DEATH, PROBATE AND DUE PROCESS: Do the Notice Requirements Under the Florida Probate Code and Rules Pass Constitutional Muster?

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In Florida, a procedure exists allowing the person seeking to administer the estate of a decedent (the "petitioner") to resolve certain issues before the issuance of letters of administration. Fla. Stat. §733.2123; 7 Fla. Pl. & Pr. Forms §50:55 (2015). One of those issues is whether the last will and testament offered for probate is valid.

Section 733.2123, Florida Statutes, provides that a petitioner may serve formal notice of the petition for administration on interested persons and that any person who is served with such notice before the issuance of letters may not challenge the validity of the will except in the proceedings before issuance of letters. The probate rules further provide that when formal notice is given, a copy of the pleading or motion shall be served on interested persons, together with a notice requiring the interested person to serve written defenses on the petitioner within 20 days of service of the notice. If no written defenses are served the petitioner may proceed on the pleading or motion ex parte and obtain an order admitting the will to probate, which operates as a judicial finding that the will was executed by a competent testator free from fraud, duress, or undue influence.

What if the will that is attached to the formal notice and petition for administration does not tell the whole story? For example, what if the decedent executed a "pour-over" will that simply makes his revocable living trust the beneficiary of his entire estate? How would the interested person be alerted to potential undue influence without also seeing copies of the relevant trust instrument(s)? How could an interested person possibly anticipate the consequences of an order admitting a will to probate if he has not also seen the trust instrument? The notice required by section 733.2123, Florida Statutes, and Rule 5.201(c), Florida Probate Rules, is inadequate. By failing to require a petitioner to serve not only the will offered for probate but also, in the event the will is a pour-over will, a copy of the trust instrument, the statute fails to safeguard the due process rights of the interested person by failing to require adequate notice. A simple modification of Rule 5.201(c), Florida Probate Rules, would cure the problem of insufficient notice quickly and easily by adding a second sentence stating that if the will offered for probate devises any portion of the estate to a trust instrument that a copy of the trust instrument is required to be served with the notice.

The full-length version of this article is available online at: http://bit.ly/2gWHlT0

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