December 13th, 2012

8:30 a.m.

SunTrust

Palm Beach, FL

A Look at Amending, Altering and Changing Estate Plans

John J. Pankauski, J.D., LL.M.

Pankauski Law Firm PLLC

120 South Olive Avenue Suite 701

West Palm Beach, FL 33401

john@pankauskilawfirm.com

(561) 514 - 0900

I. Introduction

Tax attorneys and estate planners spend countless hours carefully crafting an estate plan for clients. Detailed, well-thought-out, and very specific clauses, provisions and dispositive schemes are considered and incorporated into carefully documents—not just wills and trusts, but also survivorship accounts, beneficiary designations, lifetime transfers (gifts/loans/sales), property agreements (prenups, postnups, cohabitation agreements, agreements to make a will or leave a devise). Counselors' diligence is intended to effectuate the intent of the client in an effort to preserve assets, minimize transfer, and other, taxes, and pass those assets to the client's chosen beneficiaries. All drafting attorneys are concerned when it appears that the documents which they have prepared are under "attack." And while, historically, one could not, generally, change a will or a trust, the trend is to permit your documents to be corrected and changed. Everything is different now.

a. Litigation Involving Your Estate Documents
    i. Rescission
    ii. Construction
    iii. Modification
    iv. Reformation
    v. Common mis-conceptions by well-intentioned probate/tax attorneys in court

b. Correcting Mistakes: A Look at Reformation
    i. Documents such as leases, deeds, and contracts have been reformed for decades.
    ii. Trend is to now permit reformation of trusts and wills which were previously "un-touchable" post-death

c. Choices in Probate Litigation
    i. Increased "options"
    ii. Strategic/procedural changes
    iii. Evidentiary issues
    iv. Reformation or altering beneficiary designations

d. Contesting, Changing and Correcting Your Documents: Has the Law Gone Too Far?
    i. Has "reformation trend" removed certainty from client's documents?
    ii. Never-before-considered bases for actions

II. Litigation Involving Your Estate Documents

a. Rescission-- The "Old Way" of Doing Business
    i. An equitable action where a party seeks to be placed back to prior status (often referred to as placing a party in status quo.) The party seeking rescission in essence disavows a document. *See Mazzoni Farms, Inc. v. DuPont*, 761 So.2d 306 (Fla. 2000).

    ii. Rescind a document or provision (declare it void or of no effect)

    iii. This is different than seeking damages.

    iv. One who accepts the benefits "under" a document (e.g. receives a trust distribution or partial/advance distribution pursuant to a will) is generally prohibited from later disavowing it (estopped from repudiating it). *Id.; Carman v. Gilbert*, 641 So. 2d 1323 (Fla. 1994) (renouncing the right to property is a condition precedent to contesting an instrument; pleading of renunciation is a necessary requirement to the filing of a petition to revoke probate of a will, but such a renunciation will be qualified in effect).

1. Consider: On a Monday, an estate beneficiary receives a specific devise (cashes the check). Generally, that beneficiary may not then file an action to rescind the will on Tuesday. While these concepts are perhaps more notable in commercial (e.g. contract) cases, they apply equally as well in will and trust cases.

v. Be careful for what you wish for. A successful rescission action means that valid, prior documents may be given effect. (What do prior documents say?)

vi. May have no statute of limitations. *McFall v. Trubey*, 992 So.2d 867, 869 (Fla. 2nd DCA, 2008) ("Statutes of limitations are not generally applied in equity actions.") But relief may be precluded based upon defenses of estoppel, laches, etc.

vii. Declaratory judgment actions. While courts typically do not render advisory opinions, they may declare rights when a party has presented the court with an actual bona fide conflict and the "ripening seeds of controversy" make litigation appear unavoidable. *Pembroke Ctr., LLC v. State, Dep't of Transp.*, 64 So.3d 737 (Fla. 4th DCA, 2011).

viii. Bases to Seek Rescission
    1. Fraud
        a. Must be pled with particularity or specificity. *See Eagletech Communications, Inc. v. Bryn Mawr Investment Group, Inc.* 79 So.3d 855 (Fla., 4th DCA, 2012).
    2. Duress
    3. Undue influence
        a. A form of fraud.
        b. Must be pled with particularity or allegations may be subject to a motion to dismiss. See *Van Meter v.*

Bank of Clearwater, 276 So.2d 241 (Fla. 2nd DCA, 1973);

c. "Particularity" means that the plaintiff/petitioner must allege facts describing the circumstances surrounding the undue influence: who committed it, by what means it was committed, when or where it was committed, how it was exerted. Regarding oral statements: identify what statements were made, the substance of the statements in some detail, a time frame, and the context. *See Williams v. Bear Stearns & Co.*, 725 So. 2d 397 (Fla. 5th DCA, 1998).

d. The "particularity" requirement creates "tension" with the general legal maxim that a complaint or petition must merely recite a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief..."*)* *See Fla. R. Civ. Pro. 1.110 (b(2).*

e. Procedural issue: shifting the burden of proof if the plaintiff/petitioner can demonstrate that

f. A will, any part of a will, and the revocation of a will, is (are) void if execution is procured by fraud, duress, mistake or undue influence. *F.S. § 732.5165.*

4. Mistake ("I thought I was signing a deed.....")
5. Insane delusion—*Levin v. Levin*, 60 So.3d 1116 (Fla., 4th DCA, 2011) "The law states that "[w]here there is an insane delusion in regard to one who is the object of the testator's bounty, which causes him to make a will he would not have made but for that delusion, the will cannot be sustained." *Miami Rescue Mission, Inc. v. Roberts*, 943 So.2d 274, 276 (Fla. 3d DCA 2006) (quoting *Newman v. Smith*, 77 Fla. 633, 82 So. 236, 236 (1919)). "An insane delusion is a 'spontaneous conception and acceptance as a fact, of that which has no

real existence adhered to against all evidence and reason.' " *McCabe v. Hanley*, 886 So.2d 1053, 1055 (Fla. 4th DCA 2004) (citation omitted)"

6. Lack of mental capacity
    a. Dementia
    b. Good days vs. bad days
7. Trial strategy/Proving your case: why mess with motions to dismiss when you can dis-prove the allegations at trial?

b. Construction

i. An action to interpret, or construe, the document. ("What does this mean, Your Honor?")

ii. May be (commonly) pled as a cause of action for declaratory relief or pursuant to a statute.

iii. How do you prove your case or defend your documents? If a document or provision is ambiguous, then extrinsic evidence may be considered by a court if relevant and otherwise admissible.

1. Generally a document will be interpreted, or construed, as a matter of law, on its own, by a court simply reading it and determining the client's intent from the plain language. The rules of construction, which similarly apply to wills and trusts, generally apply to all written instruments, including contracts.

2. Common issue: surviving spouse wants to get up on stand and say what the decedent told him/her.

    a. Common Issue: Remainder beneficiaries of marital trust at odds with lifetime beneficiary/surviving spouse over HEMS—What does health, education, maintenance and support mean?

b. Surviving Spouse: "My spouse wanted me to be able to take luxurious, expensive vacations each year, just like we did together when my spouse was alive."

3. Converse: if a document or provision is un-ambiguous, then a court is typically prohibited from resorting to extrinsic evidence when discerning the client's intent.

a. If the document is unambiguous on its face, generally the court will not entertain any testimony about the party's intent or purpose. (*Duval Motors Co. v. Rogers*, 73 So.3d 261 (Fla. 1st DCA 2011).)

b. Challenge: is extrinsic evidence necessary for a court to determine if the document is ambiguous or un-ambiguous? Does the court need background? Is the ambiguity latent or patent? Does it matter?

iv. Think You Are Going to Appeal? Think Again.

1. Whether a document is ambiguous or not is generally a question of law which is typically not disturbed absent abuse of discretion. This means that if you, as an attorney, don't "get it right" at the trial level, your likelihood of reversal at the appellate court is not great.
2. At the appellate level, an appellant is typically prohibited from raising legal issues for the first time. In other words, if you did not raise an issue at the trial level, you are prohibited from making that argument upon appeal.

v. Assisting the court in determining whether an ambiguity exists, and what the court may, or may not, consider in reaching that threshold issue, is very important and may turn on "technical" rules of evidence, construction or exclusionary principles. In other words, an advocate may or may not be able to merely "stand up" in court and provide oral argument. Rather, and most commonly, the court must have "something" in front of it

to make findings of fact and draw conclusions of law. In the end, evidence, or lack of evidence, carries the day.

c. Modification
    i. Judicial
        1. Best interests of beneficiaries
        2. Modification is not inconsistent with settlor's purpose
            a. Purposes of trust may be impracticable
            b. Circumstances not anticipated by settlor exist; compliance with the existing terms of the trust would defeat or substantially impair the accomplishment of a material purpose. See, e.g. *Florida Statues § 736.04113*
    ii. Non judicial (we need or want to change something)
        1. Consent of interested parties including trustee
        2. May be permitted even in the face of language prohibiting amendments or revocation (e.g. "this trust is irrevocable and may not be altered or amended….."
        3. May be effective only for certain trusts (e.g. trusts which have become irrevocable as of [date])
        4. Common example: trust document requires a trust company with a minimum of $X Trillion of assets under management to serve as trustee but the present trustee, a large corporate entity, no longer wishes to serve. The trust document fails provide the mechanism or procedure for appointment of successor trustees if the present trustee resigns and the beneficiaries desire a smaller corporate entity to serve. Solution: modify the trust to permit a corporate trustee with a smaller amount of assets under management to serve, and provide power to remove or appoint to beneficiaries or trust protector.

d. Reformation—The law has permitted courts to reform documents for decades (contracts, deeds, notes, mortgages, recorded declaration of condominium). Over time, the law has expanded and permitted trusts

to be reformed, to correct mistakes of fact or law. The law has inched its way along, now permitting wills to be reformed—even after death.

i. Documents which we typically have reformed
    1. Contracts, deeds, etc.
    2. Long history

ii. Bases for reformation
    1. Mistake of fact
    2. Mistake of law
    3. Mistake in inducement or expression

iii. General principles
    1. Not re-writing document
    2. Correcting a mistake
    3. Effectuate purpose of document
    4. Effectuate intent of parties

Example: **"The court may reform the terms of a trust, even if unambiguous, to conform to the terms of the settlor's intent if …….the terms of the trust were affected by a mistake of fact or law…."** *Florida Statues § 736.0415*

Example: "**The court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.**

In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plain meaning of the will." *Florida Statues § 732.615*

Example: scrivenor's error (wrong amount and everyone agrees; "fixing" a tax clause)

5. Plain meaning of document (settlor's intent) may be "ignored".
    a. A Court may consider relevant evidence of settlor's intent.

6. Mistake in expression or inducement

iv. Evidentiary, procedural and other matters
    1. Clear and convincing evidence
        a. "Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." -- *Black's Law Dictionary* (9th ed. 2009).
            i. "The evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue."....."Must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983).
            ii. *Owens-Corning Fiberglas Corp. v. Ballard, 749 So.2d 483* (Fla. 1999): "[A]n

intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *In re Adoption of Baby E.A.W.*, 658 So.2d 961, 967 (Fla.1995); see also *Reid v. Est. of Sonder*, 63 So. 3d 7 (Fla. 3rd DCA, 2011).

b. Compare to standard of proof in most civil trials (greater weight/preponderance): "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* (9th ed. 2009)
    i. "The more persuasive and convincing force and effect of the entire evidence in the case."--- *Fla. Std. Jury Instr. Civil 401.3*

c. A trial court's ruling (judgment or order) will be based upon findings of fact (and conclusions of law). The findings of fact will be typically upheld if supported by competent substantial evidence.
    i. A trial court commits error when it fails to make specific findings of fact when required. See *McKeegan v. Ernst*, 84 So.3d 1229 (Fla. 4th DCA, 2012) (freezing of trust assets/granting of temporary injunction was improper: lacked factual findings, due process rights violated, no notice and opportunity to be heard).

ii. In other words, a court has awesome power to correct or change your estate documents, but only if there is competent substantial evidence which demonstrates that a mistake in fact or in law existed.
iii. This has caused some to suggest that courts are re-writing your estate documents and subjecting your legal work to a new line of attack.

2. Reliance on extrinsic evidence is essential and admissible as long as relevant—even with an un-ambiguous document
    a. Specific testimony
    b. Prior drafts
    c. Prior executed documents
    d. Communications
    e. Circumstances surrounding the drafting and execution of document in question

3. "Typical" or "threshold" issue of ambiguity is not an issue in reformation actions as it may be in construction actions. Rather, evidentiary issues which may assist the court in discerning the decedent's intent carry the day.
    a. Consider: hearsay, "dead person's" statute, state of mind exception, "opening the door". Can you get opinion testimony in? Even if self-serving?

4. Are Probate Courts less "formal" than a trial division or civil division? No (shouldn't be). Most if not all hearings are typically evidentiary and the trial will certainly be, requiring that the rules of evidence be followed, and due process rights be respected. This means that you must prove your case, introduce evidence, demonstrate why it is relevant and should not

be excluded, and anticipate objections and argument of opposing counsel. Failure to follow the rules of civil procedure and evidentiary rules is error. See *Fernandez v. Guardianship of Fernandez*, 36 So.3d 175 (Fla., 3rd DCA, 2010) (" As this was an evidentiary hearing in a contested proceeding, the matter should have been tried as is customary in a bench trial. The parties should have been given an opportunity to make opening and closing statements. Each party should have been given an opportunity to present evidence, call and question witnesses, and cross-examine the other side's witnesses. When the guardian ad litem gave her report, cross-examination by the parties should have been allowed.") See cases which also state that relief which is not requested (or framed by the pleadings or noticed for hearing) may not be properly sought by a party and a court is without authority to grant such relief (as such is violative of due process): *Bank of America, NA v Lane, 76 So.3d 2007* (Fla. 1st DCA 2011) (default judgment could not be set aside by court on its own motion where such was not presented by pleadings, not noticed for hearing nor litigated by the parties); *Franklin & Marbin PA v Mascola*, 711 So.2d 46 (Fla., 4th DCA, 1998) (improper for court to enter money judgment when only charging lien was noticed for hearing and money judgment was not tried by consent); *Donkersloot v Donkersloot*, 993 So.2d 126 (Fla., 2nd DCA, 2008).

5. Rulings must be based upon findings of fact which will evolve from the evidence or lack thereof.
    a. Oral argument of counsel is not evidence. *Korte v. U.S. Bank Nat. Ass'n*, 64 So.3d 134 (Fla. 4th DCA, 2011); *Covenant Trust Co. v. Guardianship of Ihrman*, 45 So.3d 499 (Fla., 4th DCA, 2010), rehear. den. Nov. 3, 2010.

6. Tort claims and fraud get a jury trial. Equity actions typically don't.

7. Attorneys fees may be awarded specifically for losing a reformation action, or courts may award fees to anyone who provided a "benefit" to the trust or estate. Courts may have the discretion to direct from whose share of the trust or estate fees shall be paid from.

    a. There may or may not be other "fee shifting" statutes which may or may not be applicable if you are in the "probate" court or are not seeking damage but merely equity.

v. Other documents which create property interests

1. Marital settlement agreements
   Example: Prenup says upon my death, surviving spouse shall have right to income and may receive principal for limited purposes from my financial account at XYZ Bank. Will states: all to my surviving spouse but references the terms of the prenup.
2. Prenuptial agreement
3. Beneficiary designations
    a. Consider: Deceased Spouse fails to remove a former spouse as a designated beneficiary (e.g. life insurance contract.) Who "gets" the insurance proceeds---the estate, the named former spouse beneficiary, or an alternate beneficiary? Some states treat beneficiary designations naming former spouses as void upon the dissolution of a marriage. (Minnesota Statute M.S.A. §524.2-804). Other states may not have such a statute, but, by caselaw, uphold the beneficiary designation absent specific beneficiary designation language and references in

the property distribution document. (*Crawford v. Barker*, 64 So.3d 1246 (Fla. 2011).) But see new F. S. 732.703.

b. No presumption of tenancy by entireties over bank account where clients checked box for joint tenancy on bank form. *Wexler v. Rich*, 80 So.3d 1097 (Fla. 4th DCA, 2012).

4. Orders on property distribution

vi. Who may reform and when?

1. Courts !
   a. The Court has authority to reform the Trust regardless of whether such relief was sought in the pleadings or requested by any party. *Schroeder v. Gebhart*, 825 So. 2d 442 (Fla. 5th DCA 2002).
   b. Courts may also intervene in the administration of a trust. *Florida Statutes, § 732.615, 736.0201.*
2. Interested parties—those whose interest may be affected by the outcome of the litigation.
3. Can you reform a will after discharge of the estate's fiduciary?

III. Examples

a. Non-paternity child. Decedent was married to Spouse and they had one child during their marriage. .....Or so Decedent thought. Decedent "leaves" estate to Spouse for life remainder to child. Upon the death of Decedent, Decedent's Brother reveals to you that the Decedent's child was not the product of the marital relationship between Decedent and Spouse. In actuality, Spouse cheated on Decedent and the child's paternity was actually attributable to another man. Brother states that he knew that Decedent would not want an estate to "go" to a non-child or to a cheating spouse. Brother states that the most important things to the Decedent were family and honesty.

b. Charitable devise. Decedent "leaves" a substantial pecuniary devise to the Pankauski Charity, with the remainder of the corpus/estate passing in trust for the Decedent's heirs. After death and prior to an order discharging the fiduciary, an heir files a reformation action, seeking to "remove" the pecuniary charitable devise, arguing that since the devise was drafted into the controlling document, the charity later began to support (it's an election year, so take your pick: [ ] left wing causes and social issues [ ] right wing causes and social issues), which, it is alleged, the Decedent would never have supported and which were antithetical to the Decedent's values and morals.

IV. Conclusions