Probate Section

By

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The probate section wishes to welcome two new staff attorneys, Katherine Mockler and Erin Hunt. Ms. Mockler has recently taken charge of Alachua County probate cases and Ms. Hunt is now in charge of Alachua County guardianships. Their email addresses are mocklerk@circuit8.org and hunte@circuit8.org, respectively. In addition, if my information is correct, a new division of the circuit court has been created, to become effective in January 2013. The new division will consist of all Alachua County probate, guardianship and foreclosure cases, to be presided over by Judge Mary Day Coker. Also, effective September 1, 2012, "GA" replaces "CP" in the case numbers of all Alachua County guardianships.

The remainder of this month's column is devoted to recent developments in the law which may be of interest to estate planning, probate, trust, and guardianship practitioners. Multiple revisions to Chapter 738, Principal and Income, become effective January 1, 2013. These revisions are contained in Chapter 2012-49, Law of Florida (CS for SB No. 1050). Of particular interest is the newly rewritten Section 738.801, Florida Statutes, dealing with

apportionment of expenses as between a (life) tenant and a remainder person. In summary, any trust instrument dealing with this subject prevails over the statute. In the absence of a trust provision, ordinary repairs, taxes, insurance and (mortgage) interest are charged to the (life) tenant. The remainder person is charged with (mortgage) principal, lawsuits regarding title to the property and environmental matters. Extraordinary repairs are generally shared by the parties pursuant to a formula set forth in the statute, except if the improvement is not reasonably expected to outlast the duration of the (life) tenant's estate, in which case the cost is paid solely by the (life) tenant. Nothing in the statute prevents the parties from reaching their own agreement as to these matters.

A new statute, Section 732.703, Florida Statutes, which became effective July 1, 2012, deals with the effect of divorce on disposition of various assets. The new law basically nullifies the designation of an ex-spouse who was previously designated as a beneficiary on certain non-probate assets including life insurance, annuities, IRA's and pay-on-death designations. The surviving ex-spouse is treated as having predeceased the decedent ex-spouse. Exceptions to application of the new law include cases where the divorce judgment required that an asset be held

for the benefit of the ex-spouse or children and cases governed by the law of other jurisdictions (federal or state). This is a situation where the exception may swallow the rule, due to the fact that in many cases, perhaps even a majority of cases, the "fine print" of an insurance policy, annuity, bank/brokerage account customer agreement or IRA agreement will provide that the account shall be in all respects governed by the law of the state wherein the institution issuing the account is located. In such cases it is anticipated that Florida will rarely be the selected forum.

In a recent guardianship case of interest, the First District in Faulkner vs. Faulkner, ___ So.3d ___, discussed at length the problem of who is responsible for payment of the examining committee's fees where a petition to determine incapacity is denied but is not found to have been filed in bad faith (in which case by statute the petitioner is responsible). The Court pointed out that a gap in Section 744.331(7), Florida Statutes, exists as to this point, and urged the legislature to address the matter. However, since an emergency temporary guardian was appointed (and later dismissed) in Faulkner, the Court held the fees could be assessed against the assets of the Ward.

In another guardianship decision, the Fifth District in Hancock vs. Shares, ___ So.3d ___, held that it was error for the trial court to refuse to approve a structured settlement annuity for a minor on the grounds that the minor would be unable to obtain the settlement funds upon attaining the age of 18 years. The DCA ruled that a structured settlement annuity is appropriate, so long as it is found to be in the best interest of the minor.

In another interested guardianship case, the Second District in Long vs Willis, ___ So.3d ___, held that a parent/natural guardian does not have the legal authority to "vote" on behalf of a minor child when selecting a personal representative, typically for the estate of the child's deceased parent. This can be a very important "vote", because in a wrongful death care, the personal representative is the one who has full legal authority to decide which attorney to hire to pursue the wrongful death claims of the estate and all survivors. Pursuant to Section 733.301(2), Florida Statues, a guardian of the property must be appointed in order for a minor to legally "vote" for a person to be named as personal representative.

The probate section continues to meet on the second Wednesday of each month at 4:30 pm in the fourth floor meeting room in the civil courthouse. All interested

persons are invited to attend. There are no dues and attendance is not monitored.