

# **PROBATE SECTION REPORT**

**BY**

**LARRY E. CIESLA**

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The probate section continues to meet on the second Wednesday of every month beginning at 4:30 p.m. in the third floor conference room in the criminal courthouse (220 South Main Street).



Following, in no particular order, are some topics discussed at recent meetings.

◆ The biggest recent item of interest is that, for the first time in the section's history, a member of the group has been elevated to the local bench. Long-time section member Monica Brasington was recently appointed to the Eighth Circuit bench by Governor Scott. Judge Brasington starts her judicial labors on December 16th in the Family Division, taking over Judge Groeb's caseload. Due to ongoing construction work in the civil courthouse, as of this time Judge Brasington is not sure where her office will be located. The section wishes to thank Susan Mikolaitis for her work in enlarging and framing a photo of the old Alachua County Courthouse that was presented to Judge Brasington during the section's November meeting.

◆ Another item of major significance for section members is the new order on judicial assignments signed by Judge Roundtree on November 15th, effective for the period November 18, 2013 through January 5, 2014. Judge Coker has been transferred to Gilchrist and Levy Counties for civil cases (including probate and guardianship). Alachua County probate and guardianship will revert back to the old system whereby the cases are split between Judges Monaco and Hulslander. Alachua County foreclosures will be handled by Judge Griffis. The order is posted on the circuit's website (circuit8.org) and is found in order number 9.03(v7).

◆ Also during the November meeting Richard Withers announced that UF Law School is putting together a program for an annual tax conference to take place in February, beginning in 2014, similar to the Heckerling Institute for estate planning held annually in Miami.

◆ Jane Hendricks announced that, contrary to the prior experiences of some section members, she was recently successful in e-filing a 58-page annual accounting (in a Marion County case). Jane reported that there were no glitches and that the portal internally divided the document into three parts.

◆ Katherine Mockler led a brief discussion regarding a new checklist for the procedures to be followed for the purchase of an annuity for a minor, which has been created based on substantial input from Judge Rosier. I will be following up with the guardianship staff attorney, David Altman, for more information and clarification.

◆ Susan Mikolaitis initiated a discussion as to whether or not there exists a good estate planning technique for a single person with a minor child who is interested in avoiding ownership of his or her homestead passing to the minor in the event of the untimely death of the single parent. The following were suggested: (1) recording a "Ladybird" deed, which would serve to convey title at the parent's death to the trustee of a trust for the benefit of the minor child; and (2) creation of a joint tenancy with right of survivorship using a sibling or a parent of the grantor as the joint tenant. Additional input for other ideas will be solicited during future section meetings.

◆ During the October meeting, a peculiarity of the e-filing portal in guardianship cases was pointed out. The portal automatically "closes" guardianship files when Letters are issued. When an attorney attempts to e-file a document after Letters are issued, a message is displayed

indicating the file is closed and that a \$50.00 reopen fee is required. The way to handle this is to simply ignore the request for the \$50.00 and continue to file your document. The request for the additional filing fee will then disappear.

◆ I recently came across an interesting opinion of the 1st DCA in the case of Cody v. Cody (Nov. 26, 2013; Case No. 1D12-5550), which can be accessed through the 1st DCA's website. The opinion answers the question of what happens when a will contains a bequest to the individual named as personal representative with a direction that he or she is to divide the property, "as he (or she) sees fit and proper." In Cody, the testator's will first identified his three children as the objects of his bounty, and then continued with two such bequests, one for the testator's 12.5-acre homestead, and one for the residue of the testator's estate. One of the testator's three children was designated as personal representative. The two children who were not named as personal representative filed various petitions and, among other things, requested and obtained an order dividing the homestead parcel into two parcels of 6.25 acres each, directing the PR to distribute one parcel to the daughter of one of the children, with the other parcel to be distributed to the

three children, in equal shares, "at the discretion of the PR ..."

The 1st DCA reversed, holding that the wording employed by the testator has the legal effect of an absolute devise to the individual who is named as PR, and that individual then has the discretion to either honor or ignore the testator's request. According to the 1st DCA, the testator granted the one son the discretion to divide the property in any way he saw "fit," including the right to make no division at all.

◆ Finally, I also came across the opinion in the 4th DCA in the case of Golden v. Jones (Oct. 20, 2013), which discusses at length the conflict within the DCA's as to the proper procedure to be followed when a creditor who was not provided with a copy of the Notice to Creditors files a claim in an estate after the three-month deadline has passed (but before expiration of the two-year deadline which bars all claims.) The 4th DCA certified the conflict on this issue. The procedure in the 1st DCA is governed by Morgenthau v. Estate of Andzel, 26 So.3d 628 (Fla. 1st DCA 2009), which was cited with approval by the 2nd DCA in Lubee v. Adams, 77 So.3d 882 (Fla. 2nd DCA 2012). Thus, in the 1st DCA (and the 2nd), a creditor in such circumstances is required to file along with its claim a petition for

extension of time to (late) file the claim. If such a petition is not filed, the attorney for the estate has several options, including: (1) do nothing and assume the claim is barred; (2) file a motion to strike the claim and schedule a hearing; or (3) file and serve a notice to the creditor that it must file a petition for extension of time or the claim will be barred (this is the option I always use).

In the 4th DCA, under the Golden v. Jones opinion, the claim is deemed timely, notwithstanding the fact that it was filed after the expiration of the three-month deadline (assuming it was filed prior to the two-year bar). The 4th DCA cited to Rohan Kelley's criticism of the 1st and 2nd DCA opinions (contained in the *Practice Under Florida Probate Code* CLE book) which, he argues, deny the creditor's due process rights by assuming the claim is untimely. The conflict is likely to be resolved by legislation being prepared by the RPPTL Section for the 2014 legislative session.



All interested practitioners are welcome to attend all probate section meetings. Contact my office if you wish to be added to the e-mail list to receive notice a day or two prior to each meeting (lciesla@larryciesla-law.com).