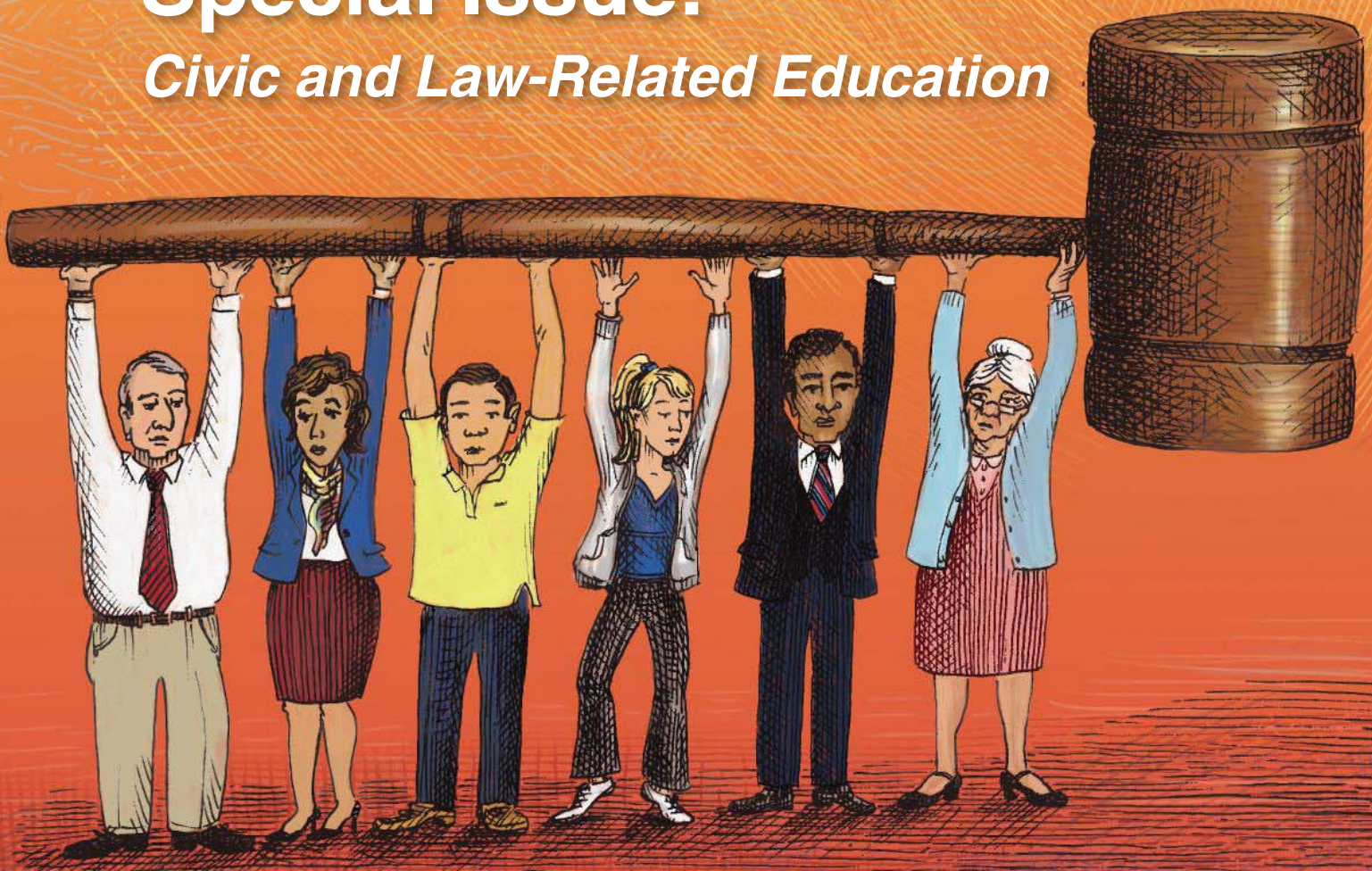
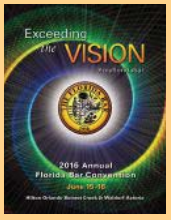
THE FLORIDA
BAR JOURNAL
VOLUME 90, NO. 5 MAY 2016
ADVANCING THE COMPETENCE AND PUBLIC RESPONSIBILITY OF LAWYERS

Special Issue:
Civic and Law-Related Education



Also Inside



Make plans to attend the Annual Convention in Orlando

contents

THE FLORIDA
BAR JOURNAL

651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
FloridaBar.org

Court-related information, flcourts.org

Publisher
John F. Harkness, Jr.

Editor
Cheryle M. Dodd

Associate Editor
Melinda Melendez

Associate Editor
Rawan Bitar

Advertising
Randy Traynor

Circulation/Administration
Cheryl Morgan

Published monthly except July/August and September/October, which are combined issues, by The Florida Bar, 651 East Jefferson Street, Tallahassee 32399-2300, telephone (850) 561-5600. Periodicals postage paid at the Post Office in Tallahassee, Florida 32399-2300 and at additional mailing offices. The Florida Bar *Journal*, ISSN 0015-3915, Pub. No. 200-960.

Subscriptions: Florida Bar members receive the *Journal* as part of their annual fee payment. Nonmember subscriptions are $50 a year; single magazine copies, $5. Single copy sales subject to Florida sales tax.

The *Journal* will accept all advertising that otherwise is in keeping with the publication's standards of ethics, legality, and propriety, so long as such advertising is not derogatory or demeaning. Advertising is not accepted by which the advertiser violates or enables another to violate the Rules of Professional Conduct or the Florida Code of Judicial Conduct. The opinions and interpretations of staff counsel and appropriate committees of The Florida Bar charged with authority to interpret the codes will be controlling. Advertising copy is reviewed, but publication herein does not imply endorsement of any product, service or opinion advertised.

Views and conclusions expressed in articles herein are those of the authors and not necessarily those of the editorial staff, officials, or Board of Governors of The Florida Bar.

The Florida Bar *Journal* welcomes letters to the editor. Letters should be no longer than 500 words. Letters should focus comments or criticism on issues, rather than individuals acting in their individual capacities, and should not be defamatory. Comments also may be clarified or edited by staff as required based on space considerations and the number and nature of comments received on any single topic. Letters are considered property of the *Journal*, and also may be displayed electronically on The Florida Bar's website and made available commercially through affinity partners of the Bar. Letters should be directed to "Letters to the Editor," The Florida Bar *Journal*, 651 E. Jefferson St., Tallahassee, FL 32399-2300 or emailed to cdodd@flabar.org.

POSTMASTER: Send change of address to The Florida Bar, Membership Records, 651 E. Jefferson St., Tallahassee, FL 32399-2300.

Special Issue

Columns

Cover by Barbara Kelley

by Jonathan A. Galler

This Party's Dead! But Will the Lawsuit Survive?

Somewhere along the bustling and congested roadways of our procedural rules of court sits a particularly dangerous intersection. The road signs here are complex, and there are not many traffic cops in sight to assist. Welcome to the legal junction that is created when a party to a pending litigation dies. It is located at the corner of the Florida Probate Code and the Florida Rules of Civil Procedure — each a busy thoroughfare in its own right. Only the most alert lawyers are likely to traverse this crossing safely.

Part of what makes this a tricky intersection, of course, is that civil litigators are often unfamiliar with the probate rules, and even experienced probate lawyers may not be very well-versed in the rules of civil procedure. When a party to a pending litigation dies, important components of both sets of procedures come into play, but the challenges are not merely the result of a lawyer in one field navigating across the terrain of another. Even a probate lawyer's otherwise routine commute through the tried-and-true creditors' claims process, for example, can suddenly become riddled with detours when it turns out that the decedent was embroiled in litigation. Similarly, civil litigators can hit unexpected potholes when they find themselves prosecuting a breach of contract or other civil action against a dead party.

Safe passage, however, is available. In brief, lawyers faced with the death of a party must travel down two procedural roads: 1) the substitution process, governed by the Florida Rules of Civil Procedure; and 2) the creditors' claims process, governed by the Florida Probate Code. These procedural rules, and the ways in which they intersect (or collide) in this context, are explored in detail below. First, we examine the substitution process, including some of the questions regarding that process that remain unanswered. Next, we explore the creditors' claims process, paying particular attention to novel questions that arise when the decedent was a litigant at the time of his or her death. Finally, as in all legal matters, various exceptions apply, and unusual circumstances can arise depending on the type of litigation pending. These, too, are examined.

Florida's Survival Statute

As a preliminary matter, Florida's survival statute, F.S. §46.021, provides that "[n]o cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law." In other words, a cause of action is not extinguished by virtue of a party's death. However, a cause of action can be inadvertently extinguished by failure to comply with the rules.

Although this article concerns the death of a party to a *pending* litigation, it is worth noting that the Florida Probate Code also addresses the limitations periods for causes of action that have not yet been commenced at the time of a party's death. F.S. §733.104(1) provides that when a person dies before the expiration of the limitations period for his or her cause of action, the action may be commenced by the decedent's personal representative "before the later of the expiration of the time limited for the commencement of the action or 12 months after the decedent's death." F.S. §733.104(2) provides that when a person dies before the expiration of the limitations period for a cause of action that could have been asserted against him or her, the cause of action will be deemed timely so long as a statement of claim is timely filed against the decedent's estate in the applicable probate proceedings.

Rules of Civil Procedure — Substitution of Parties

Fla. R. Civ. P. 1.260(a)(1) provides as follows:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on all parties as provided in rule 1.080 and upon persons not parties in the manner provided for the service of a summons. Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.

Simply put, the rule provides that if a party dies, and the pending cause of action is not thereby extinguished, the court may order the substitution of the proper parties. Importantly, courts have held that the public policy of the rule is to "facilitate the rights of persons having lawful claims against estates being preserved, so that otherwise meritorious actions will not be lost."[1] The motion for substitution may be filed by any party or by the attorney, successors, or representatives of

the deceased party.[2] Not surprisingly, though, the motion is typically made by the plaintiff or its representative.

The most readily apparent choice for a substitute is the decedent's personal representative, but a curator or administrator ad litem are valid options as well.[3] That flexibility is sensible because it can take months before a personal representative is appointed. Moreover, the court presiding over the civil litigation cannot compel the opening of an estate for the deceased party.[4] That task falls to the probate court, the filing of a petition for administration by the plaintiff or another interested person.[5]

• *The 90-Day Rule* — At the heart of the substitution process is the 90-day rule. The rule provides that the motion for substitution must be made "within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion" *or else* "the action shall be dismissed as to the deceased party."[6]

Nowadays, most filing and service are made simultaneously through the e-portal. That is not the case, though, as to unrepresented or new parties. Thus, it is noteworthy that the motion for substitution may be served *or* filed within the 90-day deadline to avoid dismissal (although prudence demands that lawyers do both).[7] Relatedly, an actual order of substitution by the court need not be entered within the 90-day deadline to avoid dismissal.[8]

• *Suggestion of Death* — As noted, the 90-day deadline is triggered by the suggestion of death. The rule is not clear about who has the obligation to make the suggestion of death. Caselaw, however, seems to favor imposing this burden upon the legal representative of the deceased party. "Where the legal representative of the decedent's estate has knowledge of the pendency of a suit against the deceased, it has the duty to inform the attorneys of record of the decedent's death."[9]

• *Enlargements of Time* — The Fifth District has held that Rule 1.260 is designed "to dispel rigidity, create flexibility and be given liberal effect."[10] Not surprisingly, then, enlargements of the 90-day deadline to move for substitution are granted liberally upon a showing of excusable neglect, inadvertence, mistake, or fraud.[11] In one case, the court even found that grief over the decedent's death might contribute to a finding of excusable neglect.[12] That said, enlargements of time are not automatic, and counsel must remain diligent.[13]

• *Abatement of Litigation* — Upon the filing of a suggestion of death, the pending litigation abates until the entry of an order of substitution.[14] Indeed, unless, and until a substitution is ordered, any proceedings that take place will be considered null and void.[15]

There is one exception. Following a suggestion of death, counsel for a deceased party may move to dismiss the action if a motion for substitution has not been made after the expiration of the 90-day deadline.[16]

Florida Probate Rules — Creditors' Claims Process

When a party to a pending litigation dies — particularly when the party was a defendant (or a counterclaim defendant) — the probate rules chart a winding and obstacle-ridden procedural road of their own. Just as it would be a mistake for probate lawyers to ignore the civil procedures governing substitution, it would be a mistake for civil litigators to ignore the procedures governing the creditors' claims process.

The creditors' claims process can be broken down into four phases: 1) service or publication of the notice to creditors; 2) the filing of a statement of claim; 3) the filing of an objection to the claim; and 4) the filing of an independent action to litigate the substance of the claim.[17] The process is designed to promote "the public policy of providing for the speedy settlement of estates" and "the payment of claims and the distribution to the beneficiaries" in a timely fashion.[18]

• *Notice to Creditors* — The personal representative of an estate is obligated to publish a notice to creditors, but he or she must also serve a copy of the notice upon any known or reasonably ascertainable creditors.[19] Service of the notice to creditors triggers a 30-day deadline to file a claim against the estate.[20] Thus, if the decedent had been a defendant in a pending litigation, the personal representative must serve a copy of the notice to creditors upon the plaintiff in that litigation even if the plaintiff has actual notice of the defendant's death.[21] Service of the notice may be made directly on the plaintiff.[22] Service may also be made on the lawyer for the plaintiff in the litigation.[23]

• *Statement of Claim* — If a creditor who has been served with a notice to creditors does not file a claim against the estate within 30 days of service, as provided in Fla. Prob. R 5.490, the claim will be barred.[24] The court may grant an extension of time to file a claim, but only on grounds of fraud, estoppel, or insufficient notice of claims period.[25]

Critically, even the plaintiff in a pending litigation must file a claim against the estate to preserve the plaintiff's ability to enforce any eventual judgment against the estate.[26] So important is the filing of a claim

that it is required even if the personal representative has already been substituted in the pending litigation. As the Fourth District has made clear: "Filing a claim with the estate is a process separate from the procedures for substitution of parties in the pending litigation which is governed by the civil procedural rules."[27]

• *Objection to Claims* — The personal representative of an estate must pay all timely claims unless an objection is filed, as provided in Rule 5.496, within the later of four months from the first publication of the notice to creditors or 30 days from the timely filing of a claim.[28]

If the claim is the subject of a pending litigation, and the now-deceased defendant had already filed an answer to the complaint denying the relief sought therein, must the personal representative nevertheless file an objection? There is support for the notion that an objection might be superfluous in those circumstances.[29] However, a prudent lawyer will certainly advise the personal representative to file an objection.

• *Independent Actions* — To preserve a claim following an objection, the claimant must commence an independent action within 30 days from service of the objection.[30] When, however, the claim is brought on a pending litigation, the commencement of a second, independent action would be inefficient. Instead — and here is the true point of juncture between the probate code and the rules of civil procedure — it is the filing of the motion for substitution that satisfies the requirement of commencing an independent action.[31]

Roadblocks, Yield Signs, and Other Hazards and Exceptions

When it comes to the death of a litigant, procedural rules alone cannot anticipate every possible curve in the road. As a result, the courts have had to navigate a host of alternate routes.

• *A Motion for Substitution When the Claim Is Untimely* — What happens when a plaintiff files a motion for substitution upon the death of a defendant but inadvertently fails to file a timely claim against the defendant's estate in the probate proceeding? Should the motion for substitution nevertheless be granted? At least one court, in a federal litigation, has held that the substitution process and the claims process are independent of one another and that the motion should be granted.[32] However, F.S. §733.702(5) provides that "[n]o action or proceeding on the claim may be brought against the personal representative after the time limited above, and the claim is barred without court order." This provision may not bar the entry of an order of substitution, but perhaps it may be enough to have the independent action disposed of on summary judgment.

• *Death of a Personal Representative* — An intriguing situation arises when the litigant who dies was a party to the litigation *solely* in his or her capacity as the personal representative of an estate. As a practical matter, it makes sense to move for substitution, but failure to do so within the 90-day deadline likely will *not* result in dismissal of the action.

> In cases involving claims made by or against an estate, there are two parties: the estate and the personal representative. However, the estate and its survivors are the real persons in interest, and the personal representative is merely a nominal party. Accordingly, dismissal as to the personal representative under [R]ule 1.260 would not accomplish dismissal of the case; the personal representative may die, but the estate does not.[33]

Other courts with similar substitution rules, however, have reached the opposite conclusion.[34]

• *Wrongful Death Actions* — Florida's Wrongful Death Act (F.S. §768.16, *et seq.*) provides that the exclusive party with the authority to bring a wrongful death action on behalf of the decedent's survivors is the decedent's personal representative.[35]

If the decedent had been prosecuting a personal injury lawsuit at the time of his or her death, and if the death was caused by that same injury, the cause of action for personal injury does not survive.[36] Accordingly, when the plaintiff in a personal injury lawsuit dies as a result of those injuries, and when the personal representative proceeds with a lawsuit solely for wrongful death, substitution of the plaintiff is not required; the wrongful death lawsuit is a new action.

However, if the personal representative wishes to proceed with a wrongful death lawsuit *and* a personal injury lawsuit (in case it cannot be proven that the injuries caused the death), the personal representative may be substituted as a party and the complaint in the existing lawsuit may be amended to assert the personal injury *and* wrongful death causes of action.[37]

• *Divorce Proceedings* — A divorce proceeding does not survive the death of a spouse if the death occurs prior to the entry of a final judgment of dissolution.[38] But where the judgment of dissolution is entered prior to the death of a spouse and the court retains jurisdiction to resolve property issues, the proceeding does not terminate with the death of a spouse, and the personal representative of the deceased spouse may be substituted in as a party.[39]

Where judicial divisions exist in a given circuit, the family division may resolve the remaining property issues; the proceeding need not be transferred to the probate division.[40]

• *Punitive Damages and Treble Damages* — The Florida Supreme Court has held that a claim for punitive damages generally will not survive the death of a defendant. "We find that logic, common sense, and justice dictate that this Court follow the majority of jurisdictions in this country and reject the imposition of punitive damages upon innocent heirs or creditors of a decedent's estate."[41] In other words, the sins of the father will not be visited upon his heirs. However, this holding was not extended by the Second District with respect to a claim for treble damages in civil theft cases because such damages were held to be remedial in nature rather than punitive.[42]

• *Class Actions* — When the pending litigation at issue is a class action, and a defendant dies, the class plaintiffs face a unique hurdle with respect to the creditors' claims process under the probate rules. As the Second District has pointed out, there is no such thing as a "class claim" in a probate proceeding.[43] Thus, to preserve his or

her claim, each member of the class will have to file an individual claim against the deceased defendant's estate.[44] A "class claim" would simply fail to comply with the requirements of the probate code because such a claim would fail to identify the names and addresses of all members of the class.[45] The court also found that it is not unfair to impose this "relatively simple" requirement upon individual class members, explaining that "[a] statement of claim may be filed on a simple, one-page form that is designed to be prepared by nonlawyers."[46]

• *Evidentiary Issues* — The rules of civil procedure and the probate rules are not the only procedural considerations that arise when a litigant dies. The Florida Evidence Code, which has both procedural and substantive components,[47] will have to be considered as well.

One of the hearsay exceptions in the evidence code is F.S. §90.803(13), which provides that an out-of-court statement may be admitted into evidence when offered by the party's opponent. The rationale for the exception is that the party who made the statement is present at trial and can testify to rebut any such out-of-court statement.[48] When one of the parties is dead, the decedent's out-of-court statements may be admitted when offered against the decedent, even though the decedent is obviously not present at trial to rebut any such out-of-court statement.[49]

However, to level that playing field, any out-of-court statement of a decedent may be admitted into evidence by the decedent's personal representative if it is relevant to a separate out-of-court statement of the decedent that was previously admitted into evidence.[50] Like all evidentiary considerations, this provision, which is triggered only when one of the parties is dead, can become an important factor in the litigation.

Conclusion

The death of a litigant generally does not extinguish the underlying cause of action itself. But keeping the lawsuit alive requires proceeding — with caution — along two separate procedural roads that will very quickly intersect: the rules of civil procedure governing the substitution of a party, and the probate rules governing the creditors' claims process. Crossing safely mandates an understanding of both sets of procedures and the judicial opinions that have interpreted them. As with any road trip, practitioners must be prepared for many detours along the way because of the unique issues that frequently arise at this particular junction.❑

[1] *Scott v. Morris*, 989 So. 2d 36, 37 (Fla. 4th DCA 2008).
[2] *Metcalfe v. Lee*, 952 So. 2d 624, 628 (Fla. 4th DCA 2007).
[3] *Shaeffler v. Deych*, 38 So. 3d 796, 800 (Fla. 4th DCA 2010).
[4] *Harrison-French v. Elmore*, 684 So. 2d 323, 324 (Fla. 3d DCA 1996).
[5] Fla. Stat. §733.202 (2015).
[6] Fla. R. Civ. P. 1.260(a)(1).
[7] *Mutual of Omaha Ins. Co. v. White*, 554 So. 2d 12, 13 (Fla. 3d DCA 1989).
[8] *Metcalfe*, 952 So. 2d at 629; *Eusepi v. Magruder Eye Inst.*, 937 So. 2d 795, 798 (Fla. 5th DCA 2006).
[9] *Ortolano v. Goforth*, 766 So. 2d 330, 332 (Fla. 4th DCA 2000); *Davis v. Evans*, 132 So. 2d 476, 481 (Fla. 1st DCA 1961).
[10] *Eusepi*, 937 So. 2d at 798.
[11] *Mims v. American Senior Living of Dade City*, 36 So. 3d 935, 936 (Fla. 2d DCA 2010); *Pearl v. Kelly*, 442 So. 2d 1012, 1013 (Fla. 3d DCA 1984).
[12] *Eusepi*, 937 So. 2d at 799.
[13] *Olympus Ins. Co. v. Hernandez*, 171 So. 3d 831 (Fla. 4th DCA 2015); *Kash N' Karry Food Stores, Inc. v. Smart*, 814 So. 2d 530, 532-33 (Fla. 2d DCA 2002).
[14] *Cope v. Waugh*, 627 So. 2d 136, 136 (Fla. 1st DCA 1993); *Floyd v. Wallace*, 339 So. 2d 653, 654 (Fla. 1976).
[15] *Ballard v. Wood*, 863 So. 2d 1246, 1249 (Fla. 5th DCA 2004).
[16] *Martin v. Hacsi*, 909 So. 2d 935, 936 (Fla. 5th DCA 2005).
[17] Fla. Stat. §733.701, *et seq*. (2015).
[18] *Pezzi v. Brown*, 697 So. 2d 883, 886 (Fla. 4th DCA 1997).
[19] Fla. Prob. R. 5.241; Fla. Stat. §733.2121 (2015).
[20] Fla. Stat. §733.702(1) (2015).
[21] *Ortolano*, 766 So. 2d at 331.
[22] *Am. & Foreign Ins. Co. v. Dimson*, 645 So. 2d 45, 47 (Fla. 4th DCA 1994).
[23] *Grainger v. Wald*, 29 So. 3d 1155, 1157 (Fla. 1st DCA 2010).
[24] Fla. Stat. §733.702(2) (2015). Fla. Stat. §733.702(4) provides limited exceptions to this rule for certain proceedings, including, *inter alia*, proceedings to enforce a mortgage or to establish liability that is protected by casualty insurance, up to the limits of such insurance protection.
[25] Fla. Stat. §733.702(3) (2015).
[26] *Spohr v. Berryman*, 589 So. 2d 225, 228-29 (Fla. 1991); *Baillargeon v. Sewell*, 33 So. 2d 130, 136 (Fla. 2d DCA 2010); *Lasater v. Leathers*, 475 So. 2d 1329, 1330 (Fla. 5th DCA 1985).
[27] *Am. & Foreign Ins.*, 645 So. 2d at 46.
[28] Fla. Stat. §733.705(2) (2015).
[29] *Klotz v. Crepeau*, 394 So. 2d 509, 510 (Fla. 5th DCA 1981).
[30] Fla. Stat. §733.705(5) (2015); Fla. Prob. R. 5.499.
[31] *Lewsadder v. Estate of Lewsadder*, 757 So. 2d 1221, 1224 (Fla. 4th DCA 2000) (citing *Cloer v. Shawver,* 177 So. 2d 691, 694 (Fla. 1st DCA 1965); *Shessel v. Estate of Calhoun,* 573 So. 2d 962 (Fla. 3d DCA 1991); *In re Estate of Brown,* 421 So. 2d 752, 753 (Fla. 4th DCA 2000)).
[32] *Continental Assur. Co. v. American Bankshares Corp.*, 483 F. Supp. 175, 177 (D.C. Wis. 1980).
[33] *Morales v. Iasis Healthcare Corp.*, 901 So. 2d 965, 966 (Fla. 2d DCA 2005).
[34] *See, e.g.*, *In re Meckean*, 2014 WL 184709 (Bankr. D. Kan. 2014); *Doherty v. Straughn*, 407 A. 2d 207, 210 (Del. 1979).
[35] Fla. Stat. §768.20 (2015).
[36] Fla. Stat. §768.20 (2015).
[37] *Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363 (Fla. 2013). *See* Raymond T. (Tom) Elligett, Jr., and Amy S. Farrior, *Time Waits for No One: The Death of a Litigant*, Fla. B. J. 55, 56 (Nov. 2002) (for further discussion regarding wrongful death lawsuits).
[38] *Marlowe v. Brown*, 944 So. 2d 1036, 1039-40 (Fla. 4th DCA 2006).
[39] *Estate of King v. King*, 67 So. 3d 387, 388 (Fla. 4th DCA 2011).
[40] *Passamondi v. Passamondi*, 130 So. 3d 736, 738-39 (Fla. 2d DCA 2014).
[41] *Lohr v. Byrd*, 522 So. 2d 845, 847 (Fla. 1988).
[42] S*nyder v. Bell*, 746 So. 2d 1096, 1099 (Fla. 2d DCA 1999).
[43] *Baillargeon v. Sewell*, 33 So. 3d 130, 136 (Fla. 2d DCA 2010).
[44] *Id.* at 136.
[45] *Id*.; *see also* Rule 5.490(a).
[46] *Baillargeon*, 33 So. 3d at 142.
[47] *Crumbley v. State*, 876 So. 2d 599, 603 (Fla. 5th DCA 2004).
[48] Ehrhardt, 1 Fla. Prac. Evidence §803.18(g) (2014 ed.).
[49] *Jones v. Alayon*, 162 So. 3d 360, 365 (Fla. 4th DCA 2015).
[50] Fla. Stat. §90.804(2)(e) (2015).

Jonathan A. Galler *is a probate and trust litigation attorney in Proskauer's Boca Raton office. He is a member of the Probate Rules Committee and the executive council of the Real Property, Probate and Trust Law Section. Galler received his J.D. from the University of Pennsylvania School of Law.*

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Michael J. Gelfand, chair, and Jeff Goethe and Doug Christy, editors.