Annual Case Law Summary
Estate Planning Council of Greater Miami
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1. *Baillargeon v. Sewell*, 33 So. 3d 130 (Fla. 2d DCA 2010)

Two creditors of the decedent filed a claim against the decedent's estate on behalf of themselves and a class of individuals similarly situated. The personal representative moved to strike the claim to the extent the claim was made for individuals other than the two creditors.

After a hearing, the trial court held that the filing of the claim was unnecessary because there was pending, at the time of the decedent's death, a class action in federal court against the decedent and because the personal representative was properly substituted after the decedent's death as a party defendant in that action. The trial court also ruled that class claims could be filed in estate proceedings. Accordingly, the trial court denied the motion to strike the claim and allowed the claimants six months to amend the claim to identify other class members.

The personal representative appealed and the appellate court reversed the trial court's ruling on the motion to strike and the grant of six months in which to amend the claim. The appellate court held that the pendency of the federal class action and the substitution of the personal representative did not obviate the need to file a claim. The Probate Code requires that claimants file a written claim stating their name, address, and that it be sworn to. The appellate court also held that class claims are impermissible in probate proceedings, relying on *In re Estate of Gay*, 294 So. 2d 668 (Fla. 4th DCA 1974) as well as the legislature's failure to overrule *Gay* with subsequent legislation.

2. *Miller v. Kresser*, 34 So. 3d 172 (Fla. 4th DCA 2010)

A settlor established an irrevocable spendthrift trust in favor of her son and

appointed another son as the trustee. Pursuant to the trust, the trustee son had absolute discretion to make distributions to the beneficiary son. Several years later, a creditor obtained a judgment in excess of $1 million against the beneficiary son. After the creditor was unsuccessful at executing on the judgment, he filed suit for proceedings supplementary against the beneficiary son and impleaded the trustee son, as trustee of the spendthrift trust. The creditor asserted that he was entitled to execute on the assets in the spendthrift trust because the beneficiary son exercised dominion and control over the trustee son.

At trial, the court ruled in favor of the creditor finding that the creditor could execute on the spendthrift trust assets because the beneficiary son exercised "exclusive dominion and control" over the spendthrift trust and because the trustee son simply "rubber-stamped" the beneficiary son's decisions regarding the trust. In addition, the trial court also based its decision on the doctrine of merger finding that the trustee and the beneficiary are essentially the same. The sons appealed the trial court's decision.

The appellate court, while noting that courts have invalidated spendthrift provisions where a beneficiary has "express control" to demand distributions from the trust or to terminate the trust and acquire trust assets, reversed because it found the language of the trust did not give the beneficiary son "express control" over distributions of the trust assets. The appellate court focused on the language of the trust which gave the trustee son discretion to distribute assets and conversely gave the beneficiary son no authority to manage or distribute trust property. The appellate court noted that there is no authority in Florida to allow creditors to execute on assets in a discretionary trust simply because the trustee allows a beneficiary to exercise significant control over the trust. The appellate court also reversed the trial court's ruling that there was a merger because the beneficiary son held equitable title to the trust assets while the trustee son held legal title to the assets.

3. *Bessard v. Bessard*, 40 So. 3d 775 (Fla. 3d DCA 2010)

A patient allegedly signed a power of attorney in favor of his son granting the son the power to manage his property and to make medical decisions for him. The patient's wife and daughter filed suit against the son to invalidate the power

of attorney. The complaint alleged that the patient did not sign the power of attorney and that at the time it was purportedly executed, the patient was suffering from dementia, did not understand "everyday matter," and did not read English. During the litigation, the patient died. After his death, the son filed a motion to dismiss the complaint as moot and a "renunciation" of his powers under the power of attorney. The trial court granted the son's motion to dismiss and granted the wife and daughter's motion for attorney's fees and costs as prevailing parties. Both sides cross-appealed.

The appellate court affirmed both the order granting the son's motion to dismiss and the order granting attorney's fees and costs to the wife and daughter. The appellate court reasoned that the dismissal was proper since the patient died and because the son had executed the "renunciation." In addition, the order awarding fees and costs was proper pursuant to Section 709.08(11), Fla. Stat. (2007) since the wife and daughter prevailed because they received the remedy they sought.

4. *Timmons v. Ingrahm*, 36 So. 3d 861 (Fla. 5th DCA 2010)

The settlor had two children from a prior marriage and married his wife who had four children from a prior marriage. The settlor never adopted the wife's four children. The settlor created a family trust and a martial trust. The beneficiaries of the family trust were the settlor's two children and the wife's four children. The marital trust was created to support the wife and would have poured into the family trust upon the wife's death. The wife was a co-trustee. After the settlor died, the wife attempted to exercise a power of appointment granted to her in the family trust. She executed a document entitled "Exercise of Limited Power of Appointment" which attempted to grant all of the principal and income of the family trust to her four children to the exclusion of the settlor's two children.

The settlor's two children brought suit against the wife and other co-trustees alleging breach of fiduciary duty and sought an accounting. The settlor's children argued that the exercise of the power of appointment was invalid because the power of appointment could only be exercised in favor of the settlor's "lineal descendants" pursuant to language in the family trust giving the settlor's wife the power of appointment. The parties agreed that there were no disputed facts and

both sides moved for summary judgment. The trial court granted the wife and co-trustees' motion for summary judgment and the settlor's two children appealed.

The appellate court reversed the trial court's decision based on the language in the family trust which only allowed the wife to exercise the power of appointment "to and among" the "lineal descendants" of the settlor. The appellate court reasoned that the four children of the wife were not "lineal descendants" of the settlor as that term is defined in the Probate Code. In addition, there was no language in the will or trust which showed that it was the settlor's intent to disinherit his two children in favor of the wife's four children.

5. *Matejka v. Dulaney*, 40 So. 3d 865 (Fla. 4th DCA 2010)

The parents of three sisters executed a trust in their favor. After the parents died, the plaintiff, one of the sisters, filed suit against another sister and that sister's husband for a trust accounting. The defendants abandoned the lawsuit and moved to France, and the court entered a default judgment in favor of the plaintiff. The plaintiff then filed a motion for final judgment requesting a specific amount of damages. The plaintiff mailed a notice of the final hearing to the defendants by regular mail only ten days before the hearing. The court presided over the hearing and entered damages against the defendants.

On appeal, the defendants argued that they were not given enough notice of the final hearing on damages after the default judgment was entered. The appellate court reversed and reasoned that with regard to unliquidated damages, that is damages that are not readily ascertained from the pleaded agreement between the parties, by an arithmetical calculation, or by application of definite rules of law, a defaulting party is entitled to due process by notice and an opportunity to be heard as to the presentation and evaluation of evidence regarding the unliquidated damages. The appellate court held that because this was an adversarial trust action, the Florida Rules of Civil Procedure applied and specifically, Fla. R. Civ. P. 1.440(c) ("...Trial shall be set not less than 30 days from the service of the notice of trial....In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default...") Accordingly, the appellate court held that the 10 days notice was insufficient.

6. *Brennan v. Estate of Brennan*, 40 So. 3d 894 (Fla. 5th DCA 2010)

In 2001, the decedent executed a will leaving his estate to his four children in unequal shares. In 2002, the decedent executed another will that devised a home he owned in Canada to the renter who rented the house for 24 years. In the 2002 will, all other assets were left to the decedent's brother, who disclaimed any interest in the estate. The decedent passed away in 2007 and his children petitioned to probate the 2001 will. The children's petition acknowledged the existence of the 2002 will but stated that it could not be located and their belief that the 2002 will no longer existed. Thereafter, the renter appeared and filed a declaration that the proceeding was adversary. The renter objected to the 2001 will and petitioned to establish the 2002 lost will.

The trial court held a hearing on the renter's petition to establish the lost will and granted the petition based on presentation of a copy of the lost 2002 will and the sole testimony of the renter. Two of the decedent's children filed a motion for rehearing and argued that there needed to be the testimony of at least one disinterested witness to prove the execution and content of the 2002 will. The court granted the motion for rehearing in part and denied it in part. Thereafter, the renter filed the affidavits of two individuals stating that the decedent executed the 2002 will in their presence. The trial court thereafter entered an amended order denying the motion for rehearing. The two children appealed.

The appellate court reversed because pursuant to Section 733.207, Fla. Stat. (2007), the testimony of one disinterested witness and a copy of the 2002 will submitted by the renter was required. The renter was an interested witness so her testimony cannot be used to support the 2002 will. In addition, the children did not stipulate to the admission of the two affidavits of witnesses filed by the renter. The appellate court held that the affidavits could not be used in lieu of testimony.

7. *Acuna v. Dresner*, 41 So. 3d 997 (Fla. 3d DCA 2010)

Prior to her incapacity, the ward executed a Declaration Naming Preneed Guardian which appointed her three daughters as her guardians in the event she became incapacitated. In 2009, the ward became incapacitated and the three

daughters disagreed about how to manage her care. Two of the daughters wanted to care for their mother by rotating her residence in each of the daughters' home. The third daughter believed that the ward should remain in her own home and be cared for by medical aides.

At the conclusion of the hearing, the probate court appointed the ward's long time accountant as her plenary guardian because it believed that the Declaration Naming Preneed Guardian required unanimous consent of the three daughters to act and the court had concerns regarding the ward's finances being dissipated due to the daughters' disagreement. The probate court also awarded attorney's fees to the attorney ad litem over the objection of the two daughters who wanted to rotate the ward's care in each daughters' home and denied their motion to disqualify the judge. The two daughters appealed all three orders.

The appellate court affirmed the order granting the ad litem attorney's fees because the two daughters lacked standing because they never filed a written Request for Notice under Fla. Prob. R. 5.060. *See Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006). The appellate court also affirmed the probate court's order denying the motion to disqualify the judge as untimely having not been filed within 10 days after discovery of facts constituting grounds for the motion. *See* Fla. R. Jud. Admin. 2.330(e).

The appellate court reversed the appointment of the ward's long time accountant as plenary guardian and directed the probate court to appoint all three daughters as the plenary guardian because there was no competent, substantial evidence supporting the decision to override the presumption that the ward wanted her three daughters to be her plenary guardian as evidenced by the Declaration Naming Preneed Guardian. The probate court failed to make any factual findings that the three daughters were unqualified, unwilling or unable to serve as guardian or that their appointment would not be in her best interest.

8. *Price v. Austin*, 43 So. 3d 789 (Fla. 1st DCA 2010)

Daughter filed a petition to determine the incapacity of and to appoint a guardian for her mother. The petition was opposed by her sister (another daughter). During the litigation, the trial court admonished the parties that their

litigation dispute would be at their expense – not their mother's. The trial court eventually found that the mother was totally incapacitated but denied the petitioning daughter's motion for attorney's fees, and she appealed.

The appellate court affirmed the trial court's denial of fees but based on a different rationale. The appellate court noted that an attorney is entitled to receive a reasonable fee for professional services rendered and reimbursement of costs incurred for the benefit of the ward, and that payment of such fees is mandatory pursuant to Section 744.108(1), Fla. Stat. (2008). However, in the instant case, a notice that the proceeding for incapacity was adversarial was served on June 12, 2008, and the trial court entered an order determining total incapacity on July 7, 2008. Over a year passed before the petitioning daughter filed her verified petition to approve payment of attorney's fees. The appellate court found that this was untimely because Fla. Prob. R. 5.025(d)(2) mandates that adversarial proceedings are to be conducted pursuant to the Florida Rules of Civil Procedure, and according to Fla. R. Civ. P. 1.525, motions for attorney's fees must be filed no later than 30 days after the final judgment.

9. *Golden & Cowan, P.A. v. Estate of Locascio*, 41 So. 3d 1113 (Fla. 3d DCA 2010)

A law firm that was neither the personal representative or curator of the estate, nor the counsel for the personal representative or curator, filed a petition for an order adjudicating its claim of lien under Section 733.608, Fla. Stat. (2008) against real property. The trial court denied the petition and the appellate court affirmed because Section 733.608 applies to a personal representative's lien.

10. *Covenant Trust Co. v. Guardianship of Ihrman*, 45 So. 3d 499 (Fla. 4th DCA 2010)

A guardian for a ward who had a trust moved the ward from one facility to another due to concerns about the quality of health care the ward was receiving. The guardian then filed a petition requiring the ward's trustee to pay for the ward's expenses, for an accounting, to remove the trustee, and for breach of fiduciary duty. These petitions and the notice of hearing were sent to the trustee via U.S.

mail in Illinois.

The trustee responded by moving to dismiss the petitions and to adjudicate that service of process had not been effected. In addition, the trustee argued that the action should be brought in Illinois. At the hearing, the trustee argued that it administered the trust in Illinois and that there was no service of process, and thus, the trial court lacked personal jurisdiction. The guardian conceded that the trustee had not been properly served and the trial court gave the guardian 30 days in which to serve the trustee.

Several months passed and the trustee filed its motion to quash service of process, renewed objection to the petitions, motion to dismiss, along with affidavits asserting that there was lack of sufficient minimum contacts to invoke long arm jurisdiction. In response, the guardian filed affidavits asserting there was sufficient contact to establish long arm jurisdiction.

Thereafter, the trial court entered an order prohibiting the trustee from expending trust funds without court order. The trustee appealed this order arguing the trial court lacked personal jurisdiction and because no evidence was offered to support the breach of trust required by Section 736.0802(10) in order to prevent the trust from using funds. The trial court also denied the trustee's motion to dismiss for lack of service of process and this order was appealed as well. Finally, the court entered an order granting the guardian's motion requiring the trustee to pay additional retainer to the guardian's attorney, which was also appealed.

On appeal, the first issue the appellate court reviewed was whether there was personal jurisdiction over the trustee. In order to obtain personal jurisdiction over a non-resident, the complaint must allege sufficient jurisdictional facts to bring the action within the ambit of the long arm statute and there must be sufficient "minimum contacts" by the non-resident defendant. In the instant case, the appellate court held that sufficient jurisdictional facts had been pled. To the extent there are competing affidavits by both sides regarding whether there was sufficient minimum contact, the appellate court held that the trial court should have held an evidentiary hearing to address this issue and accordingly remanded the case for such a hearing.

The appellate court further ruled that if the trial court finds that there was

personal jurisdiction, then it must determine whether "all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration" based on Section 736.0205, which does not allow for jurisdiction over a foreign trust unless this requirement is met. If the trial court determines that it lacks jurisdiction, then the other orders it entered are invalid.

However, if the trial court determines that it does have jurisdiction, then the trial court erred in entering an order prohibiting the trust from expending trust funds pursuant to Section 736.0802(10) because it did not make a finding that the trustee breached the trust. Also, if the trial court has jurisdiction over the trust, it still committed error in ordering the trust to pay the additional retainer to the guardian's lawyer because unless it is proven the trust acted arbitrarily, there was no legal authority requiring the trustee to pay for the guardian's attorney's fees and no such requirement was in the trust.

11. *Golden & Cowan, P.A. v. Estate of Kosofsky*, 45 So. 3d 986 (Fla. 3d DCA 2010)

Law firm appealed the decision of the trial court granting a petition to determine homestead because the trial court took testimony over the phone over the objection of the law firm. The appellate courted noted that under Fla. R. Jud. Admin. 2.530(d)(1), a judge may allow the use of telephonic testimony if all parties consent, but that in this case, it was error to allow telephonic testimony because not all the parties consented. However, the appellate court affirmed the trial court's decision because it ruled that there was other evidence in the record which supported the trial court's granting of the petition to determine homestead.

12. *Piloto v. Lauria*, 45 So. 3d 565 (Fla. 4th DCA 2010)

The decedent died intestate survived by his wife and four adult children from a prior marriage. The decedent's estate was probated in Venezuela and the Venezuelan court entered a judgment that the decedent's wife and children were the sole heirs of his estate. The Venezuelan judgment did not appoint a personal representative. Part of the decedent's estate included cash and real property in

Florida.

The children hired an attorney and had that attorney appointed as the ancillary personal representative in Florida. After being appointed as ancillary personal representative, the children's attorney sent the wife a notice of administration. In response, the wife petitioned the court to revoke the letters of administration and to appoint her as the ancillary personal representative. The children responded by arguing that they were the majority of heirs and thus were allowed to select the ancillary personal representative.

The trial court granted the wife's motion for summary judgment reasoning that under Florida law, the surviving spouse has preference to become the ancillary personal representative in an intestate estate and that the children's attorney failed to serve the wife with formal notice of the petition for ancillary administration before being appointed as the personal representative. The children appealed.

On appeal, the children argued that the Venezuelan judgment and law should apply to allow the children who are the majority of heirs to select the ancillary personal representative under the doctrine of comity. The appellate court rejected this argument because the Venezuelan judgment did not appoint a personal representative or address the administration of the ancillary estate. The appellate court also rejected the children's attorney's argument that subsection (1) of Section 734.102, Fla. Stat. (2008) allows the majority of heirs to select the personal representative. The appellate court interpreted Section 734.102(1), Fla. Stat. (2008) to hold that in an intestate ancillary administration, the law requires that the preference of appointment in Section 733.301(1)(b) controls, which is that the surviving spouse has the highest preference of appointment.

13. *Sowden v. Brea*, 47 So. 3d 341 (Fla. 5th DCA 2010)

A trust was established for the ward in 2005, prior to his incapacity. In 2006, he was adjudicated partially incapacitated and guardians were appointed for him. After various disputes between the trustee, the guardians, and other interested persons, the parties entered into a mediated settlement agreement wherein the trustee agreed to pay all the attorney's fees and costs that had been

incurred by the trust and the guardianship prior to the date of the agreement as well as future attorney's fees and costs incurred in the performance of certain specifically defined tasks. The trial court approved the mediated settlement agreement.

Approximately two years later, the ward passed away. Thereafter, the guardians' attorneys moved for fees and costs. The guardians consented but the trustees objected arguing the trial court lacked jurisdiction over the trustee and trust assets. The trial court struck the petitions on the basis that it believed it lacked jurisdiction because of the ward's death. The guardians' attorneys appealed.

The appellate court noted that the ward's death does not prevent the trial court from enforcing orders previously entered in the guardianship case and remanded the case to address the attorney's fees issue. The appellate court also rejected the trustee's argument that the trial court lacked jurisdiction over him because he entered into the settlement agreement which was approved by the court.

14. *Aronson v. Aronson*, 2010 WL 4226204 (Fla. 3d DCA 2010)

The decedent executed a trust agreement naming himself as trustee and then transferred a condominium to the trust. The condominium, which was the decedent and his surviving spouse's homestead, was the trust's sole asset. After the decedent died, his sons became the trustees of the trust. The life beneficiary of the trust was the widow and the sons were the remainder beneficiaries.

Prior to his death, the decedent also executed a quit claim deed of the condominium to the widow. Accordingly, under the impression that she owned the condominium, she paid for the upkeep including taxes and satisfied the mortgage. However, it was later decided by the court that the trust was the owner of the condominium and not the widow.

The widow filed suit to declare that the property was exempt from forced sale as her homestead, for specific performance to require the trustees to pay the annual principal disbursal provided for in the trust, and for reimbursement of the

money she paid for the upkeep of the condominium. The trial court ruled that the condominium was not constitutionally protected homestead but did order that the widow be paid by transfer of an interest in the condominium equivalent to her annual disbursal and cost of maintaining the condominium. The trustees appealed.

The appellate court held that under Article X, Section 4 of the Florida Constitution, the condominium was homestead property exempt from forced sale and thus reversed the trial court. The appellate court also reviewed the entire trust to determine the intent of the decedent which clearly showed he intended to provide for his widow and rejected the trustees' argument that the widow should be forced to pay rent. Lastly, the appellate court allowed the widow prejudgment interest on her award.

15. *Boren v. Suntrust Bank*, 46 So. 3d 1156 (Fla. 2d DCA 2010)

Parents purchased a life estate in a condominium. At the time of the purchase, the parents also entered into a repurchase agreement with the seller which established seller's exclusive right to sell the condominium to a third party upon the termination of the life estate. The repurchase agreement required the seller to sell the condominium for the benefit of the heirs of the parents and, if unable to do so within one year, required the seller to pay the heirs of the parents for the condominium.

After the mother passed away (the father died first), SunTrust was appointed as personal representative. SunTrust filed an amended inventory which included the condominium as non-exempt homestead property which raised the value of the estate. This raised the amount that SunTrust and its counsel were entitled to receive as compensation for administering the estate. The daughter objected to SunTrust's compensation and the inclusion of the condominium as non-exempt homestead property.

The trial court held that the condominium was not protected homestead because the decedent exchanged and negotiated away the homestead character of the condominium with the repurchase agreement. The daughter appealed.

The appellate court affirmed reasoning that the homestead protection did

not apply because the decedent only had a life estate which could not be transferred to her daughter. The daughter was entitled to receive the proceeds from the sale of the condominium, which were not subject to homestead protected status.

16. *Lorenzo v. Medina*, 47 So. 3d 927 (Fla. 3d DCA 2010)

The testator passed away leaving an estate consisting of parcels of residential property. The testator's will provided for a bequest of the entire estate to his brother and his brother in law in equal shares. The will also stated that if the brother or brother in law were deceased, their gifts would be given to their surviving spouses respectively.

Upon the testator's death, 50% of his estate went to the brother in law who was alive. Thereafter, the brother in law filed a petition to construe the will arguing that the gift to the brother lapsed and therefore he was entitled to the brother's 50% of the estate because both the brother and the brother's wife had predeceased the decedent. In response, the brother's children argued that Section 732.603(1), Fla. Stat. (2008), the anti-lapse statute, revived the gift to them. The trial court ruled that the remaining 50% of the estate which would have gone to the brother, and then his wife, went to their children. The brother in law appealed.

The appellate court reversed the trial court's ruling and held that the gift to the niece and nephew (children of the brother and his wife) had lapsed. Upon the death of the testator, 50% of the estate went to the testator's brother. However, since the brother predeceased the testator, the brother's gift went to his wife pursuant to the will. However, because the brother's wife was deceased, and because the brother's wife is not a descendant of the testator's grandparents, the gift lapsed and the brother's wife's children cannot invoke the anti-lapse statute.

17. *Beane v. Suntrust Bank, Inc.*, 47 So. 3d 922 (Fla. 4th DCA 2010)

A decedent executed a power of attorney in favor of her niece allowing the niece to act for her in her "name, place and stead and in any way which I myself could do if I were personally present with respect" to a myriad of matters,

including money. The day after the power of attorney was executed, the niece transferred $150,000 from the decedent's Totten trust account at SunTrust, which named another individual as beneficiary, to an account in the name of someone else.

After the decedent passed, the personal representative, who was also the guardian of the decedent, filed suit against SunTrust for allowing the transfer of funds from the decedent's Totten trust account. The personal representative argued that the power of attorney did not expressly authorize the withdrawal of money from the Totten trust. The trial court held that the power of attorney allowed the withdrawal of the funds and that SunTrust could not be held liable as a matter of law. The personal representative appealed.

The appellate court affirmed the trial court's ruling reasoning that the power of attorney was written in a manner to allow the attorney in fact broad powers to act for the decedent and that the decedent had the ability to withdraw funds from the Totten trust. Furthermore, the appellate court held that a prospective beneficiary of a Totten trust is without standing to object to withdrawals because the owner of a Totten trust can withdraw from the account without constraint. Accordingly, since SunTrust was following the power of attorney, it must be held harmless.

18. *Marger v. De Rosa*, 2011 WL 252942 (Fla. 2d DCA 2011)

A son and his mother purchased a house as joint tenants with rights of survivorship. At the time of the purchase, the son had two minor children. When the son died intestate, he had two minor children and an adult child. Upon his death, the mother claimed ownership of the house. An administrator ad litem for the son's estate claimed that the house was homestead property for the benefit of the son's children. The trial court ruled that the house was not homestead property and it passed to the mother upon the son's death. The ad litem appealed.

The appellate court affirmed the trial court's ruling because the son had acquired the house as joint tenants with rights of survivorship with his mother when he purchased it. Accordingly, upon the son's death, his interest in the house was terminated. The appellate court rejected the ad litem's argument that Article

X, Section 4(c) prohibits the house from being transferred to the mother because the son had minor children when he purchased the property. The crucial fact is that the son purchased the property as joint tenants with his mother and so the property is not afforded the constitutional homestead protection from devise. The appellate court noted that Article X, Section 4(c) does not restrict the type of interest in real property a person may acquire or how a person may title his property. The ad litem's interpretation of Article X, Section 4(c) would necessarily limit how a person with minor children can own real property.

19. *Relinger v. Fox*, 2011 WL 439428 (Fla. 2d DCA 2011)

The brother and sister of the decedent challenged a 1984 will and named the personal representative of the decedent as a defendant. The brother and sister were proponents of a 2007 will and trust. In response, the personal representative challenged the 2007 will. Also, in a separate civil action, the personal representative challenged the validity of the 2007 trust naming the brother, sister, as well as the bank holding trust funds as defendants.

The trial court granted the brother and sister's motion to abate the trust action due to the pending proceeding in the probate court. The personal representative appealed.

On appeal, the brother and sister moved to dismiss the petition to review the abatement because the personal representative allegedly could not prove irreparable harm as a jurisdictional prerequisite. The appellate court denied the motion to dismiss because a petition for certiorari is an appropriate vehicle to review an abatement order. The appellate court went on to reverse the abatement order because it was a departure from the essential requirements of law in that the parties in the trust action and the probate proceedings were not strictly the same parties. The personal representative was the plaintiff in the trust action but a defendant in the probate action challenging the 1984 will.

20. *Habeeb v. Linder*, 2011 WL 613392 (Fla. 3d DCA 2011)

Husband and wife were married for approximately 50 years prior to wife

passing away. After they were married, husband and wife took title to a condominium as tenants by the entireties. The condominium was the couple's residence and homestead property. In 1979, several years after taking title to the condominium, the husband and wife executed a warranty deed in favor of the wife so that she held the property in fee simple thereafter. Almost 20 years later, the wife executed a will devising a life estate in the condominium to the husband with a remainder interest to her sister. Under the will, the husband also received the wife's residual estate.

In 2008, the wife passed away survived by the husband and her sister. The husband died in 2009 survived by six nephews. The wife's sister died in 2010. The personal representative of the husband's estate sued to set aside the 1979 deed and argued that the wife's fee simple interest in the condominium passed to the husband upon her death. The trial court denied the husband's estate's motion for summary judgment, and instead, granted the wife's estate's motion for summary judgment. The husband's estate appealed.

On appeal, the husband's estate argued that no transfer took place because the 1979 warranty deed failed to satisfy Section 732.702, Fla. Stat. (1979). Specifically, the husband's estate argued that the fair disclosure requirement of Section 732.702(2) did not take place and that the husband's joinder on the 1979 warranty deed did not constitute an intelligent, knowing waiver of his constitutional rights. The appellate court reviewed the facts in the proceeding below including that the couple was married for many years and lived in the condominium before executing the deed, that they hired an attorney to draft the deed, and that they executed wills to devise their assets based on the assumption that the condominium had been transferred to the wife, and concluded that there was fair disclosure. The appellate court also held that the husband's joinder on the 1979 warranty deed was a waiver of his homestead right.

21. *Reid v. Estate of Sonder*, 2011 WL 1007137 (Fla. 3d DCA 2011)

A settlor created a trust that provided for cash gifts to ten charities. The trust stated that "[a]fter the gift" to the charities, another cash gift would go to a religious college. The trust also had language stating that "[a]fter giving effect to the gifts" to the charity and the religious college, a number of specific gifts were to

be made to enumerated individuals including a gift of $25,000 and an apartment to the successor trustee of the trust.

After the settlor's death, the successor trustee was named personal representative. She moved to abate the enumerated cash gifts proportionately and also claimed that the apartment was a devise to her, not subject to abatement. The trial court denied the motion to abate which was affirmed on appeal in a prior decision.

Thereafter, the personal representative, as sole trustee, petitioned to reform the trust claiming that it did not evidence the settlor's intent because he wanted to give his apartment to her not subject to any abatement. A trial was conducted and the court ruled that the trustee did not meet her burden of proving there was a unilateral mistake by clear and convincing evidence despite testimony from the drafting attorney that he made a scrivener's error in that the settlor never wanted to make the gift of the apartment a lower priority and subject to the cash gifts. The appellate court reasoned that the settlor made several amendments to the trust and in each amendment, ratified the prior trust with the language stating the apartment was to be devised to the trustee after the cash gifts were made.

22. *Lauritsen v. Wallace*, 2011 WL 1195873 (Fla. 5th DCA 2011)

The decedent killed his incapacitated wife, his step-daughter, and then himself. His daughter was appointed as the personal representative of his estate. Several of the decedent's other children challenged their father's will which led to protracted litigation. The only asset of the estate was a one-half interest in a promissory note and mortgage on a piece of real property. The debtor on the note was the decedent's son and the son's wife. The decedent's will, which was executed eleven days before his death, forgave the promissory note upon the decedent's death.

The estate had several creditors as well as administrative costs for the personal representative's fee, the personal representative's attorney's fee, and the curator's fee. The only asset which was available to satisfy these costs was the promissory note. The personal representative filed a motion to determine the status of the note arguing that the decedent's half interest in the note must be

utilized to pay the estate's debts, taxes and expenses before the balance could be forgiven. The trial court ruled that the note was forgiven upon the decedent's death and an appeal was taken.

The appellate court focused on the fact that forgiving the promissory note was a testamentary devise through the decedent's will. As such, a devise cannot be elevated above administrative expenses and the claims of creditors pursuant to Sections 731.201(10), 733,805, and 733.707(1), Fla. Stat. (2007). The key to this case according to the appellate court was that the will, the instrument cancelling the debt, was subject to the Probate Code, and as such must follow the order in which payments can be made. The appellate court acknowledged in dicta that the result would have been different had the promissory note itself stated that it was cancelled upon the decedent's death because then, the forgiveness would not have depended on the will which was subject to the Probate Code. The appellate court cited an ancient maxim for its result, "A man must be just before he is generous."