Recent Case Law Update

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Probate and Marital Agreement Cases

1. ***Baldwin v. Harris*, 309 So. 3d 293 (Fla. 5th DCA 2021). The Fifth DCA reverses a trial court order accepting estate's bold interpretation of a prenuptial agreement that was contrary to common, ordinary, and everyday meaning.**

Baldwin was married to Harris. Prior to the marriage, Baldwin and Harris executed a prenuptial agreement. The agreement provided that if Baldwin survived Harris, and the parties are not married at Harris's death, Harris would provide, in his estate planning documents or otherwise, for Baldwin to continue to receive a set monthly payment for the rest of her life in the same amount she was receiving as of the date of Harris's death. Baldwin survived Harris, and they were not married at the time of Harris's death. Harris created a trust prior to his death which purported to provide Baldwin with a monthly payment, but he intentionally defunded the trust shortly before his death. The appellate decision doesn't set forth much procedural background but presumably Baldwin filed a creditor claim in Harris's estate based on the agreement, and the estate objected to the claim. It then appears there was an independent action on the claim. The estate did not argue there was no contract, rather the estate argued that Harris complied with the plain language of the prenuptial agreement when he included a provision in his trust requiring a monthly payment to Baldwin, regardless of whether the trust was funded. In other words, he "provided in his estate planning documents" for the payment. Baldwin, of course, argued that the plain language of the agreement did not permit Harris to simply put empty words in his estate planning documents, but rather required that he provide for Baldwin to actually receive a monthly payment, either via his estate planning documents or otherwise. The trial court actually granted summary judgment for the estate, which was then reversed by the Fifth DCA. The Fifth first noted that "where a contract is clear and unambiguous, it must be enforced pursuant to its plain language." The Court then went on to hold that when interpreting an agreement, "[w]ords and phrases … should be given a natural meaning or the meaning most commonly understood in relation to the subject matter and the circumstances; and a reasonable construction is preferred to one that is unreasonable," and that "an interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." The Court described the estate's argument as bold since Harris did "in some obscure and technical sense, 'provide for' a payment when he included such a directive in his estate planning documents." However, the Court held that this bold interpretation strained the contractual language well beyond the bounds of common understanding. The Court noted that availability of funds was not a precondition to the payment obligation under the agreement and concluded that the plain and ordinary meaning of the provision was that Harris agreed to arrange for Baldwin to actually receive the monthly payment. Finally, the estate

argued that other provisions of the prenuptial agreement gave Harris free reign over his assets. The Court held this did not conflict with the payment obligation in that Harris was free to control his assets as he wished so long as he provided Baldwin with the required monthly payment and that to give the agreement any other construction would render the payment provision essentially meaningless.

Application: There are several applications here. The contract interpretation application is the obvious one and is a useful reminder for how parties and courts should analyze contracts. That analysis would be so they are read according to their plain language but also so as to give reasonable effect to all terms as opposed to interpretations that would lead to provisions having unreasonable results or no effect. Further applications here relate to the unpredictability of court decisions, even where you might think you have a very strong case. Cases like this are why litigation engagements should state that no guarantees are being made by the lawyers.

2. ***Mellini v. Paulucci*, 310 So. 3d 123 (Fla. 5th DCA 2021). The Fifth DCA holds that unilateral mistakes committed by daughter's attorneys in drafting a statement of claim were the result of an inexcusable lack of due care, and thus amendment of the claim under F.S. Sec. 733.704 and rescission of a subsequent satisfaction and release of claim was impermissible.**

This case analyzes the effect of a satisfaction and release of a creditor's claim previously filed in an estate and whether it can be rescinded. For many years, Jeno and his daughter, Gina, had been involved in litigation against each other. In March 2007, they finally entered into a mediated settlement agreement. As part of their settlement, Gina agreed to sell to Jeno her interest in certain Florida real property for $12 million. Jeno paid $2,000,000 at the closing and executed a promissory note payable to Gina in the sum of $10,000,000 for the balance of the purchase price. The note had a six percent interest rate and was to be repaid in three annual payments of $1,000,000 each, beginning in September 2008, with a balloon payment for all remaining principal and interest owed on the note to be paid on September 9, 2011. Each installment payment was to be applied first towards the outstanding interest on the note, and then towards reducing the principal. In addition, the settlement provided for Gina to separately pay Jeno $2.9 million to conclude certain federal litigation and she executed a promissory note in favor of Jeno for that amount. Jeno also had a right under the agreement to set off the amount Gina owed to him under this note against any monies that he owed to her under the $10 million note. Both parties complied with their obligations until 2011. When the September 2011 balloon payment to Gina was coming due, Jeno needed an extension for various reasons, including failing health. The parties agreed to a sixty-day moratorium on Gina pursuing any collection efforts. Then, on November 24, 2011, Jeno passed away. Gina's attorneys

prepared a statement of claim that Gina executed and timely filed against Jeno's estate regarding the promissory note. This statement of claim specifically stated that "[a]t the time of [Jeno's] death, the remaining balance due to [Gina] was $7,000,000 plus interest." As we will see, that claim calculation was incorrect. The personal representative of Jeno's estate sent a letter to Gina's counsel enclosing a check in the amount of $4,677,594.52 to fully satisfy the claim. The letter stated that the estate was exercising its setoff right and further explained that the payment of $4,677,594.52 was calculated by taking Gina's statement of claim of $7,000,000, adding the interest that accrued on the $7,000,000 since September 10, 2010, and then subtracting the $2,900,000 owed by Gina on her note payable to Jeno, plus the accrued interest on that note, also since September 10, 2010. Finally, the letter from the estate's counsel contained a satisfaction and release of claim that was to be executed by Gina prior to and as a condition of negotiating the check. As part of the resolution of the claim, the parties were to then exchange their notes marked "cancelled and paid in full." Gina, upon advice of her attorneys, executed the satisfaction and release of claim. The satisfaction stated that Gina had received "full payment" of her claim and that she was "releas[ing] the estate and the personal representative of the estate from all personal liability with respect thereto." The estate did return its note marked cancelled and paid in full, as did Gina. Over a year later, Gina's accountant was preparing her 2013 income tax return when he noticed that the statement of claim appeared to have been incorrectly calculated. The apparent mistake was that the statement of claim simply applied the $1,000,000 annual installments paid by Jeno in 2008, 2009, and 2010 towards reducing the principal balance of the $10 million note, instead of applying them first towards the accrued interest and then towards a reduction in the principal balance of the note. If the installments were applied to accrued interest first, then the principal balance that was owed by Jeno to Gina on the note at the time of his death was $8,726,560, not $7,000,000. Gina's counsel was notified by the accountant of this error and Gina, through counsel, then filed a petition with the probate court to amend her claim to include this unpaid $1,726,560 in principal, plus additional accrued interest. If a claim is defective as to form, F.S. Sec. 733.704 authorizes a court to permit an amendment of the claim. Jeno's estate responded by requesting instructions or direction from the probate court on how to proceed regarding Gina's petition to amend her claim. The personal representative informed the court that the other beneficiaries of the estate objected to the relief being sought by Gina. The probate court entered an order authorizing the amendment of claim and directed the personal representative to pay the amended claim. Estate beneficiaries appealed the order and, in an earlier opinion, the Fifth DCA reversed the order and remanded the case to the probate court to hold an evidentiary hearing "[t]o determine whether there is a legitimate basis to set aside the release at issue." See *Selton v. Paulucci*, 192 So. 3d 1257, 1258 (Fla. 5th DCA 2016). At the evidentiary hearing the probate court found that the unilateral mistake committed by Gina's attorneys in preparing the statement of claim "was not the result of [an] inexcusable lack of

due care" and rescinded her satisfaction and release of claim. The court also determined that Gina's filing of her amended claim was permissible under F.S. Sec. 733.704, and was not time-barred by F.S. 733.710 since it related back to the timely filed original claim, and it ordered the estate to pay the amended claim. The Fifth DCA reversed. On appeal, the estate and beneficiaries argued that the unilateral mistakes committed by Gina's attorneys were the result of an inexcusable lack of due care and therefore no valid or legitimate basis was shown to rescind the satisfaction and release. At the trial court, neither party disputed that Gina's attorneys committed a unilateral mistake in preparing her statement of claim and in thereafter directing or permitting her to execute and file the satisfaction and release of the claim. The Court found that the evidence showed that Gina's attorneys did not review the terms of the mediated settlement agreement and the promissory note executed by Jeno prior to preparing the statement of claim. The Court further noted that had they done so, it would have been apparent that each $1,000,000 annual payment was to be applied first towards the accrued interest and then to reducing the principal balance owed on the note. Instead, the Court found that Gina's counsel simply subtracted the $3,000,000 in payments received by Gina from the original $10,000,000 principal balance of the note and prepared the statement of claim showing the amount owed to be $7,000,000. The Court then noted that Gina's attorneys had a second chance to get things right upon receiving payment from the estate. At that point, though, apparently counsel again did not review the note and settlement agreement to verify that this was the proper amount owed to Gina to satisfy her claim before advising her to execute the satisfaction and release of claim and to return the note marked as "paid in full." Finally, the Court noted that because the probate court's finding that Gina's attorneys' unilateral mistakes were not the result of an inexcusable lack of due care was drawn from undisputed evidence, it is more in the nature of a legal conclusion to which the appellate court was not obligated to give deference. The appellate court then conducted a de novo review. In doing that review the appellate court disagreed with the probate court and found an inexcusable lack of care. The terms of the promissory note were not complicated. The Court held that the attorneys' failure to review the promissory note and mediated settlement agreement that they had access to before preparing the statement of claim and later advising Gina to execute the satisfaction and release of claim, could not be characterized as a minor, inadvertent, or clerical error or one resulting from a simple miscalculation. Finally, the Court held that there was no excuse for the attorneys not to review the terms of the documents before preparing the statement of claim and later advising Gina to satisfy the claim. This meant that there was no legitimate basis to set aside the satisfaction and release of claim or allow the amendment of claim.

Application: Probate courts are courts of equity but creditor claims proceedings are an element of probate administration where the law tends to be much stricter. It appears the court determined that the amendment statute related to claims allows for amendments due to defects in form but not in substance and

that incorrectly calculating the amount of the claim due to inexcusable neglect of counsel is an error in substance. Attorneys are famously not experts in math so it makes sense to carefully review applicable legal documents and have any significant claim calculations double-checked, or made by accountants in the first place, prior to the filing of claims or acceptances of calculated payoffs by the estate. A final application here is that if you can posture on appeal that the trial court only reviewed undisputed evidence in its ruling, you can argue for the appellate court to conduct its review of the decision de novo. Food for thought.

3. ***Giat v. SCI Funeral Services of Florida LLC*, 308 So. 3d 642 (Fla. 4th DCA 2021). The Fourth DCA reminds us that common law, rather than F.S. Sec. 497.005(43) (the statute listing persons legally authorized to give authorization for cremation), controlled dispute between son and widow over disposition of father's remains.**

Nissan Giat died on August 28, 2020. He had no will or any written instruction regarding the disposition of his remains. His widow arranged for his funeral and cremation. On September 2, 2020, his son filed suit to enjoin the funeral home from cremating the decedent's remains. His verified petition stated that his father was born and raised Jewish and that his father had shared his wish with him to be buried in accordance with Orthodox Jewish law and custom and not to be cremated. The widow filed a verified response opposing the petition and stated that the decedent had often shared his desire to have his body cremated upon his death so that his ashes could remain with her in their marital home. She further stated that her husband was not religious and did not regularly attend temple. On September 10, 2020, the trial court held an emergency hearing. It appears the hearing was not an evidentiary hearing. The court after the hearing ruled that pursuant to F.S. Sec. 497.005(43) the spouse's intent was controlling and that no further determination of intent was needed. The court denied the injunction on the basis that the son had not established a substantial likelihood of prevailing on the merits. The court then stayed the order to allow the son to file an appeal. On appeal, the son argued that the statute was not controlling in this case and that the court should have conducted an evidentiary hearing as common law was applicable to this case. The son argued that the language of the statute does not apply to disputes between private parties as to the disposition of a decedent's body, and instead merely governs funeral homes and cemeteries. He further argued that under common law, where there is a bona fide dispute as to a decedent's intent regarding disposition of his remains, the court should be an evidentiary hearing to determine the intent of the deceased. The Fourth DCA agreed and reversed and remanded for an evidentiary hearing, holding that the common law and not F.S. Sec. 497.005(43) controls a dispute between family members over the disposition of the decedent's remains. The Court noted that the focus of Chapter 497, Florida Statutes is the relationship between funeral homes and the persons who seek their services. The definition of “legally authorized

person[s]" under that chapter, the court noted, was to specify the persons with whom a funeral home may contract to arrange services. The Court then held that Section 497.005(43) does not purport to designate the right to control the manner of disposition of a corpse where there is a dispute among family members. Further, F.S. Sec. 497.383(2) provides that "[a]ny ambiguity or dispute concerning the right of any legally authorized person to provide authorization under this chapter or the validity of any documentation purporting to grant that authorization shall be resolved by a court of competent jurisdiction." The Court determined that this statute recognizes that, where there is a dispute over the disposition of a decedent's remains, the issue is a matter of common law. Finally, the court noted that even where a provision in a will concerns the burial of a decedent's remains, Florida courts have held that the issue of burial location is a factual question that may be submitted to a court and that a testamentary disposition is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that he intended another disposition for his body. Here, the dispute is between two private parties and the court is not being asked to consider whether a funeral home is liable. Therefore, common law applies and an evidentiary hearing as to the decedent's intent is required.

Application: From time-to-time disputes over bodily remains arise for probate practitioners. This case is a good explanation of the application, and limitations in applicability, of Chapter 497. The case has a detailed discussion of prior case law including *Arthur v. Milstein*, 949 So. 2d 1163 (Fla. 4th DCA 2007), which also held that common law applied over an earlier version of F.S. Sec. 497.005.

4. ***Finlaw v. Finlaw*, ___ So. 3d ___ (Fla. 2d DCA 2021). The Second DCA holds that where contracting parties expressly agree on the disposition of property upon death, that agreement generally controls over a contrary testamentary disposition of the property.**

In 1986, the decedent, Twila Finlaw, along with other individuals, entered into a partnership agreement creating an Ohio partnership called Palmer-Finlaw Associates. The partnership agreement included a provision that upon the death of a partner that any partner shall have the right and privilege of leaving his or her interest in the partnership by last will and testament to his or her spouse or to his or her lineal descendants. Each of the partners agree to have prepared and to execute a last will and testament so as to ensure that his or her interest in the partnership would, upon his or her death, pass to and vest in his or her surviving spouse. Each partner further agreed that the last will and testament would vest his or her partnership interest in his or her children (the partnership agreement said children but included a parenthetical (lineal descendants) right after the word "children") if not survived by a spouse. The agreement provided that should any partner neglect or fail to execute the required last will and testament, so as to ultimately cause his or her

partnership interest to pass to and vest in a non-family member of the deceased partners, then upon such event, the partnership shall be liquidated and dissolved forthwith. Finally, the agreement provided that should the legatee of any deceased partner wish to sell the acquired interest in the partnership, such a sale could be accomplished pursuant to other provisions of the agreement. In 2014, the decedent executed a will that named her grandson Jeffrey S. Finlaw as personal representative of her estate and devised the remainder of her estate (including her partnership interest) to him. After the decedent passed away, her will was admitted to probate in Florida and the grandson was appointed personal representative of her estate. The decedent's son, Roger S. Finlaw, filed a statement of claim claiming all rights to the partnership interest due to the decedent's failure to execute her will in conformity with the partnership agreement. The estate objected. Thereafter, the son filed an independent action asking the court to construe the partnership agreement and determine that he, rather than the grandson, was the sole beneficiary of the decedent's interest in the partnership.The trial court ruled in favor of the son and held that: “To expand the plain language meaning of 'children' to include any other lineal descendants of the Decedent would unnecessarily expand the standard definition of 'child' or 'children' beyond its plain meaning.” The Second DCA affirmed. On appeal, the grandson challenged the trial court's interpretation of the partnership agreement in two ways. First, he argued that he was an appropriate recipient of the decedent's partnership interest under the terms of the agreement because he was his grandmother’s lineal descendant. Second, he argued in the alternative that, if he was precluded from inheriting the decedent's interest, then the court should have dissolved the partnership pursuant to the partnership agreement terms. The Court rejected these arguments. It noted that while the grandson is a “lineal descendant” of the decedent, he is not her “child,” and thus he was outside the class of people who could receive the interest under the plain language of the agreement. The Court further noted that the agreement states that dissolution is required only where the partnership interest ultimately passes to someone who is not a “spouse or lineal descendant” of the decedent, which did not occur here. The Court held as a threshold matter that although the parties agreed that Ohio law governs the interpretation and effect of the partnership agreement, Florida law is substantially similar in this regard. In both Ohio and Florida, courts are required to read writings as a whole, giving meaning and effect to each part. Under both Ohio and Florida law, where contracting parties expressly agree on the disposition of property upon death, the Court cited several cases for the proposition that such an agreement generally controls over a testamentary disposition of the property. Here, the decedent’s devise of the partnership interest was a clear breach of the contract. However, that breach of the agreement did not trigger the dissolution of the partnership since it was a devise to a lineal descendant. Thus, the court affirmed the order requiring grandson as personal representative to assign all interest and rights in the partnership to the son on behalf of the estate.

Application: The case is a good discussion and illustration of both contract analysis and of the principle that express language in a contractual agreement specifically addressing the disposition of property upon death will defeat a testamentary disposition of that property.

5. ***In re Estate of Brown***, **310 So. 3d 1131 (Fla. 2d DCA 2021). The Second DCA clarifies application of the Florida Probate Rules versus the Florida Rules of Civil Procedure.**

This case relates to procedural issues surrounding a claim for attorney's fees allegedly owed by an estate. Specifically, attorney Stephen P. Heuston and Heuston Legal PLLC, made a claim for attorney's fees against the Estate of Brown. The personal representative, Kerkhoff, alleged that Heuston never represented her so she disputed any entitlement to attorney's fees. It appears that an evidentiary hearing was set on the matter but prior to the hearing the Heuston firm filed a notice of voluntary dismissal pertaining to their claim for attorney's fees owed from the Estate. The hearing was then canceled. Kerkhoff appealed the order of cancellation of the hearing. The appellate decision does not make clear why that order was appealed and only concerns itself with clarifying which rules of procedure apply to the matter.
The appellate court held that the notices filed by Heuston resolved the matters to be presented at the hearing, so the trial court properly entered the order of cancellation and this order was affirmed. The Court then went on to note that the matter was properly governed by the Florida Probate Rules, rather than the Florida Rules of Civil Procedure. In other words, the notice that should have been filed was a notice of withdrawal of the claim for fees as opposed to a notice of voluntary dismissal. The Court explained that since this was not an adversary matter under Probate Rule 5.025, the Rules of Civil Procedure did not apply. Florida Probate Rule 5.010 provides that the probate rules "govern the procedure in all probate and guardianship proceedings" where the Probate Rules do not explicitly make the Rules of Civil Procedure applicable. After the discussion of the importance of applying the correct procedural rules, the Court then held that whether called a notice of voluntary dismissal or a notice of withdrawal, it was undisputed that the notice filed by Heuston terminated their pending claim for attorney's fees with prejudice. Thus, the trial court properly concluded that the specific matters to be heard at the evidentiary hearing were rendered moot by Heuston's filings.

Application: This case has a good discussion of the situations under which the Rules of Civil Procedure apply in probate cases as opposed to the Probate Rules and why it is important to use the proper procedural rules.

6. ***Estate of Quinn, by and through Eck v. CCRC OPCO Freedom Square, LLC*, 320 So. 3d 300 (Fla. 2d DCA 2021). The Second DCA denies certiorari relief but holds that trial court impermissibly rewrote the parties' agreement by extending an express contractual deadline.**

The decedent was a resident of an ALF operated and managed by Freedom Square. After she passed away, her estate sued Freedom Square alleging negligence and wrongful death. Pursuant to the terms of its residency agreement with the decedent, Freedom Square moved to compel arbitration. The agreement provided that the parties had twenty days after a demand for arbitration to either agree on a sole arbitrator or to each choose a nominator who would thereafter choose the sole arbitrator. Finally, the agreement provided that if either party failed to select their arbitrator/nominator within the twenty-day period, they effectively forfeited their right to choose an arbitrator. Following the procedure, the estate ultimately selected a nominator during the time period. Freedom Square did not respond until the 21st day, after the expiration of the selection period. After some back-and-forth communications, the estate contended that Freedom Square had forfeited its right to select any arbitrator under the plain language of its own residency agreement. At a hearing on Freedom Square's motion to compel the estate to select an arbitrator, even though it appeared the estate had done so, Freedom Square conceded that its motion to compel arbitration had constituted a demand for arbitration that "started the 20-day process" under the agreement. It also conceded that it did not select an arbitrator within the period, whereas the estate had done so. Freedom Square then asserted that because the parties had not "reasonably exhausted … discussions of selecting a lone arbitrator" by the deadline, the trial court should require the estate to propose another nominator. In response, the estate contended it was the only party who had complied with the terms of agreement. When the parties failed to reach agreement by the deadline in the agreement, only the estate selected a nominator. Given those facts, the estate argued that by failing to select an arbitrator within twenty days, Freedom Square had forfeited its right to do so. The trial court, in its review, focused on the fact that the estate's correspondence selecting its nominator was transmitted at 4:40 p.m. on the day of the deadline. The court stated, "I don't think you get to do a gotcha." The court then criticized the estate for sending the correspondence "at 4:40 on the day … the deadline for the day you are tasked with coming to agreement or not, in the days of corona virus and not everybody's working from their office." However, Freedom Square's counsel clarified that communications occurred in September 2019 which preceded the pandemic and thus occurred "before we were all at home." In addition, counsel conceded that Freedom Square did not respond until the day after the deadline. The trial court then expressly ruled that "4:40 the day of the drop-dead deadline in the contract is insufficient," and gave Freedom Square the unilateral choice between either selecting a nominator or letting the court pick an arbitrator. Freedom Square stated that it preferred the former and the trial court entered an order directing the parties to each select a nominator. The estate then moved for certiorari review of the order. The Second DCA dismissed the petition since it held the estate had failed to establish irreparable harm but went on to discuss the trial court's ruling as to the contractual deadline in dicta. The Court first noted that in

order to obtain certiorari relief, the petitioner must establish (1) a departure from the essential requirements of the law (2) resulting in material injury for the remainder of the case (3) which cannot be corrected on post-judgment appeal. The Court here held that the estate had met the requirements of prong 1 but not 2 and 3. Regarding departure from the essential requirements of the law, the estate argued that the trial court rewrote the agreement in Freedom Square's favor, allowing it to choose a nominator despite having forfeited its right to do so by missing the express deadline set forth in the agreement. The Second DCA agreed and noted that the contractual analysis in this case was very clear. The agreement required the parties to undertake certain actions within twenty days. The estate acted timely but Freedom Square did not. Thus, pursuant to the terms of its own agreement, Freedom Square should have been deemed to have forfeited its right to choose an arbitrator. The Court held that the trial court's contrary conclusion that the estate's selection was impermissible because it was transmitted near the end of the business day on the day it was due was not supported by the agreement or any legal authority. The Court held that making a timely action close in time to a due date is not a "gotcha," and shouldn't give a non-compliant party the ability to gain a court extension over objection after missing an express contractual deadline it created in the first place. The trial court's ruling ignored the forfeiture term of the selection clause and rendered the language meaningless. In addition, the Court rejected Freedom Square's contention that this relief was appropriate under F.S. Secs. 682.031 and 682.04, which allow the court, under certain circumstances, to order provisional remedies and appoint an arbitrator. The Court noted that F.S. Sec. 682.04(1) expressly requires the parties' chosen method for appointing arbitrators to be followed "unless the method fails." Here the method for selection did not fail; Freedom Square simply did not timely select a nominator and thereby forfeited the right to do so. For those reasons, the Court held that the trial court departed from the essential requirements of the law by ignoring the terms of the agreement and creating its own terms. However, because the estate had an adequate appellate remedy, the Court held it could not establish irreparable harm so as to be entitled to certiorari relief. This is because the estate would be able to challenge the eventual arbitration award if it went ahead with arbitration under the trial court's terms.

Application: The theme of this update appears to be contract interpretation in probate court and this case is another example. It also outlines in a useful way when certiorari relief is available to an appellant.

7. ***White v. Marks*, ____ So. 3d ____ (Fla. 5th DCA 2021). The Fifth DCA holds that expiration of the statute of limitations to establish paternity barred a paternity claim by a woman described in decedent's will as an adopted daughter, where no actual adoption took place and the references in decedent's will were deemed only descriptive, rather than direct, unequivocal acknowledgements of paternity.**

Donald Marks passed away in 2018. Nicole Marks sought to contest Mr. Donald Marks' will. The will devised his estate to Joseph White and Darla Hall in equal shares and expressly did not provide for Ms. Marks. The will stated: "I have also intentionally made no provision under this will for my adopted daughter Samantha Nicole Marks, although it is my desire that Joseph White make appropriate provisions for her." Ms. Marks petitioned for revocation of probate, alleging that the will was the product of undue influence and that she was a legal heir to the estate. Ms. Marks claimed that her standing to bring the challenge was as a daughter of Mr. Marks, arguing that Mr. Marks had acknowledged paternity in writing. At trial, however, it was clear that at least two facts were true: (1) Ms. Marks was not the biological daughter of Mr. Marks and (2) she was never legally adopted by him. Despite the fact that Mr. Marks was not her biological father, his name was entered on Ms. Marks' birth certificate to avoid social stigma attached to out-of-wedlock births where the father was listed as "unknown," Mr. Marks had agreed to be listed as the father. Ms. Marks moved for summary judgment on her claim she had standing to contest the will based upon the appearance of his name on her birth certificate and references to her as an adopted daughter in the decedent's will and in a notation within a pocket planner. The argument raised in response was that the applicable statute of limitations set forth in F.S. Secs. 732.108 and 95.11 barred Ms. Marks' claim that she was Mr. Marks' daughter. If the statute of limitations applied then she lacked standing to bring a proceeding to revoke probate. In the alternative, it was argued that the written documents relied upon were insufficient to establish acknowledgement of paternity by Mr. Marks. The trial court granted summary judgment in favor of Ms. Marks holding that the writings were acknowledgments of paternity under F.S. Sec. 732.108(2)(c). The appellate court first determined that it had standing to hear the appeal as it deemed the order as one that was a determination of heirship under Florida Rule of Appellate Procedure 9.170. The Court then held that there is a four-year statute of limitations, beginning when the individual reaches the age of majority, to any "action relating to the determination of paternity." F.S. Sec. 95.11(3)(b). Recent cases have determined that the statute of limitations applies to actions in probate brought under F.S. Secs. 732.108(2)(a) and (b). The Court found that while there did not appear to be any case directly addressing the applicability of the statute of limitations to section 732.108(2)(c), which was the provision under which Ms. Marks claimed relief, section 95.11(3)(b) provided that the statute of limitations applies to any "action relating to the determination of paternity." The Court used this analysis to hold that Ms. Marks' claim of standing was barred by the statute of limitations. The Court then went on in dicta to hold that even if Ms. Marks' claim was not time-barred, the alleged acknowledgments of paternity do not qualify as such under section 732.108(2)(c). The birth certificate was not signed by Mr. Marks and without the accompanying required written consent, could not qualify as written acknowledgment under the statute. Consequently, Ms. Marks is forced to rely upon the will and pocket planner where Mr. Marks referred to her as his adopted daughter. The Court held that neither constitute

an acknowledgment of his paternity. Because it is undisputed that an adoption did not occur, the references in the will and pocket planner were deemed to be only understandable as descriptive, rather than direct, unequivocal acknowledgments of paternity. Finally, it was undisputed that Mr. Marks did not undertake parental responsibilities during Ms. Marks' life.

Application: This case is a further confirmation of the difficulty in establishing paternity in probate proceedings, given the holdings of recent cases that have interpreted F.S. Sec. 732.108 and F.S. Sec. 95.11. These cases have held to a strict approach that the statute begins running when the individual reaches the age of majority.

8. ***Hannibal v. Navarro*, 317 So. 3d 1179 (Fla. 3d DCA 2021). The Third DCA analyzes a dutiful child undue influence case where the parties stipulated to a presumption of undue influence and affirms a ruling that the dutiful child overcame the presumption and established that the will was not the product of undue influence.**

Matthews had five children including Navarro and Marvalene. Following Ms. Matthews' death in 2017, Navarro, filed a petition for formal administration of Ms. Matthews' will, executed in 2003 (the "2003 Will"). The 2003 Will directed that Ms. Matthews' home in Key West be sold and the proceeds distributed to her five children. However, the will specified that Marvalene would receive only 4% of the sales proceeds, whereas the other four children would each receive 24% of the sale proceeds. In addition, the 2003 Will devised another vacant lot in Key West solely to Navarro, and devised the remainder of her cash and personal property equally to all of Ms. Matthews' children, with the exception of Marvalene, who was to receive nothing of the remainder. Marvalene contested the will, arguing, among other things, that it was a product of undue influence by Navarro over Matthews. Interestingly, the parties all stipulated to a presumption of undue influence, pursuant to F.S. Sec. 733.107(2), and agreed that the burden to prove that the 2003 Will was not the product of undue influence was on Navarro, under a standard of preponderance of the evidence. The parties then tried the claim of undue influence. At trial, several witnesses testified and the trial court considered the deposition testimony of the attorney who prepared the 2003 Will. The testimony at trial revealed that Marvalene had never repaid a loan to her mother, a fact which witnesses testified placed a financial burden on Ms. Matthews and led to resentment. Conversely, the trial testimony established that Navarro had a very close relationship with her mother, and cared for her both personally and financially over the years. The trial court ultimately ruled that Navarro had proven by a preponderance of the evidence that the 2003 Will was not the product of undue influence. Marvalene appealed, arguing that the trial court incorrectly applied the presumption of undue influence and misapprehended the evidence at trial. The Third DCA affirmed. It started by noting that it was to review the trial court's factual findings for competent substantial evidence. The Court further noted the

Carpenter presumption applied due to the stipulation and determined that due to F.S. Sec. 733.107(2) that Navarro, as the alleged wrongdoer, bore the burden of proving that there was no undue influence. The Court then went on to state that the work of the trial court was to determine whether Navarro met her burden of proof, by a preponderance of the evidence, to establish that Ms. Matthews' 2003 Will was not procured by undue influence. The Court held this was precisely what the trial court did and refused the invitation to reweigh the evidence presented to the trial court below.

Application: It's not clear how much litigation was conducted before the parties agreed to stipulate to the application of the presumption of undue influence to Navarro but it's an interesting tactic. I wonder how much testimony was avoided by Navarro by the stipulation. In any event, the case is an extension of the "dutiful child" line of cases that includes *Estate of Kester v. Rocco*, 117 So. 3d 1196 (Fla. 1st DCA 2013) and *Carter v. Carter*, 526 So.2d 141, (Fla. 3d DCA 1988), where courts have held that where communications and assistance are consistent with a "dutiful" adult child towards an aging parent, there is no presumption of undue influence by the child over the parent with regard to parent's will.

9. ***Williams-Paris v. Joseph*, ___ So. 3d ___ (Fla. 4th DCA 2021). Fourth DCA analyzes multiple issues related to a prenuptial agreement, including whether homestead was waived and discusses witnessing requirements.**

Arlene Williams-Paris ("the Wife") appealed several probate court orders determining that she waived her right to inherit as a spouse by signing a prenuptial agreement. The case involved the enforceability and scope of a prenuptial agreement entered into hours before the Wife and Calvin Paris ("the decedent") got married. The couple lived together in the decedent's home in Florida for approximately five years before the wedding and continued to do so afterwards. Both had been married before. Approximately a year before the marriage, the decedent told the Wife that "if we get married, I would like you to get a prenup." According to the Wife, at least, the issue was never brought up again until their wedding day. In June 2015, the decedent proposed that the couple get married the following month while on vacation in Massachusetts. The Wife agreed and made the arrangements with a month's notice. On the day of the wedding, the decedent woke the Wife at 7:00 a.m. demanding she find a prenuptial agreement online and sign it. She did not react to this announcement with joy, but the decedent refused to marry her unless she signed one, explaining that she was to be his fifth wife and a prenuptial agreement was necessary in the event of divorce. The Wife apparently then followed the decedent to the office in the vacation home, where the decedent instructed her to search the word "prenup" online. The Wife then selected a website (Rocketlawyer.com, I believe) offering legal forms online using a digital program to create an agreement by filling in responses to prompts. Apparently,

most of the information responding to the prompts was supplied by the decedent. The form itself could not be read until all of the questions asked in the prompts were completed. After the prompts were completed, including ones providing their financial information for the exhibits to the agreement, the Wife printed the prenuptial agreement. The decedent then drove the Wife to a notary where they signed the agreement in the notary's presence. There were no third-party witnesses. The marriage then occurred at 4:00 p.m. that day. Approximately four years after the marriage, the decedent passed away intestate while still married to the Wife. The Wife petitioned the probate court to: (1) invalidate the prenuptial agreement; (2) declare the residence described in paragraph 2 of the agreement to be the decedent's homestead subject to her election to take a one-half interest; and (3) award her intestate share and elective share of the estate as spouse. The petition argued that the prenuptial agreement was invalid based on fraud, deceit, duress, coercion, misrepresentation, and overreaching since the decedent never explained that it applied in the event of death and because it contained unfair or unreasonable provisions. She also petitioned for rescission of the agreement based on her unilateral mistake. Finally, she argued the agreement on its face did not waive her rights in the decedent's homestead due to a paragraph exempting the property from application of the agreement. The decedent's children (the "Children") moved for summary judgment, arguing that the prenuptial agreement had a specific provision pertaining to a spouse's death which on its face countered the Wife's argument that it was only effective in the event of divorce. They argued that provision also included a homestead waiver. The Children further argued the Wife knew what she was signing and was not coerced into signing, as verified by the notary's affidavit filed in support of the motion stating that the notary did not indicate that anything unusual occurred when the prenuptial agreement was signed. The Wife further contended that the decedent did not fully disclose his assets prior to the agreement being signed or in the exhibits attached to the agreement. The probate court granted the Children summary judgment on the Wife's coercion and duress arguments. After a nonjury trial on the disputed issue of misrepresentation and unilateral mistake, the probate court denied the Wife's petition to invalidate the prenuptial agreement on those issues.

The Fourth DCA affirmed the trial court's holdings as to the validity of the agreement. It then reversed the trial court as to the waiver of homestead and held the agreement did not waive the Wife's homestead rights due to the specific provision exempting the property from application of the agreement. The agreement would have a meaningless provision related to the property otherwise, held the Court. The Court then, in a footnote, engaged in a lengthy analysis of section 732.702(1), Florida Statutes. It appears from the opinion that no one argued the applicability of section 732.702(1), Florida Statutes, which requires an agreement that waives spousal inheritance rights (including homestead) to be signed by the waiving party in the presence of two subscribing witnesses. That statute controls the waiver of spousal rights in the

post-mortem context, such as homestead elective share, exempt property, and so forth. The Court stated that it did not believe the requirements of that provision of the statute had been met. With regard to the notary, the Court cited a case that held that the notary did not count as one of two subscribing witnesses where the notary did not sign separately as a subscribing witness and a case rejecting the argument that the notary's acknowledgment should be regarded as that of a second subscribing witness. The Court also noted that it found no case law supporting the contention that one party's signature on a contract can qualify as a subscribing witness to the other party's signature. It appears from the Court's footnote that it would have invalidated the post-mortem waiver of spousal rights portion of the agreement had the applicability of section 732.702(1) been argued but the Court noted that it was not argued below or in the briefs so it did not apply the provision to its analysis.

Application: The case has several interesting elements. First, the facts of the timing and potential duress seem fairly significant in favor of the wife but they were not enough to invalidate the agreement at trial. Being embarrassed about having to cancel a wedding at the last minute is not enough duress. Second, it's not clear why section 732.702(1), Florida Statutes, was not argued at trial by the wife. That seems like an easier legal argument than the ones made at the trial level but the strategy involved in that decision did not make the text of the appellate decision. In any event, it makes sense at the trial level to allow for, and make, alternative arguments so the court can consider multiple grounds to find in your favor and so you have an appealable issue if you lose.

10. ***Bivins v. Douglas*, ___ So. 3d ____ (Fla. 3d DCA 2021). The Third DCA continues line of cases holding firm to application of the four-year statute of limitations for paternity under F.S. Sec. 95.11(3)(b) resulting in lack of standing for alleged heirs.**

Bivins and his children filed a declaratory action seeking to invalidate several trust instruments executed by the decedent, Pearce. Bivins alleged that he and/or his three biological daughters were the lineal descendants and sole intestate heirs of Pearce's intestate estate. Bivins alleged he was born out of wedlock and that his biological mother and his biological father, Pearce, participated in a marriage ceremony after Bivins' birth and thus Bivins was a descendant of Pearce. Bivins alleged that he and his children, who he argued were Pearce's intestate heirs, were interested parties entitled to challenge Pearce's estate planning. The planning devised Pearce's assets to his charitable foundation and certain named individuals. Bivins and his children were never included as beneficiaries of Pearce's trust. Bivins filed several complaints which were dismissed for a variety of grounds, including lack of standing. Finally, the trial court dismissed with prejudice the most recent version of the complaint due to insufficient allegations to support standing and for failure to state a cause of action. On appeal the Third DCA affirmed the dismissal with prejudice. Bivins argued that his mere allegation that he was Pearce's biological

son was sufficient to establish his standing as an intestate heir. He also argued that the statute of limitations on paternity did not bar his claims or that the delayed discovery doctrine or equitable estoppel should apply to avoid the limitations bar. None of these arguments persuaded the Court. Bivins' complaint raised the issue of paternity. The Court noted that F.S. Sec. 95.11(3)(b) imposes a four-year statute of limitations on an "action relating to the determination of paternity, with the time running from the date the child reaches the age of majority." Thus, in order to qualify as Pearce's intestate heir, Bivins would have had to establish Pearce's paternity within the time period allowed by the statute of limitations. Here, the limitations period ran in 1987, four years after Bivins reached the age of majority when he turned eighteen years old. The Court then found that since Bivins failed to obtain a judicial declaration of paternity within that period, Bivins's claim is barred by the statute of limitations. Bivins argued that Pearce and his mother married after his birth and that this established his paternity. He argued that F.S. Sec. 732.108(2)(a) supported this contention. The Court rejected that argument and held that section 732.108(2)(a) requires proof that the marriage was between Bivins' natural parents. This, of course, would still require a legal determination of paternity and the four-year statute of limitations applies to that determination. Thus, Bivins was not an intestate heir. The Court then logically held that if Bivins was not an intestate heir, then neither were his children. Finally, the Court held that the "delayed discovery doctrine" and equitable estoppel did not apply here. "Delayed discovery doctrine" does not apply to paternity determinations but rather a limited set of causes of action. One such cause of action is fraud but fraud was not alleged in the complaint. With regard to equitable estoppel, the Court held there was no allegation in the complaint that anyone actively induced Bivins into foregoing filing a paternity suit so that doctrine was also inapplicable. Given that neither Bivins nor his children were heirs, the Court held it was correct to determine they had no standing to contest Pearce's estate plan when they were not mentioned in any prior planning documents in which they would take if the current plan was invalidated.

Application: This case is another in a recent run of cases applying F.S. Sec. 95.11(3)(b) to hold that an untimely paternity claim in a probate matter is barred, with the resulting lack of standing that then results. To the extent that paternity may be an issue when advancing or defending a probate case, it's vital to determine whether paternity is established legally or whether the time for determination may have already run.

11. ***Ramos v. Estate of Ramos*, ___ So. 3d ___ (Fla. 3d DCA 2021). The Third DCA reminds us that the owners of real property do not need to be described as husband and wife in the deed and their marital relationship does not need to be referred to in order to establish a tenancy by the entireties.**

Eleida Ramos (“Eleida”) and Pedro Ramos (“Pedro”) were married in 1975. In 2013, the couple purchased a residence in Homestead, Florida. The deed to that property identifies them as “Pedro Pablo Ramos and Eleida Farro Ramos; whose post office address is 14545 SW 293rd Street, Homestead, Florida, 33032; hereafter called the grantee.” No indication of marital status was set forth in the deed. Eleida died in 2016, and Pedro died in 2020. Exposito, Eleida's daughter, filed a petition for summary administration as personal representative of her mother's estate seeking, as sole asset, the Homestead, Florida, property. Exposito attached Eleida's will, dated 2012, when Eleida lived in Hillsborough County, devising “my share of the primary residence to my daughter, Kenia Elena Exposito, if she survives me....” Maritza Ramos (“Ramos”) is the personal representative of Pedro's estate. Ramos filed an objection to Exposito's petition for summary administration. Ramos argued that Eleida's estate has no interest in the property because the deed conveyed the property to the married couple as tenants by the entireties. She argued that when Eleida died, her undivided one-half interest passed to Pedro by survivorship. When Pedro died, then his now-entire interest in the property went to his estate if that was the case. Exposito countered that because the deed contained no language indicating an estate by the entireties, it must be assumed to be a tenancy in common. If that was the case, then Eleida's one-half interest in the estate passed to her estate upon her death. The trial court denied Ramos's objection and granted Exposito's motion to strike and entered summary judgment for Eleida's estate. The court denied a motion for rehearing, and Ramos appealed. The Third DCA reversed on the basis that the seminal case of *American Central Insurance Company v. Whitlock,* 122 Fla. 363, 165 So. 380 (Fla. 1936), and its progeny, control this case. Those cases hold that in the case of real property, the owners do not need to be described as husband and wife in the deed and their marital relationship does not need to be referred to in order to establish a tenancy by the entireties. More recently, the Court noted that this principle was affirmed by the Florida Supreme Court in *Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 54 (Fla. 2001), which held that where real property is acquired specifically in the name of a husband and wife, it is considered to be a “rule of construction that a tenancy by the entireties is created.” This means that a conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent. The Court noted that there was nothing in the deed to indicate that Eleida and Pedro Ramos did not intend to take title to the Homestead property as tenants by the entireties. This meant that when Eleida died, her one-half interest passed to Pedro.

Application: This issue arises from time to time in probate matters where the deed is silent as to the marital relationship of two married individuals. If the couple owning the property are married but the deed is silent as to that relationship (the deed doesn’t use the words, husband, or wife, or entireties), then the entireties status can be confirmed by the recording of an affidavit of marital status in the public records.

12. ***Townsend v. Mansfield*, ___ So. 3d ___ (Fla. 1st DCA 2021). The First DCA confirms that probate courts have the exclusive jurisdiction to award fees for appellate services rendered to an estate, as opposed to the appellate courts, where the basis of the claim is provision of a benefit to the estate.**

The case report for this case doesn't go into the facts of the appeal but rather just explains which court has jurisdiction to award attorney's fees related to a probate appeal. The First DCA first notes that attorney's fees in probate cases are governed by the Florida Probate Code's fees and costs provisions and that the probate court has authority to award fees to "[a]ny attorney who has rendered services to an estate." § 733.106(3), Fla. Stat. The Court also noted that as a court of equity, the probate court is also expressly permitted to make discretionary allocations for fee awards. "When costs and attorney's fees are to be paid from the estate, the court may direct from what part of the estate they shall be paid." § 733.106(4), Fla. Stat. The Court then holds that it is without authority to award attorney's fees in probate matters, even for appellate services performed, where the basis of the claim is provision of a benefit to the estate. The Court underlined that this was the case even where the benefit to the estate is defense against another beneficiary's frivolous appellate action. The Court based its ruling on application of the statutory scheme of the Probate Code, the Supreme Court Case of *Garvey v. Garvey*, 219 So. 2d 685, 686 (Fla. 1969) and subsequent appellate decisions with the same holding. Finally, the Court renounced dicta to the contrary in its *Carrithers v. Cornett's Spirit of Suwannee, Inc.,* 93 So. 3d 1240, 1241–42 (Fla. 1st DCA 2012) decision.

Application: This ruling may be a little counterintuitive, in that the appellate court is ruling that certain fees related to an appeal must be sought at the trial court but it is a helpful clarification for probate practitioners.

13. ***Futch v. Haney*, ___ So. 3d ___ (Fla. 2d DCA 2021). The Second DCA discusses and upholds the timeliness of an elective share election by a surviving spouse and underlines Florida's strong public policy of protecting a surviving spouse.**

Mary Jo Futch's husband died in April 2019. Haney filed a petition for administration in June 2019 and was appointed as personal representative of the estate in July 2019. The notice of administration was filed on August 14, 2019. On January 6, 2020, Futch filed a petition for extension of time to make election for elective share, requesting a three-month extension until April 8, 2020, as she had recently received documents relating to the calculation of the elective share and needed additional time to review them. On April 7, 2020, Futch filed a second petition for extension of time, alleging that the COVID-19 emergency affected her ability to consult with counsel. Futch asked for an extension until June 8, 2020, or "a date when the [c]ourt resumes in-person

probate proceedings." On June 9, 2020, Futch filed a third petition for extension of time, seeking extension until June 18, 2020. The appellate decision does not indicate that any of the interested parties filed objections to Futch's extension requests. On June 10, 2020, Futch filed her election to take elective share. The personal representative, the trustees of the decedent's trust, and the beneficiaries then all filed objections to Futch's election, and Futch responded. After hearing argument from counsel, the trial court denied Futch's June 9, 2020 petition for extension and sustained the objections on the grounds that the election was untimely filed. On appeal, Futch argued the election was timely and that F.S. Sec. 732.2135(4) applied to toll the time in which she was required to make her election. The Second DCA, in reviewing the timeliness of the election held that the statutory language of F.S. Sec. 732.2135 was clear: because Futch had filed a timely petition for an extension of time, the time for making the election was tolled. The Court then noted that each additional petition for extension was filed within the time sought in the prior petition, thus continuing to toll the time, and that the plain language of the statute does not limit the amount of time that a surviving spouse may seek in a petition for extension, it does not prevent the surviving spouse from filing a timely subsequent petition seeking additional time. Further, the statute does not require a hearing or ruling on a petition in order for the time to be tolled. Finally, the Court noted that its conclusion was consistent with Florida's strong public policy of protecting a surviving spouse.

Application: The case is a good illustration of Florida's public policy of protecting the surviving spouse where such protection is consistent with the applicable law. The court also argued that the statutory language was clear in granting the extension of time for the elective share election but the public policy likely influenced the court in its analysis.

14. ***Swiss v. Flanagan*, ___ So. 3d ___ (Fla. 3d DCA 2021). The Third DCA affirms what it describes as a well-reasoned trial court opinion regarding application of the law of undue influence and discusses the active procurement requirement of the *Carpenter* presumption.**

This opinion does not delve deeply into the facts of the underlying dispute but does give a good detailed discussion related to the *Carpenter* presumption for undue influence cases. That presumption applies when three elements are present with regard to a challenged document: the alleged influencer is a substantial beneficiary, had a confidential relationship with the decedent, and actively procured the will or other document being challenged. With regard to the active procurement element, *Carpenter* listed several non-exclusive criteria to consider in determining whether active procurement exists. These criteria include: (a) whether the beneficiary was present at the execution of the will; (b) whether the beneficiary was present when the testator expressed a desire to make a will; (c) whether the beneficiary recommended an attorney to draft the will; (d) whether the beneficiary knew of the contents of the will prior to

execution; (e) whether the beneficiary gave instructions on preparation of the will to the attorney; (f) whether the beneficiary secured witnesses to the will; and (g) whether the beneficiary possessed the will subsequent to execution. In this case, there was no issue that the alleged influencer was a substantial beneficiary under the challenged will or that she had a confidential relationship with the testator. The issue was as to active procurement. In the will in question, the decedent's children were disinherited in favor of his long-time companion and she was named as personal representative (which was not the case in prior wills). The trial court invalidated the will on the grounds of undue influence. As to facts related to active procurement, it found that Swiss was actively involved in the testator's estate planning as early as 2001, arranged legal appointments, accompanied him to multiple law offices, compiled a list of recommended attorneys, contacted attorneys directly, faxed edited estate documents to a lawyer, and possessed familiarity with the contents of the estate documents. In addition, the court found that in the months preceding the execution of the disputed will, the testator was in declining health and that his condition was poor enough to warrant a request for competency evaluations by his long-serving estate planning attorney. Further, when the will was drafted and executed, Swiss, who was mentally and physically capable, had assumed control over the testator's finances and other aspects of his personal affairs, restricted his communication with his children, and disclosed his financial holdings to others. Finally, the trial court found that "[t]he circumstances [of the will] are highly suspicious, including the absence of a documented attorney's file for the estate preparation … the clear involvement of … Swiss in contacting the lawyer and arranging the meeting, [and] the errors in the will and affidavit." The Third DCA affirmed the ruling and gave a good discussion related to the *Carpenter* presumption, its application, and that the active procurement criteria in that case were suggestive but non-exclusive and that later case law had provided additional factors for courts to consider in undue influence cases.

Application: The case is a good discussion of current law on the *Carpenter* presumption and in particular regarding analysis of the active procurement element of the *Carpenter* presumption.

15. ***Fisher v. PNC Bank*, N.A., ___ F.4th ___ (11th Cir. 2021). The Federal Court of Appeals for the 11th Circuit addresses application of the Probate Exception to Federal diversity jurisdiction.**

This case related to a dismissal of a complaint with prejudice, so the appellate record assumes for the purposes of review that the complaint allegations were correct. Those allegations stated that Fisher and her mother, Charlap, co-owned an investment account with the Royal Bank of Canada. Both women were account holders, and Fisher was the designated emergency contact on the account. Charlap contacted PNC about securing a $100,000 loan to assist her son Alan. Alan had recently been convicted of fraud and theft, and Charlap

wanted to give him some help to keep him out of jail. To arrange the $100,000 loan, Charlap transferred the RBC investment account to PNC. Charlap was in poor mental and physical health, and she needed assistance managing the account at the time of the transfer. Upon transferring her assets to PNC, Charlap notified the bank that the investment account included over $150,000 belonging to Fisher that had been entrusted to her. She instructed the bank that Fisher was to remain a co-owner and emergency contact on the investment account, as she had been on the RBC account. Allegedly, PNC representatives confirmed to her that Fisher would be on the account, but PNC removed Fisher from the account without informing her or Charlap. Fisher also alleged a variety of issues related to PNC's conduct in connection with Alan and Charlap that Fisher argued caused her to lose "all of her investments that were part of Ms. Charlap's account with PNC." She had also incurred significant costs in an attempt to establish guardianship over her mother and regain control of the account. Fisher filed a five-count complaint against PNC in the United States District Court for the Southern District of Florida that alleged (1) civil theft, (2) aiding and abetting civil theft, (3) negligence, (4) fraudulent concealment, and (5) aiding and abetting fraud. Complete diversity existed between the parties. The district court dismissed the case on the grounds that it lacked subject matter jurisdiction due to the probate exception to federal diversity jurisdiction. The federal Court of Appeals for the 11th Circuit reversed. The Court then entered into a detailed analysis of the probate exception. This exception is a judicially created exception to jurisdiction holding that a federal court may not exercise diversity jurisdiction over state probate matters. Among other things, it prevents a probate system based on a race to a federal courthouse. The Court then notes that the exception is narrowly construed and applies only in three circumstances. It "reserves to state probate courts [1] the probate or annulment of a will and [2] the administration of a decedent's estate[.]" *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). It also bars federal courts from [3] "dispos[ing] of property that is in the custody of a state probate court." *Id.* at 312. Other than those three exceptions, federal courts retain jurisdiction "to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate." *Id.* at 296. The Court also notes that a main purpose of the probate exception is to preclude valuation of estate assets or the actual transfer of property under probate. Fisher argued that the district court erred in dismissing her lawsuit because it could adjudicate her claims for damages against PNC without probating her mother's will, administering the estate, or disposing of the estate's property. The Court agreed and held that Fisher's complaint does not require the district court to do any of the three things that the probate exception prohibits. The Court confirmed that a claim does not fall within the probate exception merely because it "raises questions which would ordinarily be decided by a probate court." For the exception to apply, the issue before the court must fall into one of the three categories of the probate exception: probating a will, administering an estate, or disposing of property in custody of a probate court. Here, Fisher was not asking the district court to dispose of property that was in the custody

of a state probate court. She sought damages from PNC directly. Her position was that her allegedly lost funds were never properly subject to probate proceedings at all. Finally, there was no question that Fisher was the real party in interest to her case as she was suing on her own behalf as opposed to on behalf of the estate.

Application: This case is a good explanation in detail of the application of the mysterious probate exception to federal diversity jurisdiction. The case cites the recent U.S. Supreme court *Marshall* case in much of its analysis so that case would be good reading as well for anyone interested in more information about this issue.

Trust Cases

16. ***Ammeen v. Sjogren*, ___ So. 3d ___ (Fla. 1st DCA 2021). The First DCA holds that trust beneficiary with a power of appointment can represent and bind permissible appointees and that the beneficiary's decision to consent to the termination of a trust and relinquish her interest also relinquished any interest in the trust of the permissible appointees.**

Jeffrey Ammeen and Kirsten Ammeen were married in 2001 and divorced in 2008. The marriage produced two daughters, J.A. and A.A. In 2002, Kirsten's mother, Jane Sjogren (the "Settlor"), established the Kirsten Ammeen and Issue Year 2002 Trust (the "Trust). Kirsten was the trust beneficiary and held a testamentary power of appointment over the Trust, exercisable at her death and only through her will. The Trust contained the following relevant provisions:

> (2)(b) Upon the death of Settlor's daughter, Kirsten Ammeen, the then remaining balance of the Trust estate shall be distributed to, or held in trust for the benefit of, such person or persons among the issue of Settlor's daughter, Kirsten Ammeen, and upon such estates and conditions as Settlor's daughter, Kirsten Ammeen, shall appoint by Will, making specific reference to this power. Any unappointed property shall be held for the benefit of the spouse of Settlor's daughter, Kirsten Ammeen, if he is then living and if he was married to and living with Settlor's said daughter at the time of her death[.]
>
> ....
>
> (2)(c) Upon the death of Settlor's daughter's spouse, or if Settlor's daughter, Kirsten Ammeen, did not have a spouse (or such spouse was not married to and living with Settlor's said daughter) at the time of her death, the then remaining balance of the Trust estate, or such unappointed property, as the case may be, shall be distributed to, the then living issue of Settlor's daughter, Kirsten Ammeen, per stirpes[.]
>
> ....

> (4)(a) Whenever Trustees, in their discretion, determine that a trust, or any part thereof, should be terminated for any reason, Trustees, without any liability to any person whose interest may be affected, shall terminate such trust, or part thereof, and shall distribute the terminated portion of the trust to the individual or individuals at that time eligible to receive the income therefrom.

In 2007, disputes arose within the Settlor's family over various family assets, which led to Kirsten and her two sisters suing the trustee of the Trust, Wade Sjogren, and another brother, as well as the Settlor. In 2009, the parties entered into a mediated settlement agreement, which they read in open court in New Jersey. As part of the settlement the sisters, including Kirsten, agreed to transfer their interests (along with their spouses' and children's interests) in their individual 2002 trusts to the brothers and the Settlor. In 2014, after certain further proceedings, a New Jersey court found the settlement was valid, binding, and enforceable. The court noted that because Florida law was implicated, a Florida court needed to declare that no provision of the settlement was illegal or unenforceable. In March 2015, Kirsten died without a will. Jeffrey Ammeen opened an intestate estate for her and was appointed guardian of the property of J.A. and A.A. In August 2015, the Duval County Circuit Court found Kirsten's estate was bound by the terms of the settlement. The court found the sisters had consented to the trustee exercising his power to terminate each of their 2002 trusts in order to effectuate the settlement and that this exercise of power was not a breach of his fiduciary duty to the sisters. In 2016, after receiving confirmation from the Florida court, the New Jersey court entered a final order effectuating the settlement. In the meantime, earlier in 2016, Jeffrey had initiated the breach of trust lawsuit against the trustee in Duval County. The Duval court in this breach case found that Kirsten had consented to the relinquishment of any interests in, and the termination of, the Trust before her death and that her interests were deemed to have passed in 2009, when the settlement was entered in open court. The court then held that J.A. and A.A. were only permissible appointees before 2009 and were not beneficiaries; therefore, they were bound by the representation provisions of F.S. Sec. 736.0302(1) to Kirsten's relinquishment of rights. The court granted final summary judgment in favor of the Trustee then since J.A. and A.A. lacked standing to sue for breach of trust. On appeal, Jeffrey argued, among other things, that J.A. and A.A. were beneficiaries of the Trust and so had standing. The First DCA found otherwise and held that Kirsten was the beneficiary of the Trust until she relinquished her interest. The Court noted that during Kirsten's lifetime, the Trust could have been terminated at the trustee's discretion and all assets distributed to Kirsten alone. In addition, J.A. and A.A. were only permissible appointees, not beneficiaries, while Kirsten was alive. As the holder of a limited power of appointment, Kirsten could appoint among a specified class or class of individuals. The class of potential appointees remained open and subject to defeasance until Kirsten's death in 2015. In other words, J.A. and A.A. were nonexclusive members of an open class of potential appointees.

The Court found that this meant they were not beneficiaries of the Trust. The Court then noted that under Florida trust law, with her power of appointment Kirsten had the ability to represent and bind permissible appointees J.A. and A.A. This was due to the representation provisions of F.S. Sec. 736.0302 which states that "[t]he holder of a power of appointment may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power." Therefore, Kirsten's decision to relinquish any interest in the Trust and to consent to its termination meant that any potential interests J.A. and A.A. had in the Trust as permissible appointees were also relinquished in 2009. The Court finally noted that there was no finding that Kirsten acted in bad faith in making the settlement so the bad faith exception under F.S. Sec. 736.0302(3) was inapplicable.

Application: This case is a helpful confirmation of the effectiveness of the representation provisions in the trust code. Among other things, representation provisions allow for interested parties to the trust to be parties to agreements related to the trust that are binding and not subject to challenge by persons with merely permissive or speculative interests in the trust.

17. ***The Northern Trust Company, as Trustee of the Elizabeth W. Walker Trust v. Abbott*, 313 So. 3d 792 (Fla. 2d DCA 2021). The Second DCA holds that a probate court's order denying a motion to strike claim lacked finality and contemplated additional judicial labor and, thus, was not a final, appealable order.**

The Northern Trust Company, as Trustee of the Elizabeth W. Walker Trust FBO Charles P. Walker, III, E/U the Elizabeth W. Walker Revocable Trust, U/A/D April 26, 1976 appealed a probate court order denying its motion to strike a statement of claim filed by Rebecca Cooper Walker, individually and in her capacity as Trustee of the Charles P. Walker Trust. Following the death of her husband, Charles P. Walker, III, Rebecca was appointed the personal representative (PR) of his estate. On August 31, 2018, Rebecca published notice to creditors. In November 2018, without notice to the estate, Northern Trust had applied $1.4 million of the assets held in the Charles P. Walker Trust to satisfy a secured pledge agreement signed by the decedent in 2015. The opinion notes that Rebecca petitioned for resignation as the PR, which the court granted, but does not indicate why she resigned. On December 3, 2018, the successor PR served Rebecca with an amended notice to creditors and on December 12, 2018, Rebecca filed a claim against the decedent's estate, individually and as trustee of the Charles P. Walker Trust. The claim contended that the decedent did not intend to satisfy the loan from the corpus of the Charles P. Walker Trust, the assets of which were meant for the benefit of Rebecca Walker during her lifetime. Rebecca further contended that the decedent was in the early stages of dementia when he signed the pledge agreement. Northern Trust both objected to the claim and moved to strike the claim. At hearing on the motion to strike, Northern Trust argued that: (1)

pursuant to F.S. Sec. 733.702(1), the claim was precluded because it was filed more than three months after the first notice to creditors was published by Rebecca; (2) the claim failed to state any facts alleging a valid claim against the estate; and (3) Rebecca was not a creditor entitled to be paid from the estate pursuant to F.S. Sec. 733.707. Rebeca argued that because she had filed an independent action in response to Northern Trust's objection to the claim, any issues related to her claim were now the subject of that independent action and the probate court no longer had jurisdiction over those issues. In addition, she argued she filed the claim as soon as she became aware that she had one—when she learned Northern Trust had paid itself from the Charles P. Walker Trust. She also argued her claim was timely filed because it was filed within thirty days of her being served with the Amended Notice to Creditors and it was not until November 6, 2018, when Northern Trust depleted the corpus of the Charles P. Walker Trust, that the claim arose. The probate court entered an order denying Northern Trust's motion to strike, finding that "further discovery was needed to determine if there is any basis for a claim against the Decedent." On appeal, the Second DCA held that the order was not a final probate order subject to appeal as set forth in Appellate Rule 9.170(b). Specifically, the Court held the order failed to "finally determine a right or obligation of an interested person" or "terminate judicial labor or provide finality as to any issue or party in this case." Rather, the order denied Northern Trust's requested relief but stated "further discovery is needed to determine if there is any basis for a claim against the Decedent." In other words, the order contemplated additional judicial labor by the probate court. The Court noted that such additional labor might include conducting an evidentiary hearing on the issues raised in the motion to strike—whether Rebecca Walker was a "reasonably ascertainable" creditor entitled to notice under section 733.2121(3)(a), whether the claim was legally sufficient in form under section 733.703, or whether the claim was timely filed. The Court then distinguished the cases advanced by Northern Trust which Northern argued stood for the proposition that an order denying a motion to strike is proper for appellate review under rule 9.170. In distinguishing the cases, the Court determined those cases all involved orders finally determining the right or obligation of an interested party. The Court dismissed Northern Trust's appeal without prejudice to Northern Trust filing a second motion to strike the claim, after the appropriate discovery was conducted through the probate court proceeding. Finally, the Court addressed the parties' arguments related to the scope of the probate court's jurisdiction when faced with both an objection, which results in the filing of an independent action in circuit court, and a motion to strike a statement of claim in the probate court. Rebecca took the position that when she filed her independent action, the probate court's jurisdiction ended. Neither the probate rules nor chapter 733 address the filing of a motion to strike, but the Court noted that cases allow an interested party to file both an objection and a motion to strike a statement of claim, as Northern Trust did here. The Court explained that a motion to strike tests the facial sufficiency of the statement of claim and an objection relates to the validity or merits of a facially sufficient

claim. The Court then held that when a challenge to the legal sufficiency of a claim is made by motion to strike, the probate court must first determine the facial sufficiency of the claim before the parties litigate the subject matter of the claim in the circuit court independent action. The Court also held that a challenge to the timeliness of the claim is a matter within the jurisdiction of the probate court. If the statement of claim is not facially sufficient or is time barred, then there is no reason to require the parties to participate in an independent action to determine the merits of the claim.

Application: The case is mainly helpful, not in its analysis of order finality, but rather in its analysis of the jurisdiction of the probate court versus the general circuit court when parallel proceedings related to a claim are pending in both courts. The decision gives primacy to the probate court's right to determine the facial sufficiency and timeliness of the claim prior to any circuit court determination of the underlying merits of the case.

18. ***In re Romagnoli*, ___ B.R. ___ (Bankr. S.D. Fla. 2021). The Bankruptcy Court for the Southern District refuses to apply *Bosonetto* and confirms a claimed homestead exemption for property transferred to a revocable trust and confirms TBE protection.**

The bankruptcy case was one where the bankruptcy trustee has raised many objections to the debtor's exemptions, most of which objections were, according to the court, at best, incredibly aggressive positions. Two of the positions taken were that: (1) homestead property transferred to a revocable trust lost its creditor protection exemption; and (2) Exempt tenancy by the entireties ("TBE") property loses its exemption completely due to the existence of joint debt, in this case an unsecured obligation owed jointly by the debtor and his wife to the IRS. The trustee argued that if a debtor and the debtor's non-filing spouse have any joint debt, then the TBE exemption is forfeited for the benefit of all creditors, regardless of the size of the joint debt. With regard to the homestead issue, the trustee relied solely on the case of *In re Bosonetto*, 271 B.R. 403 (Bankr. M.D. Fla. 2001) for the argument that the exemption was lost on the transfer to trust. The Court rejected the trustee's arguments. With regard to the homestead issue the Court held that the reasoning of *Bosonetto* is "reasoning of which no other court, including other judges in the Middle District of Florida, has adopted." The Court stated that its homestead ruling was based on the substantial body of Florida case law, which liberally applies the homestead protection regardless of the manner in which title to the homestead is held. With regard to the availability of the TBE assets due to the existence of the joint debt, the Court held that the proper interpretation of Florida law and the Bankruptcy Code was that only TBE assets sufficient to pay the IRS claim (the joint debt itself) may be liquidated and solely to pay the IRS claim.

Application: *Romagnoli* is a good rebuttal to *Bosonetto*, which continues to be an outlier, and a good discussion of the TBE law including a discussion of the unities required for TBE protection. It is a debtor-friendly case. It also illustrates, though, that the unfortunate *Bosonetto* decision still is out there creating possibilities for litigation related to homestead.

19. ***Babun v. Stok Kon + Braverman*, ___ So. 3d ___ (Fla. 3d DCA 2021). The Third DCA confirms that for fee awards under F.S. Sec. 733.106(3) where an attorney has rendered a benefit to the estate, the order must set specific findings as to its determination of the number of hours, the hourly rate, and any reduction or enhancement factors.**

Sara Cristina Babun, ("Sara"), is the daughter of Cristina and Jose Babun Selman (the "deceased"). Cristina is the deceased's spouse. In 2019, Sara petitioned to be appointed as personal representative of the Estate of Jose Babun Selman, and co-trustee of the Jose Babun Selman Third Amended and Restated Trust (the "Trust"). Over Cristina's objections, Sara was appointed to be personal representative. Cristina then hired lawyers ("Appellees"), including the Stok firm, to represent her and filed an adversary proceeding related to the Trust. The court appointed a neutral co-trustee, Phil Schechter, to serve along with Sara. With the adversary issues raised by Cristina still outstanding, the Appellees filed a petition for their fees for work as Cristina's counsel between January 1, 2019 and August 31, 2020, seeking a total of $624,751.41 ($473,094.25 for the trust litigation, $10,753.14 in costs; $53,500.00 for the estate proceeding, $87,404.02 in costs). Sara objected to the Appellees' fees, noting that the still-outstanding adversary claims against the Trust had not yet been adjudicated. In addition, Sara had previously filed a petition to determine Cristina's capacity, as well as Cristina's competency to retain Appellees to represent Cristina in the various proceedings. The probate court conducted an evidentiary hearing on Appellees' fee petition. The Appellees argued that they had conferred a substantial benefit on the Estate and Trust and were entitled to compensation pursuant to F.S. Sec. 733.106 and 736.1005. Sara made a variety of arguments in response, including that the Appellees had not conferred any benefit on the Estate or Trust. Appellees presented evidence that their services related to obtaining the appointment of an independent trustee (Schechter), securing living expenses for Cristina, and discovering fraudulent transactions, among other things, and that these actions had benefitted the Estate and Trust. However, beyond simply introducing the billing record, the decision indicates that no testimony or other evidence was presented by Appellees, expert or otherwise, as to any of the lodestar factors required by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). Probate and trust fees are governed by the Probate Code and the Trust Code, which do not require *Rowe* lodestar calculations for services rendered by the attorney for the personal representative and the attorney for the trustee. However, *Rowe* does come into play where third-party attorneys are seeking

fees from an estate or trust in the context of having provided a benefit to the estate or trust. In computing a court-awarded attorney's fee, *Rowe* held that a trial judge should (1) determine the number of hours reasonably expended; (2) determine the reasonable hourly rate for the services; (3) multiply the result of (1) and (2) to compute what is known as the "lodestar"; and, when appropriate, (4) adjust the fee up or down on the basis of the contingent nature of the litigation or the results obtained. *Rowe* also points courts toward the following factors as objective guidance:

(1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Apparently at the evidentiary hearing, evidence was not presented as to the *Rowe* factors. There was also no testimony regarding costs incurred. The Appellees' fee expert, in his testimony, testified as to the benefit of the services to Cristina but not the Estate or Trust. The probate court judge, in his rulings, correctly noted that Appellees' representation of Cristina did not bar them from payment from the Estate and Trust if the legal services benefitted the Estate and the Trust. After the hearing, the court issued an order that, among other things, held that any fee award would be "held in abeyance" until it could be demonstrated how the work benefitted the Estate or Trust. The court also held that Appellees would need to resubmit their fee petition "identifying with specificity those services provided to Cristina that also served the larger purpose of vivifying Jose Babun's intent as testator and settlor[.]" Finally, the court determined that because Appellees' legal work led to the appointment of co-trustee Shechter, whose work benefitted the Estate, Appellees' time expended to secure the appointment of the co-trustee and assist him in discharging his duties should be compensated. The court required the Appellees to submit a new fee petition specifically identifying the time associated with those efforts. After the court's rulings, Appellees then did

submit a new fee petition. Sara objected to that new fee petition, arguing it did not remedy the problems of the first fee request. Without further hearing, the court ultimately entered an order for the Trust to pay fees to Appellees in the amount of $530,266.75, and to the fee expert in the amount of $9,282.50. The Third DCA reversed. First, the Court confirmed the correctness of the probate court as to the entitlement issue: an attorney who has rendered services to the estate or trust may be awarded reasonable compensation from the estate or trust. However, in this case, the Court held that the probate court made no findings of fact or conclusions of law concerning the reasonableness of the hours or hourly rates necessary to support the award to Appellees of fees and costs. It confirmed that an award of attorney's fees without making adequate findings justifying the amount of the award is reversible error under *Rowe*. The Court explained that under *Rowe,* "[t]he trial court must set forth 'specific findings' as to its determination of the number of hours, the hourly rate, and any reduction or enhancement factors."

Application: Fee cases such as this come up in probate and guardianship appeals from time to time where the attorneys demonstrate entitlement to fee awards, the probate court grants fees, but the awards are overturned on appeal due to lack of proper findings in the order. When you are seeking a fee award from the court, review the law and facts that must be found to exist by the court and make sure those elements are in the record so an order in your favor stands up on appeal.

Guardianship Cases

20. ***Foster v. Radulovich*, ___ So. 3d ___ (Fla. 2d DCA 2021). The Second DCA confirms that an alleged incapacitated person in incapacity proceedings has the right to substitute his court-appointed attorney with the attorney of his choice until the trial court determined his incapacity.**

This case involved guardianship incapacity proceedings related to Foster, the alleged incapacitated person. The trial court appointed counsel for Foster Pursuant to F.S. Sec. 744.331(2)(b). There was a hearing related to appointment of an emergency temporary guardian for Foster where the appointed counsel attended but Foster was not present. The parties—including appointed counsel—stipulated to the appointment of Radulovich as emergency temporary guardian over Foster's property. The emergency temporary guardianship letters delegated Mr. Foster's right to contract to the Temporary Guardian and were set to expire on September 20, 2020. Thereafter, Attorney Denman filed a motion seeking appointment as Mr. Foster's private counsel for the proceedings. The motion was opposed by the guardianship petitioner, DCF, and by the Temporary Guardian. They argued that Foster could not hire Attorney Denman because the trial court had removed his right to contract through the emergency temporary guardianship. At a hearing on the motion, Mr. Foster explained to the trial court

that he had met with Attorney Denman to discuss the guardianship proceedings and wanted Attorney Denman to serve as his attorney, but the court denied the motion and struck the notice of appearance as a nullity. Attorney Denman, on behalf of Foster, then challenged by writ of certiorari the order denying the motion to substitute counsel and striking his notice of appearance. The Second DCA reversed the trial court and granted the writ. The Court first noted that "[t]o obtain a writ of certiorari, the 'petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal.'" The Court held that it had jurisdiction because an erroneous denial of a motion for substitution of counsel causes the kind of irreparable harm for which certiorari lies because the litigant is deprived of his or her choice of counsel for the entire proceeding and this deprivation cannot be remedied on appeal. The Court then went on to confirm that Section 744.331(2)b provides that "[t]he alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court." Under relevant case law, an alleged incapacitated person is permitted to substitute counsel until the trial court determines incapacity by clear and convincing evidence. Before incapacity has been determined, the trial court may appoint an emergency temporary guardian for the person, property, or both, but the Court noted the trial court is not required to determine that the person is incapacitated to appoint an emergency temporary guardian. In response, DCF and the Temporary Guardian argued that although section 744.331(2)(b) permits Foster to substitute counsel to represent him in proceedings to determine his incapacity, Foster could not personally exercise his statutory right to substitute counsel because the trial court removed his right to contract and delegated it to the temporary guardian. They further argued that permitting an alleged incapacitated person whose right to contract has been removed pursuant to an emergency temporary guardianship to contract with an attorney would undermine the protective purpose of an emergency temporary guardianship. Their argument as to procedure was that the correct course if Mr. Foster wanted to substitute his court-appointed counsel would be to express his wishes to his temporary guardian who would make the ultimate decision regarding whether to retain Attorney Denman. The Court rejected those arguments and held that section 744.331(2)(b) specifically provides that an alleged incapacitated person has the right to substitute appointed counsel with counsel of his or her choice during proceedings to determine incapacity and this right, by logic and practicality, must entail the right to enter into an agreement with the attorney of his choosing. This means that while section 744.3031(1) is broad enough to allow removal of the right to contract generally, section 744.331(2)(b) effectively prohibits the trial court from removing the alleged incapacitated person's right to contract with an attorney. Because the statute confers on the alleged incapacitated person the right to contract with and substitute counsel, this constitutes an exception from the general authority of the trial court to remove the alleged incapacitated person's rights by conferring authority on an emergency temporary guardian. The Court noted that a person subject to an emergency temporary guardianship remains an *alleged*

incapacitated person until such time as he is adjudicated incapacitated and is free to exercise all rights not otherwise delegated to a guardian pursuant to an emergency temporary guardianship, including the right to substitute counsel.

Application: This case is a good confirmation of the AIP's right to hire private counsel, even where an ETG has been appointed. As a practical matter, the trial court should confirm that the AIP has actually hired the private counsel as opposed to third parties who may be trying to get rid of the court-appointed lawyer and put their chosen lawyer in place for the AIP.

21. ***Leonard-Boyce v. Winkle*, 324 So. 3d 34 (Fla. 2d DCA 2021). The Second DCA holds that trial court's reduction of guardian's billing rate, without evidence supporting the reduction, warranted reversal and guardian had the right to be heard as to the reduction.**

Leonard-Boyce, the guardian for Van Winkle, filed a fee petition included a timesheet that reflected she had performed guardianship work totaling 63.7 hours at a billing rate of $95 per hour. No one contested the number of hours or the hourly rate Ms. Leonard-Boyce requested. The guardianship court, though, entered without a hearing an order awarding her 63.7 hours of compensable time, but at $90 per hour. The court did not include any findings or reasoning in the order as to why it had unilaterally reduced the rate. The court then denied the guardian's motion for reconsideration of the fee reduction. The Second DCA reversed the order. It noted that "[o]rdinarily, '[t]he amount of guardian's fees to be awarded as compensation for services rendered is in the discretion of the trial court, and its determination will not be disturbed unless there is a lack of competent, substantial evidence to support the award.'" Nevertheless, in this case, the Court, in reviewing the fee order held that it could not ascertain what competent, substantial evidence supported the unilateral reduction of the billing rate. In addition, the guardianship court then did not afford Leonard-Boyce an opportunity to be heard on the reduction of her fees. The Court cited existing Florida case law reversing orders where the trial court did not set out the considerations that resulted in the trial court's reduction of the fee and that the trial court should not reduce the amount of compensation requested by the guardian without first providing the guardian with an opportunity to be heard on the petition.

Application: This case is helpful to guardians in their efforts to seek fees and have the court either grant them or at least give them an opportunity to argue against fee reductions. Fee issues are sensitive matters in many guardianship cases as the court is seeking to protect the ward who needs resources for his or her own continuing care but the appellate court's decision is a reminder that the trial court's protection of the ward must not extend to lack of fairness to the guardian.