GUTTER CHAVES JOSEPHER RUBIN FORMAN FLEISHER MILLER P.A.

TAX, BUSINESS, & ESTATE AND TRUST LITIGATION UPDATE

June 2, 2018
An Electronic Newsletter of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A.

CONTENTS

ABOUT OUR FIRM

We are a boutique law firm that seeks to protect and enhance the individual, family and business wealth of our clients in the following principal practice areas: Planning to Minimize Taxes (U.S. & International) - Probate & Trust Litigation - Estate Planning, Charitable, Marital & Succession Planning - Business Structuring & Transactions - Trusts & Estates Administration - Tax Controversies - Creditor Protection.

Court Stops Beneficiaries From Commuting Trust [Florida]

By Charles (Chuck) Rubin and Jenna Rubin

EXECUTIVE SUMMARY: An income beneficiary of a trust and the trust remaindermen were unable to successfully commute and terminate a trust.

FACTS: A revocable trust became irrevocable at the death of the settlor. The settlor provided for an income interest for her son for his life, with the remainder to pass to three educational institutions at the son's later death.

The son and the remaindermen entered into an agreement to terminate the trust, and divide the $3 million of trust assets between them based on their actuarial interests. The trustee of the trust was not a party to the agreement, and did not agree to the early termination.

The son filed a complaint against the trustee to terminate the trust in accordance with the agreement, citing Fla.Stats. §§736.04113 and 736.04115. Fla.Stats. §736.04113 allows for judicial modification of an irrevocable trust on petition of a trustee or a qualified beneficiary if: (a) the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill; (b) because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or (c) a material purpose of the trust no longer exists. Fla.Stats. §736.04115 similarly allows judicial modification if compliance with the terms of a trust is in the best interests of the beneficiaries, taking into account the intent of the settlor and the current circumstances and best interests of the beneficiaries.

Both parties moved for summary judgment, and the trial court ruled in favor of the son, allowing termination of the trust. The trial court held that the termination was in the best interests of the beneficiaries since it would preserve trust assets by eliminating unnecessary expenses relating to trust administration. On appeal, the appellate court reversed the trial court and directed that summary judgment be entered in favor of the trustee barring the termination of the trust.

COMMENTS: There are few income beneficiaries and remaindermen who would not want to commute their trusts and receive direct and immediate access and ownership over trust assets if given the opportunity. And in fact, this can be accomplished in Florida if the beneficiaries can satisfy a court that it would be in their best

More About Our Firm

The firm and its attorneys have been recognized in numerous peer rating guides, such as U.S. News & World Report law firm rankings, Best Lawyers, Martindale-Hubbell, Chambers, Who's Who in American Law, Florida Trend's Legal Elite, Superlawyers, and South Florida Legal Guide Top

interests (for post-2000 trusts) or that trust purposes no longer exis,. have been fulfilled, or have become illegal, impossible, wasteful, or impracticable to fulfill. Fla.Stats. §§736.04113 and 736.04115. Before this decision, the desires of settlors to retain assets in trust for beneficiaries to avoid vesting of significant assets in their hands, to protect them from creditor claims, to have third party or professional asset management, and to achieve the other benefits of trust ownership could be easily thwarted if courts are lenient in applying those statutory provisions... Here though, the appellate court recognized that the settlor's intent is the polestar of trust interpretation and that early termination of the trust based on common circumstances applicable to many trust administrations would thwart that intent.

The appellate court noted that the trustees' fees were customary, there were no unusual administrative expenses, and there had been no invasion of principal. It also indicated that market fluctuations did not create a real risk that the settlor's intent would be thwarted. The court noted "[i]f we were to affirm the trial court's ruling, beneficiaries could have trusts terminated simply by stating that they did not want to pay trustees' fees, administrative expenses, or be concerned with market fluctuations."

The case is instructive since there is little case law that interprets the specific requirements for judicial modification in the subject statutes. It makes terminating a trust more difficult by holding that barring other circumstances, mere savings on future administrative expenses, and the risk of market fluctuations will not be not enough to meet the requirements for judicial modification or termination.

The case also illustrates the benefits of having the trustee on board when petitioning to terminate a trust. If the trustee and all the beneficiaries reach an agreement, it is more likely than not that a trial court will approve termination when presented with a petition invoking the modification statutes and an agreed order to sign. However, the case also suggests that even with the trustee's participation, an activist trial court may decline to sign off on the termination based merely on the grounds put forth by the beneficiaries in this case.

If the trustee agrees with the beneficiaries, and the Florida statutory requirements relating to date of the trust and the applicable rule against perpetuities allow it, another route to terminate a trust might be through nonjudicial modification under Fla.Stats. §736.0412. Alternatively, if the settlor is still living, common law modification or termination (judicial or nonjudicial) may be allowable by agreement between the settlor and beneficiaries, without regard to the trustee's consent.

There are other avenues in Florida that can allow, under proper circumstances, for the modification or termination of a trust. A chart previously prepared by the authors of this posting that summarizes the various approaches (and updated for this case) is available for download here [follow the download instructions to save the file on your computer and then click the file to open it].

Horgan v. Cosden, 2018 WL 2374443 (Fla. 2nd DCA 2018)

HOMESTEAD BOOK ANNOUNCEMENT

In case you missed the announcement last week, Florida Tax Publications LLC has published Charles (Chuck) Rubin's treatise on Florida homestead law, entitled Rubin on Florida Homestead. This 240 page eBook/PDF is the only publication that covers all aspects of Florida homestead law, in depth but also in an understandable manner. Visit www.rubinonfloridahomestead.com for more information.

POSSIBLE FIX COMING TO CHARITABLE GIFTING PROBLEM

By Charles (Chuck) Rubin

For many taxpayers, the 2017 tax law changes removed an incentive to many taxpayers to make charitable contributions. As an itemized deduction, charitable contributions provide a deduction only to taxpayers who itemize their deductions. With a much larger standard deduction, and reductions in available deductions for state and local taxes and mortgage interest, many taxpayers who used to itemize will no longer do so. This is especially true for lower and middle income taxpayers. Thus, many charities expect reductions in gifting to them do to the loss of income tax benefits to donors.

A bipartisan bill, the Charitable Giving Tax Deduction Act, has been introduced into the House of Representatives that would address this issue. The Act would make charitable deductions an "above-the-line" deduction. This means that taxpayers can deduct contributions against their income, whether or not they itemize their deductions. The income tax incentive to make charitable gifts would thus be restored, and even enhanced from the pre-2017 tax law changes.

Whether the bill will pass is anyone's guess at this time. Its bipartisan support and its charitable nature probably gives it more of a shot to pass than most bills.

TAKEAWAY FROM RECENT DECISION ON FLORIDA ATTORNEY EXTRAORDINARY ATTORNEY FEES FOR ORDINARY ADMINISTRATIVE WORK IN AN ESTATE [FLORIDA]

By Charles (Chuck) Rubin

In this case, the Personal Representative sought fees for serving as both PR and attorney for the estate - while not totally clear from the opinion, it appears the PR sought those fees using the presumptively correct fee Florida statutory fee schedule schedule.

The PR also engaged outside counsel to assist with some matters. It is the fees for that outside counsel that the court was principally concerned with. The court ended up substantially reducing the fees sought by the

outside counsel either outright, or deferring the consideration of some of those fees until later since some of them were too premature for the court to rule on. Some of the conclusions of the court were:

a. Work by the office of the outside attorney to determine addresses of 53 interested persons for purposes of receiving formal notice regarding a determination of beneficiaries and pertaining to the sale of property and determination of homestead did not constitute "extraordinary" services entitling an attorney for compensation. Instead, such work was of the "ordinary" services character. The court did note that proceedings for determination of beneficiaries can be considered extraordinary in appropriate circumstances.

b. Work by outside attorneys to strike a late claim upon failure of a claimant to file an independent action were similarly not "extraordinary" services of the attorneys.

c. Review by outside attorneys of prepared estate income tax return was determined to be duplicative of the Personal Representative's and CPA's efforts.

d. Paralegal time of outside attorney's office relating to preparing addresses and Fed Ex mailers, processing paperwork to the computer, scheduling hearings, coordinating phone conferences, and similar services were found to be administrative and secretarial in nature and not legal services.

e. In regard to the employment by the estate of multiple attorneys, the court noted: "While parties have the right to employ as many lawyers as they choose, the Court will not assess lawyer fees for or against any party for more than one lawyer for a matter in which no more than one lawyer is required. . .As such, duplicative time charges by multiple attorneys working on the case are generally non-compensable and the Court cannot award compensation for various extensive conferences between lawyers without any indication of how those conferences advanced the case. . .. Finally, "excessive time spent on simple ministerial tasks such as reviewing documents or filing notices of appearance" is normally not compensable. . . Nor are duplicative reviews and consultations by numerous attorneys.

It appears that most of the problems here would not be problems as to compensating the PR or the attorney for the estate under ordinary fee arrangements - instead, the delegation of ordinary administrative tasks to another attorney while the PR and estate attorney were charging for ordinary services was a problem.

Note, that this opinion was issued by the Circuit Court, and is not an appellate decision. Thus, its precedential value in other cases may be limited

RE: ESTATE OF GINGER ECKERT ROBERTS, 15th Judicial Circuit in and for Palm Beach County, Probate Division, Case No. 50-2016-CP-004272. January 4, 2018

IRS Provides Some Relief for Post-Divorce Grantor Trust Rule Issues

By Charles (Chuck) Rubin

During happy days, one spouse (call him or her the "Donor Spouse") sets up an irrevocable trust for the benefit of the other spouse (call him or her the "Donee Spouse"). Under Code §672(e)(1)(A), a grantor of a trust is treated as holding any power or interest in a trust that is held by an individual who was the spouse of the grantor *at the time of the creation of such power or interest*. This typically results in grantor trust status for the trust since the Donor Spouse is treated as having retained rights to income and principal in the trust - with the Donor Spouse being taxable on some or all of the trust income.

Fast forward, and the happy couple is not so happy. They divorce, but the trust lives on. Since the testing under Code §672(e)(1)(A) of the spousal relationship that gives rise to the grantor trust status looks to the time of the creation of the trust, not the status in any later tax year, the Donor Spouse continues to be taxable to the Donor Spouse after the divorce. This is typically an unexpected and unwanted surprise to the Donor Spouse.

Previously, Code §682 remedied this circumstance by providing the Donee Spouse would be taxable on the income. Even then, it was not a perfect solution, with some income potentially remaining taxable to the Donor Spouse, such as capital gains.

In the 2017 Tax Act, special rules allowing shift of alimony tax consequences to a payee spouse were repealed. As part of that repeal, Code §682 was removed from the Code. This presents at least two major issues.

First, what happens to trusts that were formed prior to the repeal of Code §682? Notice 2018-37 has answered this question. It indicates that regulations will be issued to provide that former Code §682 will continue to apply to those older trusts, so the Donee Spouses will remain taxable thereunder. However, this applies only to spouses divorced or legally separated under a divorce or separation instrument executed on or before December 31, 2018, unless that instrument is modified after that date and the modification provides that the changes made by the 2017 tax act apply to the modification.

The second major issue is what happens to trusts for spouses whose divorce or separation occurs after December 31, 2018? Without Code §682, Donor Spouses should remain taxable on those trusts under the grantor trust rules because Code §672(e)(1) continues to apply. Ramifications for persons setting up spousal trusts, either during the marriage or providing for them in prenuptial or postnuptial agreements, is to consider these issues and perhaps to come up with a way to terminate the grantor trust treatment to the Donor Spouse upon divorce if that is the desired arrangement. One way perhaps may be to terminate the trust upon divorce - as to who the assets will be payable can be worked out with regard to the other tax and

planning consequences to such a termination or having such a termination provision in existence (e.g., provisions relating to the qualification for and termination of QTIP trust status). Another might be to trigger a mandatory reimbursement provision for the taxes to the Donor Spouse from the trust, or other Donee Spouse assets (again, subject to other applicable tax and planning considerations).

The Notice does request comments on whether guidance is needed regarding the continued application of the grantor trust provisions after divorce or separation. Perhaps Treasury is thinking about instituting its own regulatory relief to the application of the grantor trust rules after divorce or separation, but the Notice provides no indication that is on the table.

Notice 2018-37 (4/12/2018)

IRS GUIDANCE ISSUED ON NEW INTEREST STRIPPING RULES

By Charles (Chuck) Rubin

The Tax Cuts and Jobs Act substantially modified the interest stripping rules of Code §163(j). In a recent IRS notice, the IRS provided guidance on some of the provisions of the revised limitation and what new regulations will say. Here are some highlights:

a. The old provision allowed for the carryforward of disallowed interest expense to future years. The notice advises that any disallowed interest expense for the last tax year beginning before 1/1/2018 can be carried over (to be subject to the new provisions in the next year). Such a carryforward does not apply to an "excess limitation carryforward" from such prior year. A similar provision applies to such a carryover in regard to the Code §59A base erosion minimum tax.

b. The new rules allow interest to be deducted to the extent of the taxpayer's business interest income, plus 30% of adjusted taxable income, plus floor plan financing interest. The notice indicates that any interest paid or accrued by a C corporation on its indebtedness will be business interest income for these purposes. This is based on the premise, noted in the legislative history, that a corporation does not earn investment interest or investment income. This treatment will not apply to S corporations, however. The regulations will also address C corporations that are partners in partnerships paying interest.

c. The notice provides that the new provision applies at the level of a consolidated group, and also that regulations when issued will address other consolidated group issues.

d. The notice provides that the IRS will be issuing regulations to the effect that a disallowance and carryforward of an interest expense deduction under Code §164(j) will not impact the reduction in earnings and profits of a payor C corporation.

e. The notice indicates regulations will be issued regarding the application of Code §163(j) in the partnership scenario.

Notice 2018-28, 2018-16 IRB

OFFSHORE VOLUNTARY DISCLOSURE PROGRAM (OVDP) CLOSING IN SEPTEMBER

By Charles (Chuck) Rubin

The OVDP commenced in 2009, and provided a mechanism for U.S. taxpayers who had not complied with various non-U.S. information disclosure and tax payments to square up with the IRS without risk of criminal prosecution, but at the cost of fixed penalties, back taxes, and interest. Over 56,000 taxpayers have used one of its programs. With a steady decline in submissions from 18,000 in 2011 to only 600 in 2017, the IRS has determined to close the program on September 28, 2018. Taxpayers who have been on the fence about joining the program will need to do so before that date.

For now, the other special compliance initiatives for the reporting of foreign financial assets remain in place, principally:

a. IRS-Criminal Investigation Voluntary Disclosure Program;
b. Streamlined Filing Compliance Procedures;
c. Delinquent FBAR submission procedures; and
d. Delinquent international information return submission procedures.

IR-2018-52, March 13, 2018

STATE ASSET PROTECTION TRUSTS TAKE ANOTHER HIT

By Charles (Chuck) Rubin

Numerous states have statutes that allow for the creation of self-settled discretionary trusts that are protected from claims of the settlor while allowing the settlor to be a discretionary beneficiary. Such trusts are likely valid for settlors who are residents of the particular state, the property in the trust is located in that state, and no other state has jurisdiction over the parties. While these states seek the trust business of persons outside of their borders seeking these benefits, the validity of these benefits to such person has been an unanswered question.

In a recent Supreme Court of Alaska case (Alaska being one of the states that allow for asset protection trusts), judgment debtors transferred Montana property to an Alaska asset protection trust after judgments were entered against them. The judgment creditors brought an action to void the transfer to the trust as a

fraudulent conveyance in Montana applying Montana law, and prevailed. A bankruptcy trustee in a Chapter 7 bankruptcy brought in Alaska also sought to have the transfer voided as a fraudulent transfer in federal court, and prevailed.

The debtors sought to have both of these determinations voided because they should have been heard in Alaska state court. This was based on Alaska law that conferred jurisdiction regarding fraudulent conveyance claims involving Alaska asset protection trusts exclusively to Alaska state courts. The Alaska Supreme Court ultimately ruled:

a. The Full Faith and Credit Clause of the U.S. Constitution does not force states to be bound by another state's law that exclusive jurisdiction to hear matters based on a cause of action even though that state created the cause of action. The court also noted that a fraudulent transfer action is a "transitory" action so that it may be brought in a court having jurisdiction over the parties without regard to where the transfer took place.

b. The Supremacy Clause of the U.S. Constitution prevents a state from depriving federal courts of their jurisdiction.

The U.S. Constitution has always been a concern regarding the enforceability of the protections of state asset protection trust law when the debtor resides in another state or is exposed to the jurisdiction of another state's law or courts, but given the relative newness of these statutes there was a dearth of case law resolving whether these concerns would be recognized by courts hearing these cases. This case, along with other similar decisions that are springing up, validate these concerns and cast doubt on the ability of asset protection trust states to offer enforceable protection when the debtors reside outside of the state, have property outside of the state, or are subject to the jurisdiction of courts outside of the asset protection trust state.

Note that these constitutional concerns are not an issue when the trust is situated outside of the U.S. in a non-U.S. asset protection (at least when the assets are situated outside of the U.S).

Toni 1 Trust v. Wacker, 2018 WL 1125033 (Alaska 2018)

NO HOMESTEAD TREATMENT FOR PROPERTY OWNED BY A CORPORATION [FLORIDA]

By Charles (Chuck) Rubin

In a recent case, residential property was owned by a corporation. The sole shareholder and president of the corporation resided on the property, and the corporation had attempted to convey the residence to the shareholder, but its deed was effective and ineffective. In attempting to fend off a creditor, it was argued that

the property qualified as homestead property and was thus beyond the reach of creditors, and the trial court agreed.

Article X, section 4 of the Florida Constitution, which provides protection against forced sale for homestead property, reads in relevant part:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person. . . (emphasis added).

Since a corporation is not a natural person, that would seem to be the end of the argument that the property was homestead property. However, in Callava v. Feinberg, 864 So.2d 429, 431 (3rd DCA 2004), and other cases similar to it, property owned by a trust qualified as homestead property. Since a trust is not a natural person, why should ownership be a corporation be treated differently than a trust for this purpose?

In reversing the trial court, the 2nd DCA noted the crucial difference. In Callava, an individual beneficiary of the trust was found to hold an equitable interest in the subject property. Legal ownership was in the trust. Equitable ownership in a natural person is sufficient for these purposes – legal ownership is not required.

The problem for the shareholder in the instant case is that the shareholder had neither legal nor equitable/beneficial ownership, and thus the property did not qualify for homestead protection.

DeJesus v. A.M.J.R.K., 43 Fla. L. Weekly D331a (2nd DCA 2018)

THE U.S. WILL NOW BAR TAX DELINQUENTS FROM TRAVELLING ABROAD

By Charles (Chuck) Rubin

I wrote back in 2015 here about new legislation that gave power to the Secretary of State to deny, revoke or limit the passport of persons with delinquent taxes. Code §7345 provides that the Commissioner of the IRS will provide notice to the Secretary of the Treasury, who will then transmit that notice to the Secretary of State, in regard to a taxpayer's delinquent tax debt. Generally, it applies to delinquent tax debt over $50,000 (adjusted for inflation), for which a notice of lien has been filed or a levy has been made. Upon receipt of a Code §7345 certification, §32101(e) of the 2015 FAST Act provides that the State Department will generally deny an application for issuance or renewal of a passport from such individual, and may revoke or limit a passport previously issued to such individual.

In Notice 2018-01, the Treasury Department announced that the IRS and the State Department will begin implementing these provisions in January, 2018. The Notice provides information about the implementation of the rules.

The National Taxpayer Advocate in its annual report to Congress noted the right to travel internationally is a fundamental right of citizenship. Many civil libertarians would assert that the right to travel is more than this - it is a natural right of individuals that is not bestowed by governments, and should be restricted only for security purposes (including immigration and criminal enforcement). Restricting a fundamental and natural human right for the enforcement of civil debt obligations is a new chapter in U.S. tax law, and one that can be expected to give rise to constitutional challenges.

Notice 2018-01, Revocation, Limitation or Denial of Passport in Case of Certain Tax Delinquencies

FLORIDA CASE LAW UPDATE - TRUST, ESTATE & GUARDIANSHIP LITIGATION

By Jenna Rubin

Webb v. Blue, --- So.3d --- (Fla. 1st DCA 2018)

In this 1st DCA decision, we get another refresher on some aspects of Florida's homestead law. Namely, this decision gets into the issue of how to validly devise homestead property to a non-heir, when the decedent is survived by heirs (but not a spouse or minor children).

The decedent here was survived by no spouse and no minor children. He devised his "entire estate" to a friend, but did not specifically reference his homestead as part of the entire estate. Relatives of the decedent filed a Petition to Determine Homestead Status, asserting that the property was the decedent's homestead and descended to the decedent's heirs since there was no specific intent in the will to pass the homestead property to the friend. The trial court denied the Petition, finding that because the decedent was not survived by a spouse or minor child, he could freely devise his homestead to anyone and the will was clear about his intent.

On appeal, the Court affirmed the denial of the Petition. It reviewed Florida homestead law, and found that because the decedent was not survived by a spouse or minor children, he had two options: he could devise his homestead to his heirs to maintain the homestead's protection against creditors, or he could devise the homestead to someone other than an heir, which would make the homestead an asset of the estate subject to expenses and creditors. The Court held that because there is no constitutional, statutory, or common law requirement that the decedent specifically devise his homestead to his friend because he was survived by heirs, the language in his will about his "entire estate" was sufficient to devise the property to the friend and make the homestead an asset of the estate available to creditors.

Prewitt v. Kimmons, 237 So.3d 1158 (Fla. 5th DCA 2018)

This decision rested on whether sufficient questions of fact were raised to preclude summary judgment regarding claims of breaches of fiduciary duty. The beneficiary of an irrevocable trust sued her sister, one of the successor trustees, for breach of fiduciary duty, alleging that she had failed to distribute funds as provided for by the trust documents, failed to seek the return of $10,000 of trust assets wrongly retained by another of the successor trustees, and failed to return monies that she had purportedly misappropriated from the trust account prior to the settlor's death. The Court held that questions of fact remained over the breach of fiduciary duty claim, where: (1) there was record evidence that the trustee had paid lease payments on a car that was ultimately conveyed to a beneficiary in contravention of the terms of the trust, (2) there was record evidence that the other successor trustee had received $10,000 from the settlor for "safekeeping" purposes and those monies had never been returned to the trust nor had the successor trustee pursued the recovery of those funds, and (3) there was record evidence that in a time period when the settlor was in deteriorating heath and receiving morphine, the successor trustee improperly distributed money to herself and her daughter.

Lyublanovits v. Zebny, --- So.3d --- (Fla. 2nd DCA 2018)

This decision construes the language in F.S. 744.312 regarding the appointment of an emergency temporary guardian who is a professional guardian as the permanent guardian of a ward. The Court construed the language of the statute and the findings of fact in the trial court order, and found that the requirements had been met for this emergency temporary guardian to stay on as permanent guardian for the ward.

Specifically, F.S. 744.312(4)(b) provides as follows:

"An emergency temporary guardian who is a professional guardian may not be appointed as permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian. The court may waive the limitations of this paragraph if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify waiving the limitations of this paragraph."

In sum, a professional guardian who is serving as an emergency temporary guardian may stay on in one of two situations: (1) the ward or the ward's next of kin request they stay on, or (2) the court waives the limitations based on specific findings of fact regarding the special requirements of the guardianship.

Here, both occurred. The ward told numerous witnesses that he wanted the emergency guardian to stay on. The court also made findings of fact about the emergency temporary guardian's special skill set and qualifications which made her specially equipped to deal with this specific ward. Thus, the Court affirmed the emergency temporary guardian's appointment as permanent guardian of the ward.

Schlesinger v. Jacob, 240 So.3d 75 (Fla. 3d DCA 2018)

In this decision, the 3rd DCA adopts the requirement that an attorney's services must benefit a ward or the ward's estate in order to be entitled to fees. The Court focuses on the different standards under the statutes to determine entitlement to fees, versus the standard to determine amount and reasonableness of fees.

On one hand, F.S. 744.108(1) governs entitlement to fees, and provides:

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.

Case law construing this section has uniformly added in the requirement that the services must benefit the ward or the ward's estate, despite the fact that the word "benefit" appears nowhere in the statute.

On the other hand, F.S. 744.108(2) deals with the amount and reasonableness of fees once it is determined that an attorney is entitled to fees. It provides:

When fees for a guardian or an attorney are submitted to the court for determination, the court shall consider the following criteria:

(a) The time and labor required;
(b) The novelty and difficulty of the questions involved and the skill required to perform the services properly;
(c) The likelihood that the acceptance of the particular employment will preclude other employment of the person;
(d) The fee customarily charged in the locality for similar services;
(e) The nature and value of the incapacitated person's property, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person;
(f) The results obtained;
(g) The time limits imposed by the circumstances;
(h) The nature and length of the relationship with the incapacitated person; and
(i) The experience, reputation, diligence, and ability of the person performing the service.

It seems clear from the language of the statute that the results obtained by the lawyer would be relevant in determining the amount and reasonableness of the fee, rather than entitlement, but for now, courts have unanimously read this requirement into the threshold entitlement question as well.

I urge practitioners who are involved in guardianship matters to read the concurring opinion by Judge Robert Luck. He expresses his concerns about the added requirement that an attorney's services "benefit" the ward and notes that if fees are only awarded to successful litigants, family members may be less likely to bring guardianship actions out of concern for how the attorney will be paid, leaving vulnerable persons with less oversight by the courts.

Smith v. Smith, 232 So.3d 509 (Fla. 1st DCA 2017)

This decision involves the question of whether a prenuptial agreement precluded the surviving spouse from seeking the removal of the co-personal representatives of the decedent spouse's estate. The prenuptial agreement in question provided that the surviving spouse would "refrain from any action or proceeding to void or nullify to any extent the terms of any last will and testament or trust or testamentary substitute."

The co-personal representatives argued that the above provision prevented the surviving spouse from seeking their removal. The spouse argued that the provision did not affect her rights she later acquired through subsequently executed estate planning documents, and that the waiver provisions did not extend to the interest she acquired in her husband's estate when she was named an income beneficiary of the marital trust created under the terms of his last will executed after the marital agreement.

The Court held that because the premarital agreement expressly provided that the parties would not challenge "any" last will and testamentary trust, the parties clearly contemplated documents executed after the agreement. Thus, the wife was prevented from seeking to nullify the terms of her husband's last will by seeking the removal of the co-personal representatives named in the will.

Boren v. Rogers, --- So.3d --- (Fla. 5th DCA 2018)

Writs of certiori are rarely available in discovery disputes, because in most cases, the harm caused by an improper ruling on discovery can be corrected on appeal. Here, however, the trial court denied the plaintiff the ability to conduct discovery about a decedent's prior estate planning documents. Her entire argument was based on the idea that she was a beneficiary of these prior estate planning documents, and therefore she had standing to contest certain newer documents that she believed were the product of undue influence. Because the trial court simply granted the defendant's motion for protective order, without making a finding of good cause that the discovery not be had, the Court granted the petition for writ of certiori and quashed the protective order. It noted that the trial court's order was insufficient because the document request was seeking items that could be admissible at trial and were reasonably calculated to lead to admissible

evidence. Because the plaintiff would need these documents at trial to establish that she has standing as a prior interested beneficiary of the trust, the trial court's order effectively eviscerated her claim.

Cohen v. Shushan, --- So.3d --- (Fla. 2d DCA 2017)

In Florida, a "surviving spouse" receives certain benefits- they can take an intestate share of the deceased spouse's estate and they may also be entitled to an elective share, family allowance, homestead and so on. Under principles of comity, Florida courts will recognize the marriage of citizens of a foreign country if that marriage was valid under foreign law. Here, a surviving child of a decedent and a purported spouse of the decedent disagreed regarding whether a marriage would be deemed valid under Israel law, and as a result whether the marriage should be recognized by the Florida Probate Court for inheritance purposes.

After hearing expert testimony on Israeli law, the trial court held that because the surviving spouse would be considered the decedent's "reputed spouse" under Israeli law, she should take under Florida's intestacy law. A "reputed spouse," translated from Hebrew, means "Known in Public." The trial court found that because the arrangement of Israeli reputed spouses was viewed as a legal union, it should be recognized as a marriage in Florida.

The Appellate Court disagreed. In its review of Israeli law, the Court held that the only legal marriage in Israel is a religious marriage. It stated that, "[w]hile Israel has also established the reputed spouse relationship as something of an alternative marriage, and indeed, has conferred a broad array of rights to reputed couples that...are "equal" to marriage, Israeli law has purposely kept the status of these two relationships separate." Even though a reputed spouse in Israel may be entitled to inherit from their reputed spouse, the Court found that under Florida law, the "status" of being married is as important as the rights that come with marriage, and therefore only an Israeli religious marriage should be recognized.

Landau v. Landau, 230 So.3d 127 (Fla. 3d DCA 2017)

Normally, an injunction is considered to be a serious form of relief, and courts typically will not grant them unless a high burden is met. Here, however, the Court upheld an injunction freezing trust assets, based on the probate court's "inherent jurisdiction" to protect the assets under its supervision. The Court held that in this case, where the Trustee, who was also a beneficiary of the trust, had been sued by a beneficiary for an accounting, breach of trust, and other causes of action, the Trustee's due process was not violated by an injunction order freezing the trust assets until the accounting was completed.

DID YOU KNOW?

An average person laughs about 15 times a day.

FIRM ANNOUNCEMENTS

As noted above, Charles (Chuck) Rubin has published a treatise entitled Rubin on Florida Homestead. Visit www.RubinonFloridaHomestead.com for more information.

On April 9, 2018, Jenna Rubin presented on Probate and Trust Litigation at the Palm Beach County Bar Association's Probate and Trust Cross Training Seminar.

Sean Lebowitz was a panelist at the RPPTL presentation Guardianship Incapacity Hearing and Guardian Hearing.

Charles (Chuck) Rubin was awarded a JD Supra Readers Choice Award for 2018.

Sean Lebowitz was a panelist at Palm Beach Bench & Bar Conference presentation on the Florida Rules of Judicial Administration.

Charles (Chuck) Rubin authored the Recent Developments in January 2018 edition of Estate Planning, a Thomson Reuters Checkpoint national publication.

Sean Lebowitz presented on Probate and Trust Litigation 101 to the Boca Raton Chapter of the Paralegal Association of Florida, Inc.

DAILY TAX AND BUSINESS UPDATES AVAILABLE. View prior articles, updates that we didn't have room for in this newsletter, or read the above postings when they are first published, by visiting http://www.rubinontax.blogspot.com and http://www.rubinonprobatelit.blogspot.com. To read this issue, or past issues, online, visit http://www.floridatax.com/httpdocs/Resources.html (and scroll to the bottom of the page).

Most of the postings in this newsletter are first published on the Internet during the preceding month. If you use Twitter, you can be notified of postings as they occur by following #RubinOnTax. If you use Flipboard, search for the magazine "Rubin on Tax (and More)."

Having problems receiving this newsletter? Make sure that the E-mail addresses "taxandbusinessupdate@mail-list.com" and "crubin@floridatax.com" are marked as a friend or otherwise set to clear your spam filters! Subscribe and unsubscribe instructions accompany the email sending this newsletter - if not, send subscribe and unsubscribe instructions to crubin@floridatax.com. To be properly processed, unsubscribe instructions need to come from the applicable email address or send instructions

to crubin@floridatax.com with the specific address being unsubscribed.

Feel free to forward this newsletter on to anyone who you think may be interested.

The Usual Disclaimer: This newsletter summarizes for informational purposes only information of interest to the clients and friends of Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A. The information is condensed from, and a general summary of, legislation, court decisions, administrative rulings and other information, and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.

Gutter Chaves Josepher Rubin Forman Fleisher Miller P.A.
Boca Corporate Center
2101 Corporate Blvd., Suite 107
Boca Raton, Florida 33431
(561) 998-7847
www.floridatax.com