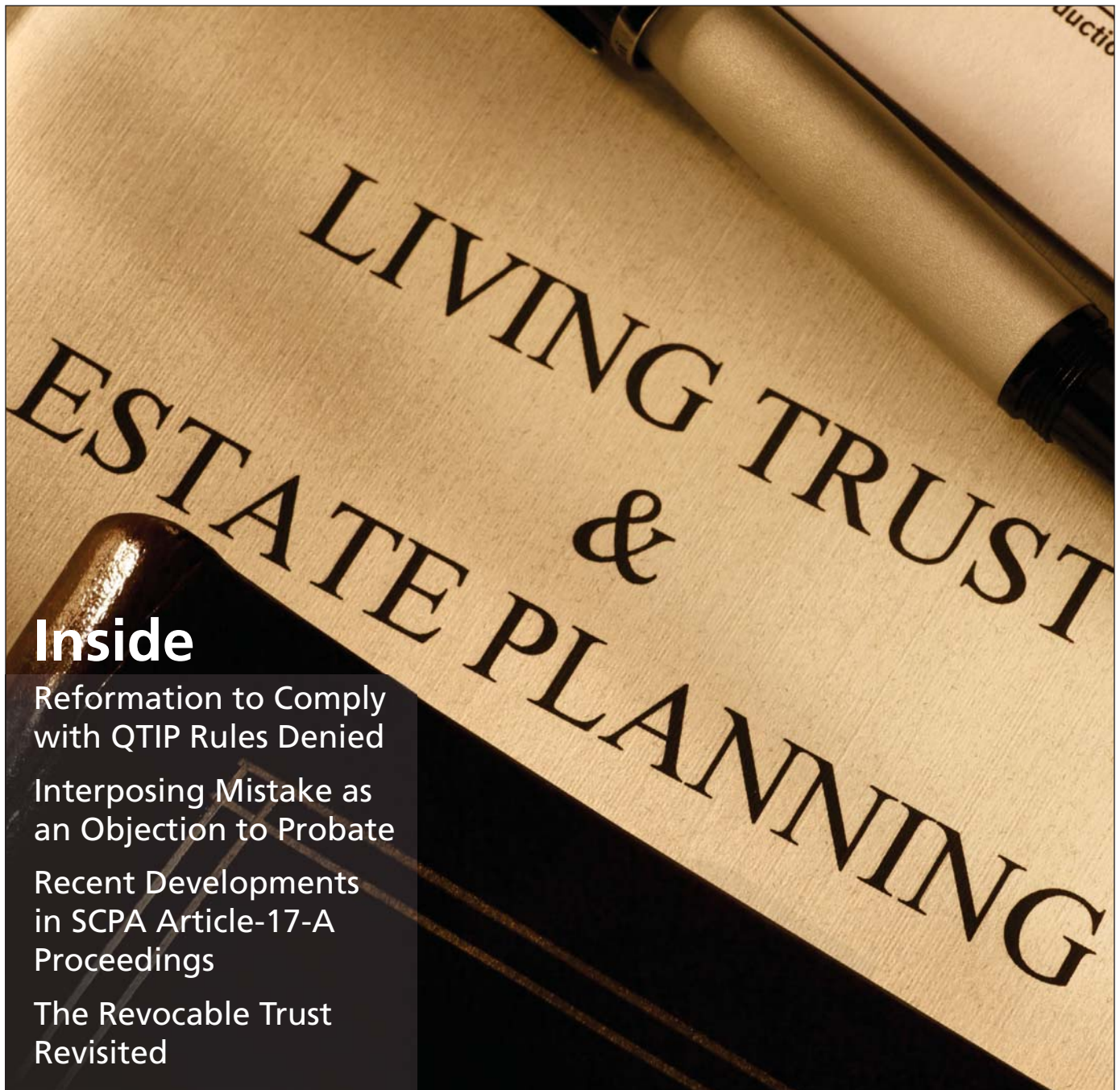


Trusts and Estates Law Section Newsletter



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By David Pratt and Jonathan A. Galler



David Pratt

DECISIONS OF INTEREST

Motion to Enjoin Use of Trust Assets

In this case, Clifford Abromats, as trustee, alleged that Phillip Abromats, as beneficiary, had unduly influenced their mother to make certain trust amendments. Phillip asserted that Clifford committed breaches of trust and that, under Florida law, the court should enjoin Clifford from using

trust assets to litigate the case. Section 736.0802(10), Florida Statutes, allows the use of trust assets to pay for a trustee's attorney's fees, but when the trustee is alleged to have committed a breach, he or she must notify the beneficiaries of the intent to pay fees from trust assets. The beneficiary then has the right to move to enjoin the use of trust assets for that purpose; however, the court must deny the motion unless there is reasonable basis for the court to conclude preliminarily that there has been a breach. The burden on the beneficiary is made even higher by the fact that the court may deny the motion for good cause. Here, the court found that the record was rife with cross-accusations and that it was more proper to side with Florida's default rule allowing the trustee to use trust assets for his fees.

Abromats v. Abromats, 2016 WL 5941888 (S.D. Fla. Oct. 13, 2016)

No Lawyer-Client Privilege

This is a case of four siblings seeking to revoke probate of two wills on grounds that the decedent, their mother, was subject to undue influence by a fifth child. At a deposition of the estate planning lawyer who prepared the decedent's will, the lawyer asserted the attorney-client privilege and ethical duty of confidentiality and refused to answer questions related to the decedent's reasons for disinheriting the plaintiffs. The Third District Court of Appeal rejected his claim of privilege. Ordinarily, the privilege remains intact even after a client's death, but there is no privilege when "a communication is relevant to an issue between parties who claim through the same deceased client." Section 90.502(4)(b), Florida Statutes. The court similarly rejected the lawyer's claim that the questions were intended to disclose information that the lawyer was ethically barred from disclosing under the Rules Regulating the Florida Bar. In litigation, those rules of confidentiality take a backseat to the compulsion of evidence, and a lawyer may refuse to disclose only



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that which is shielded from discovery by the lawyer-client privilege.

Vasallo v. Bean, 2016 WL 6249157 (Fla. 3d DCA Oct. 26, 2016) (not final)

Motion to Substitute Representative

The plaintiffs in this case appealed from a trial court order denying a motion to substitute parties after one of the defendants died. The motion to substitute sought to have the trial court appoint a representative for the decedent, who was the subject of a pending breach of duty claim. However, the trial court ruled that it had no authority to appoint a representative. Instead, it was up to the plaintiffs to seek to substitute the personal representative of the decedent's estate or, if there was no estate, to petition for administration as a creditor of the estate. On appeal, the Fourth District Court of Appeal noted that the order was non-final and held that it would not treat the plaintiffs' argument as a petition for writ of certiorari, seeing as there was no showing of irreparable harm not remediable on appeal. The fact that costs would be incurred by the plaintiffs in petitioning for administration is not irreparable injury.

Gomerz v. Fradin, 199 So. 3d 554 (Fla. 4th DCA 2016)

Compelling a Trust Accounting

This case presents the issue of whether an estate or a beneficiary of a revocable trust may compel the trustee, upon the decedent's passing, to render an accounting of the trust for the years when the decedent was alive. Thelma Coleman created a revocable trust of which she was the trustee, but of which she allowed her granddaughter to become successor trustee during her life. Upon her death, the granddaughter's co-personal representative and a beneficiary of the trust, Betty Hilgendorf, sought to compel an accounting of receipts and disbursements made during the settlor's lifetime. Both the trial court and Fourth District Court of Appeal held that such an accounting could not be compelled, particularly where: the trust did not require such accountings; the settlor never requested accountings during her lifetime; and there was no showing of any breach of fiduciary duty of the part of the trustee. The appellate court distinguished the case from others where, for example, an accounting had

been sought during the settlor's life or where breaches of duty to the settlor had been alleged.

Hilgendorf v. Estate of Coleman, 201 So.3d 1262 (Fla. 4th DCA 2016) (not final)

Slayer Statute

Maurice McGriff and Terry Rigby were domestic partners, and McGriff was named as a beneficiary of Rigby's life insurance proceeds. A physical altercation between the two resulted in the death of Rigby. The state prosecutor was unable to charge McGriff with Rigby's death because McGriff claimed it was an act of self-defense and there were no other witnesses to the incident. Florida's slayer statute provides that a life insurance beneficiary may not collect if he "unlawfully and intentionally kills" the holder of the policy. Section 732.802(3), Florida Statutes. McGriff himself died during the pendency of the lawsuit, and his personal representative was substituted in his place. Pursuant to the slayer statute, because McGriff was not convicted of causing Rigby's death, the statute would not apply unless the court determined by the greater weight of the evidence that McGriff killed Rigby un-

lawfully and intentionally. Because McGriff conceded that the killing was an act self-defense, it was unquestionably intentional. However, the totality of the evidence before the court did not prove that it was more likely than not that McGriff pushed Rigby. The slayer statute, therefore, did not preclude distribution of the proceeds to McGriff's beneficiaries.

The Prudential Ins. Co. of Am. v. Harding, 2016 WL 6568085 (M.D. Fla. Nov. 4, 2016)

David Pratt is the Chair of Proskauer's Private Client Services Department and the Managing Partner of the Boca Raton office. His practice is dedicated to estate planning, trusts and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan A. Galler is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation group and are admitted to practice in Florida and New York.

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