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Death, Probate And Due Process: Do The Notice Requirements Under The Florida Probate Code And Rules Pass Constitutional Muster?

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Property rights are among the basic substantive rights expressly protected by the Due Process Clause of the United States Constitution and the Florida Constitution.[1] Probate proceedings are *in rem* proceedings directed against property and against anyone claiming an interest in the property.[2] A proceeding to admit a will to probate affects the property rights of interested persons, and those persons are entitled to due process of law before those rights are extinguished, diminished or otherwise affected.

Due Process

The United States Supreme Court has held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"[3] (e*mphasis added)*. The notice must be of such nature as reasonably calculated to convey the required information and must afford a reasonable time for those interested persons to make an appearance.[4] "When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing" the interested person.[5]

Fla. Stat. § 733.2123 (2018): Adjudication before issuance of letters

In Florida, an extraordinary 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.[6] One of those issues is whether the last will and testament offered for probate is valid. Fla. Stat. § 733.2123 (2018) provides, in pertinent part, 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. Formal notice is the method of service used in probate proceedings and the method of service of process for obtaining jurisdiction over the person receiving the notice.[7] Formal notice must be served on the interested person or on the interested person's designated representative by using "any commercial delivery service requiring a signed receipt."[8] The probate rules further provide:

> When formal notice is given, a copy of the pleading or motion shall be served on interested persons, together with a notice requiring the person served to serve written defenses on the person giving notice within 20 days after service of the notice, exclusive of the day of service, and to file the original of the written defenses with the clerk of the court either before service or immediately thereafter, and notifying the person served that failure to serve written defenses as required may result in a judgment or order for the relief demanded in the pleading or motion, without further notice.[9]

If no written defenses are served, the petitioner may proceed on the pleading or motion *ex parte*.[10]

Civil Procedure cf. Probate Procedure

Civil litigators will recognize formal notice as the probate equivalent of the civil summons, putting a defendant on notice and requiring written defenses to be served within 20 days of service.[11] If a probate petitioner elects to serve formal notice of the petition for administration prior to the issuance of letters in order to avail himself of the shortened objection period,[12] a copy of the will offered for probate must be attached to the notice.[13] This probate rule also finds its corollary in the civil procedure rules, which require that all "documents upon which action may be brought or defense made…shall be incorporated in or attached to the pleading."[14] The similarities between a circuit civil case and a probate case involving service of a petition for administration prior to issuance of letters are striking at the outset: (1) both are commenced by filing a complaint or petition, which must include any document upon which relief is sought, and (2) both are required to be served on the defendant or interested person with a summons or notice informing the person that written defenses are due within 20 days. The similarities end there. In a civil action, if no written

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defenses (or any papers) are filed, the process of obtaining a default judgment requires two steps. First, a motion for clerk's default must be filed, and once the clerk's default is entered, then a motion for final default judgment must be filed. The motion for final default judgment should be verified and show 1) acquisition of jurisdiction over the defaulting party, 2) existence of default by failure to serve or file any response, 3) no pleading filed containing a certificate of service and 4) military status of defendant.[15] Most importantly, in nearly all circumstances, the motion for final default judgment must be served on the defendant, who will have the opportunity to ask the court to set aside the default for excusable neglect and due diligence. In general, a clerk's default can only be converted to a final judgment with notice to the defaulting party. Furthermore, a final default judgment can be set aside under the rules of civil procedure in accordance with Fla. R. Civ. P. 1.540, which provides relief from judgment for inadvertence, excusable neglect, newly-discovered evidence and fraud, including misrepresentation or other misconduct.[16]

Ironically, the civil procedure rules abolished the historic distinction between legal procedure and equity procedure by adopting the policy of liberality favored by equity, preferring to adjudicate matters on the merits and not on technical pleading requirements.[17] The probate rules, although written to govern the procedures applicable to courts of equity, afford *less* leniency to an interested person than the civil rules. In probate, if the interested person fails to file any written defenses within 20 days – even if that person is calling the petitioner's lawyer and requesting information – then the petitioner can walk directly into the courthouse on the morning of the 21st day and obtain an *ex parte* order, admitting the will to probate, and that order operates as a judicial finding that the will was executed by a competent testator free from fraud, duress, or undue influence.[18] In other words, the petitioner can obtain the probate equivalent of a final default judgment on the validity of the will that affects the rights of the interested person without any further notice or opportunity to be heard.

Defenders of Fla. Stat. § 733.2123 (2018) may argue the requirement that an interested person file written defenses within 20 days of service of the formal notice and petition for administration is merely a procedural rule.[19] While true, application of the rule has the practical effect of operating as a statute of limitations or mandatory non-claim provision. This is most often true in situations where the petitioner is seeking quick entry of an order admitting the will to probate to avoid an anticipated undue influence challenge to testamentary documents and runs to the courthouse on the 21st day after service. Once the order admitting will is entered, courts are loathe to vacate it if the petitioner can prove that formal notice was served and 20 days lapsed with no written defenses being filed. The special time constraints created by Fla. Stat. § 733.2123 (2018) are extraordinary and require strict compliance if interested persons who are served with formal notice of the petition for administration are to be limited to 20 days.[20] As noted above, one of those requirements is that the petition for administration must be served via formal notice along with a copy of the will being offered for probate.

What if the Last Will & Testament does not tell the whole story?

For example, what if the decedent executed a "pour-over" will that simply makes his or revocable living trust the beneficiary of his or her entire estate? How would the interested person be alerted to potential undue influence without also seeing copies of the relevant trust instrument(s)? There is no requirement under the Probate Code or the Probate Rules that a petitioner seeking to admit a pour-over will to probate must also serve a complete copy of the trust instrument, including all amendments, on the interested person so that he or she can make an informed decision about whether a challenge to the will should be made.[21] Florida courts have held that adequate notice is a fundamental element of the right to due process and although a litigant may choose to suffer default and consequences from that default, the litigant is entitled to anticipate the consequences that reasonably flow from the allegations of the complaint (which includes the exhibits to it).[22]

If the petition for administration and a copy of a pour-over will are the equivalent of a complaint with an exhibit, then how could an interested person possibly anticipate the consequences of a default (*i.e.*, the order admitting will to probate) unless he or she has also seen the trust instrument(s)?

The notice required by Fla. Stat. § 733.2123 (2018) and Fla. Prob. R. 5.201(c) is inadequate to ensure, under every scenario, that an interested person is being provided with all the information necessary to make a fully-informed decision about whether written defenses should be filed in response to the petition for administration. The probate process affects the property rights of interested persons and meaningful due process is required before stripping the interested persons of those rights. Fla. Stat. § 733.2123 (2018) and Fla. Prob. R. 5.201(c) do not include adequate due process protections because they do not mandate adequate notice if the decedent had a pour-over will. 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.

The ripple effect of an order admitting a will to probate is far reaching because it precludes not only a will contest, but also potentially a trust contest of a contemporaneously-executed trust instrument and a tortious interference action where the underlying tort is undue influence in the procurement of the will and/or trust instrument. The Probate Code provides that

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"the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence."[23] Therefore, an order admitting a will to probate could possibly be used as collateral estoppel in a trust contest or a tortious interference action. Under the current state of Florida law, a petitioner who engaged in undue influence in the procurement of a trust could serve a petition for administration and copy of the pour-over will on an interested person via formal notice, refuse to serve a copy of the trust instrument for 20 days, obtain the order admitting the will to probate on day 21, and then attempt use that order as collateral estoppel to prevent the interested person from challenging the trust instrument executed on the same date as the will because there has been a "finding" – by default judgment, not by evidence in the record – that the decedent was competent and was not the victim of undue influence, fraud or duress on the date he or she executed the testamentary documents. Furthermore, an interested person who learns of the undue influence after the will was admitted to probate may be barred from bringing a tortious interference action if the underlying tort was procurement of the will and trust through undue influence. Nowhere in the formal notice are the far-reaching and extraordinary consequences of failing to file written defenses to a seemingly innocuous petition for administration of a pour-over will spelled out for the interested person.

Fla. Stat. § 733.2123 (2018) and The Florida Probate Rules fail to protect an interested person's due process rights.

It is unclear what compelling governmental interest is advanced by the enactment of Fla. Stat. § 733.2123 (2018) (the expeditious administration of estates?) and whether that interest justifies the termination of property rights 20 days after receiving deficient notice. The following amendments to the Probate Rules would help to balance the state's interest in quickly and efficiently administering estates with an interested person's due process rights:

Modification of Rule 5.025(a): Specific Adversary Proceeding

Probate proceedings are governed by the Probate Rules; however, certain proceedings in probate are adversarial by nature, and those proceedings are conducted pursuant to the Florida Rules of Civil Procedure.[24] Adversarial proceedings are of two kinds: specific adversary proceedings and declared adversary proceedings.[25] Specific adversary proceedings are deemed adversarial by the Probate Rules. Those proceedings are: proceedings to remove a personal representative, surcharge a personal representative, remove a guardian, surcharge a guardian, probate a lost or destroyed will or later-discovered will, determine beneficiaries, construe a will, modify a will, cancel a devise, partition property for the purpose of distribution, determine pretermitted status, determine pretermitted share, determine amount of elective share and contribution, and for revocation of probate of a will.[26] With the exception of the two removal actions, every other specific adversarial proceeding involves property rights, and the more rigorous Civil Procedure Rules are invoked in lieu of the Probate Rules.

Service of a petition for administration via formal notice pursuant to Fla. Stat. § 733.2123 (2018) should be added to the list of specific adversary proceedings because it implicates the interested person's property rights. Doing so would force the proceedings to be conducted like a civil suit, which would include the procedures required for entry of a default judgment.[27]

Modification of Rule 5.040: Formal Notice

A civil summons is cautionary. It grabs the defendant's attention with a clear and stern warning:

A lawsuit has been filed against you. You have 20 calendar days after this summons is served on you to file a written response to the attached complaint with the clerk of this court. A phone call will not protect you. Your written response, including the case number given above and the names of the parties, must be filed if you want the court to hear your side of the case. If you do not file your response on time, you may lose the case, and your wages, money, and property may thereafter be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Compare the language of a civil summons with the language in a formal notice:

You are notified that a petition for administration has been filed in this court, a copy of which accompanies this notice. You are required to serve written defenses on the undersigned within 20 days after service of this notice, exclusive of the day of service, and to file the original of the written defenses with the clerk of the above court either before service or immediately thereafter. Failure to serve and file written defenses as required may result in a judgment or order for the relief demanded in the pleading or motion, without further notice."

When a family member dies, people expect to receive communication from an attorney regarding probate, so the fact that a lawyer is sending notices is unremarkable. Furthermore, the formal notice includes a petition for administration, which is not adversarial, makes no accusations directed at the interested person and in no way gives any indication that the interested person's property rights will be affected. Additionally, if the will attached to the formal notice is a pour-over will, it tells the interested person *absolutely nothing* about the distribution of the decedent's estate. The formal notice does not advise the interested person that a phone call will not protect him or her.

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The formal notice does not advise the interested person that he or she may lose property rights without any further notice if he or she does not file written defenses. The formal notice does not advise the interested person that not only will he or she forfeit any rights in this proceeding, but the order entered admitting the will to probate may prevent him or her from bringing a trust contest or tortious interference action in the event he or she suspects or discovers undue influence later. Finally, the formal notice does not advise the interested person that he or she should call an attorney.

A more comprehensive and cautionary formal notice should be written and used if a petitioner wishes to avail himself of the extraordinarily short limitation period permitted under Fla. Stat. § 733.2123 (2018).

Modification of Rule 5.201(c): Notice of Petition for Administration

The Probate Rules currently provide that "[i]f the petitioner elects or is required to serve formal notice of the petition for administration prior to the issuance of letters, a copy of the will offered for probate must be attached to the notice."[28] The problem of insufficient notice could quickly and easily be cured 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 Florida Trust Code defines a "trust instrument" as "an instrument executed by a settlor that contains terms of the trust, including any amendments to the trust."[29]

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Conclusion

The state's interest in the quick and efficient settling of a decedent's estate must be balanced against the property rights of interested persons. Any process required under the Florida Probate Code and the Florida Probate Rules must, *under every circumstance*, satisfy the requirements of Constitutional due process. The impact of an order admitting a will to probate extends beyond the probate proceeding and potentially affects the interested person's rights in the context of a trust challenge and a tortious interference claim. In certain situations, the application of Fla. Stat. § 733.2123 (2018) results in an unconstitutional violation of an interested person's due process rights; however, the simple changes to Probate Rules 5.025(a), 5.040 and 5.201(c) outlined herein could serve to protect due process rights while furthering the state's interest in the quick and efficient administration of estates.

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Endnotes

1 U.S.C.A. Const. Amend. 14; Florida Constitution, Art. 1 §9; *Moser v. Barron Chase*, 783 So.2d 231 (Fla. 2001) (citing *Department of Law Enforce. v. Real Property*, 588 So.2d 957, 964 (Fla. 1991)).

2 Fla. Stat. § 731.105 (2018).

3 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), 70 S. Ct. 652, 94 L. Ed. 865 (citing *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751; *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed. 520) (emphasis added).

4 Mullane at 314.

5 Mullane at 315.

6 Fla. Stat. § 733.2123 (2018).

7 Committee Notes, Fla. Prob. R. 5.040.

8 Fla. Prob. R. 5.040(a)(3).

9 Fla. Prob. R. 5.040(a)(1).

10 Fla. Prob. R. 5.040(a)(2).

11 Fla. R. Civ. P. 1.070 and 1.140.

12 If probate is opened first and notice of administration is served after letters of administration are issued, the interested person has three (3) months after the date of service to object. Fla. Stat. § 733.212(2)(c) (2018); Fla. Prob. R. 5.240.

13 Fla. Prob. R. 5.201(c) ("If the petitioner elects or is required to serve formal notice of the petition for administration prior to the issuance of letters, a copy of the will offered for probate must be attached to the notice.").

14 Fla. R. Civ. P. 1.130.

15 Comment, Fla. R. Civ. P. 1.500.

16 Fla. R. Civ. P. 1.540(b).

17 Comment, Fla. R. Civ. P. 1.500 citing North Shore Hospital, Inc. v. Barber, 143 So.2d 849 (Fla. 1962).

18 Fla. Stat. § 733.103(2) (2018) ("In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator; free of fraud, duress, mistake, and undue influence; and that the will was unrevoked on the testator's death.").

19 Tanner v. Estate of Tanner, 476 So.2d 793 (Fla. 1st DCA 1985).

20 In re Ballett's Estate, 426 So.2d 1196 (Fla. 4th DCA 1983) (citing *Nardi v. Nardi*, 390 So.2d 438 (Fla. 3d DCA 1980) ("If interested persons served with formal notice of administration are to be limited by special time constraints in petitioning for revocation of probate, the personal representative must strictly comply with the statute authorizing such limitations").

21 As a best practice, probate litigators simultaneously challenge both the will and the trust to avoid application of an incorporation clause in the will that could potentially serve to incorporate the terms of a trust agreement that was invalidated for undue influence.

22 Hooters v. Carolina Wings, 655 So.2d 1231 (Fla. 1st DCA 1995).

23 Fla. Stat. § 733.103(2) (2018).

24 Fla. Prob. R. 5.010 and Fla. Prob. R. 5.025.

25 Fla. Prob. R. 5.025(a).

26 Fla. Prob. R. 5.025(a).

27 Fla. Prob. R. 5.025(d)(2).

28 Fla. Prob. R. 5.201(c).

29 Fla. Stat. § 736.0103(23) (2018).

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