Recent Case Law Update

Estate Planning Council of Broward County

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Probate Cases

1. ***Walters v. Agency for Health Care Administration*, ___ So. 3d ____ (Fla. 3d DCA 2019). The Third DCA holds that cooperative stock apartments are still not homestead with regard to descent and devise.**

Townsend ("Decedent") died on August 29, 2017. She left behind, as her sole heir, her adult daughter Walters ("Walters"). In February 2018, Walters petitioned the probate court for summary administration of the Decedent's intestate estate, the sole asset of which was the Decedent's interest in a cooperative apartment in North Miami Beach. The petition for summary administration listed this asset as "Cooperative Stock, 16900 NW 14th Avenue, Apt. 203, North Miami Beach, FL 33162" and described it as being "PROTECTED HOMESTEAD." Walters sought distribution of this asset to her, despite the existence of at least one creditor. Walters also petitioned the probate court to determine the homestead status of the cooperative stock and alleged that the property was protected homestead. Following notice to creditors, including AHCA, AHCA filed a statement of claim against the estate in the amount of $81,276.76, and objected to Walters' petition for homestead protection asserting that the cooperative stock was not entitled to homestead protection because it was not a fee simple interest in land as required by law. See Art. X, § 4, Fla. Const.; § 732.401, Fla. Stat. (2017). Following a hearing, the trial court denied Walters' petition to declare the cooperative stock homestead property, relying upon *In re Wartels' Estate*, 357 So. 2d 708 (Fla. 1978) and *Phillips v. Hirshon*, 958 So. 2d 425 (Fla. 3d DCA 2007). Walters asserted on appeal that her case was distinguishable from *Wartels* as her case arguably involved a forced sale rather than a case of devise and descent. The distinction is significant because the Florida Supreme Court (in *Wartels*), and the Third DCA (in *Hirshon*), held that a cooperative apartment cannot be considered homestead property for the purpose of descent and devise because it does not constitute "an interest in realty." The Third District in *Hirshon* observed that "following the date of the operative factual scenario under which *Wartels* was decided, the Florida legislature adopted a new Cooperative Act, Chapter 719, Florida Statutes . . . which places co-ops on equal footing with all other `interest[s] in realty', as defined by *Wartels*, which have long been eligible to be impressed with the character of homestead for the purposes of devise and descent. . . ." *Hirshon*, 958 So. 2d at 428. With reservations, the Third DCA affirmed here and held that the instant case is not a forced sale but, as in *Wartels* and *Hirshon*, instead was within the devise and descent category and thus the cooperative stock was not homestead property. The Court recognized this placed it in conflict with the Second District and Fifth Districts. The Court then certified, as a question of great public importance, the same question certified by this court in *Hirshon*:
DOES THE FLORIDA SUPREME COURT'S DECISION IN *IN RE ESTATE OF WARTELS V. WARTELS*, 357 So.2d 708 (Fla. 1978), HAVE CONTINUING

VITALITY IN LIGHT OF THE ADOPTION BY THE FLORIDA LEGISLATURE OF THE COOPERATIVE ACT, CHAPTER 76-222, LAWS OF FLORIDA?

Application: Cooperative apartments still do not have clear homestead protection in Florida in light of this decision and the continued viability of *Hirshon* and *Wartels*.

2. ***Robinson v. Estate of Robinson*, ___ So. 3d ___ (Fla. 3d DCA 2020). The Third DCA holds that the Probate Court's equitable powers do not allow it to disregard applicable statutes of limitation regarding paternity determinations affecting probate administration.**

Robinson's brother, John E. Robinson (the "Decedent"), died intestate in 2004. In 2016, Michel filed petitions for summary administration for Decedent's estate and to determine homestead status, who claimed that she was the Decedent's daughter and heir. When Michel later filed a copy of her birth certificate as ordered by the court, another person was listed as her father. After amendments to the petition and the affidavit of heirs, the trial court entered orders of summary administration and determination of homestead, finding in pertinent part, "that all interested persons have been served proper notice of the petition and hearing, or have waived notice thereof . . . ." Five months later, Robinson wrote to the court asking that the estate be reopened based on lack of notice and disputed Michel's claim to be the Decedent's daughter. Thereafter, he petitioned to reopen the estate and vacate the orders of summary administration and determining homestead. After the estate was reopened, Michel filed a verified petition for release of a blood sample of the decedent. Robinson argued that Michel's claim to establish paternity was barred by the statute of limitations. Here, Michel was born out of wedlock in 1980, and she reached the age of majority in 1998. She did not petition for summary adjudication until 2016, or for a blood sample from the decedent to verify paternity until 2017. The trial court initially ruled in Robinson's favor and vacated the summary administration. Thereafter, a successor judge granted Michel's petition for rehearing and the requested DNA testing, reasoning that "if there is a DNA sample that could scientifically establish whether or not John Robinson is the father, it would be . . . an extreme injustice for this not to occur." The probate court emphasized that it was a court of equity and reversed its order that had vacated the two prior rulings. Robinson argued on appeal that Michel's paternity determination was barred by *Rose v. Sonson*, 208 So. 3d 136, 139 (Fla. 3d DCA 2016), and *Dixon v. Bellamy*, 252 So. 3d 349, 351 (Fla. 3d DCA 2018), and their holdings that section 732.108(2)(b), as amended in 2009, does not provide relief to paternity claims such as Michel's since her claim had already been extinguished by section 95.11(3)(b) in 2002 (four years after she reached majority), and the 2009 amendment does not apply retroactively. Michel argued the Probate Court is a court of equity and has inherent authority to do justice. The Third DCA agreed with Robinson and reversed. By the time Michel

filed her paternity claim, it had already been time barred by section 95.11(3)(b), because more than four years had passed since she attained the age of majority in 1998. Because her right to establish paternity was extinguished in 2002, it could not be revived by the 2009 amendment to section 732.108. The Court held that equity is not a basis to disregard statutes of limitations or the Court's prior decisions.

Application: This decision underlines the inapplicability to many individuals of the amendment to section 732.108 regarding paternity, as the majority of individuals are already time-barred by the limitations period. The decision also is a reminder that the Probate Court's equitable powers are broad but not limitless.

3. ***Lopez v. Hernandez*, ___ So. 3d ___ (Fla. 5th DCA 2020). The Fifth DCA holds that a beneficiary cannot be held personally liable for fees and costs awarded under F.S. 733.106 and that a charging lien is inappropriate without a recovery.**

This decision is the tenth appeal before the Fifth District for brothers, attorneys, and co-beneficiaries Angel Ruben Lopez Hernandez ("Ruben") and Angel Raul Lopez Hernandez ("Raul") regarding their dead father's fifteen-year-old estate. Ruben and Raul both challenged a probate court order addressing attorney's fees and costs sought by attorney Williams. Williams served as Ruben's attorney when Ruben was the estate's personal representative. The order awarded Williams' fees and costs, and it imposed a charging lien on Ruben's portion of the estate. It divided liability for the attorney's fees between the estate and Ruben, personally, due to the finding that Ruben directed Williams to engage in frivolous litigation on the estate's behalf. The Fifth District affirmed the trial court's finding that Williams acted in such a manner, as well as Raul's cross-appeal challenging the reasonableness of Williams's award. The Court reversed the personal imposition of attorney's fees on Ruben and found that Williams is not entitled to a charging lien on Ruben's portion of the estate. The Court noted that F.S. Sec. 733.106 authorized payment of attorney's fees out of a beneficiary's portion of an estate, but held it does not permit probate courts to impose personal liability for the estate's attorney's fees and costs. Further, Williams was not entitled to a charging lien because "[t]he personal representative . . . received no fund or positive judgment or settlement out of [his] efforts." *See Correa v. Christensen*, 780 So. 2d 220, 220–21 (Fla. 5th DCA 2001). He merely administered the estate.

Application: The decision notes the limited reach of F.S. Sec. 733.106, which allows for taxing fees and costs to a beneficiary's share of an estate but does not provide for personal liability outside of estate assets.

4. ***Zaidman v. Zaidman*, ___ So. 3d ___ (Fla. 3d DCA 2020). The Third DCA holds that Belgian holographic will with only one witness is not**

entitled to admission to probate in Florida, regardless of any validity in Belgium.

This case was a battle between two competing last wills and testaments: a 2012 will executed in Florida, and a 2015 document apparently executed in Belgium. The probate court concluded that, as a matter of law, the earlier Florida will controlled and had not been revoked by the later Belgian document. The competing wills were filed with the probate division following the 2017 death of René Zaidman ("Mr. Zaidman"). The first was presented by his wife Natchaya. That will was executed in Miami-Dade County in 2012, with the requisite formalities under Florida law. The second will was filed on behalf of Mr. Zaidman's son Sacha and daughter Patricia (the "Children"). The document was handwritten, dated May 17, 2015, and deposited with a rabbi in Antwerp, Belgium (the "2015 Will"). The 2015 document purported to revoke all previous wills as part of its provisions. The petition for administration was filed by Natchaya in Miami. It alleged under oath that Mr. Zaidman and his wife were residents of a single-family home in Aventura, Florida, and that Mr. Zaidman was domiciled in Miami-Dade County. The Children filed a counter-petitions contending that the 2015 Will controlled and had revoked the 2012 Will. Following an adversary hearing, the trial court granted the Wife's motion to strike the Children's amended counter-petition with prejudice. The Children appealed both on substantive legal grounds and on the ground that the trial court judge had signed the wife's proposed order without allowing them sufficient time to object to the form of the order. The Third DCA affirmed the probate court judge and held first that objection as to time to object to the form of the order was meritless. The Court noted that trial court conducted a thorough hearing, invited the submission of the order, and the order simply granted the motion to strike with prejudice without extensive elaboration. Both sides were determined to have had a full and fair opportunity to present their legal arguments regarding the competing wills. With regard to the substantive legal issues raised, the Court began by noting that "[t]he primary goal of the law of wills, and the polestar guiding the rules of will construction, is to effectuate the manifest intent of the testator. Notwithstanding this goal, strict compliance with statutory requirements is a prerequisite for the valid creation or revocation of a will." *In re Estate of Dickson*, 590 So. 2d 471, 472 (Fla. 3d DCA 1991). In Florida, a will must be signed at the end by the testator and in the presence of two witnesses who witness the execution (or an acknowledgement by the testator) in the presence of each other. F.S. Sec. 732.502(1)(a)-(c). The Court further noted that these statutory formalities apply to foreign wills, as F.S. Sec. 732.502(2) provides. That subsection provides that "[a]ny will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will." The Court went on to note that Florida courts refuse to recognize holographic wills

that are not executed in strict compliance with the Probate Code, even if the will is valid under the laws of the state or country of execution. Finally, the Court held that the holographic will was not entitled to force and effect under Florida law with regard to its purported revocation of the 2012 Will.

Application: The holding of the case seems relatively straightforward with regard to the lack of admission of the holographic will to probate.

5. ***Warner v. Quicken Loans, Inc.***, **___ F. Supp. ___ (M.D. Fla. 2020). The U.S. District Court, Middle District of Florida, confirms that the provisions related to descent of homestead do not apply to property held as tenancy by the entireties and therefore a homestead order contrary to tenancy by the entireties does not effectuate a change to title of the property.**

Father and mother owned a Florida residence as tenancy by the entireties property until mother died on June 18, 2014. Mother died intestate, survived by father and daughters. During the probate of mother's estate, father petitioned the probate court to determine the homestead status of the property, using a standard FLSSI form petition for requesting the homestead status of property where a decedent died intestate. In 2015, the probate court entered an order determining the property to be homestead and adjudging that title to the property descended to father for a life estate and a remainder interest equally to the daughters. In 2018, father mortgaged the property and the mortgage was acquired by Quicken Loans, Inc. It does not appear that daughters joined in the mortgage. In 2019, father died. Daughters then tried to quiet title to the property, taking the position they owned it free and clear of the mortgage. Quicken countered that father had sole ownership after mother's death and the mortgage was a valid lien against the property. Daughters argued that the homestead order controlled the ownership interests in the property. Quicken argued that the probate court was without jurisdiction to adjudicate interests in the property since it passed outside of probate by operation of law. The federal district court, applying Florida substantive law, agreed with Quicken and held that the descent of homestead provisions under F.S. Sec. 732.401 do not apply to property owned by a decedent in tenancy by the entireties. The court noted that this is expressly stated in subsection (5) of the statute. The court held that under Florida law, a probate court has no jurisdiction over property not cognizable in probate, and any judgment is binding only on the *rem* over which the probate court has jurisdiction. Finally, where a probate court is without jurisdiction to dispose of property, no party's conduct can confer jurisdiction. The court discussed the recent case of *Mullins v. Mullins*, 274 So. 3d 513 (Fla. 5th DCA 2019), in its review of the issues. In that case, the court held a homestead order created no new rights and the siblings' consent to the form of the order could not have altered the property rights established by the mother's will. The *Mullins* court rejected an argument that consent to the form of the order altered the property rights established by the mother's

will, and the court observed heirs and beneficiaries may formally agree to alter their prescribed interests in an estate, but the agreement must be in writing and comply with section 733.815, Florida Statutes, which provides "interested persons may agree among themselves to alter the interests, shares, or amounts to which they are entitled in a written contract executed by them."

Application: The decision confirms the holding in *Mullins* that a homestead order, by itself, does not have the consequence of changing already vested title to real property. The court cited with approval that part of the *Mullins* decision that stated that "the homestead order is not a title transaction as defined by section 712.01(3), Florida Statutes (2011), which reads, "any recorded instrument or court proceeding which affects title to any estate or interest in land and which describes the land sufficiently to identify its location and boundaries." It should be noted that provision is now F.S. Sec. 712.01(7), Fla. Stat. (2018).

Guardianship and Proxy Cases

6. ***Carter v. Bromberg*, ___ So. 3d ___ (Fla. 5th DCA 2020). The Fifth DCA revisits the perennial guardianship issue of "interested person" status and determines a mother is an interested person with standing as to the appointment of a successor guardian for her adult son due to her next of kin relation.**

In 2016, Carter was appointed to be the plenary guardian of her incapacitated son following the resignation of her ex-husband as their son's guardian. In 2017, DCF filed a separate petition under Chapter 415 for the entry of an order authorizing protective services to protect the Ward from "abuse, neglect, or exploitation," as defined in section 415.102, Fla. Stat., while under Carter's care. Eventually an order was entered by the court that "suspended" any guardianship orders. A separate order was entered in the guardianship case that "suspended" the Letters of Guardianship issued to Carter for a period of "sixty (60) days or until further order of the court." After that, DCF and the ward's court-appointed counsel filed a "joint motion to intervene" in the guardianship proceedings seeking the issuance of an order disqualifying Carter under section 744.309(3), Florida Statutes, from serving as the ward's guardian. That statute lists persons who are disqualified from being appointed to act as guardian, including convicted felons and any person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in section 39.01 or section 984.03(1), (2), and (37), Fla. Stat. In December 2018, a professional guardian petitioned to be appointed successor guardian of the ward. Carter also moved to reinstate her Letters of Guardianship. Although it does not appear that an order had been entered on the joint motion to disqualify Carter from acting as guardian or to otherwise remove her as the plenary guardian, the trial court held an evidentiary hearing on the professional guardian's petition to be the Ward's

successor plenary guardian. Carter was present at this hearing, but the court did not permit her to participate. The trial court granted the petition and entered an order appointing the professional guardian to be the ward's successor plenary guardian of the person and property. Afterward, the court, without a hearing, entered a separate order denying Carter's motion for reinstatement of her Letters of Guardianship. The court found in this order that (1) Carter was not an "interested person," (2) she had failed to demonstrate a change in circumstances from the time her Letters of Guardianship were suspended to justify reinstatement, and (3) a professional guardian had just been appointed. The Fifth DCA reversed. The Court held that Carter was denied her due process right to participate in the proceedings since she was an "interested person" under the applicable statutes and rules. *See* F.S. Secs. 744.3371(1) and 744.102(14). Carter was "next of kin" for her son and thus entitled to participate in a hearing regarding appointment of guardian for him. This is true, held the Court, even if she was disqualified from acting as his guardian herself.

Application: This case is merely the latest in a line of guardianship cases addressing the hot-button issue of standing conferred by "interested person" status. The concurrence by Judge Lambert has valuable commentary that Carter's "status as the Ward's next of kin does not automatically entitle her to full participation at all future hearings pertaining to her son's guardianship. While the majority opinion correctly recognized that Carter, as next of kin, was statutorily entitled to meaningfully participate in the hearing to appoint her son's guardian, there is no bright-line rule as to whether a person qualifies as an "interested person" with standing to participate in every guardianship proceeding or hearing. *Hayes*, 952 So. 2d at 508; see also *Rudolph v. Rosecan*, 154 So. 3d 381, 385 (Fla. 4th DCA 2014)("A person's status as an 'interested person' with standing in a guardianship proceeding is dependent upon whether the person would be affected by the outcome of the proceedings. Simply being next of kin does not confer 'interested person' status.)."

7. ***Ewell v. Trainor*, ___ So. 3d ___ (Fla. 5th DCA 2019): Proper service of process on a ward who has had the right to sue or defend lawsuits removed is made on the ward's guardian and not the ward.**

In 2017, Susan Trainor obtained a final judgment of injunction for protection against stalking violence against Shannon Ewell. Even though Ewell was served with process and attended the final hearing, unbeknownst to the judge, Ewell had been found incapacitated several years earlier and a different division appointed a limited guardian of the person for Ewell. In 2019, counsel for Ewell filed a motion for relief from judgment pursuant to Fla. Fam. L. R. P. 12.540, contending the judgment was void because there was never proper service on the guardian. The trial court denied the motion and Ewell appealed. The Fifth DCA reversed because when a legal guardian has been appointed who has been delegated the ward's right to sue and defend lawsuits, process must

be served on the legal guardian as provided in F.S. Sec. 48.031. Proper service is indispensable for the court to have personal jurisdiction over the ward unless properly waived.

Application: Service of process can be tricky when one of the parties is a ward under a guardianship. To avoid the result in this case, it is a good practice to research defendants before they are sued to determine, for example, if they are under a guardianship. However, be mindful that even under a guardianship or ETG, there may be certain situations where the ward is still entitled to personal service or notice. When to serve a ward depends on the rights delegated to the guardian and whether the ward is under a plenary or limited guardianship.

8. ***Hicks v. Hicks*, ___ So. 3d ___ (Fla. 4th DCA 2019): Before awarding attorney's fees as a sanction, the Court must (1) make a "bad faith" finding, (2) link the "bad faith" conduct to the fees incurred, and (3) take testimony and make findings as to reasonable hours and rates.**

Reginald Hicks was appointed as guardian of his mother. However, during the guardianship, Reginald failed to comply with several court orders, including placing assets in a restricted depository, and failed to comply with statutory requirements including filing annual plans, accountings and an inventory. As a result, Reginald's sister, Sharon, petitioned the Court for the appointment of a forensic accountant, which the Court granted, and ordered Reginald to pay for. Reginald continued to be uncooperative by refusing to provide information to the accountant and failure to pay the accountant. These failures resulted in multiple orders of contempt, enforcement and sanctions. Ultimately, the Court entered an order removing Reginald as guardian and requiring him to file a final accounting. The forensic accountant filed a report finding "significant differences" between the IRS reported income and the income deposited into the ward's account. Sharon filed additional motions for contempt, cleared a hearing date with Reginald, and set a hearing. Reginald failed to appear at the hearing or file a final report. After a rule to show cause, the Court found Reginald to be in indirect civil contempt for failure to file the final report. The order directed Reginald to pay $3,500 in attorney's fees and $17,284.88 in forensic accounting fees. Failure to comply would result in incarceration with a $17,284.88 purge amount. Reginald appealed. On appeal, Reginald argued that the trial court erred in awarding attorney's fees because it failed to make a specific finding of bad faith and failed to show the fees were related to the bad faith conduct. Moreover, the court failed to take any expert testimony or make findings as to the reasonable number of hours and hourly rate. The Fourth DCA reversed, indicating that while the trial court has inherent authority to award fees and costs for bad faith, it must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of conduct that resulted in the incurrence of fees. Last, the trial court must determine, by competent, substantial evidence, a present ability to pay a purge amount.

Application: In awarding fees and costs as a sanction, the order must include the necessary findings of fact and elements required for sanctions. The Fourth District did not hold that the sanctions weren't warranted, rather the order was merely missing a determination of bad faith and how fees were specifically incurred as a result. Practitioners should be mindful regarding requirements and ensure they are included in a court order to avoid an appeal such as this one.

9. ***Forman v. Forman*, ___ So. 3d ___ (Fla. 4th DCA 2019): Award of attorney's fees against Petitioner for bad faith filing of incapacity petition needs to include findings regarding reasonable rate and reasonable hours.**

This is the most recent update in a highly publicized guardianship matter involving Broward's Clerk of the Court, Brenda Forman. Brenda filed for determination of incapacity and appointment of an emergency temporary guardian with regard to her estranged husband, Howard Forman. The Court ultimately dismissed the petition for incapacity after the examining committee members unanimously found that Howard did not lack capacity in any respect. The trial court then specifically assessed fees against Brenda under F.S. Sec. 744.331(7) after finding that the petition was filed in bad faith. The court awarded $59,997.00 in fees based on 171.42 hours of time at rates of $350/hr for attorneys and $125/hr for paralegals. Brenda appealed. The Fourth DCA affirmed the trial court order as to entitlement to fees but reversed and remanded back to the trial court for an order containing the necessary findings of fact regarding the amount of fees. At the fee hearing, the trial court judge found that some of the billing entries were duplicative and/or included administrative work which should have been performed by a paralegal and billed at the paralegal rates. However, the order did not indicate which specific entries it was referencing. The Fourth District specifically found that the order needs to include the number of hours reasonably expended by the attorney v. the paralegal, and not a lump sum award. The order must also set forth the services for which compensation was deemed permissible and for which compensation was disallowed. The Court did specifically state that a new evidentiary hearing is not necessary if the trial court could enter an order with the necessary findings based on notes and/or the transcript. The trial court also awarded "fees on fees" for litigating the attorney's fees which the Fourth upheld.

Application: This is another example of the importance of getting a proper order from the trial judge that will be upheld as to form by the appellate court. Here, the Fourth District upheld the trial court's determination of bad faith but remanded for a more thorough order regarding the amount of fees and basis for that amount.

10. ***Hernandez v. Hernandez*, 276 So. 3d 401 (Fla. 3d DCA 2019). The Third DCA confirms that a ward's death does not prevent a trial court from enforcing orders previously entered in the guardianship case.**

In the latest decision relating to the guardianship of Elena Hernandez, the ward's nephew, Antonio, Jr., appealed the trial court's order granting summary judgment to the guardian, Eusebio, and denying Antonio, Jr.'s partition action. The trial court and the Third DCA found that Antonio, Jr. had no interest in the real property and therefore did not have standing to partition. The dispute stemmed from a Ladybird Deed signed by the ward prior to the guardianship. A Ladybird Deed is a type of life estate deed which allows a property to pass automatically to one or more designated remaindermen at death without the need for a probate. However, unlike a traditional life estate deed, with a Ladybird Deed the life tenant retains the right to sell or otherwise convey the property without the consent or joinder of the remaindermen. Here, the guardianship court authorized the sale of the property and despite the ward dying before closing, the court held that there was equitable conversion of the property based on the contract.

Application: This is further confirmation that a guardianship matter does not end at the moment of the ward's death and there are typically still outstanding duties and obligations of the guardian of the property to conclude the administration.

11. ***Erlandsson v. Guardianship of Erlandsson*, ___ So. 3d ___ (Fla. 4th DCA 2020). The Fourth DCA explains the role of the court-appointed counsel in incapacity proceedings.**

Erlandsson's parents filed a petition for limited guardianship seeking to remove her rights except for her right to vote and right to marry. The trial court appointed an examining committee to investigate and provide a report and recommendation to the court. According to the committee's reports, Erlandsson (the "AIP") was not taking care of her medical or psychiatric needs and that she was schizophrenic and extremely paranoid. She had recently been involuntarily committed to a mental health facility, and was alleged to demonstrate a need for long-term psychiatric care. The examining committee unanimously reported that Appellant lacked the capacity to exercise her basic rights and recommended that a plenary guardian be appointed. The trial court also appointed counsel to represent the AIP in the guardianship hearings. The AIP asked to discharge her appointed counsel, objecting throughout the hearing to her lawyer's representation and to having a guardianship imposed. Despite the AIP's objections, appointed counsel did not seek to withdraw, believing her client lacked the capacity to make the decision to fire her. The AIP continued to object to counsel's representation during the hearing, and the trial court denied her request to discharge her lawyer. At the hearing, the AIP attempted to cross-examine a witness herself, but was prohibited from doing so. Finally,

appointed counsel argued in favor of a plenary guardianship, against the AIP's clear and express wish that no guardianship be established. The trial court ordered a plenary guardianship, appointing Appellant's parents as guardians. The Fifth DCA reversed and remanded with instructions to appoint new counsel to represent the AIP at a new incapacity hearing. The opinion has a detailed discussion of the role of the court-appointed guardian. First, the Court noted it is mandatory to appoint counsel for the AIP. Second, the Court held that counsel is entitled to be awarded reasonable fees for the services rendered. Third, the Court held the AIP does not have a constitutional right to challenge the effective assistance of her appointed counsel. A right to effective assistance of counsel under the due process clause of the Florida or U.S. constitutions has not been extended beyond very limited areas, such as where incarceration or involuntary commitment may be imposed for example. Fourth, the Court held that a lawyer appointed in guardianship proceedings represents the expressed wishes of the AIP and not necessarily the "best interests" of the AIP. The Court noted that the applicable statute, section 744.102(1), requires an appointed attorney to represent the expressed wishes of the AIP to the extent it is consistent with the rules regulating The Florida Bar. The Court then expressly noted that it did not read Rule 4-1.14 of the Rules of Professional Conduct to entitle counsel in a guardianship proceeding to counter a client's express wishes not to have a guardian appointed. Finally, the Court held that forcing the AIP to be represented by counsel who was advocating for her "best interests" as opposed to her expressed wishes and goals violated F.S. Sec. 744.102(1).

Application: This case is a very welcome explanation of the role of the court-appointed lawyer in incapacity cases and makes clear the attorney's role is that of the AIP/ward's legal advocate and not as a guardian ad litem. The attorney is to advocate for and seek to carry out the client's expressed wishes, even if the attorney thinks the guardianship would be in the client's best interests.

12. ***Jones v. Guardianship of Jones***, **___ So. 3d ___ (Fla. 5th DCA 2020). The Fifth DCA confirms that close family members are entitled to an award of reasonable fees for serving as guardians so long as the services rendered are reasonable and necessary services performed with the scope of duties of a guardian.**

Penelope Jones appealed a guardianship order denying her request for guardian compensation. The sole basis for the trial court's denial of the request was that Jones had "an obligation to provide such services for the ward without compensation due to the father/daughter familial relationship between the Ward and the guardian." The Fifth DCA reversed and held that a guardian, including a close family member guardian, is entitled to a reasonable fee for services rendered to the ward. The criteria to be considered by the court in determining an award of fees to a guardian are set forth in F.S. Sec. 744.108(2). Nothing in that statute disqualifies a family member from

compensation. The Court did note that where there is a close familial relationship between the guardian and the ward, the guardian is not entitled to compensation for merely doing what any family member would do for their relative under the circumstances. However, a guardian in a close familial relationship with the ward is entitled to compensation for reasonable and necessary services performed within the scope of his or her duties as a guardian. The Court remanded and ordered the trial court to determine the services that would reasonably be performed by a professional or other non-family member guardian necessary to discharge a guardian's duty to the ward. The guardian would be entitled to compensation to the extent those services were actually performed and properly documented.

Application: This case is a helpful clarification to the body of case law relating to guardian's fees. Guardianship courts quite rightly are mindful of their role to protect wards whose guardianships they administer so it is understandable how confusion about fees to close relatives can arise. This case provides a good explanation for how to compute what is compensable and what is not compensable when a family member guardian seeks fees.

Trust Cases

13. ***Demircan v. Mikhaylov*, ___ So. 3d ___ (Fla. 3d DCA 2020). The Third DCA holds that the common law of trusts still applies to trust modification and that findings related to Chapter 736 are not required when the settlor and all beneficiaries consent to modification of an irrevocable trust.**

Settlor created an irrevocable trust, initially consisting of $25,000,000. The purpose was both to fund a venture and benefit the settlor's children as beneficiaries. The trust designated Zinoviev as the only person with power to remove the trustee (or appoint additional trustees to the original trustee, Demircan). After a series of disagreements, settlor and the trust beneficiaries moved to (among other things) modify the trust to strip Zinoviev of his powers. At the hearing, the trustee argued that Zinoviev was an indispensable party who had not been joined, that the beneficiaries' consent was not sufficiently shown, and that common law modification required consideration of factors other than consent, as reflected in chapter 736, Florida Statutes. The trial court granted relief as a matter of law, allowing the modification of the trust. On the issue of modification, noting the settlor and all beneficiaries' consent, the trial court granted the requested relief based on the authority expressed in *Preston v. City National Bank of Miami*, 294 So. 2d 11, 14 (Fla. 3d DCA 1974). The Third DCA affirmed as to this issue and held that a common law trust modification under *Preston* is neither abrogated, nor controlled by section 736.04113's requisite findings. Judicial modifications at common law are distinct from judicial modifications under chapter 736 and are still viable even after the adoption of chapter 736. The Court further noted that the Trust Code

recognizes that "[t]he common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state." § 736.0106, Fla. Stat. (2016). More specifically, F.S. Secs. 736.04113 and 736.04115 both state that "[t]he provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts." Nothing in chapter 736 modifies or abrogates the common law modification rule adopted in Preston. Finally, the court cites to the *Minassian* case to state that while "[s]ections 736.0410–736.04115 and 736.0412, Florida Statutes, provide means of modifying a trust under the Florida Trust Code . . . the sections on modifying trusts do not provide the exclusive means to do so." *Minassian v. Rachins*, 152 So. 3d 719, 724 (Fla. 4th DCA 2014).

Application: This case is a continuation of precedent confirming the continuing viability of the common law authority to modify or terminate irrevocable trusts even after the enactment of Florida's Trust Code. The case goes on to note that had the trust itself had a provision that the trust could not be terminated without the trustee's consent, then the trust cannot be terminated merely by agreement of the settlor and beneficiaries, if the trustee refuses that consent.

14. ***Hett v. Barron-Lunde*, ___ So. 3d ___ (Fla. 2d DCA 2020). The Second DCA holds that the trial court departed from the essential requirements of law in compelling the disclosure of the nonparty trust's financial records without conducting an evidentiary hearing and in compelling disclosure of alleged attorney-client privileged information without conducting an *in camera* inspection.**

Following the death of her father Barron, Michelle Barron-Lunde, as personal representative of her father's estate, sued Hett ("Petitioner"), alleging Petitioner wrongfully obtained approximately $200,000 from Barron's bank accounts after John Barron's mental state began to deteriorate. The complaint raises claims of civil theft, conversion, breach of fiduciary duty, unjust enrichment, and seeks the imposition of a constructive trust. Petitioner, the only named defendant in the complaint, denied liability. At some point during his relationship with Barron, Petitioner retained an attorney with the Mowry Law Firm to set up a trust for Barron's benefit. Barron-Lunde served discovery on Petitioner, including a request for the production of her "complete tax returns, including all schedules and attachments, from the year 2012 to present." Petitioner objected to the request for her financial information based on her right to privacy under Article I, section 23 of the Florida Constitution. In addition, Respondent served nonparty subpoenas on Petitioner's financial institutions along with the law firm who set up the Trust. The subpoenas requested financial records, copies of trusts, trust accountings, and other similar information. Petitioner filed an objection to the subpoenas raising the following grounds: (1) the requests interfere with a nonparty's right to privacy under Article I, section 23 of the Florida Constitution; (2) the requests sought

documents relating to Petitioner as trustee; however, Petitioner, as trustee, was not a party to the underlying litigation; and (3) the subpoena to the law office seeks information protected by the attorney-client privilege. The trial court compelled disclosure of both the financial records, the trust records, and the law firm records. The Second DCA reversed as to the trust records and attorney-client law firm records. The Court held that Petitioner, in her separate trustee capacity was not party to the litigation and was entitled to an evidentiary hearing prior to the court entering an order compelling the records. Petitioner, individually, was the only party sued in the case, so she could never be liable in her trustee capacity based upon the allegations of the complaint. The trial court never acquired personal jurisdiction over Petitioner in her trustee capacity. Absent any allegations in the complaint that Petitioner, individually, fraudulently transferred or otherwise converted the subject monies to Petitioner, as trustee or even simply to the Trust, the records were held to be irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Court determined the trial court erred in denying Petitioner an evidentiary hearing to determine the relevancy of the trust records. With regard to the disclosure of law firm records, where privilege is asserted and where there is no consent by the client to disclosure the Court held it was error for the trial court to compel the disclosure of law firm records without conducting an *in camera* inspection to determine whether the attorney-client privilege applied.

Application: This case reiterates the importance of courts recognizing that having jurisdiction over someone as an individual is not the same as jurisdiction over them in their trustee capacity. The review of privacy and privilege issues in the case is detailed and this is a good primer for attorneys who either seek financial and law firm discovery in their cases and for those seeking to limit such discovery.