife's costs and attorney's fees from the trust. They had, however, used trust funds to pay their own attorney's fees without court approval. This left the trust with not enough money to pay the final judgment amount plus the wife's attorney's fees and costs. The wife then moved to compel payment and to hold the co-trustees personal liable for damages and attorney's fees and costs. The trial court awarded the wife appellate attorney's fees but deferred ruling on the co-trustee's personal liability.

Eventually, the co-trustees and their law firm returned the bulk of the funds improperly diverted but there was still a balance of $112,000 remaining needed to pay the damages and wife's attorney's fees and costs. The trial court held an evidentiary hearing and ordered that the co-trustees were jointly and severally liable to the wife for attorney's fees and costs pursuant to Sections 737.627 and 736.1004.

The appellate court affirmed after it found no error. The dissent makes an interesting point in that it appeared to state that there should have been a separate lawsuit filed against the co-trustees to make them personal liable. The concurrence addresses this point and states that but for the co-trustees being co-trustees, they could not have acquired the funds in question to pay their attorney's fees and costs. They did not acquire these funds through some independent tort, and no separate cause of action was needed.

17. *Connell v. Connell*, 90 So. 3d 1140 (Fla. 2d DCA 2012)

The decedent passed away at 95 years of age. Approximately a year prior to his death, he married his wife. The couple had an antenuptial agreement which stated in pertinent part that their separate property from before the marriage or acquired after their marriage would remain so. The agreement did state that jointly owned property would pass to the survivor by right of survivorship.

After the execution of the antenuptial agreement, the decedent and his wife established a joint checking account with rights of survivorship. Thereafter, the decedent purchased an expensive watch with funds from the joint checking account and a small amount from the wife. In addition, the decedent purchased a ring for himself with funds he obtained from exchanging another ring given to him by his wife and his own funds.

The decedent wore the watch and ring every day. Two weeks before being hospitalized, he gave the watch and ring to his wife to put away. After he passed, the wife refused to turn over the watch and ring to the personal representative, who then filed a motion for aid in marshaling assets in an attempt to obtain the watch and ring. After an evidentiary hearing, the trial court

ruled that the watch and ring were assets of the estate. It found that these were the decedent's personal items and that there was no donative intent when he gave the watch and ring to the wife for safe keeping.

On the wife's motion for rehearing, the trial court reversed itself and ruled that the watch and ring were assets of the wife. Its new ruling was based on the fact that the assets used to purchase the watch and ring came from the couple's joint account.

The appellate court reversed based on the legal principle that once jointly owned property is withdrawn, it loses the right of survivorship. When joint tenants convey an interest to a stranger, it destroys the unities of possession and title. The appellate court focus on who the watch and ring were purchased for – in this case the decedent – not his wife. Accordingly, it held that the watch and ring were assets of the decedent, which belonged to his estate.

18. *Walker v. Bailey*, 89 So. 3d 297 (Fla. 5th DCA 2012)

A minor died alleged from medical malpractice. Her estate was probated and her mother was appointed personal representative. The mother then filed a wrongful death suit. After settling with the medical clinic, the mother petitioned for an equitable distribution and asked the court to find that she suffered the "majority" of the loss. She provided formal notice of the petition to the father. After 20 days passed without any response from the father, and prior to the scheduled hearing, the trial court entered an order apportioning 100% of the proceeds to the mother. Thereafter, the hearing was cancelled. The father moved for rehearing arguing that he believed the hearing was the appropriate forum in which to assert his position, and objected to the apportionment. He advised the court that he wanted to present evidence addressing the apportionment at the hearing. The father's motion for rehearing was summarily denied.

The appellate court reversed and held that apportionment of a wrongful death settlement requires a hearing based on due process. It rejected the mother's argument that since formal notice was provided as allowed by Fla. Prob. R. 5.040 and because the father never responded, that the trial court was correct. The appellate court noted that Rule 5.040 allows for the relief in the specific pleading or motion to be granted if there is no response within the 20 days – which is not what happened here where no specific apportionment was requested (the mother simply asked for a "majority"). The appellate court noted that the mother's petition did not put the father on notice that she was seeking all the funds from the wrongful death suit. Specifically, Rule 5.040 does not provide for a default against a party who refuses to respond.

19. *Bonney v. Bonney*, 94 So. 3d 702 (Fla. 4th DCA 2012)

A co-personal representative sued to remove her sister as co-personal representative of their aunt's estate. As a result, the defendant co-personal representative filed a third-party

complaint against her brother for conversion and unjust enrichment for funds taken from their aunt's bank account. She later voluntarily dismissed the third-party complaint.

The trial court awarded the brother attorney's fees pursuant to Sections 733.609 and 733.106(3) for having to defend the third-party action.

The appellate court reversed and held that Section 733.609 was not applicable since it did not involve a breach of fiduciary duty by the personal representative. In addition, the appellate court held that Section 733.106(3) was not applicable since the brother's attorney did not render a service to the estate. The court distinguished this matter from *Estate of Lewis*, 442 So. 2d 290 (Fla. 4th DCA 1983), where the trial court awarded fees under Section 733.106(3) because the petitioner in that case provided benefits to the estate by preserving the testamentary intention of the testator. Here, the brother's attorney did not provide a benefit to the estate.

20. *Bishop v. Estate of Rossi*, 2013 WL 132449 (Fla. 5th DCA 2013)

Appellant appeals an award of attorney's fees to the personal representative of the estate. The trial court held an evidentiary hearing and found entitlement to fees and awarded an amount. However, the trial court's order did not clearly express findings regarding the numbers of hours reasonably expended and a reasonable hourly rate as required under Florida law. The appellate court reversed only as to the reasonable amount and directed the trial court to amend its order to show that reasonable hourly rate and reasonable amount of time expended. The appellate court did affirm as to entitlement to fees, holding that it was a pure question of law in this case.

[Guardianship fee orders must comply with this principle as well.]

21. *Geraci v. Sunstar EMS*, 93 So. 3d 384 (Fla. 2d DCA 2012)

The decedent died and creditors filed claims against her estate. The personal representative filed a petition to determine whether under Article X, Section 4(a)-(b) of the Florida Constitution, the decedent's condominium qualified as homestead and was therefore exempt from forced sale to pay the creditor claims.

The condominium is subject to a 100 year lease agreement starting in 1976 and the decedent owned the remaining term on the lease. She lived in the condominium.

The trial court ruled that the condominium did not qualify as homestead because the decedent only owned a leasehold interest in it – not a fee simple interest.

The appellate court reversed and noted that Florida has long held that any beneficial interest in land may entitle its owner to the homestead exemption, citing to the Florida Supreme

Court's decision in *Bessemer Props., Inc. v. Gamble*, 27 So. 2d 832 (Fla. 1946). The real test is whether the debtor intended to make the property her homestead and her actual use of the property as her primary residence, even if the interest is only a leasehold interest. Here, because she lived in the condominium, it qualifies as homestead.

In rendering its holding, the 2nd DCA distinguished this case from *In re Estate of Wartels*, 357 So. 2d 708 (Fla. 1978) (holding that a co-op is not a homestead for purposes of descent because it is not "an interest in realty") because this case involves the use of homestead as it relates to creditor claims – not devise and descent. (The Florida Constitution affords 3 categories of protection for homestead property: 1) limits devise and descent where there is a minor child or surviving spouse; 2) limits forced sale for creditor claims; and 3) reduces property taxes.) However, the 2nd DCA recognized that other cases have been decided contrary to its ruling in this case. *See In re Lisowski*, 395 B.R. 771, 777 (Bankr.M.D.Fla.2008) (concluding that, under *Wartels*, the homestead exemption from forced sale applies only to improved land or real property that is owned by the debtor); *Phillips v. Hirshon*, 958 So.2d 425, 430 (Fla. 3d DCA 2007) (holding that a co-op did not qualify for homestead exemption for purposes of descent and devise because it was not an interest in realty under *Wartels*).