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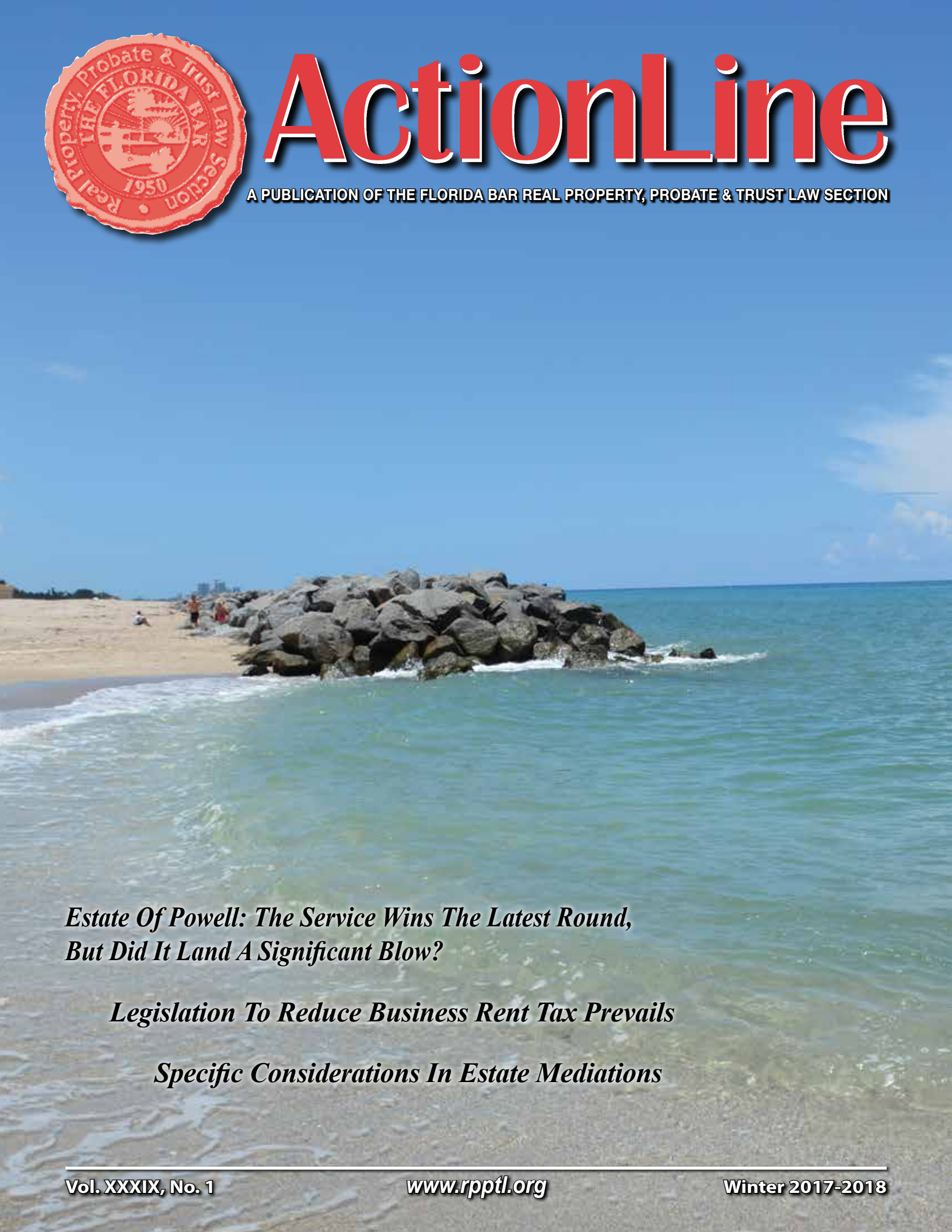
A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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Specific Considerations In Estate Mediations

Vol. XXXIX, No. 1 www.rpptl.org Winter 2017-2018

This magazine is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a service to the membership.

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Determining Reasonableness Of Attorney's Fees And Costs In Probate And Trust Proceedings

By Brandan J. Pratt, Esq., CFP®
and Jennifer L. Fox, Esq., Huth, Pratt & Milhouser, Boca Raton, Florida

Motions to determine entitlement and amount of attorney's fees almost always follow the completion of a trial in trust and estate disputes. There are many articles written about entitlement to attorney's fees. However, determining entitlement to attorney's fees is only half the battle. Under Section 733.6175 of the Florida Probate Code, the personal representative has the burden to prove that the attorney's fees are related to probate and are reasonable. Specifically, Section 733.6175(3) provides that the personal representative has the burden of proof regarding the propriety of the employment of any person that the personal representative employs and the reasonableness of their compensation. In the trust context, Section 736.0206(3) puts the burden of proof of the propriety of the employment and the reasonableness of the compensation on the trustee.

In *Donovan Marine, Inc. v. Delmonico*, the court ruled that "[w]hile a trial court has broad discretion when determining the reasonable amount of attorney hours expended, it is "well-settled that an award of attorney's fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended' [internal citation omitted]."[1] *Florida Patient's Compensation Fund v. Rowe* is Florida's seminal case on determining the reasonableness of attorney's fees. In *Rowe*, the Florida Supreme Court adopted the federal "lodestar" method for computing reasonable attorney fees in contested proceedings.[2]

In determining the reasonableness of attorney's fees, courts should consider the following factors set forth in Fla. Bar. Code Prof. Resp. DR 2-106(b) and Rule 4-1.5 of the Rules Regulating the Florida Bar: (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 that the acceptance of the particular employment will preclude other employment by the lawyers; (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; and (8) whether the fee is fixed or contingent.[3]

The first step of the lodestar equation requires the court to determine the number of hours reasonably expended on the litigation. The second step of the lodestar equation requires the court to determine a reasonable hourly rate for the services of the prevailing party's attorney. The number of hours reasonably expended determined in the first step, multiplied by a reasonable hourly rate determined in the second step, produces the lodestar, which is an objective basis for an award of attorney's fees.[4]

The opponent of the attorney's fee has the burden of pointing out with specificity which hours should be deducted.[5] The author has identified nine specific objections to attorney's fees and costs in trust and estate proceedings, which are: (1) duplicated time, (2) unreasonable rates, (3) unreasonable time, (4) legal services not necessary or beneficial, (5) lack of specificity, (6) fees for fees, (7) clerical work, (8) executorial services, and (9) costs that violate the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

First, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney performed duplicated legal services. When awarding attorney's fees, "the court must consider the possibility of duplicate effort arising from multiple attorneys, in determining a proper fee award (internal citation omitted). Fees should be adjusted and hours reduced or eliminated to reflect duplications of services."[6] A party has the right to hire as many attorneys as it desires (internal citation omitted), but the opposing party is not required to compensate for overlapping efforts.[7] In *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, the court did not award compensation for time sheets reflecting a significant amount of time spent in conferences between the partner and the associate who were working on the case.[8] Further, "[i]f three attorneys are present at a hearing when one would suffice, compensation should be denied for two."[9] Similarly, in *Florida Birth-Related Neurological Injury Comp. Ass'n v. Carreras*,[10] the Third District Court of Appeal held that intercommunication between co-counsel constituted a duplication of work and such hours could not be considered when calculating attorney's fees.

In contrast, in *Centex-Rooney Constr. Co. v. Martin County*, the court ruled that "[w]here a party engages separate counsel to represent it on various aspects of an action, attorney's fees to each counsel are not precluded provided that the services

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rendered are necessary, not duplicative, and the total fee is reasonable."[11] In *Centex,* thirty-five attorneys and twenty-nine paralegals represented Martin County during five years of litigation; however, only seventeen of those individuals billed more than thirty hours. The court held that it was reasonable for the county's attorneys to hold one hour monthly "team meetings" to coordinate legal services due to the complexity of the case and in order to avoid duplicated efforts. Additionally, the court held that the county was justified in having several attorneys at trial to cover specific parts of the litigation because of the technical complexities involved in the case.

Second, a respondent can object to a petitioner's attorney's fees on the grounds that the rate charged by the attorney is unreasonable. In *Rowe,* the Supreme Court ruled that "[t]he party who seeks the fees carries the burden of establishing the prevailing 'market rate,' *i.e.*, the rate charged in that community by lawyers of reasonably comparable skill, experience and reputation, for similar services."[12] However, under Fla. Stat. § 733.6175(4), expert testimony is not required.

Third, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney spent an unreasonable amount of time. A claim for hours that the court finds to be excessive or unnecessary may result in a reduction in the number of hours claimed.[13] The novelty and complexity of the issue should normally be reflected by the number of hours reasonably expended on the litigation.[14] Excessive time spent on simple ministerial tasks such as reviewing documents or filing notice of appearance is noncompensable.[15]

Fourth, a respondent can object to a petitioner's attorney's fees on the grounds that the legal services were not necessary and/or beneficial to the estate. "[I]n order to be entitled to a reasonable attorney's fee from estate funds, the lawyer's services must have been either necessary for or beneficial to the probate estate."[16] In *Rowe*, the Supreme Court of Florida held that "[t]he 'results obtained' may provide an independent basis for reducing the fee when the party prevails on a claim or claims for relief, but is unsuccessful on other unrelated claims."[17] In *Goldworn v. Estate of Day*, the court stated, "[i]n the instant case, the estate and its beneficiaries derived no necessary or beneficial services from the efforts of appellant's attorneys. While appellant was not removed as co-personal representative, the trial court spoke disparagingly about the performance of his duties in that position."[18]

Fifth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney's invoices lack specificity. "To accurately assess the labor involved, the attorney fee applicant should present records detailing the amount of work performed…. Inadequate documentation may result in a reduction in the number of hours claimed."[19]

Sixth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney should not be awarded fees incurred in litigating the reasonableness of fees. In *State Farm Fire & Casualty Co. v. Palma*, the Florida Supreme Court held that fees incurred in determining the prevailing party's entitlement to fees are properly recoverable, but that fees incurred in litigating or quantifying the amount of fees due to the prevailing party are not recoverable.[20] The Court based its holding on an interpretation of the language in Fla. Stat. § 627.428, which permits a prevailing insured to recover reasonable attorney's fees from the insurer in a dispute arising under an insurance contract, but it does not specifically permit an award of fees for fees.[21] Routinely, appellate courts have followed *Palma* in ruling that fees incurred in litigating the amount of fees are generally not recoverable.[22] This rule may not apply when litigating the amount of fees owed to personal representatives or in guardianships.[23]

Seventh, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney billed for clerical work. Fla. Stat. § 57.104, governs fees recoverable for work performed by legal assistants and paralegals. The statute provides that fees for such work may be awarded when the work constitutes "nonclerical, meaningful legal support to the matter." However, purely clerical tasks should not be billed at paralegal rates regardless of the qualification of the biller. Courts have reversed an award of paralegal fees where there was no evidence that the work was paralegal work as opposed to secretarial work.[24] In *Youngblood v. Youngblood,* the court explained that typical "clerical work" such as sending mail or e-mails to the clerk or the opposing party, scheduling a hearing, or "file maintenance" is not compensable under this statute.[25]

Eighth, a respondent can object to a petitioner's attorney's fees on the grounds that the attorney's fees include executorial services. In *In re Estate of Goodwin*, the personal representative (whose law firm served as the attorney for the personal representative) bore the burden of distinguishing between the time spent doing executorial services (non-legal services) versus the time spent performing legal services.[26] In *Heirs of Estate of Waldon v. Rotella*, the court held that "[it] is, of course, a fundamental principle of probate law that an attorney for the personal representative is only entitled to compensation for necessary legal services rendered for the estate; while there is nothing to prohibit the attorney from doing executorial services which the personal representative would normally perform, he must look to the personal representative for payment of those services, not the estate."[27] In *In re Estate of Lieber*, the Florida Supreme Court explained that executorial services include marshalling estate assets, protecting estate assets, interesting purchasers in the sale of estate assets, and selling estate assets.[28] Further, the Court explained that:

"[t]here is nothing improper in a personal representative engaging attorneys or others to perform the services which he should perform, but it is improper for the court to pay fees to attorneys for the personal representatives for purely executorial services, the reason being that a duplicate cost to the estate usually results, in that the personal representative gets paid for the work as an executorial service and the attorney is compensated for the same work as a legal service."[29]

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Ninth, a respondent can object to a petitioner's costs on the grounds that the costs violate the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. Pursuant to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, "the burden is on the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case."[30] The guidelines are categorized as follows: (1) litigation costs that should be taxed, (2) litigation costs that may be taxed as costs, and (3) litigation costs that should not be taxed as costs. Litigation costs that should be taxed include expenses for depositions, documents and exhibits, witnesses, and court reporting costs other than for depositions. Litigation costs that may be taxed as costs are mediation fees and expenses, reasonable travel expenses, and electronic discovery expenses. Litigation costs that should not be taxed as costs include the costs of long distance telephone calls with witnesses, expenses relating to consulting but non-testifying experts, travel time, travel expenses of attorneys, costs of privilege review of documents, and costs incurred regarding any matter which was not reasonably calculated to lead to the discovery of admissible evidence. The guidelines are advisory only and are within the broad discretion of the trial court.[31]

In conclusion, a petitioner has the burden of proving that the attorney's fees and costs sought are reasonable with respect to the hourly rates charged and the number of hours worked. However, a respondent has the burden of pointing out with specificity which hours should be deducted. Specific objections to attorney's fees and costs in trust and estate proceedings may include the nine grounds discussed in this article.

B. PRATT

Brandan J. Pratt, Esq., CFP® *is a partner at Huth, Pratt & Milhauser in Boca Raton, Florida, where he focuses on trust, estate and guardianship litigation. Mr. Pratt earned his BS from the University of Illinois, his CFP from Florida State University, and his JD from Marquette Law School, Cum Laude. He has an AVVO rating of 10/10, has been selected by Florida Super Lawyers as a "Rising Star" in Trust & Estate Litigation for 2012-2017, and has been named a Top 40 Trusts & Estates Lawyer Under 40 by both the ASLA and the National Advocates for 2015-2017.*

J. FOX

Jennifer L. Fox, Esq. *is an associate attorney at Huth, Pratt & Milhauser in Boca Raton, Florida, where she focuses on trust, estate and guardianship litigation. Ms. Fox earned her BS from Florida Atlantic University, Summa Cum Laude, and her JD from Western Michigan University Cooley Law School, Cum Laude. Ms. Fox currently serves as the Treasurer of the Young Lawyers Section of the South Palm Beach County Bar Association.*

Endnotes

1 *Donovan Marine, Inc. v. Delmonico*, 174 So. 3d 534, 537 (Fla. 4th DCA 2015); *Mitchell v. Mitchell*, 94 So. 3d 706, 707 (Fla. 4th DCA 2012).

2 *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

3 *Id.*

4 *Id.*

5 *Brake v. Murphy*, 736 So. 2d 745 (Fla. 3d DCA 1999), citing *Centex –Rooney Construction Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999).

6 *Brevard County v. Canaveral Props.*, 696 So. 2d 1244, 1245 (Fla. 5th DCA 1997).

7 *Brake v. Murphy* at 748.

8 *N. Dade Church of God, Inc. v. JM Statewide, Inc.*, 851 So. 2d 194, 196 (Fla. 3d DCA 2003).

9 *Brake v. Murphy, supra, citing Jane L. v. Bangerter, 826 F. Supp. 1544 (D.Utah 1993).*

10 633 So. 2d 1103 (Fla. 3d DCA 1994).

11 *Centex-Rooney Constr. Co. v. Martin County*, 725 So. 2d 1255 (Fla. 4th DCA 1999), citing *Florida Drilling & Sawing v. Fohrman*, 635 So. 2d 1054, 1055-56 (Fla. 4th DCA 1994).

12 *Florida Patient's Compensation Fund*, 472 So. 2d at 1151.

13 *Id*. at 1150.

14 *Id*.

15 *N. Dade Church of God, Inc.* at 196. See also *Haines v. Sophia*, 711 So. 2d 209, 212 (Fla. 4th DCA 1998); *Ziontz v. Ocean Trail Unit Owners Ass'n Inc.*, 663 So. 2d 1334, 1335-36 (Fla. 4th DCA 1993).

16 *Heirs of Estate of Waldon v. Rotella*, 427 So. 2d 261, 263 (Fla. 5th DCA 1983), citing *In re Gleason's Estate,* 74 So. 2d 360 (Fla.1954).

17 *Florida Patient's Compensation Fund*, 472 So. 2d at 1151.

18 *Goldworn v. Estate of Day*, 452 So. 2d 659, 660 (Fla. 3d DCA 1984).

19 *Id* at 1150.

20 *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993).

21 *Id.*

22 *See Wight v. Wight*, 880 So. 2d 692, 695 (Fla. 2d DCA 2004); *Oruga Corp. v. At&T Wireless*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998).

23 See Fla. Stat. § 733.617 and Fla. Stat. §744.108.

24 *Dayco Prods. v. McLane*, 690 So. 2d 654 (Fla. 1st DCA 1997); *Moore v. Hillsborough County Sch. Bd.*, 987 So. 2d 1288 (Fla. 1st DCA 2008).

25 *Youngblood v. Youngblood*, 91 So. 3d 190, 192 (Fla. 2d DCA 2012).

26 *In re Estate of Goodwin*, 511 So. 2d 609 (Fla. 4th DCA 1987).

27 *Heirs of Estate of Waldon v. Rotella*, 427 So. 2d 261, 263 (Fla. 5th DCA 1983); *In re Estate of Lieber,* 103 So. 2d 192 (Fla.1958).

28 *In re Estate of Lieber* at 200.

29 *Id.*

30 Fla. R. Civ. P. Appx. II.

31 Fla. R. Civ. P. Appx. II.