Probate Section Report
by
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The probate section continues to meet on the second Wednesday of each month at 4:30 in the civil courthouse. Following are some recent topics of interest.

Amy Tully announced she will be going on maternity leave for six months beginning in mid-May. Amy's duties as staff attorney for Alachua County probate cases will be handled by Jennifer Kerkhoff (kerkhoffj@circuit8.org). Jennifer will continue to handle Levy and Gilchrist probates and plans on handling Alachua probates remotely from her office in Bronson. Chessie Ferrell (ferrellc@circuit8.org) will continue to handle Alachua County guardianships. Nathan Hall (halln@circuit8.org) has been hired to handle Bradford and Baker probates and guardianships.

Amy Tully also announced that an updated list of persons qualified to serve on an incapacity examining committee has been adopted under Administrative Order No. 6.961(A), dated May 8, 2011. A copy of the order and attached list can be obtained from the circuit8.org website.

Richard White initiated a discussion of the recent decision in Habeeb v Linder, ____So.3d____, (Fla. 3rd DCA Feb. 9, 2011), which is of interest to estate planners in the context of waiver of homestead. The case involved a husband signing a "RAMCO"

form warranty deed in favor of his wife to their homestead condominium. The deed was signed many years after the marriage, and contained no reference to a waiver of homestead or other spousal rights. The wife subsequently devised the homestead to her husband for life, with remainder to her sister. The husband and the sister both survived the wife, however, the husband died shortly thereafter and his personal representative initiated litigation against the wife's estate to obtain fee simple title to the homestead, on the theory that the deed did not constitute a waiver of spousal rights as described in Section 732.702 Florida Statutes. Most notably, it was argued that there was an absence of the requirement of a "fair disclosure" of each spouse's assets, as is expressly required by Subsection (2) of the statute, if the waiver is executed after the marriage. The trial court and the DCA both indicated that the required fair disclosure could be inferred from the circumstances of the case (long-term marriage; deed prepared by attorney; subsequent estate planning documents executed based on the assumed validity of the deed). It is interesting to note that there is no doubt that the husband intended to waive his homestead rights, as the petition for administration he signed to open the wife's estate (under oath) and the petition to determine homestead filed in the wife's estate (also under oath), stated the wife was the sole owner of the home. It was only after the husband died,

shortly after opening the wife's estate, that the husband's children initiated the claim for the fee simple title to the homestead.

Although the waiver of homestead contained in the deed was ultimately upheld by the courts, considering the time, effort, energy and expense involved in doing so, clients are probably better advised to invest in a traditional postnuptial agreement which strictly complies with the provisions of Section 732.702, Florida Statutes.

As long as we are on the subject of recent DCA opinions, I thought I would point out the interesting decision in the case of In re: Estate of Ann Dunn Aldrich (Basile vs Aldrich), ____So.3d____, (Fla. 1st DCA April 21, 2011), wherein the First DCA held that a will without a residuary clause could convey the decedent's residuary assets to the beneficiary named to receive specific assets. As pointed out by the dissent, this could be viewed as a judicial rewriting of decedent's will as, "The trial court had no business supplying a residuary clause where none exists…". The facts reflect that the decedent, a Clay County resident, using an "E-Z Legal Forms" will, made a number of specific bequests (house, contents, IRA, life insurance, automobile and bank accounts) to her sister Mary Jane Eaton, and if she predeceases, to her brother, James Michael Aldrich. The sister predeceased, leaving her estate to decedent, consisting

primarily of real estate located in Putnam County. Upon decedent's death her intestate heirs were her brother, James Michael Aldrich (50%) and two nieces, children of a predeceased brother, (25% each). The nieces asserted they were entitled to receive 50% of the decedent's residuary estate on the basis that the Putnam County real estate was not among the list of specific bequests and the will contained no residuary clause. The trial court and the DCA rejected this argument, based on the theory that the decedent's intent was to give everything to her surviving brother (notwithstanding the fact that there was no evidence of decedent's intent other than the will itself). The DCA went through a lengthy analysis of the law in order to reach its conclusion, discussing such rules of construction as the intention of the testatrix being the polestar by which all courts are to be guided; the theory of after-acquired property; and the presumption against partial intestacy.

Here's another tip for clients: instead of relying on this decision, invest in a good estate planning lawyer who believes in use of a residuary clause. It will be much cheaper and more efficient than a lawsuit and an appeal.

All interested practitioners (including paralegals and trust officers) are invited to attend meetings of the probate section. Please contact me if you would like to be added to the email list for meeting notices.