A View from the Bench
Senior Judge Mark A. Speiser

1) Can a creditor with a Writ of Garnishment issued against an estate involve themselves in the administration of an estate?

   a) An estate is not exempt from garnishment; Murray v Nations Bank of Florida 846 So. 2d 548 (4th DCA 2003)

   b) Section 733.705 (2) provides either P.R. or any other interested person (beneficiary or creditor) can file an objection to a claim filed by a creditor of the decedent

      i) Would a creditor with a Writ of Garnishment against an estate beneficiary have standing to object to a claim filed by a creditor of a decedent?

      ii) Can a garnishment creditor with a writ of garnishment against an estate beneficiary object to the P.R.'s inventory required to be filed by Section 733.604 for failure to include what garnishment creditor believes are other assets of the decedent that should be included in the probate estate?

iii) Can a garnishment creditor of an estate beneficiary object to purportedly excessive fees paid to the P.R. and counsel for the P.R.? [Section 733.106(6) allowing court to assess fees against a person's part of the estate in such proportion the court deems just]

c) If P.R. is seeking to marshal estate assets held by a bank, yet another court issued a garnishment order over the account for a former spouse seeking back support/alimony over a portion of proceeds, who has priority?

Kipinis v Taub 286 So. 2d 271 (3rd DCA 1973) held and Section 77.06(2) provides service of the garnishment writ on the bank (the garnishee) vests the divorce court with exclusive jurisdiction over the account until all issues related to the garnished funds are resolved. Garnishee bank can retain and not turnover to the probate court up to double the amount of funds that are the subject of the garnishment writ Section 77.19

d) Garnishment creditor of an estate beneficiary need not file a claim against estate since such a creditor is only seeking to secure a distributive share the beneficiary would otherwise be entitled to.

i) Garnishment creditor merely needs to serve a copy of garnishment order on P.R.

e) Does a spend thrift provision in a trust exempt that trust from being the subject of a garnishment order? No!

i) Harris is sole beneficiary of special needs trust funded by proceeds from a settlement

ii) Harris had no control over trust, was unable to compel trustee to make distributions, and did not personally receive any disbursements from the trust as they are made directly to third parties who provided services for the benefit of Harris

iii) Alexander, Harris's ex-spouse, obtained a valid child support order for substantial arrearages

iv) Trial court ruled Harris had no ability to pay arrearages or his ongoing monthly support obligations

v) Alexander v Harris, 278 So. 3d 721 (2nd DCA, 2019)

Held a special needs trust does not protect Harris from his legal court ordered obligation to support his child or for that matter a

former spouse and that continuing writ of garnishment order directed at the trust was appropriate

vi) Section 736.0503(2) provides spendthrift provisions are unenforceable against a valid court garnishment order attaching present or future disbursements to pay the trust beneficiary's child, spouse or former spouse obligations

vii) However Section 736.0503(3) provides garnishment of a spendthrift trust will be permitted only upon an initial showing that traditional means of enforcing the claim are insufficient

viii) In sum, where two public policies conflict, that is enforcement of spendthrift provisions to protect individuals incapable of managing and protecting their own funds and payment of spousal and child court ordered obligations, enforcement of family obligations take precedence

2) Death Certificates

a) Guardian's authority does not end immediately upon death of ward, rather upon the filing of a certified copy of Ward's death certificate and entry of order of discharge; Section 744.521

b) Guardian not entitled to a death certificate stating cause of death since Section 382.35(4) provides that section of death certificate is confidential from public inspection

c) Only decedent's spouse, parent, child, grandchild or sibling of legal age may receive a death certificate with cause of death; Section 382.0252(9)(1)

d) Amending a death certificate

    i) Except for correction of a misspelling or omission of name of surviving spouse, the Florida Department of Health cannot change the name of the surviving spouse on the death certificate without a court order; Section 382.016(2)

e) Death certificate in a formal administration must be filed no later than three months following date of first publication of the notice to creditors, and, in a summary administration, at any time prior to the entry of the order of summary administration; Section 771.103; Rule 5.205(a)(1)(3)

    i) The court may nevertheless order the P.R./petitioner to file death certificate at any time during the proceeding; Rule 5.205(c)

f) Presumptive death it is a Court’s determination that a death of a Florida resident occurred but that the body of that person has not been located

i) Department of Health shall issue a presumptive death certificate when ordered by the court

ii) The medical certification of cause of death must be signed by the judge issuing the court order; Section 382.012(1)(2)

iii) This procedure is employed either if a person's absence from their last known domicile is for a continued period of five years, without a satisfactory explanation after diligent search and inquiry or at any time where the absent person was exposed to a specific peril of death and the person's body is unlocatable

iv) the court can enter an order based upon direct/circumstantial evidence that presumes the person to be dead; Section 731.103(3)(4); Rule 5.171(c)

3) Examples of Unethical Conduct by Probate Counsel

a) Nov. 2013, Anderson appointed P.R. of mother's estate in Broward and letters of administration issued by Judge Greene, assigned to preside over estate administration

i) Jones, Esq. entered appearance as counsel for P.R. Anderson in his mother's estate

ii) June 2014, Jones, Esq. filed petition for incapacity in Broward claiming Anderson suffered a brain injury during an auto accident, that Anderson needed guardianship and was incapable of handling his affairs

iii) Sept. 2014, Jones, Esq. petition to be appointed as Anderson's guardian, was appointed, and retained himself as counsel for the plenary guardianship of Anderson

iv) Assets of Anderson's guardianship would be his inheritance from his mother's estate

v) Judge Speiser assigned to preside over Anderson's guardianship case

vi) In January 2016, while Anderson's own guardianship case was still pending, the incapacitated Anderson as P.R. of his mother's

probate estate petitioned Judge Greene through his counsel Jones, Esq. for a $233,000 disbursement to Anderson's purported brother, and $35,500 to Jones, Esq. as his final attorney's fees

vii) Obviously, Jones, Esq. as guardian and counsel for guardian in Anderson's still pending guardianship case, knew Anderson remained incapacitated and incapable of handling any financial affairs

viii) Attorney Jones, Esq. failed to advise the Broward Clerk of Court at the time he filed petition for incapacity for Anderson and successfully secured a guardianship for Anderson, that there was still pending a related case in front of Judge Greene where Anderson was serving as P.R. of his mother's estate

ix) Attorney Jones, Esq., pursuant to Section 733.303(1)(6), knew his client Anderson was no longer qualified, mentally or physically, to serve as P.R. of his mother's probate estate as he simultaneously was a ward in his own guardianship, yet Attorney Jones, Esq. filed a petition for Guardianship on behalf of

Anderson that Judge Greene entered order on awarding fees to Attorney Jones, Esq. in amount of $35,000.

x) Attorney Jones, Esq.'s failure to advise Broward Clerk's office at time he filed guardianship case for the puportedly incapacitated Anderson that it was a related case to the then pending case of Anderson mother's estate and that Anderson was no longer qualified to serve as P.R. of her estate resulted in Attorney Jones, Esq. receiving serious Florida Bar sanctions

b) A non-blood relative friend may be nominated in a will to serve as a P.R. of an estate as long as that person is a Florida resident; Section 733.302

i) At time petition for administration is filed if that non-relative friend has moved out of state, that person cannot be appointed to serve

ii) Likewise if that non-relative Florida friend once appointed subsequently moves out of state while the estate is still pending, counsel for P.R. must immediately notify probate court when this

fact becomes reasonably ascertainable to counsel; Section 733.304

(1) Failure of counsel to do so may subject counsel to ethical sanctions

c) Client referred to attorney to prepare will

i) Attorney inquired whether a client had relative or in-state friend to serve as P.R.

ii) Client said no and asked counsel if he knew of anyone who could serve as P.R.

iii) Counsel offered to serve as P.R. and suggested that his wife, a hairdresser, that client never met, be appointed to serve as Co-P.R.

iv) In client’s will both attorney and wife nominated as Co-P.R.s

v) Attorney knew that with his wife serving as Co-P.R., that both would be entitled under Section 733.617(5) and in fact did receive two separate but equal full commissions allowed to a sole P.R. since the estate was valued at more than $100,000

vi) Attorney's wife did absolutely nothing for the estate

vii) Attorney suspended by Florida Bar

d) Lawyer drafts will for client, a fellow teacher with lawyer's wife

i) Will names lawyer as P.R. and lawyer's wife as successor P.R.

ii) Wife named as sole residuary beneficiary after three small specific bequests to other named beneficiaries

iii) Conduct of counsel is prohibited by Section 732.806(1)

e) Attorney did not prepare will

i) Attorney and his wife however jointly named as 25% residual beneficiaries and attorney named as P.R., as he was a friend of testator

ii) Attorney prepared a second and third codicil for testator

iii) In third codicil, a prior specific devise was eliminated, the effect of which increased the residuary inheritance of the attorney and his wife by 25% of the revoked specific devise

iv)This conduct is likewise prohibited by 732.806(1)

f) Best friend of lawyer's mother dying of cancer

i) She had no spouse or children

ii) Best friend asked lawyer's mother if lawyer could prepare a trust and will for her

iii) Lawyer prepared pour-over will and he was named P.R. of the pour-over will and trustee of the trust he prepared

iv) Lawyer's mother named as income beneficiary of the trust

v) Upon death of lawyer's mother, lawyer and his sister named as successor income beneficiaries of the trust

vi) Upon death of lawyer and his sister, trust principal was to be divided and distributed outright to four children of lawyer

vii) This scheme likewise is precluded by Section 732.806(1)

g) Lawyer prepared will for wealthy elderly Jewish client with no living relatives

i) Client made specific devises to several Jewish charities

ii) Will gave lawyer, upon client's death, exclusive power to designate 7 religious charitable beneficiaries of his choice to receive the remainder of the residuary estate

iii) Lawyer, a Catholic, chose 7 Catholic charities as the beneficiaries

iv) Does this pass the smell test?

v) Is this an ethical violation?

vi) Did the lawyer adequately protect himself by preparing sufficient documentation, memorandum, affidavits for his file?

h) Can a lawyer who is designated to serve as a P.R. of a nonrelative client's will do so after lawyer becomes a judge/general magistrate (GM)? No!

i) Code of judicial conduct describes a judge as an Article V Florida Constitutional Judge and those performing judicial functions under the direction/supervision of an Article V judge

ii) This broad definition contemplates applicability to GM as well

iii) Cannon 2 provides a judge shall avoid impropriety and the appearance of impropriety and all of the judge's activities

iv) Judge shall not serve as "... P.R., trustee, guardian" except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties

4) Qualification of nominated P.R. to serve as P.R.

a) Can a decedent's son-in-law, living out of state with his wife, decedents nonresident daughter, who is nominated in decedent's will to serve as P.R. of decedent's estate and is qualified to do so under section 733.304(4) be appointed and serve as P.R. if in fact prior to decedent's death, decedent's daughter dies or is divorced from the nominated son-in-law? No! Qualification to serve as P.R. is initially determined as of date of death of decedent, not the date the will is executed

5) Caveats

a) Section 731.110; Rule 5.260

b) Any interested person, creditor or non-creditor apprehensive that an estate, testate or intestate, will be administered without their knowledge can file a caveat

c) <u>Non-creditor interested person may file a caveat before or after an estate is open for a decedent</u>

i) Probate court may not admit a will of a decedent or appoint a P.R. until formal notice of a petition for administration has been

served on caveator (or their designated representative) and the caveator afforded an opportunity to participate in the proceedings

(1) A caveat filed before the death of decedent expires two years after it was filed

(2) If caveator is a beneficiary under another will executed by decedent, the will being offered for probate may not be admitted until an adversary proceeding has been conducted

(a) Grooms v Royce 638 So. 2d 1019 (5th DCA 1994)

(b) Boyles v Cooney 46 Fla. L. Weekly D 2614 (4th DCA, Dec 8, 2021)

(c) Tien v In Re Estate of Shutien 46 Fla. L. Weekly D 2463 (3rd DCA, Nov 17, 2021)

ii) A caveat of a creditor can only be filed after the decedent's death

(1) If caveat filed after issuance of letters of administration or after will admitted into evidence, Clerk of Court must promptly notify caveator in writing of date of issuance of letters and name and address of the P.R. and counsel for P.R.

(2) Once creditor files a caveat, that creditor would necessarily become a reasonably ascertainable creditor and must be served with actual formal notice of the estate proceeding and the period within which to file a claim against the estate

(a)The creditor must then file a claim within 30 days after date of service; Section 733.702(1)

iii) Crescenzo v Simpson 239 So. 3d 213 (2nd DCA 2018)

(1) 5 years after decedent's demise, Simpson filed petition for administration of decedent's estate and sought to be appointed as P.R.

(2) Sole asset of estate was a lot in Hillsborough County

(3) Simpson indicated decedent's will had designated his sister and niece as his beneficiaries and that no other person had an interest in the lot

(4) Simpson sought to have will admitted into probate

(5) Crescenzo's counsel had not filed a caveat but rather an "Answer and Affirmative Defenses" to Simpson's petition

claiming Crescenzo had an interest in the estate since he owned 50% of the subject lot

(6) Without a hearing addressing Crescenzo's claims, Trial Court ("T/C") entered order admitting will and appointing Simpson as P.R.

(a)T/C order stated contrary to Crescenzo's assertion there had been no objection to will being admitted to probate

(7) Crescenzo appealed T/C order claiming he had raised sufficient challenges to both will's validity and appointment of Simpson as P.R., in that he, Crescenzo, was entitled to a hearing before T/C entered order

(8) Simpson argued on appeal since Crescenzo did not file a caveat his only remedy was to file a petition to revoke probate under Rule 733.109

(9) T/C noted had Crescenzo filed as a non-creditor interested person caveator, the T/C would be required to hold a hearing to determine the validity of challenge to the will prior to admitting will and appointing a P.R.

(10) Rule 5.260(6) delineates content of a caveat

(11) Appellate court concluded:

(a) Although Crescenzo's counsel did not file a "caveat" but rather "an answer and affirmative defenses", the court determined that Crescenzo's pleading was the functional equivalent of a caveat that Rule 5.260(6) contemplated

(b) To hold otherwise would be to elevate form over substance

(c) T/C order reversed and on remand T/C was ordered to hold hearing on Crescenzo's will contest

6) Disgorgement/Clawback Surcharge Proceedings

a) Occuring more frequently

i) Typically initiated by:

(1) Beneficiary

(2) Creditor

(3) Successor P.R./Estate counsel

(4) Successor trustee of revocable trust serving as beneficiary of a pour over will

ii) Target of lawsuit:

(1) Prior P.R./Estate counsel

(2) Experts retained to perform services for the estate

b) Routine issue is that fees paid were excessive

c) Frequently arise when petition for discharge and/or final accounting filed and disclosure of compensation/fees occurs

d) To secure jurisdiction over recipient of challenged fees, complaining party must effectuate personal service on the person(s) allegedly overpaid, by summons or formal notice

i) Email service to counsel for purportedly overpaid fiduciary or other service provider is insufficient to confer court with jurisdiction over such person in their individual capacity to empower court to enter a disgorgement order to recoup estate funds they currently hold in a non-fiduciary account

ii) This can be either a Rule 5.025(a) or (b) specific or declared adversary proceeding contingent upon the nature of the relationship the recipient of the funds had with the estate

e) Under section 733.6175(1)(2) probate court has exclusive authority to review propriety of employment and reasonableness of compensation paid to P.R., counsel for P.R. and any agents employed by a P.R.

f) Section 733.6175(3) empowers court to order recipient of excess compensation to make appropriate refunds

   i) No expert testimony is required to prove that compensation paid was excessive

g) Two leading reported decisions on disgorgement:

   i) Simmons v Estate of Barnowitz 189 So. 3d 819 (4th DCA, 2015)

   ii) Kozinski v Stabenow 152 So. 3d 650 (4th DCA, 2014)

h) Section 736.0206 extends to probate court, authority to review both the propriety of employment by a trustee of any person and the reasonableness of any compensation paid to that person or to the trustee

7) Motions to determine primary residence of decedent their homestead property. Are such motions necessary?

a) Simply stated should perhaps be more accurately described as an exercise pursuant to this fictional "Title Company Relief Act"

b) No formal court order of distribution in a testate estate concerning decedent's homestead is required to pass title to persons entitled to decedent's homestead property; nor is a P.R.'s deed judicially mandated

   i) Clifton v Clifton 533 So. 2d 192 (5th DCA, 1989)

c) Homestead property whether devised by will or by intestacy passes outside of probate estate; P.R. has no jurisdiction over, nor title to, homestead residence and it is not an asset of the estate

   i) Cavanaugh v Cavanaugh 542 So. 2d 1345 (1st DCA, 1989)

d) If property is homestead P.R. has no legal authority to issue a deed to pass title

   i) In Re Estate of Hamel 821 So. 2d 1276 (2nd DCA, 2002)

e) Petition to determine homestead is normally initiated to change record title to domicile and relieve P.R. from any obligation concerning the property

f) Nevertheless, Rule 5.405, referencing the concept of "protected homestead" set forth in section 731.201(33) empowers an interested person to file a verified petition to determine that real property owned by the decedent is "protected homestead"

i) See In Re Noble's Estate 73 So. 2d 873 (Fla 1954)

(1) Rule 5.405 does not limit the authority to seek this "judicial blessing" to the P.R. but extends the right to any "interested person"

(2) Does this rule open the door to "stand alone petitions to determine homestead"?

(3) Can this determination be made before the creditors' period to file claims has expired?

8) Dealing with a client who wants to use a funding company, because they are financially strapped, to secure a cash advance on their anticipated inheritance

a) Best advice:

i) Discourage client from using this process

ii) Advise clients to inquire about funding company's:

(1) Rates

(a) Are the rates compounded and if so how frequently?

(2) Fees and costs involved

(a) Are they charged before or after compounding?

b) Many funding companies add administrative, origination, or transfer costs onto the principal amount owed and compound monthly and/or quarterly the total including both fees and costs

i) Example: $1000 advance with a total of $750 in administrative, origination and/ or transfer costs compounded monthly at 3% is $1,924.78 at end of year one

ii) Furthermore, if probate administration entails a lawsuit or adversary proceeding, then the compound effect of such prolonged litigation makes payback amounts to funding company extremely high in years two and three

9) Section 732.401(2) Election by Surviving Spouse

a) If homestead not devised but passes by intestacy and decedent survived by spouse and one or more descendants, routinely surviving spouse takes life estate in homestead with vested

remainder per stirpes to descendants in being at the time of decedent's death

b) Section 732.401(2), amended in 2012, affords surviving spouse an option to elect, in lieu of life estate, to instead take an undivided one/half interest as tenant in common in the homestead property, with the remaining undivided one/half interest vesting in the decedent’s descendants at the time of decedents death per stirpes

c) Election to effectuate spouses interest in the homestead under this factual scenario can be made by:

   i) surviving spouse, or with court approval by

   ii) attorney in fact, or

   iii) guardian, if court determines it is in best interest of surviving spouse to do so

d) Election must be made in writing within 6 months of decedent's death and during spouse’s lifetime

e) Once made, election is irrevocable

f) Election unavailable if property owned as tenancy by entireties or joint with right of survivorship

g) This statute substantially enhances value of surviving spouse's interest

i) Failure of estate counsel to advise surviving spouse of their right to make this election will undoubtedly precipitate a bar grievance complaint

10) P.R. obligations and duties regarding homestead

a) Protected homestead normally is not an estate asset subject to administration by P.R.

b) Exceptions:

i) If P.R. has reasonable grounds to believe residence is protected homestead yet it is not occupied by a person who has an interest in the property, P.R. may, but is not obligated to, take possession of that property to preserve, insure and protect that property

(1) P.R. may collect rent from the residents of that property for benefit of heirs or devisees of that property

(2) P.R. however has no duty to rent that property if unoccupied

(3) any funds expended by P.R. to preserve, maintain, or insure that property can empower P.R. to obtain a lien on that property to secure repayment of those expenditures; Section 733.608; Rule 5.404

ii) If testamentary devise of homestead by the decedent is permitted, but made to someone other than an heir (a person to whom the benefit of homestead protection would not inure), then the homestead would be part of the routine probate estate administration

(1) In Re Estate of Hamel 821 So. 2d 1276, 1279 (2nd DCA, 2002)

(2) In Re Estate of Clifton, 553 So. 2d 192, 194 (5th DCA 1989)

iii) Where the will specifically orders "... That the homestead property be sold and the proceeds divided among the heirs", then the net sale proceeds are deemed protected homestead proceeds but are handled as probate assets

(1) Knadle v Estate of Knadle 686 So. 2d 631 (1st DCA 1996)

(2) Estate of Price v West Florida Hospital 513 So. 2d 767 (1st DCA 1987)

11) Bonds

a) Customarily and routinely wills filed with clerk for probate administration recite the nominated P.R. is not required to post a bond

b) This language, inserted in the will, normally not at the client's behest but rather at the suggestion of their drafting attorney, potentially can invite a subsequent legal malpractice claim or raise the eyebrows of concern of the presiding judge

c) Probate bonds are intended to protect the appointed P.R. but also have a residual spillover effect of benefiting the creditors and beneficiaries of the estate when there is a claim of malfeasance, misfeasance or negligence by the P.R. in the discharge of their administrative responsibilities

d) Section 733.402(4) provides any interested person, or the court on its own initiative, can require a bond or increase/decrease the amount of the bond or require additional security

e) Banks or trust companies serving as P.R. are not required to post a bond; Section 733.402(3)

f) Premium cost for a probate bond is very modest compared to a criminal bond

g) Factors considered by court in setting bonds

i) Gross value of the estate.

ii) Nature of relationship, if any, between P.R. and beneficiaries.

iii) Liquidity of assets

iv) Amount and nature of creditors' claims

v) Domicile of P.R.

vi) Capacity of P.R. to undertake responsibility of serving as P.R.

h) A bond premium is deemed an expense of the estate administration.

i) Court has authority to dismiss an amended complaint in a trust proceeding for failure of trustee to post a bond as required by a revocable trust agreement.

i) Ramos v Halpern 46 Fla L. Weekly D2582 (3rd DCA Dec 1, 2021)

12) Termination of guardianship

a) Before a final discharge of a Guardian, the Guardian will routinely pay all fees owed to the Guardian and Guardian's counsel prior to transfer of funds remaining in the guardianship to a deceased's estate.

b) Guardian has authority and indeed it is incumbent upon the Guardian to do so in its petition for discharge to request the retention of sufficient funds to pay unpaid and anticipated costs and fees of other providers of services to the ward who were retained by the guardian to do so pursuant to Sections 744.441 and/or 744.444.

c) Such providers of services may include, but are not limited to, home health care aides, accountants, attorneys who provided specialized legal services for the guardianship outside the realm of expertise of guardian's counsel; Section 744.527(2) and Rule 5.680 (6)(3)

d) Failure of Guardian's counsel to advise the guardian to seek court approval to retain such funds and consequently, obligating these

agents employed by the Guardian to file claims against the estate of the deceased ward, will likely expose both the Guardian and Guardian’s counsel to individual surcharge actions before the guardianship court even after all the deceased ward’s assets have been transferred to the ward’s probate estate.

e) Every one of these service providers will inevitably become class 8 creditors of the deceased Ward's estate, resulting in the possibility of their receiving less on their claim than would be the case had they been paid directly by the guardianship.

i) Additional administrative fees of P.R. and counsel for P.R. have priority in their compensation being paid before any estate creditors, and likewise will reduce the amount of funds available to pay all creditors.

ii) Significantly prolonged delay will be incurred before these identified service providers to the ward ascertain whether they will be getting compensated.

iii) This unpaid cadre of service providers to the ward will also likely incur additional unnecessary expenditures required to

collect fees owed to them by having to navigate the estate administration process.

13) Discharge of a Guardian subsequently appointed as P.R. of testate/intestate estate.

a) Section 744.528

b) Guardian must serve copy of final report and petition for discharge upon estate beneficiaries.

c) Beneficiaries will have 30 days to file objections.

d) Any interested person may set a notice of hearing on any objections filed by the beneficiaries.

e) If the notice of hearing on the objections is not served upon the Guardian, within 90 days after filing of objection as well as on the beneficiaries of the ward's estate and other persons to whom the court directs service, then the objection will be deemed abandoned.

f) Guardian can only be discharged when:

i) All objections are judicially resolved

ii) The Guardian's report is approved by the court and

iii) In case of guardian of property, all property has been distributed to ward's estate, or the person entitled to it.

14) Disposition of unclaimed funds held by Guardian

a) Section 744.534

b) Upon Ward's demise, if property in hands of Guardian is unable to be distributed because an estate proceeding has not been initiated, guardian of the property shall be deemed an interested person under Section 733.202 and may, after a reasonable period of time, initiate an estate proceeding.

15) Personal representative's right to sell real property

a) Section 733.613(2)

b) As previously noted, several appellate decisions have opined it is unnecessary to secure a court order to have a court determine that a decedent's primary residence is homestead

c) Furthermore, when decedent's will confers a specific power to sell real property or a general power to sell any asset of the estate and distribute the net sale proceeds to creditors/beneficiaries, the P.R. may sell any real property of the estate (Section 733.608(1))

d) The sale need not be justified by a showing of necessity, and the sale pursuant to the power of sale shall be valid.

e) From a judicial perspective, but perhaps not from a title insurance company's viewpoint, court orders authorizing sale of estate real property are not absolutely required, necessary or mandatory.

16) Agency for Healthcare Administration ("AHCA")

a) Responsible for implementation and administration of Medicaid in Florida.

b) Medicaid provides access to medical and housing assistance for low income individuals.

c) Section 733.2121(3)(d) requires:

i) If decedent 55 or older at time of demise, P.R. shall promptly serve a copy of notice to creditors and a copy of death certificate to AHCA within three months from date of first publication of notice to creditors unless AHCA has already filed a statement of claim in the estate proceedings

d) This affords AHCA the opportunity to recoup from decedent's estate or directly from decedent's special needs or pooled trust

holding the majority of decedent’s liquid assets the funds AHCA advanced to pay for decedent's medical or housing needs while alive. Use of these special trusts enable wealthy individuals to qualify for Medicaid benefits without having to spend down their assets to meet the threshold qualifying asset test established by Medicaid.

e) Failure of P.R./estate counsel to comply with this notification requirement required by 733.2121(3)(d) can expose them to a surcharge and responsibility for the amount owed to AHCA

17) Durable Power of Attorney (“DPOA”)

a) “Weapon of mass destruction”

b) Probate counsel and P.R. must be cognizant of and hyperattentive to potential and actual abuse and misuse of DPOA by holder, by attorney (if involved in preparing DPOA) as well as any banks, trust companies and brokerage firms where issuer of DPOA interacted with or where issuer has financial accounts.

c) Ensure that such financial institutions exercised due diligence when holder of DPOA secures the release of funds pursuant to the authority of a DPOA

d) Where appropriate and cost prudent, legal action should be contemplated and pursued by P.R. and counsel for P.R. to hold financial institutions accountable to recover misappropriated and wrongfully obtain decedent's funds where lax safeguards were in effect

18) Limitations on claims against an estate

a) Section 733.710

b) Neither decedent's estate, the P.R., nor any beneficiaries shall be liable for any claim against the decedent filed two years after the death of the decedent, even if letters of administration issued.

c) If claim filed timely within two years, but not paid or otherwise disposed of, the limitation period is inapplicable.

d) Section 735.206(4)(f) likewise imposes a time limitation of two years from the date of decedent's death within which decedent's estate or those to whom it has been assigned shall be liable for any

claim against the decedent in the context of a summary administration.

e) Wallace v Watkins 253 So. 3d 1204 (5th DCA 2018)

i) Clarifies distinction between a creditor's claim and a claim against the estate filed by an heir

ii) Section 735.206(4)(G) clarifies that in the context of a summary administration, that an heir or devisee of decedent lawfully entitled to a share of the state, but who was not included in the summary administration order may enforce all rights in appropriate proceedings against those who procured the order and shall be entitled to attorney's fees if successful.

iii) Wallace opinion allowed 3 omitted heirs to reopen estate 15 years after decedent's demise when they discovered they were adopted children of the decedent.

19) If not survived by spouse or minor child, decedent can validly devise homestead to a non-heir as part of probate estate since there were no constitutional restrictions on devise of homestead.

a) Webb et al. v Blue, as P.R. of Estate of Herbert Daniel 243 So. 3d 1054 (1st DCA 2018)

i) Decedent died testate with no surviving spouse or minor children.

ii) Blue was P.R. and sole beneficiary.

iii) Blue filed for probate and listed two assets in decedent Daniel's estate, non- exempt homestead and a truck

iv) Webb and other relatives (Appellants) asserted Decedent's home was his homestead and descended to appellants who were decedent's legitimate heirs and that Blue should not receive the homestead since she was merely a friend and there was no specific intent to pass the property to her.

v) Blue asserted decedent claimed homestead exemption for real estate tax purposes, but devised the property to her without homestead protection.

vi) Trial court held since decedent not survived by spouse or minor child, decedent could freely devise his home to anyone. Decedent's will unambiguously expressed his intention to leave his entire estate, his homestead and truck, to Blue.

vii) Article 10, Section 4(c), Florida Constitution is designed to protect only two classes of persons, namely, surviving spouse and minor children.

viii) If decedent has no minor child and wife either waived her right to homestead, or there was no wife (either due to death or divorce), then:

(1) The homestead could be devised to any heir, in order to maintain the homestead protection against creditors' claims, or to someone other than an heir which would render the homestead a general asset of the estate, subject to administrative expenses and claims.

ix) Appellate court affirmed trial court decision.

x) See Arlene Paris v Joseph et al. 46 Fla. L. Weekly D2476 (4th DCA Nov 17, 2021)

(1) Discusses construing validity of a prenuptial agreement as to whether a spouse voluntarily waived her right to inherit her husband's homestead.

20) Be aware in a contested fee dispute in court if opposing counsel cites:

a) In Re Estate of Lane 562 So. 2d 352, 355 (4th DCA 1990)

"I would only add that this estate has proved to be a magnificent legal banquet at which fees have flowed, like wine. It may be true the litigants, not the lawyers, spawned this career controversy. Nevertheless, I hope that all concerned can get together over coffee, conclude the banquet and go home." (Party was seeking attorneys' and P.R. fees in amount of $1,536,000)

21) Authority of appellate court to award attorney fees in probate appeal

a) Payment for attorney's fees incurred doing appellate work on a probate case that provides a benefit to the estate by securing a favorable appellate ruling must be presented to the probate trial court as the appellate court lacks authority to award attorney's fees in any probate matter.

b) Townsend v Glass 46 Fla L. Weekly (1st DCA Oct 6, 2021) Reh'g Denied (Nov 4, 2021)

i) Attorneys in probate case governed by section 733.106.

ii) Probate court is a court of equity and has authority to make discretionary allocation for attorney's fees and direct that one or more person's part of an estate that fee award should be assessed.

22) Compensation to counsel for P.R. of estate

(Section 733.6171) Amended and effective for estates commenced after October 1, 2021

a) Counsel entitled to be paid reasonable fees without prior court order unless counsel is seeking to be paid pursuant to the schedule set forth in Section 733.6171(3) which requires counsel to make written disclosures to the P.R. as delineated in Section 733.6171(2)(b) and obtain the P.R.'s timely signature acknowledging the disclosures

i) If no such required written disclosures are made, or if they are made but no written acknowledgement is received from the P.R., counsel cannot receive fees without prior court approval or written consent of all interested parties (beneficiaries and creditors)

b) Compensation for ordinary services is presumed to be based upon compensable value of estate, which is the inventory value of probate estate assets and income earned by estate during the administration

c) Upon petition of any interested person (beneficiary/creditor) court may increase or decrease compensation for counsel's ordinary services or award fees for extraordinary services performed if the circumstances justify doing so

d) Compensation paid to counsel may be calculated by the attorney and P.R. in a matter different than provided in Section 733.6171 if the manner is in writing and disclosed to the parties bearing the impact of the compensation and no objection is made

e) If a separate written agreement as to fees exists that was reached between the will drafting counsel and the testator, a copy of that agreement must be furnished to the P.R. prior to commencement of employment by counsel, and if employed, promptly served on all interested counsel

f) A separate agreement or a provision in will directing that P.R. employ a specific attorney does not obligate P.R. to employ that counsel or obligate that attorney to accept legal representation

i) If such counsel however is retained, their compensation shall not exceed the amount provided in the agreement or will

23) Concerns about self-dealing and overreaching by will drafting attorney

a) Section 733.617(6) and rule 5.030(a) permit a designated P.R. who is also an attorney to represent him/herself as counsel for estate and collect both compensation as attorney and commission as P.R.

b) Unfortunately, these two provisions occasionally inspire ethical concerns, abuse, and financial exploitation.

i) This is especially a concern where will drafting attorney is designated P.R. and there is no clause indicating who should serve as counsel for the estate

c) A concerned, cautious, attentive, experienced probate judge will focus on this scenario to ensure there was no unprofessional conduct

or undue influence by estate planning counsel in securing their nomination or another member of their firm to serve as P.R.

d) Was client informed of comparative costs and other considerations in appointing counsel as P.R., as opposed to a trusted friend or relative or a financial institution?

e) Court will inquire as to whether a prior relationship existed between the client and counsel retained to prepare the will and the nature, extent, and depth of that relationship

f) Did drafting attorney suggest/offer to serve as P.R. or did the idea of doing so emanate from the client?

g) Did counsel advise client that he would more likely, if nominated, to serve as P.R. in the will that he/she would likely retain him/herself to serve as the estate attorney and collect two separate renumerations?

h) Was lawyer, contrary to Rule 4-1.8(c) and (k) of Florida Code of Professional Conduct and Section 732.806, also named as a beneficiary in the will the attorney drafted?

i) Is lawyer charging their hourly attorney's fee rate for performing non-legal functions as P.R.?

   i) This would be especially egregious if will provides the attorney serving as P.R. is entitled to a commission in excess of the amount presumed reasonable as set forth in section 733.617(2) and (3)

j) If counsel has client who bonafidely wants counsel to serve as P.R. and/or be designated as a beneficiary of client's estate, counsel should:

   i) Refer client to another attorney to prepare the estate planning documents, or

   ii) Prepare separate additional documents and/or memos to the file signed by client acknowledging full disclosure by counsel was made to client and that an independent decision, free of any undue or improper influence, was made by client to designate their drafting attorney preparing the testamentary documents to also serve as P.R.

      (1) Relevant cases:

(a) Rand et al. v Gezler 489 So. 2d 796 (3rd DCA 1986)

(b) In Re Estate of Nelson 232 So. 2d 222 (1st DCA 1970)

(c) Zinnser v Gregory 77 So. 2d 611 (Fla. 1955)

k) Effective October 1, 2020, Section 733.617 was amended to add safeguards to prevent unscrupulous attorneys from abusing the process of collecting two fees from a testator's estate without prior disclosure being made, disclosed to, and agreed to by the testator

i) Section 733.617(8) now only allows counsel preparing the will to serve as P.R. of a testator's estate and be compensated to do so if the counsel is related to the testator or enumerated statutory disclosures are made in writing to the testator in a separate writing to the will (but may be annexed to the will)

ii) Failure to secure a signed acknowledgement from the testator does not disqualify a P.R. from serving nor affect the validity of the will

(1) It only prevents the attorney from securing a separate compensation for serving as a P.R.

iii) This amendment is effective only for wills executed on or after October 1, 2020

24) Distinction between attorney, client relationship and fiduciary duties

a) In an estate administration, counsel for the P.R. has an attorney client relationship with the P.R.

i) All communications between the P.R. and the estate counsel are confidential.

ii) See rules regulating the Florida Bar 4-1.7.

b) Attorney for the estate owes fiduciary duties to the P.R., estate beneficiaries/heirs and creditors but counsel for the estate does not have an attorney client privilege with estate beneficiaries, heirs or creditors

c) A fiduciary duty is a duty to act in the best interest of someone else

i) Black's Law Dictionary defines fiduciary duty as a duty of utmost good faith, trust, confidence, and candor; a duty to act with the highest degree of honesty and loyalty toward another person, and in the best interest of the other person.

d) In Re Estate of Gory 57 So. 2d 1381, 1383 (4th DCA 1990)

i) Counsel for the P.R. owes fiduciary duties not only to the P.R. but also to estate beneficiaries

ii) However, counsel and the beneficiaries do not have an attorney client relationship

iii) counsel does not create a conflict of interest in representing a P.R. in a matter simply because one or more of the beneficiaries takes a position adverse to the P.R.

iv) A contrary position would create havoc with the orderly administration of the decedents' estates, not to mention the additional attorney fees that would be generated.