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Trusts and Estates Law Section Newsletter

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A Message from the Chair

Marion Hancock Fish

One of the hallmarks of our Section is that we have an extraordinarily engaged membership. As I can attest, the Section leadership is the recipient of many calls and emails from members about better ways to do our work, as well as new ideas and projects—so many, of course, that we can't follow up on all fronts.

However, Past Chair Gary Freidman's suggestion to broaden the scope of our Technology Committee is one that I jumped on immediately. Over the past several years, Technology Committee Chairs Gary Mund and David Goldfarb have worked to keep the Section up to date on technology. Recent projects include e-filing and changing the NYSBA website. Gary and David have embraced the suggestion to expand their Committee's role and are now considering new projects, some oriented toward member education and practice management, including:

- analysis and review of software;
- demonstrations of selected applications;
- membership survey of technology use;
- use of social media;
- ethical concerns in use of technology;
- cloud computing and internet security; and
- educating members through use of NYSBA's website and community.

In addition, the Technology Committee plans to host roundtable discussions at the upcoming Annual Fall Meeting to be held at the Turning Stone Casino and Resort in Verona, New York on October 29 and 30. Incidentally, the Roundtables will be offered on Thursday, October 29, from 2:00 to 5:00. Thanks to David and Gary for their willingness to take on these new initiatives, to Gary Freidman for encouraging us to move in this direction, and to Tom Collura and Parth Chowlera for agreeing to lend their help.

An increased emphasis on technology is also being promoted by the Big Bar. Recognizing the critical

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By David Pratt and Jonathan Galler

David Pratt

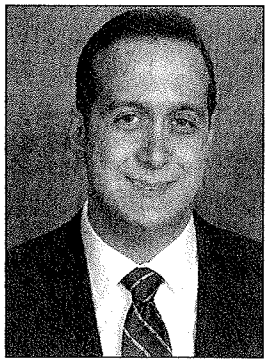
LEGISLATIVE UPDATE

Assessing Attorneys' Fees and Costs for Estates and Trusts

Florida recently enacted amended statutes governing the assessment of attorneys' fees and costs for estates and trusts. Under the amended statutes, if a court assesses fees or costs to be paid from an estate or trust, the court may direct from what part of the estate or trust such fees or costs are to be paid and may direct that they be assessed against one or more persons' shares in the proportions that the court deems just and fair. Further, the amendments provide a non-exclusive list of factors that the court may consider in assessing fees and costs. These include: the extent to which a person whose part of the estate or trust is to be assessed actively participated in the proceeding; the relative strength or weakness of the merits of the claims, defenses or objections asserted by someone whose part of the estate or trust is to be assessed; and whether the person to be assessed was a prevailing party. In response to a few recent appellate decisions, the amendments also specifically provide that the court need not find that the person whose share is to be assessed engaged in bad faith, wrongdoing or frivolousness. *See* §§ 733.106, 733.6171, 736.1005, 736.1006 and 736.1007, Fla. Stat.

Qualifications of Personal Representative

Florida also enacted amended statutes relating to objections to administration, including those relating to the qualification of a personal representative. Under the amended statutes, an interested person is no longer limited to three months within which to object to the appointment of a personal representative when such objection is based on the personal representative's failure to meet his or her required statutory qualifications. Rather, the personal representative's failure to meet those qualifications at the time of his or her appointment is the basis for mandatory removal at any point prior to discharge. The amendments also provide that a personal representative who knows that he or she was not qualified at the time of appointment must immediately resign. If a personal representative becomes unqualified subsequent to his or her appointment, he or she must provide notice to interested persons, who then have 30 days within which to remove the personal representative on that basis. The amendments also provide for corresponding revisions to the statutes that set forth the particular information and deadlines that must be included in a notice of administration. *See* §§ 733.212, 733.2123, 733.3101 and 733.504, Fla. Stat.



Jonathan Galler

Estate Tax Apportionment

Florida also enacted an amended estate tax apportionment statute. *See* § 733.817, Fla. Stat. The amendment, which makes both substantive and non-substantive revisions, is the first significant change to the statute since 1997. By way of an example of a substantive change, the existing statute provided that the tax apportionment language in a will governs even if a trust with conflicting apportionment language was executed at a later date. Under the amended statute, however, if the tax apportionment language in the governing instruments are in conflict, the tax apportionment language in the last executed instrument governs. By way of another example, the amended statute provides that the tax imposed on protected homestead, exempt property, and the family allowance is to be apportioned against the property of the estate and revocable trust. Under the existing statute, that was true only for the tax imposed on protected homestead. Some of the non-substantive changes include (i) updating references to reflect changes in the tax code (for example, eliminating any reference to the state death tax credit, which was eliminated in 2005 in favor of the state death tax deduction) and (ii) clarifying various ambiguous provisions in the prior statute.

DECISIONS OF INTEREST

Trust Reformation to Conform to Settlor's Intent

Section 736.0415 of the Florida Trust Code authorizes the court to reform a trust if it is proved by clear and convincing evidence that the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law. In this case, the settlor created a revocable trust of which she was the sole beneficiary during her lifetime. The trust assets were to be divided upon her death between the beneficiaries listed in a "Schedule of Beneficiaries." However, no such schedule was ever prepared. Upon the settlor's death, one of her children brought an action to declare the trust void for lack of beneficiaries. The other two children counterclaimed for judicial reformation, offering evidence of the settlor's intent to name them as sole remainder beneficiaries, along with an affidavit of the drafting attorney acknowledging his oversight in failing to prepare a Schedule of Beneficiaries. The trial court held that the trust was void for lack of any beneficiaries. But the Second District Court of Appeal reversed, holding that the trust did not, in fact, lack "any" beneficiaries given that the settlor herself was the designated lifetime beneficiary. The appellee argued, in the alternative, that reformation is unavailable

except to correct simple scrivener's errors. The appellate court disagreed, holding that Florida has a liberal policy of reforming instruments to conform to the intentions of the parties and that section 736.0415 is similarly broad in scope. Moreover, the appellate court noted that distinguishing a simple matter from a complex one would be subjective and, thus, an inappropriate test.

Megiel-Rollo v. Megiel, 2015 WL 1740365 (Fla. 2d DCA Apr. 17, 2015) (not yet final).

Will Contest on Ground of Undue Influence

Richard Blinn married his fourth wife at the age of 82. The following year, he executed a will under what the Fourth District Court of Appeal characterized as "suspicious circumstances." Two lawyers were involved but neither took responsibility for advising Mr. Blinn or developing the estate plan. The will devised the entire estate to his wife, whereas his prior two wills left his estate to his daughter or, alternatively, his granddaughter. Upon his death, Mr. Blinn's daughter successfully challenged the will, alleging undue influence on the part of the wife. In Florida, a presumption of undue influence generally arises when a beneficiary of a will shared a confidential relationship with the testator and actively procured the beneficial interest. However, where the beneficiary is a spouse, it is often difficult to prove undue influence. In fact, the presumption is not triggered in such a situation because it would not necessarily be unusual or nefarious for a spouse to play a role in developing an estate plan from which he or she benefits. Nevertheless, the appellate court affirmed the trial court's finding of undue influence in this case, deferring to the trial court's detailed judgment and evaluation of the evidence. The trial court found that the wife had preyed on the decedent's mental infirmity to alienate him from his family. Commenting on a recording of the wife screaming at the decedent, the court noted that "[i]t is rare in a case like this to have such a glimpse into an abusive marital relationship."

Blinn v. Carlman, 159 So. 3d 390, 391 (Fla. 4th DCA 2015).

Trustee's Attorney Does Not Owe Duty to Beneficiaries

Seldom do issues of great relevance to trusts and estates lawyers play out in federal court. A recent Eleventh Circuit Court of Appeals case, however, addressed the issue of whether "under Florida law, an attorney retained to represent only the trustee also owes a fiduciary duty to the beneficiaries of the trust." In this case, the beneficiaries of a trust sued the trustee's attorney for breach of fiduciary duty despite acknowledging that no attorney-client relationship existed between the parties. The lawsuit was filed in federal court based on diversity jurisdiction. The plaintiffs alleged that the trustee's attorney owed them a duty to prepare a proper trust accounting. The trial and appellate courts held that the trustee's attorney has no fiduciary duty to the trust beneficiaries. Quoting the Florida statute on the fiduciary lawyer-client privilege, the court held that Florida law provides that "only the person or entity acting as a [trustee] is considered the client of the lawyer." Section 90.5021(2), Fla. Stat. The Court also cited the comments to the Rules Regulating the Florida Bar, which provide that "the personal representative is the client rather than the estate or the beneficiaries." Rule 4-1.7 cmt. Notably, though, the court declined to address the separate but similarly important question of when a trust beneficiary may have standing to sue as a third-party beneficiary of a legal services contract between the trustee and the trustee's attorney.

Bain v. McIntosh, 597 Fed. Appx. 623, 624 (11th Cir. 2015).

Homestead Proceeds Exempt From Creditor Claims

It is axiomatic under Florida law that the proceeds of a voluntary sale of a homestead are exempt from the claims of creditors, just as the homestead itself is exempt, if the seller can demonstrate a good faith intention prior to and at the time of the sale to reinvest the proceeds thereof in another homestead within a reasonable time and the proceeds have not been commingled with other assets. *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201 (Fla. 1962). With that backdrop, a recent decision by the Fourth District Court of Appeal addressed the question of whether the proceeds from the sale of a homestead will remain protected if the judgment debtor uses those proceeds to purchase securities. The trial court ruled that the proceeds remained protected, and the appellate court affirmed, holding that "[t]he investment was not so inconsistent with the purposes of homestead that the funds lost their protected status." Non-cash proceeds of a sale may be eligible for creditor exemption so long as they serve the same function as cash proceeds do—namely, to be reinvested in a new homestead with a reasonable time. Because homestead exemption laws are to be liberally construed so that "the family shall have shelter and shall not be reduced to absolute destitution," the courts should not encourage excessive speculation with the proceeds of a sale. Here, because there was no evidence that the securities were particularly risky and remained separate from the judgment debtor's other funds, the creditor protection was not lost.

JBK Assoc., Inc. v. Sill Bros., Inc., 160 So. 3d 94 (Fla. 4th DCA 2015).

David Pratt is the Chair of Proskauer's Personal Planning Department and the Managing Partner of the Boca Raton office. His practice is dedicated exclusively to the areas of estate planning, trusts, and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. Jonathan 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 Department and are admitted to practice in Florida and New York.