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Formalities of Will Execution In Probate Litigation Cases

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Authority:
§732.502 Fla. Stat.
Bain v. Hill, 639 So. 2d 178 (Fla. 3rd DCA 1994)
Price v. Abate, 9 So. 3d 37 (Fla. 5th DCA 2009)

*** Statutes and Constitution are updated through the 2013 Regular Session.***
*** Annotations are current through February 7, 2014 ***
TITLE 42. ESTATES AND TRUSTS (Chs. 731-739)
CHAPTER 732. PROBATE CODE: INTESTATE SUCCESSION AND WILLS
PART V. WILLS
GO TO FLORIDA STATUTES ARCHIVE DIRECTORY
Fla. Stat. § 732.502 (2013)

§ 732.502. Execution of wills

Every will must be in writing and executed as follows:

(1) (a) *Testator's signature.*

1. The testator must sign the will at the end; or

2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by the testator's direction.

(b) *Witnesses.* --The testator's:

1. Signing, or

2. Acknowledgment:

a. That he or she has previously signed the will, or

b. That another person has subscribed the testator's name to it,

must be in the presence of at least two attesting witnesses.

(c) ***Witnesses' signatures.*** **--The attesting witnesses must sign the will in the presence of the testator and in the presence of each other**.

(2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the will was executed. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.

(3) Any will executed as a military testamentary instrument in accordance with *10 U.S.C. s. 1044d*, Chapter 53, by a person who is eligible for military legal assistance is valid as a will in this state.

(4) No particular form of words is necessary to the validity of a will if it is executed with the formalities required by law.

(5) A codicil shall be executed with the same formalities as a will.

HISTORY: S. 1, ch. 74-106; s. 21, ch. 75-220; s. 11, ch. 77-87; s. 961, ch. 97-102; s. 42, ch. 2001-226; s. 5, ch. 2003-154.

Bain v. Hill

Court of Appeal of Florida, Third District
639 So. 2d 178 (Fla. 3rd DCA 1994)
July 5, 1994, Filed
CASE No. 94-302

Reporter
639 So. 2d 178; 1994 Fla. App. LEXIS 6609; 19 Fla. L. Weekly D 1435

JANINE BAIN, Appellant, v. LINDA HILL, as personal representative of the Estate of Raymond E. LeDuc, Appellee.

Subsequent History: [1]** Released for Publication July 21, 1994.

Prior History: An Appeal from the Circuit Court for Dade County, Allen Kornblum, Judge.

Core Terms

the will, testator, witnesses, signatures, attesting witness, testator's name, subscribed, Signing

Case Summary

Procedural Posture
Appellant sought review of an order of the Dade County Circuit Court (Florida) admitting a will to probate following an evidentiary hearing.

Overview
The trial court admitted a will to probate after an evidentiary hearing. The court of appeals affirmed. The conclusion that the testator signed at the "end" of his will was supported by the law. Also, the fact that there was evidence that at least one of the witnesses may have signed before the testator did not invalidate the will. As long as the witnesses saw the testator sign the will and the witnesses signed it in his presence and that of each other, the order in which this occurred made no difference. There could be no fraud when all parties sat at the same table and affixed their signatures in the presence of each other regardless of who signed first.

Outcome
The order admitting the will to probate was affirmed because the testator's signature was valid and because the order of the signatures of the testator and the witnesses was of no consequence.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Formalities > General Overview

HN2 See *Fla. Stat. ch. 732.502* (1993).

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Formalities > General Overview

HN1 There can be no fraud when all parties sit at the same table and affix their signatures in the presence of each other regardless of who signs first.

Counsel: William A. Greenberg, for appellant.

Carlson & Bales and Curtis Carlson and Julie A. Moxley, for appellee.

Judges: Before SCHWARTZ, C.J., and JORGENSON and GODERICH, JJ.

Opinion by: SCHWARTZ

Opinion

[*179] SCHWARTZ, Chief Judge.

This is an appeal from an order admitting a will to probate after an evidentiary hearing. We affirm.

The conclusion below that the testator signed at the "end" of his will, *§ 732.502(1)(a)1, Fla. Stat.* (1993), [1] is squarely supported by *Bradley v.*

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[1] ***HN2*** **Execution of wills**.--Every will must be in writing and executed as follows:
(1)(a) Testator's signature.--
1. The testator must sign the will at the end; or
2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by his direction.
(b) Witnesses.--The testator's:
1. Signing, or
2. Acknowledgment:
a. That he has previously signed the will, or
b. That another person has subscribed the testator's name to it,
must be in the presence of at least two attesting

Bradley, 371 So. 2d 168 (Fla. 3d DCA 1979), in which, incredibly, the testator signed the will at the same erroneous place on the same Ramco form as Mr. LeDuc. **We also reject the alternative claim that the attestation of the will was insufficient under *section 732.502(1)(b)* & *(c)* [2] because there was evidence that at least one of the witnesses signed before the testator. Even if this were the case, we agree with *Waldrep v. Goodwin, 230 Ga. 1, 195 S.E.2d 432 (1973)* that so long as (a) the witnesses saw the testator sign the will and [**2] (b) they signed it in his presence and that of each other, the order in which this occurred makes no difference. As the court stated:**

> ***HN1* [T]here can be no fraud when [as in the present case] all parties sit at the same table and affix their signatures in the presence of each other regardless of who signs first**.

Waldrep, 195 S.E.2d at 435; accord *In re Estate of Lee, 225 Cal.App.2d 578, 37 Cal.Rptr. 572 (1964)*; *Conway v. Conway, 14 Ill.2d 461, 153 N.E.2d 11 (1958)*; *Hopson v. Ewing, 353 S.W.2d 203 (Ky.App.1961)*; *Wilkinson v. White, 8 Utah 2d 336, 334 P.2d 564 (1959)*.

Affirmed.

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witnesses.

(c) Witnesses' signatures.--The attesting witnesses must sign the will in the presence of the testator and in the presence of each other. . . .

§ 732.502, Fla. Stat. (1993).

[2] **[**3]** *Ibid.*

Price v. Abate

Court of Appeal of Florida, Fifth District
9 So. 3d 37 (Fla. 5th DCA 2009)
March 6, 2009, Opinion Filed
Case No. 5D08-2109

Reporter
9 So. 3d 37; 2009 Fla. App. LEXIS 3619; 34 Fla. L. Weekly D 502

FRAN PRICE, Appellant, v. KATHLEEN L. ABATE, DAVID W. FLANIGAN, MICHAEL D. FLANIGAN, PATRICIA L. FLANIGAN, PATRICK J. FLANIGAN, WILLIAM J. FLANIGAN, CAROLE A. LATKOVIC, and SHANNON ODDERA. Appellees.

Subsequent History: As Corrected October 28, 2009.

Prior History: **[**1]** Appeal from the Circuit Court for Seminole County, Kenneth R. Lester, Jr., Judge.

Core Terms

the will, trial court, summary judgment, witnesses, probate, heirs, issue of material fact, lascivious, attested, lewd, personal representative, statutory requirements, deposition testimony, trial court's ruling, died intestate, formalities, purported, notarize, provides, purposes, testator, vicinity, genuine

Case Summary

Procedural Posture

Appellant personal representative petitioned the Circuit Court for Seminole County (Florida), for administration of the decedent's estate. Appellee intestate heirs petitioned to determine the beneficiaries of the decedent's estate. The personal representative petitioned to establish a lost will. The trial court issued a final summary judgment order determining that the decedent had died intestate. The personal representative appealed.

Overview

The personal representative alleged that the decedent had executed a valid will but that it had not been found. The decedent's heirs asserted that the personal representative could not sustain her burden of proving that the decedent's purported lost will had been properly attested to under *§ 732.502 Fla. Stat.* (2005). To support their claim, the heirs cited to the deposition testimony of the only living witnesses to the execution of the decedent's purported lost will, two bank employees who witnessed the will. The trial court concluded that entry of summary judgment in favor of the heirs and against the personal representative was warranted because the uncontradicted evidence demonstrated that the bank employees did not sign the purported will in the presence of each other as one employee was not in the presence of the other employee when the employee signed the document. On appeal, the court affirmed the trial court's conclusion that the mere fact that the two employees were in the vicinity of one another when one employee signed the decedent's will at the bank was insufficient to satisfy the statutory requirement that the employee signed the will in the other employee's presence.

Outcome

The trial court's ruling was affirmed.

LexisNexis® Headnotes

Estate, Gift & Trust Law > Wills > Will Contests > Execution

Estate, Gift & Trust Law > Wills > Lost Wills

Evidence > Burdens of Proof > Allocation

HN1 An essential prerequisite to establishing and probating a lost will is proof that the lost document was executed in accordance with the formalities set forth in *§ 732.502, Fla. Stat.* (2005). A testator must strictly comply with the requirements of the statute in order to create a valid will.

Estate, Gift & Trust Law > ... > Probate > Probate Proceedings > General Overview

Estate, Gift & Trust Law > Wills > Will Contests > Execution

Evidence > Burdens of Proof > Allocation

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

HN2 *Section 733.502, Fla. Stat.* (2005), provides that, among other things, it is essential to the validity of a will for the witnesses to sign in the testator's and each other's presence. The proponent of a will bears the burden of establishing prima facie its formal execution and attestation. *Section 733.107(1), Fla. Stat.* (2005). An improperly attested will can not be admitted to probate.

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

Criminal Law & Procedure > ... > Sex Crimes > Indecent Exposure > Elements

Criminal Law & Procedure > ... > Sex Crimes > Obscenity > Elements

Criminal Law & Procedure > ... > Sexual Assault > Corruption of a Minor > Elements

HN3 The Florida lewd and lascivious act statute, *§ 800.04(3), Fla. Stat.*, provides that any person who knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years without committing the crime of sexual battery is guilty of a felony of the second degree.

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

Criminal Law & Procedure > ... > Sex Crimes > Indecent Exposure > Elements

Criminal Law & Procedure > ... > Sex Crimes > Obscenity > Elements

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Children > Elements

Criminal Law & Procedure > ... > Sexual Assault > Corruption of a Minor > Elements

HN4 While a child need not be able to articulate or even comprehend what an offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation to occur.

Counsel: Alan B. Taylor of Litchford & Christopher, Orlando, and G. Charles Wohlust of G. Charles Wohlust, P.L.C., Winter Park, for Appellant.

Richard L. Pearse, Jr. of Richard L. Pearse, Jr., P.A., Clearwater, for Appellees.

Judges: PALMER, C.J. TORPY and EVANDER, JJ., concur.

Opinion by: PALMER

Opinion

[*38] PALMER, C.J.,

In this probate proceeding, Fran Price appeals the final summary judgment entered by the trial court in favor of the appellees on Price's petition for the administration of a lost will. Finding no genuine dispute as to any material issue of fact, we affirm.

On April 21, 2005, Price filed a petition seeking the administration of the estate of Thomas Flanigan. The petition explained that Flanigan died on February 15, 2005, and that Price was the personal representative of Flanigan's "undiscovered will".

The petition averred that "[t]he original of the will which is known to exist as of January 2005 has not been found and may not exist at this time". The petition requested that the trial court admit Flanigan's estate to probate and that Price be appointed as the personal representative of the estate.

After the trial court issued letters **[**2]** of administration to Price, Flanigan's eight intestate heirs filed a petition to determine the beneficiaries of Flanigan's estate. In response, Price filed a petition to establish a lost will. Price's petition alleged that Flanigan had executed a valid will but that it had not been found.

Upon review of cross-motions for summary judgment, the trial court issued a final order determining that Flanigan had died intestate. Of importance to this appeal, the trial court determined that there were no disputed issues of material fact and that, as a matter of law, Flanigan died intestate because the lost will which Price was seeking to enforce was invalid because it had not been executed with the formalities required by *section 732.502 of the Florida Statutes* (2005). This appeal timely followed.

HN1 An essential prerequisite to establishing and probating a lost will is proof that the lost document was executed in accordance with the formalities set forth in *section 732.502 of the Florida Statutes*. 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)*.

HN2 *Section 732.502 of the Florida Statutes* provides that, **[**3]** among other things, it is essential to the validity of a will for the witnesses to sign in the testator's and each other's presence. *Simpson v. Williamson, 611 So. 2d 544, 546 (Fla. 5th DCA 1992)*. The proponent of a will bears the burden of establishing *prima facie* its formal execution and attestation. *See §733.107(1), Fla. Stat.* (2005). An improperly attested will can not be admitted to probate. *Jordan v. Fehr, 902 So.2d 198, 201 (Fla. 1st DCA 2005)*.

In seeking summary judgment, Flanigan's heirs asserted that Price could not sustain her burden of proving that Flanigan's purported lost will had been properly attested to. To support their claim, the heirs cited to the deposition testimony of the only living witnesses to the execution **[*39]** of Flanigan's purported lost will, bank employees Dalila Ramos and Donna Fazio.

Ramos testified that Flanigan asked her to notarize a hand-written piece of paper which stated "that he was leaving basically everything that he owned to Fran Price." Ramos testified that she did not remember if Flanigan signed the paper in her presence or not. Ramos further testified that after she notarized the document she called over a teller named Donna Fazio to act as a [4] witness. Critical to this appeal, she further testified:**

> **Q. Now, when you signed it, was Donna Fazio present?**
>
> **A. No.**
>
> * * *
>
> **Q. And Donna Fazio did not see you sign the document; is that correct?**
>
> **A. That is correct**.

Donna Fazio's deposition testimony was consistent with the testimony submitted by Ramos. In that regard, Fazio testified that Ramos summoned her by using a phone intercom, and that Ramos asked her to witness a document:

> **Q. You say by the time you got there, everything was already signed?**
>
> **A. Yes, sir.**
>
> **Q. Now, did you see anybody sign?**
>
> **A. No.**
>
> **Q. Were you present when anybody signed?**
>
> **A. No**.

The trial court concluded that entry of summary judgment in favor of the heirs and against Price was warranted because the uncontradicted record evidence demonstrated that Ramos and Fazio did not sign in the presence of each other because Fazio was not in the presence of Ramos when Ramos signed the document. Price challenges this ruling, conceding that there are no cases in Florida which expressly define the term "in the presence of each other" for purposes of the statute but claiming that, given the physical proximity of the two witnesses, the determination of this issue involves genuine issues of material **[**5]** fact which should be determined by the trier of fact after hearing the actual testimony of the witnesses. We disagree.

The decision issued by our Supreme Court in *State v. Werner, 609 So. 2d 585 (Fla. 1992)*, supports the trial court's ruling. In that case, the Court was asked to define the word "presence" for purposes of ***HN3*** the lewd and lascivious act statute, *section 800.04(3) of the Florida Statutes*, which provides that any person who knowingly commits any lewd or lascivious act "in the presence of" any child under the age of 16 years without committing the crime of sexual battery is guilty of a felony of the second degree. The State argued that the plain and ordinary meaning of "presence" is "the part of space within one's immediate vicinity." Upon review, the Court rejected the State's argument and concluded that, ***HN4*** while the 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.

Application of this reasoning to the instant case supports the trial court's conclusion that **the mere fact that Ramos and Fazio were in the vicinity of one another at the time Ramos [**6] signed Flanigan's will was insufficient to satisfy the statutory requirement that Ramos sign the will in Fazio's presence**. Accordingly, we affirm the trial court's ruling.

AFFIRMED.

TORPY and EVANDER, JJ., concur.

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