

Probate Section Report
by
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The first monthly meeting of the probate section for the new decade was held on January 13, 2010. The meeting began with a discussion of current estate planning strategies, given the unique circumstances of the estate tax law (no estate tax for persons dying in 2010; a one million dollar estate tax exclusion beginning on January 1, 2011). We all agree congress will pass new estate tax legislation this year. Most likely the law will provide that it is retroactive to January 1, 2010. This provision will certainly be challenged in court, which could take years to resolve. Simply put, nobody knows where we will end up on the estate tax issue. Peter Ward indicated he favors use of a disclaimer trust, thereby building in a level of flexibility at the time of death. Richard White indicated he likes the idea of a formula trust, leaving the maximum amount which will result in no tax, in trust, for the benefit of the spouse, so as to keep this amount out of the estate of the second to die spouse. Another suggestion from Richard is to ask the client what he or she would do if there were no tax, and work from there. Richard indicated he would monitor the advice coming from the top estate planners around the state and report back to the section at the next meeting.

The meeting next progressed to a discussion regarding the powers of a health care surrogate designated under Chapter 765, Florida Statutes. Peter Ward questioned whether a surrogate could direct that nutrition and hydration be withheld or withdrawn in a situation where the patient is not in a terminal or end stage condition. Peter expressed his discomfort at the thought of doing so as the surrogate. A quick review of the statutes indicates that this is clearly permissible. Some of the applicable statutes are summarized as follows: (1) Section 765.102, Florida Statutes, contains a legislative finding that every competent adult has the right to choose or refuse medical treatment and that a person may plan for subsequent incapacity by designating another to determine his or her future medical treatment. Furthermore, every person has the right to make an advance directive to provide, withhold or withdraw life-prolonging procedures, or to designate another to make this decision in his or her place in the event the individual becomes incapacitated or is personally unable to direct his or her care. Section 765.101(10), Florida Statutes, defines "life-prolonging procedure" to include providing sustenance and hydration. Section 765.105, Florida Statutes, allows any interested person who disagrees with the surrogate's decision to seek expedited judicial intervention under Rule 5.900, Florida Probate Rules. Section 765.109, Florida Statutes, provides immunity from

criminal prosecution or civil liability for health care personnel and surrogates acting in good faith.

The meeting next proceeded to a continuation of a prior discussion regarding the standard operating procedure for probate lawyers with regard to serving or not serving a copy of Notice to Creditors upon secured creditors. Several practitioners indicated that they had in the past not served secured creditors due to the fact that Section 733.702(4)(a), Florida Statutes, specifically provides that secured creditors are not required to file a creditor's claim against an estate as a condition precedent to maintaining an action to enforce its rights to reach the security. Richard White pointed out that the landscape has changed as it pertains to real estate mortgages. Many real estate owners are now faced with a situation where the security for their mortgage is worth much less than the amount owing on the mortgage. Upon the death of such a property owner, the issue of the possibility of recovery of a deficiency judgment against the property owner for the difference becomes significant. Accordingly, Richard feels the better practice is to now serve Notice to Creditors upon secured creditors. In this regard, it should be pointed out that in the event the secured party files a creditor's claim against the estate, Sections 733.705(7) and (8), Florida Statutes, contain

detailed procedures for differing possibilities for dealing with the future uncertainty inherent in such a situation.

The probate section continues to meet on the second Wednesday of each month beginning at 4:30 p.m. in the fourth floor meeting room in the Civil Courthouse. All interested parties are welcome to attend. Please send an email to lciesla@larryciesla-law.com if you wish to be added to the email list which is sent each month two days prior to the date of the meeting.