# Florida Update

By David Pratt and Jonathan A. Galler

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## LEGISLATION OF INTEREST

### Elective Share

The governor is expected to sign into law a bill that modifies several sections of the Florida Probate Code relating to the elective share. This bill expressly includes the decedent's protected homestead in the elective estate, and it values the homestead differently depending on the interest of the surviving spouse. In addition, current law authorizes an award of attorneys' fees only where an election is made or attempted in bad faith. The bill expands the types of actions in which fees may be granted, and an award of fees no longer must be predicated on bad faith. The bill also extends the time to move for an extension to choose the elective share, expands the application of interest penalties for late payment by those responsible to contribute to the elective share, and provides for saving trusts that would otherwise qualify as "elective share trusts" but for a particular deficiency.

## DECISIONS OF INTEREST

### Common Law Spouse Under Israeli Law Is Not Spouse Under Florida Law

Mali Ben Shushan and the late Yehezkel Cohen had been living together in Israel, and both had children from their earlier marriages. Upon Yehezkel's death, the probate court in Florida held that Mali was entitled to an intestate share of Yehezkel's Florida estate because the two, for all intents and purposes, were living as a married couple in Israel. Yehezkel's daughter, Diana, appealed, and the appellate court reversed. According to Diana, Yehezkel had never formally married Mali, which, in Israel, is a union exclusively formed under the auspices of a recognized religious authority. Rather, the two were common law spouses. Section 732.102, Florida Statutes, provides an intestate share of a Florida estate to a "surviving spouse." Although Mali and Yehezkel held themselves out as married, and although common law spouses have a broad array of rights under Israeli law, the relationship of marriage is unique. Florida will not recognize as a marital spouse what Israel refers to as a common law spouse, said the appellate court.

*Cohen v. Shushan*, 212 So. 3d 1113 (Fla. 2d DCA 2017).

### Objection to Filing For Elective Share Granted

Michael Sudman's wife, Theresa, was appointed the personal representative of his estate upon his death.

Jonathan A. Galler

During the administration, Theresa filed an election to take the elective share of Michael's estate under section 732.201, Florida Statutes. However, the trustee of the decedent's trust filed an objection, alleging that Theresa had waived her right to take the elective share, under section 732.702(1), Florida Statutes, by signing a prenuptial agreement. The trustee served two requests for admissions on Theresa, asking her to admit that, in fact, she did execute a prenuptial agreement with Michael. Theresa never responded to them, and at a non-evidentiary hearing, the probate court deemed the requests "admitted" and granted the objection to Theresa's election. The appellate court agreed. In addition to other fatal flaws in Theresa's position on appeal, the appellate court noted that she filed an affidavit *after* the court entered its order granting the objection, in which she noted that they never entered into a prenuptial agreement. Too little, too late, said the appellate court.

*Sudman v. O'Brien*, 2017 WL 1829479 (Fla. 2d DCA May 5, 2017) (not yet final).

### Lack of Direct, Financial and Immediate Interest in Contingent Trusts

In Florida, a party may attempt to set aside an adoption if the party did not receive notice of the adoption in advance and can show a direct, financial and immediate interest in the adoption. A showing of indirect, inconsequential or contingent interest is wholly inadequate. *See* Section 63.182(2)(a), Florida Statutes. In 2004, John Adam Edwards adopted Brindley Kuiper. In 2014, that adoption was challenged by John's biological son, Ryan Maxwell. Brindley—upon being adopted—and Ryan were beneficiaries of three irrevocable trusts created by John's great-grandparents to provide for their descendants. Therefore, the trial court held that Ryan had standing to challenge the adoption

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because his interest in the trusts was affected by the adoption. However, as the appellate court pointed out, their interest in the trusts was merely contingent. The trusts were managed at the sole discretion of the trustees, who determined if and when to distribute to the eligible beneficiaries. Because Ryan possessed no direct and immediate right to funds in the trust or control over trust-disbursement decisions, the appellate court held that he lacked standing to challenge the adoption.

*Edwards v. Maxwell*, 215 So. 3d 616 (Fla. 1st DCA 2017).

**Reformation of Trust**

The successor trustee of a trust created by the decedent petitioned for a declaratory judgment alleging that the trust's amendments were invalid because they were not signed by two witnesses, as required by Florida law. One of the beneficiaries, however, opposed and counterclaimed for reformation of the trust. If the trust were reformed to satisfy the intent of the settlor, she argued, the trustee would be required to transfer real property to her. The trial court denied the declaratory judgment and reformed the trust, but the appellate court disagreed. Section 736.0415, Florida Statutes, allows the court to reform "the terms of a trust" where the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law. Here, the mistake of law alleged was the failure to have the document signed by two witnesses. However, the appellate court held that reformation of the trust was inappropriate here because appellee did not seek to reform "the terms" of the trust but, rather, she sought to validate and enforce an invalid, unenforceable trust document.

*Kelly v. Lindenau*, 2017 WL 2180970 (Fla. 2d DCA May 17, 2017) (not yet final).