Probate And Trust Case Summaries

Prepared by Daniel L. McDermott, Esq. – Adrian Philip Thomas, P.A., Fort Lauderdale, Florida

A Respondent in a trust contest, who happens to be both the drafting attorney and co-trustee of the contested trust, cannot assert that a trust contestant lacks standing, then refuse to produce the documents that would help establish that she does have standing. Consequently, the trial court erred by granting a protective order, which effectively eviscerated the trust contestant's claim, while making no finding of good cause and providing no explanation for denying the motion.

Boren v. Rogers, et al, 2018 WL 663727 (Fla. 5th DCA F2018)

In 2014, Ann Boren (the "Contestant") filed an amended complaint seeking to void a 2014 trust and a 2013 trust executed by Elaine Mullins (the "Settlor"). The allegations in the amended complaint were that Respondent, Evelyn Rivera (the "Alleged Influencer"), who was not a family member, befriended the Settlor late in life, at a point when the Settlor was in failing health and suffering from cognitive deficits, and unduly influenced the Settlor to execute the two trust instruments that substantially benefitted the Alleged Influencer and excluded the Contestant. The Contestant alleged that but for this undue influence she would have been a beneficiary and that for many years prior to the Settlor's death in December 2014, the Settlor had maintained a longstanding estate plan whereby her assets would pass to certain family members upon the Settlor's death, including the Contestant.

The attorney who drafted both the 2013 and 2014 trusts, Co-Respondent, Thomas Rogers, Esquire (the "Drafting Attorney/Trustee"), was also appointed trustee under both the 2013 and 2014 trusts that he drafted. In responding to the amended complaint, the Drafting Attorney/Trustee argued that the Contestant lacked standing to challenge the trusts "under the doctrine of dependent relative revocation because the trust was initially created in 1992 and 'was amended and/or restated in 1996, 2000, 2002, 2005, 2007, 2013 and 2014.'" The Drafting Attorney/Trustee argued that the Contestant must first show that she would have been a beneficiary under an earlier trust before she would be entitled to receive a copy of the most recent trust documents.

The Contestant then served a request for production of documents to the Drafting Attorney/Trustee, requesting the production of copies of all trust documents prepared by the Drafting Attorney/Trustee, his law firm, or by anyone else for the Settlor's signature. The request also sought together with copies of all notes, memoranda, or other documents created or maintained by the Drafting Attorney/Trustee relative to both the trust documents and communications to and from the Settlor regarding the preparation or execution of the trust documents and other estate planning documents. Finally, the request sought communications between the Drafting Attorney/Trustee and the Alleged Influencer.

The Drafting Attorney/Trustee moved for a protective order as to all requested documents on four grounds, which included, in pertinent part, that the requested documents were irrelevant and that he should not have to produce them because the Contestant did not identify the specific trust of which she claimed to be a beneficiary. The trial court conducted a hearing and directed the Drafting Attorney/Trustee to produce trust instruments from 1992-2007 for in camera review. The documents were submitted to the court under seal. Following its review, the trial court entered an order finding that the Contestant was "not entitled to a review" of any of the documents sought in the request for production and granted the motion for protective order in its entirety and without further explanation. The Contestant filed a petition for writ of *certiorari* with the Fifth District Court of Appeal seeking reversal of the order denying discovery.

The Fifth District Court of Appeal quashed the motion for protective order entered by the trial court. While the Fifth District Court of Appeal began its opinion noting that "[c]ertiorari is rarely available to review orders denying discovery because in most cases the harm can be corrected on appeal," it went on to recognize that "in those rare circumstances when the discovery is relevant or is reasonably calculated to lead to the discovery of admissible evidence and the order effectively eviscerates a party's claim, defense, or counterclaim, relief by writ of certiorari is appropriate." Moreover, the trial court made no finding of good cause, provided no explanation in its order for denying the motion, nor did it separately analyze the individual requests contained in the respective paragraphs of the Contestant's discovery request, which the Fifth District Court of Appeal stated "is insufficient when, as here, Boren's document request is directed at items that, based on the allegations in the amended complaint, would appear to be admissible at trial or otherwise reasonably calculated to lead to admissible evidence."

In quashing the motion for protective order, the Fifth District Court of Appeal reasoned that the Contestant would need the requested trust documents in order to establish at trial that she has standing as a prior beneficiary of the trust to bring suit. With no access to the requested trust documents, the Contestant lacked the ability to explain or demonstrate how those trust

continued, page 53

documents would have established her standing. Thus, the Court concluded that "the order effectively eviscerates her claim, which cannot be remedied on direct appeal because, at the very least, with no access to these documents, [the Contestant] lacks the ability to explain or demonstrate on direct appeal how the trust documents would have established her standing." Accordingly, the trial court's denial of discovery in this case effectively prevented the Contestant from proving her case and constituted a departure from the essential requirements of the law. The Fifth District Court of Appeal further directed the lower court to permit discovery of the requested trust documents or, alternatively, make the requisite finding of good cause as to why these trust documents must be protected from production.

Trial court erred in entering summary judgment in favor of defendants on (1) a count alleging breach of fiduciary duty by successor trustee and (2) counts alleging civil theft and conversion against individual defendant who had failed to return trust funds transferred to her solely where there was evidence sufficient to demonstrate existence of material disputed issues of fact.

Prewitt v. Kimmons, 2018 WL 791395 (Fla. 5th DCA 2018)

The Appellant, Brenda Prewitt, a named beneficiary of an irrevocable trust (the "Trust") established by her then deceased mother, Pauline Tyler ("Settlor"), sued her sisters, Shirley Kimmons ("Kimmons") and Sandra Perkins ("Perkins") (collectively the "Appellees"). Count III of Appellant's multi-count second amended complaint alleged that Kimmons, who was the successor trustee of the Trust, "breached her fiduciary duty to Appellant by, (1) failing to distribute funds as provided for by the trust documents, (2) failing to seek return of $10,000 of trust assets wrongly retained by Perkins, and (3) failing to return monies that Kimmons had misappropriated from the trust account prior to [Settlor's] death." Similarly, Count V (conversion) and Count XIII (civil theft) both sought damages from Perkins for (1) failing to return monies to the Trust that she received for "safekeeping" purposes and (2) misappropriating monies from the Trust account prior to Settlor's death. The trial court granted summary final judgment in favor of Appellees on all claims and Appellant filed an appeal to the Fifth District Court of Appeal.

The Fifth District Court of Appeal reversed the trial court's order, in part, after concluding that "disputed material issues of fact precluded the entry of summary judgment on Counts 3, 5, and 13." The court concluded that record evidence was sufficient to permit Appellant to proceed with her claims as set forth in Counts 3, 5, and 13 where: (1) there was record evidence that the Kimmons, as trustee, had paid lease payments on a car that was ultimately conveyed to a beneficiary and that said payments were not consistent with the terms of the Trust; (2) there was evidence that Perkins had received $10,000 from the Settlor solely for "safekeeping" purposes, that these monies had never been returned to the Trust account, and that Kimmons had taken no action to recover these monies; and (3) there was record evidence that during a time when the Settlor "was in deteriorating health and receiving morphine, the Kimmons improperly disbursed money from the trust account to herself and her daughter." The court ultimately concluded that the aforementioned record evidence created questions of fact as to Appellant's breach of fiduciary duty claim against Kimmons, citing to Fla. Stat. §736.0801, §736.0811, and §736.0812, and was sufficient to preclude summary judgment as to Count V (conversion) and Count XIII (civil theft) against Perkins.

Trial court erred by denying motion for entitlement to attorney's fees and costs pursuant to Fla. Stat. §744.108, after concluding that none of the services rendered by appellants benefitted the ward. In a specially concurring opinion, the Honorable Judge J. Robert Luck opined that the Third District Court of Appeal and other appellate courts of this state have read into subsection (1) of section Fla. Stat. §744.108, a requirement that the attorneys' services must benefit the ward or the ward's estate, which is a requirement the legislature did not intend when drafting Fla. Stat. §744.108.

Schlesinger v. Jacob, 43 Fla. L. Weekly D419a, 2018 WL 988292 (Fla. 3d DCA, February 21, 2018)

Appellants, Michael J. Schlesinger, of Schlesinger & Associates, P.A., and Luis E. Barreto, of Luis E. Barreto & Associates, P.A. (collectively "Appellants") provided services in a guardianship proceedings, which included (1) filing a petition to determine incapacity, which the trial court granted upon a determination that the Ward was totally incapacitated; and (2) filing a petition to establish a plenary guardianship, which the trial court also granted after determining that such was necessary "to provide for the welfare and safety of the Ward," and because there was no less restrictive alternative to plenary guardianship that would "sufficiently address the problems and needs

continued, page 54

of the Ward." Appellants filed a motion for entitlement to attorney's fees and costs pursuant to Fla. Stat. §744.108, which the trial court denied. In its order denying the motion for entitlement to attorney's fees and costs, the trial court concluded that none of the services rendered by Appellants benefitted the Ward. Consequently, Appellants filed an appeal of the trial court's order denying the motion for entitlement to attorney's fees and costs.

On appeal, the Third District Court of Appeal reversed the trial court's order denying Appellants' motion for entitlement to attorney's fees and costs after finding that the trial court's conclusion was unsupported by competent substantial evidence in the record. Specifically, the Third District Court of Appeal found that as a result of the Appellants' services, "the Ward received the full benefit and protection of a plenary guardianship of person and property under Florida law." In addition to finding that the trial court's conclusion was unsupported by competent substantial evidence in the record, the Third District Court of Appeal also noted that "[t] he trial court's order appears to have conflated the separate determinations of entitlement to attorney's fees with the reasonable amount of fees to be awarded." Entitlement to attorney's fees is governed by Fla. Stat. §744.108(1), which provides that "[a] guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward, whereas the reasonableness of said fee is governed by subsection 744.108(2), Fla. Stat."

The majority opinion noted that the Third District Court of Appeal "has adopted our sister courts' construction of section 744.108(1)" and cited to *Losh v. McKinley*, 106 So. 3d 1014, 1015 (Fla. 3d DCA 2013), but did not delve any further into *Losh*. However, in a special concurring opinion, the Honorable Robert J. Luck, opined that the Third District Court of Appeal "should recede from Losh and read section 744.108 as the legislature wrote it." The special concurrence explained that "because our court in *Losh v. McKinley*, 106 So. 3d 1014 (Fla. 3d DCA 2013) joined the other district courts in welding onto the guardianship attorney's fee statute, section 744.108(1), the requirement that an attorney's services 'benefit' the ward for the attorney to be entitled to fees" exists in the Third District Court of Appeal, "even though the word 'benefit' is found nowhere in section 744.108(1) ("A guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward.")."

Judge Luck's occurrence explained that "[b]y authorizing attorney's fees for services rendered to the ward, the legislature sought to encourage concerned family members and other interested parties to investigate abuses of a ward and to bring good-faith claims to the probate court." While those claims may not be successful in the end, the special concurrence opined that the family members and other interested persons who bring them are nevertheless "rendering services to the ward by making sure they are well cared for and that the guardian is doing his or her job." Thus, "[b]y authorizing attorney's fees for services rendered to the ward, the legislature has essentially asked family members and interested parties, the ones best suited to watch over the ward, to be vigilant in protecting the ward's rights and bring to the trial court's attention good-faith concerns that the ward is being abused." Here, the specially concurring opinion noted, even "if the ward's daughter had been unsuccessful in her petitions, they triggered the trial court to appoint three doctors who were required to meet with the ward and his family physician and caretaker, diagnose him, and evaluate his capacity to manage his financial affairs and make medical decisions concurrence." Thus, "[b]y filing and litigating the petitions, the attorney rendered services to the ward by making sure he was being properly cared for and was of sound mind to exercise his rights."

While the specially concurring opinion agreed with the outcome of the majority opinion, it went on to express its disagreement with the Court's previous recognition of there being "a benefit requirement to Fla. Stat. §744.108(1)," which Judge Luck opines discourages attorneys from bringing guardianship claims that would otherwise be brought. The special concurrence explained that under Losh and the other cases cited by the majority opinion, the additional requirement that an attorney's services must benefit the ward has "consequences that were not intended by the legislature." Moreover, the concurrence notes that under *Losh*, "if the attorney services rendered to the ward are not successful, then the attorney is not entitled to fees." Consequently, the result of this additional, and legislatively unintended, requirement is that "attorneys are less likely to represent family members and interested parties concerned about how the ward is treated because they will not get paid, and thus, fewer claims by family members and interested parties will be brought to court," which will result in less oversight of the most vulnerable members of our community. Thus, because Fla. Stat. §744.108(1), provides for attorney's fees where services were rendered to the ward, "*Losh* and the other cases cited by the majority opinion are contrary to the legislature's decision to expand the scope of those entitled to attorney's fees to those who render services to the ward, and not just to successful parties, as it has done in countless other statutes."

The special concurrence concludes by explaining that the structure of Fla. Stat. §744.108, shows that the legislature intended that the benefit resulting from the litigation is not to be considered when determining whether the attorney is entitled to fees. Rather, as Judge Luck explained, "[s]ubsection

continued, page 55

(1) is the entitlement section, and says that an attorney who renders service to the ward is entitled to a reasonable fee for services rendered. §774.108(1), Fla. Stat." Then, and only once the trial court determines that an attorney is entitled to fees under subsection (1), does the trial court proceed to subsection (2), which provides the set of criteria for the court to consider in determining the amount of the fee award. It is these factors in subsection (2) that, "unlike in subsection (1), go to the benefit received by the ward from the attorney's services." In other words, subsection (1) deals with entitlement and subsection (2) accounts for benefit to the ward when considering the amount of fees to be awarded. The concurrence concludes that "*Losh* and the other cases flip the analysis and consider the benefit factors at the entitlement stage" and "[t]his is not what the legislature wrote and it is not what it intended."

Trial court erred by entering temporary injunction requiring non-party financial institution to remove its unilateral freeze of accounts without requisite findings, without a demonstration of substantial likelihood of success or irreparable harm, and without requirement of posting of bond by the moving party.

Dubner v. Ferraro, 43 Fla. L. Weekly D767b (Fla. 4th DCA, April 11, 2018)

Appellant, Ronald N. Dubner, Esquire ("Appellant"),[1] instituted several lawsuits in Palm Beach Circuit Court (including trust, probate, and tort actions) based on claims that his half-siblings had unduly influenced their mother to alter the estate plan of their mother and father in order to give them millions of dollars in *inter vivos* gifts, to the detriment of Appellant. Appellant also filed a separate lawsuit in Broward Circuit Court, which related to separate conduct and causes of action (unjust enrichment, constructive fraud, tortious interference with a business relationship, exploitation of a vulnerable adult, and declaratory action) by his half-siblings, which also named as defendants two companies in which Appellant previously held ownership interests and the financial broker (the "Broker") holding accounts of Appellant's half-sister, half-brother, and other family entities (the "Broward Action").

After the Broward Action was filed, the Broker, without a court order, put a unilateral freeze on the accounts in dispute in the Broward Action pursuant to a contractual right contained in an account agreement with Broker. The Personal Representative of Appellant's late half-brother's estate and Appellant's half-sister (collectively "Defendants"), filed an emergency verified motion for injunctive relief in the Palm Beach County probate case seeking an Order enjoining the Broker to remove the freeze or the posting of a $60 million bond by Appellant. Defendants claimed "irreparable harm" insofar as their purported "inability to access critical funds not subject of a court order." Defendants also claimed a likelihood of success on the merits because Appellant had not moved for injunctive relief prior to the Broker instituting the freeze. Moreover, Defendants claimed that allowing the broker to arbitrarily freeze client accounts would be a disservice to the public interest "as it would allow more frivolous filings of lawsuits simply naming different financial institutions in complaints as a method of securing prejudgment relief." The trial court set a hearing on Defendants' verified motion for injunctive relief, at which the trial court granted Defendant's motion and ordered the Broker to release any hold or freeze on the accounts.

The Appellant appealed the trial court's temporary injunction order to the Fourth District Court of Appeal. Appellant argued, in pertinent part, that (1) the injunction was defective for failure to comply with the procedural and substantive requirements for temporary injunctions, (2) the injunction was defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b), and (3) Defendants had failed to meet the standard of proof for issuance of a temporary injunction. The Fourth District Court of Appeal agreed with the Appellant's three aforementioned arguments and reversed the trial court's temporary injunction order.

The Fourth District Court of Appeal agreed with Appellant's first argument that the injunction was defective for failure to comply with the procedural and substantive requirements for temporary injunctions. The Fourth District Court of Appeal noted that the trial judge orally announced at the hearing, "I'm ruling that the brokerage house have no freeze on it . . . ; that there's not to be any freeze," but there was no other oral explanation or findings in the Court's pronouncement or its order. Consequently, the temporary injunction order failed to comply with the requirements of Rule 1.610(c), Fla. R. Civ. P. Moreover, as to Appellant's argument that Defendants failed to meet the standard of proof for issuance of a temporary injunction, the Fourth District Court of Appeal agreed and noted that "defendants failed to demonstrate a substantial likelihood of success or irreparable harm." Finally, the Court agreed with Appellant's argument that "the injunction is defective for failure to include a bond in accord with the express requirements of Florida Rule of Civil Procedure 1.610(b). See *Fla. High Sch. Athletic Ass'n. v. Rosenberg*, 117 So. 3d 825 (Fla. 4th DCA 2013)." While Defendants argued that Appellant waived his bond challenge, the Court noted that "we disagree and see no basis for avoiding the bond requirement." Consequently, the Fourth District Court of Appeal reversed the trial court's order and remanded with instruction to dissolve the mandatory injunction.

Endnote

1 It should be noted that the author of this case summary is lead counsel for the Appellant.