

Probate Section

By

Larry E. Ciesla

The probate section continues to meet on the second Wednesday of each month at 4:30 p.m. in the fourth floor meeting room in the Civil Courthouse. In no particular order, the following are some of the matters discussed by the section during recent meetings.

The big news is that effective January 1, 2013, all Alachua County probate, guardianship and mortgage foreclosure cases have been segregated into their own division with the Honorable Mary Day Coker presiding (Judge Silverman will continue as magistrate for foreclosure cases). This means that Judge Coker will be the only judge hearing probate and guardianship cases in Alachua County. Judge Coker was kind enough to attend some recent probate section meetings and here is what I take away from our discussions. Most importantly, Judge Coker has fully recovered from her recent serious medical issues and is extremely happy to be back at work with a full caseload. She indicated that she maintains an open door policy and any practitioner is welcome to stop by her office at any time in order to discuss any difficulties he or she may be experiencing, to just say hello.

On a procedural level, Judge Coker requests that all papers be e-filed and that service by her Judicial Assistant, Karen Brake, likewise be prepared for e-service. Paper copies may be added for pro se parties. Judge Coker stated that she will do her best to see that all orders are signed and e-served expeditiously. The early returns on this issue as now in and it is safe to say that the turnaround timeframe for receiving signed orders is as short as anyone could reasonably expect.

On the subject of scheduling hearings, Judge Coker would like practitioners to first explain the situation to the appropriate staff attorney. In some cases the staff attorney may be able to consult with Judge Coker and process the matter without a hearing. If a hearing is required, the staff attorney will direct the practitioner to email Ms. Brake to obtain a hearing time. Ms. Brake prefers to be contacted via email, as telephone communication tends to be more inefficient and time consuming. As of the present time, contact Staff Attorney Katherine Mockler for probate matters and Erin Hunt for guardianship matters.

Judge Coker will be following the usual rules for telephone appearances by counsel and for telephone testimony. A motion and an order are required for an

attorney to appear by phone. A motion and an order are required for testimony by phone. The witness must be sworn in by a notary who is in the witness's physical presence. Telephone testimony may only be taken by consent of all parties. See Rule 2.071, Florida Rules of Judicial Administration.

The section welcomes new members Adam Towers and Richard Withers. Adam practices with the firm of Bogin, Munns and Munns in Gainesville and concentrates on real estate litigation and commercial litigation with a heavy concentration on quiet title lawsuits. Richard Withers practices with the firm of Dean Mead in Gainesville and specializes in tax matters.

I recently had the opportunity to look into the current state of affairs regarding the insurability of Ladybird Deeds. According to information obtained by Carl Johnson and relayed to me, Old Republic/The Fund will insure Ladybird Deeds without requiring the joinder of the contingent remainder holders, so long as the sale is to a bona fide purchaser for value. On gift transactions, joinder is required. First American will insure all Ladybird Deeds without any joinder requirements. Many thanks to Carl for sharing this information.

Jane Hendricks initiated a discussion regarding the recent opinion in the case of Brennan v. Honsberger, 101 So.3d 415, (Fla. 5th DCA 2012), wherein the legal requirements to prove a lost will. This involves a two-step process. Initially, the will proponent must introduce competent, substantial evidence to overcome the presumption that the will was intentionally destroyed with the intent of revocation. Secondly, the proponent must establish the full and precise terms of the lost will were discussed in detail. The testimony of two disinterested witness is required to establish the terms of the will, except in cases where a "correct" copy showing the terms as well all signatures is provided, in which event only one disinterested witness is required. In this case the proponent presented a "correct" copy of the will, as well as the testimony of two disinterested witnesses, who both testified as to the formalities of execution of the will, but failed to testify as to the actual content of the will. Accordingly, the trial court's order admitting the will to probate was reversed. The moral of the story is next time, have the drafting lawyer and/or the legal assistant who typed the will serve as the disinterested witnesses and make sure they testify as to the precise terms of the will.

Richard White pointed out to the section the recent decision in the case of Morey vs. Everbank, 93 So.3d 482, (Fla. 1st DCA 2012), wherein the First District held that life insurance proceeds payable to the trustee of decedent's revocable living trust were not exempt from the claims of creditors of decedent's estate. In doing so the court examined Section 222.13(1), Florida Statutes, which provides an exemption from decedent's creditors for life insurance proceeds left to the beneficiary stated in the policy. The Court also examined Section 733.808, Florida Statutes, which allows a decedent to leave life insurance proceeds to the trustee of a revocable trust. The court found the two statutes not to be in conflict, holding that by making the proceeds payable to his revocable trust, and including language to use the trust assets to pay all of decedent's legal debts, the decedent had simply waived the exemption otherwise available to him. The moral of this story is to be more precise in the estate planning process. In this case the decedent had actually created a separate, sub-trust within his revocable trust, for the benefit of his three children. All he had to do to preserve the exemption was name the trustee of the children's trust as the beneficiary of the policy. Richard indicated that the

RPPTL Section is considering proposing legislation to address this issue.

If you are interested in being added to the email list to receive notice of future section meetings, please send an email to me at lciesla@larryciesla-law.com.