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CODIFYING REQUIREMENTS FOR EXECUTION OF A LAST WILL & TESTAMENT

EXECUTIVE SUMMARY:

Every U.S. state and commonwealth has a provision in their respective statutes specifying the requirements for execution of a Last Will and Testament ("Will"). While the requirements may seem like common sense, attorneys and individuals all too often neglect them during the process of executing estate planning documents. One of the most neglected requirements in Florida involves the failure of the attesting witnesses to sign the Will in the "presence" of the testator and each other (not a requirement in all states and commonwealths).

In Price v. Abate, the Fifth Circuit Court of Appeals in Florida (the "5th DCA") recently addressed this issue; surprisingly, it had never been addressed before. The 5th DCA concluded that "even though the witnesses were in the same room as the testator when he signed the purported will, they weren't in his "presence," thus warranting summary judgment rejecting the will." Merely being "present" as a witness, when an individual is signing his or her Will, means more than just being in the same room as the testator at the time the documents are being executed. The witnesses must actually watch the testator sign his or her Will, and understand what they are witnessing.

FACTS:

BACKGROUND

Section 732.502 of the Florida Statutes outlines the specific requirements for execution of a Will under Florida law. The statute requires:

1) The document to be in writing;

2) The testator's signature at the end of the document (another individual may execute the document on his or her behalf - with the testator's consent);

3) The testator's signature or acknowledgement in the presence of at least two attesting witnesses; and

4) The attesting witnesses execution of the Will in the presence of the testator *and* in the presence of each other.

Florida law is also clear that a "testator must strictly comply with the requirements of the statute in order to create a valid will" (Allen v. Dalk, 826 So. 2d 245, 247 (Fla. 2002)).

An essential element of compliance is for the witnesses to sign the Will in the testator's and each other's presence (Simpson v. Williamson, 611 So. 2d 544, 546 (Fla. 5th DCA 1992)).

An improperly attested will may not be admitted to probate (Jordan v. Fehr, 902 So.2d 198, 201 (Fla. 1st DCA 2005)).

The purpose of the statute is to assure the signature on the Will is that of the testator and to assure the circumstances under which the testator's signature was affixed to the document (Manson v. Hayes, 539 So. 2d 27, 28 n.2 (Fla. 3d DCA 1989)).

FACTS AT ISSUE IN THE CASE

In Price v. Abate, 2009 WL 559908 (Fla. 5th DCA Mar 06, 2009), the 5th DCA was asked to determine the definition of the word "presence" for purposes of witnessing a Will under the Florida Statutes. The case involved a summary judgment order under which a Probate Court Judge ruled that a witness' mere presence in a room at the time a testator executed his Will was insufficient to meet the "properly attested to" requirement under the Florida Statutes.

The case originated from the decedent's heirs objection to the admission of a purported lost will to probate.

The heirs objection was predicated upon the witness' testimony that:

1) None of the witnesses were in the same room as the testator at the time he executed his Will;
2) Neither of the witnesses signed the Will in the presence of the other; and

3) The witnesses were unaware of nature of the document they were witnessing.

THE OPINION OF THE PROBATE COURT

Based on the witness' testimony, the Probate Court concluded that because the witnesses were not in the same room as the testator when he signed the purported Will, they were not in his "presence," and rejected admission of the Will to probate.

THE OPINION OF THE FLORIDA CIRCUIT COURT OF APPEALS

On appeal, the 5th DCA upheld the Probate Court's ruling based upon the Florida Supreme Court's rationale in State v. Werner, 609 So.2d 585 (Fla. 1992). While addressed in a different context, the court in Werner defined the word "presence" for purposes of the lewd and lascivious act statute and concluded that a

"child need not be able to articulate or even comprehend what the offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation to occur."

The 5th DCA reasoned, in making its ruling, the fact neither witness was in the vicinity of the other or the testator at the time the Will was executed was insufficient to satisfy the statutory requirement.

COMMENT:

A similar result was recently reached in the matter of the Will of Christopher E. DiPasquale in the state of New York. There, the New York court held that certain formalities exist in the course of the execution of a Will, and it must be established that the testator was aware:

1) That he or she was signing their Will;
2) Of his or her assets and there approximate value; and
3) Of the purpose of the witnesses and that he or she requested them to act in that capacity.

When those formalities are not observed (in the New York case the witnesses were unable to show that the testator was aware that he was making his will or

that the witnesses would be witnessing it), a court has no other option but to deny probate.

LESSONS TO BE LEARNED:

The lesson of Price v. Abate is that before any estate planning documents are executed, the attorney should thoroughly review each document with the testator and insure the documents dispose of his or her estate in accordance with his or her specific intent.

Once completed, the witnesses and notary should acknowledge *their* presence for the testator's execution of his or her estate planning documents. All should sign in the presence of each other.