Florida Attorney Richard Ehrlich issues First Article in his Law Instructional Series on Estate Planning

In the most recent commentary, Richard Ehrlich addresses the problem of having an out-of-estate attorney prepare estate-related documents


Richard Ehrlich, Estate Planning attorney in Florida

CORAL SPRINGS, FLORIDA, UNITED STATES, September 4, 2018 /EINPresswire.com/ -- In the first article of his series of Instructional Articles, Florida Attorney Richard Ehrlich comments on the issue of having a local attorney prepare a will and other probate-related documents. In the case that Mr. Ehrlich reviews, Kelly v. Lindenau, 223 So. 3d 1074 (Fla. Dist. Ct. App., 2nd District 2017), an Illinois resident moved to Florida yet had an Illinois attorney prepare amend his trust twice. Here, the second amendment was signed by only one of the two witnesses. While the amendments met the requirements of Illinois law, it failed to comply with Florida requirements.
Mr. Ehrlich notes that a recent decision coming out of the Second District Court of Appeal of Florida serves as a cautionary tale for all Florida residents to review their estate planning documents with a competent licensed Florida attorney.

> Different states may have differing requirements ... individuals who become Florida residents [should] review their estate planning documents and plans with a competent Florida attorney"
> *Richard Ehrlich, Attorney in Florida*

Ralph Falkenthal created a revocable trust, also commonly known as living trust, while he was still a resident of Illinois with the aid of an Illinois attorney. Mr. Falkenthal's wife passed away and he moved to Florida after her death. In Florida, Mr. Falkenthal met Donna Lindenau and moved in together at a new residence purchased by Mr. Falkenthal in Bradenton.

After moving to Florida, Mr. Falkenthal employed his Illinois attorney to amend his trust twice. The second amendment in 2014 specifically provided that the residence in Bradenton should pass to Ms. Lindenau upon Mr. Falkenthal's death. There was no dispute that the second amendment met the signing requirements of Illinois law, but Mr. Falkenthal was a Florida

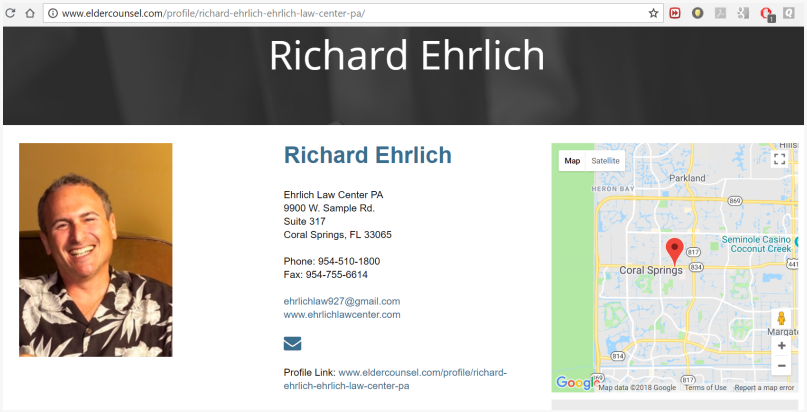
resident at the time.

Mr. Falkenthal passed away on February 7, 2015 and his daughter Judy took over the administration of the trust as a successor trustee. Judy, as a trustee, filed a lawsuit in Florida court, seeking to have the court determine the validity of the second amendment that left the Bradenton residence to Ms. Lindenau. Under Florida law, portions of a revocable trust dealing with disposition of property upon the trustor's death must meet the same formality as a will, which must be signed in front of two witnesses and those witnesses must also sign the document in front of each other. Here, the second amendment was signed by only one of the two witnesses. While no one disputed whether that met the requirements of Illinois law, everyone agreed that it fell short of Florida's requirements.

Seeking to save the second amendment from being invalidated, Ms. Lindenau sought reformation of the trust under Florida law. Ms. Lindenau argued that because Mr. Falkenthal's intent was clear and it was only a mere mistake of law that prevented his intent from being carried out, the trust should be reformed. Trial court agreed and granted the remedy of reformation and the children appealed.

Website, Richard Ehrlich, Attorney in Florida

Richard Ehrlich Estate Planning Attorney in Florida Attorney Profile



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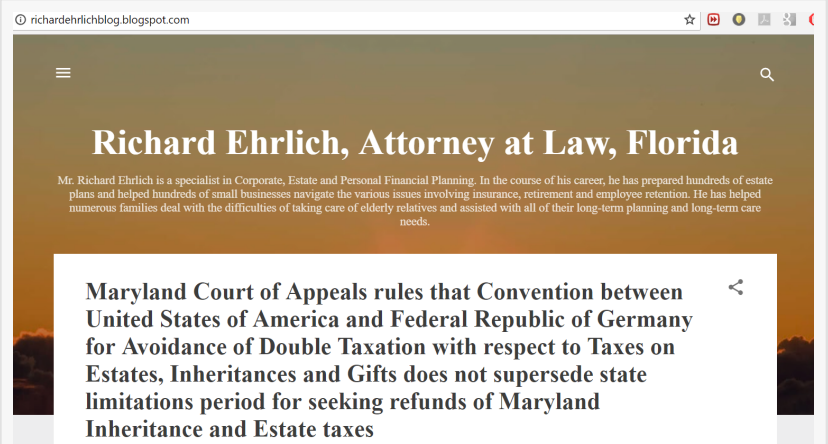
Second District Court of Appeal of Florida reversed, noting the important distinction between terms of a trust and the execution of a trust. The appeals court noted that "[s]ection 736.0415 provides in relevant part that the terms of a trust can be reformed 'to conform ... to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.'" The appeals court went on to explain that the problem with the second amendment was that the execution failed to meet Florida's requirement, not that the terms failed to reflect Mr. Falkenthal's intent. Therefore, appeals court concluded that the remedy of reformation was not available. The appeals court also rejected Ms. Lindenau's alternative request for a constructive trust, because using a constructive trust to validate an invalid execution would be inappropriate.

The Court explains at the end of its opinion: "... while the imposition of a constructive trust might be appropriate where a will (and thus a trust) has been validly executed, that remedy is not

appropriate where there is an error in the execution of the document. We conclude that 1079* that distinction should be extended to cases such as this one where an amendment to a trust was not validly executed. Because there was no valid, enforceable amendment, the imposition of a constructive trust on the Bradenton house "would only serve to validate an invalid" amendment. Allen, 826 So.2d at 248. Accordingly, we hold that the trial court erred by denying the petition for declaratory judgment, by applying section 736.0415 to reform the second amendment, and by requiring the transfer of the Bradenton house to Lindenau. Our reversal makes it unnecessary to decide a second issue raised solely by Judy in her capacity as successor trustee."



Richard Ehrlich, Estate Planning Attorney in Florida, Blog

"The case highlights the potential pitfalls that may arise as individuals move to Florida from other states", cautions Mr. Ehrlich. "Different states may have differing requirements when it comes to estate planning documents and plans. Therefore, individuals who become Florida residents would be well served to review their estate planning documents and plans with a competent Florida attorney to ensure that their wishes will be respected and carried out upon their death."

The complete commentary is available on the Blog of Richard Ehrlich at https://richardehrlichblog.blogspot.com/

The case is Kelly v. Lindenau, 223 So. 3d 1074 (Fla. Dist. Ct. App., 2nd District 2017), available at https://scholar.google.com/scholar_case?case=16538980995063858850&hl=en&as_sdt=6,47&as_vis=1

Relevant parts of the court case are the following (footnotes omitted):

Jill KELLY; Jeff Falkenthal; and Judy L. Mors-Kotrba, as successor trustee, Appellants,
v.
Donna LINDENAU, Appellee.
Case No. 2D16-2011.
District Court of Appeal of Florida, Second District.

[...] Ralph created his revocable trust in December 2006 while he still resided in Illinois. The trust was validly executed pursuant to Illinois law. The trust provided that upon his death, the trust assets would be distributed to his wife. In the event that she predeceased him, they would be evenly distributed to his three children, Jill, Jeff, and Judy. Ralph's wife predeceased him, and Ralph subsequently moved to Florida.

In 2009, Ralph met Lindenau. In 2010, Ralph purchased a house located in Bradenton, and he resided there with Lindenau. Subsequently, Ralph executed a first amendment to the trust on October 25, 2012, the testamentary aspects of which are irrelevant to this appeal.[3] On December 18, 2014, Ralph executed a second amendment that modified the trust to provide for a specific devise to Jeff of a Sarasota residence. The second amendment also provided for a specific devise of the Bradenton residence to Lindenau. No other changes were made to the remaining trust residue. At the time of execution of both the first and second amendments, Ralph resided in Florida. Yet, both amendments were prepared by Ralph's Illinois attorney, and

the parties have not disputed Lindenau's assertion that the amendments were prepared in accordance with Illinois law. Even though the amendments were executed in the presence of two witnesses, they were only signed by one of the witnesses.[4]

1076*1076 Ralph died on February 7, 2015, whereupon the trust became irrevocable. Judy, in her capacity as successor trustee, then filed a petition for declaratory judgment to determine the validity of the first and second amendments. Lindenau filed her counterclaim, which she later amended, seeking a reformation of the trust in relation to the second amendment. Lindenau argued that the error in failing to have two witnesses sign the second amendment was a mistake of law. In the alternative, Lindenau argued for the imposition of a constructive trust in her favor regarding the Bradenton house.

Jill and Jeff filed a motion for summary judgment, arguing that the amendments were invalid because they were not executed in accordance with Florida law. They also argued that reformation was not appropriate because Lindenau was not seeking to reform trust provisions already contained within the trust but was instead seeking to validate the otherwise invalid amendment. The trial court denied the motion for summary judgment. The case proceeded to a bench trial with the trial court ultimately granting Lindenau's reformation request pursuant to section 736.0415, Florida Statutes (2016), and ordering Judy, as successor trustee, to transfer the Bradenton house to Lindenau within ten days of the final judgment. This appeal followed, and the trial court granted a stay of the transfer of the Bradenton house pending the outcome of this appeal.

There is no dispute that Ralph's intent was to leave the Bradenton house to Lindenau. There is also no dispute that the second amendment was only signed by one of the witnesses. Rather, the dispute focuses on whether an improperly executed trust amendment can be validated through reformation pursuant to section 736.0415. The trial court concluded that section 736.0415 permitted reformation in this case because Lindenau met her burden of proving that "the accomplishment of the settlor's intent was affected by a mistake in law." Because the trial court's conclusion rests on a question of law, we review the final judgment de novo. See Gessa v. Manor Care of Fla., Inc., 86 So.3d 484, 491 (Fla. 2011); Megiel-Rollo v. Megiel, 162 So.3d 1088, 1094 (Fla. 2d DCA 2015).

In Florida, the testamentary aspects of a revocable trust[5] are invalid unless the trust document is executed by the settlor of the trust with the same formalities as are required for the execution of a will. § 736.0403(2)(b), Fla. Stat. (2014).[6] In turn, the portion of the Florida Probate Code that addresses the execution of wills requires that wills must be signed in the presence of two attesting witnesses and that those attesting witnesses must themselves sign the will in the presence of the testator and of each other. § 732.502(1)(b)-(c), Fla. Stat. (2014). Consequently, a trust — or an amendment thereto — must be signed by the settlor in the presence of two attesting witnesses and those witnesses must also sign the trust or any amendments in the presence of the settlor and of each other. These requirements are 1077*1077 strictly construed. Cf. Allen v. Dalk, 826 So.2d 245, 247 (Fla. 2002) (explaining that strict compliance with statutory requirements for execution of a will is mandated in order to create a valid will and recognizing that absent the requisite formalities, a will "will not be admitted to probate").

The Florida Supreme Court has affirmed a circuit court's refusal to admit a will to probate where one of the two witnesses refused to sign it. Crawford v. Watkins, 75 So.2d 194, 195, 197-98 (Fla. 1954). The court in Crawford explained that the signature of an attesting witness serves "as testimony of the fact that all legal steps necessary to make the will a legal instrument have been taken by the testator." Id. at 197-98 (emphasis added). Thus, where a testator, or a settlor in the case of a trust, fails to strictly comply with the statutory requirements for valid execution of the relevant document, the document remains invalid and unenforceable. Id.; see also Aldrich v. Basile, 136 So.3d 530, 533 (Fla. 2014) (explaining that codicil that was only signed by one witness "was not an enforceable testamentary instrument under the Florida Probate Code"); Allen, 826 So.2d at 248 (expressly refusing to impose a constructive trust over estate assets — despite the

testator's clear intent as stated within the will — where the testator failed to sign the will, a "major requirement for a validly executed will").

Lindenau concedes that the second amendment was invalid under Florida law, but she argues that the failure to obtain the second witness's signature was a mistake of law affecting the accomplishment of Ralph's intent and that the appropriate remedy is reformation. We disagree. Although Lindenau asks this court to distinguish Allen, Crawford, and Aldrich on the basis that they either predated the enactment of section 736.0415 or failed to address it, we are not persuaded that any distinction is dispositive in this case due to the language of the statute itself.

Section 736.0415 provides in relevant part that the terms of a trust can be reformed "to conform ... to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Aside from the issue of the settlor's intent, the statute thus focuses on the terms of the trust, not the execution of it. See also Megiel-Rollo, 162 So.3d at 1094 (quoting Morey v. Everbank, 93 So.3d 482, 489 (Fla. 1st DCA 2012), for the proposition that reformation is used to correct a "mistake in the form of expression or articulation" such as where a trust includes a term that "misstates the donor's intention[,] fails to include a term that was intended to be included[,] or includes a term that was not intended to be included"). [...]

1078*1078 We reject Lindenau's argument that Megiel-Rollo can be read to mean that reformation is available even where a trust was invalidly executed. In that case, although the circuit court ruled that no valid trust had ever been created, that finding was predicated on the fact that the attorney who drafted the trust failed to prepare a Schedule of Beneficial Interests that was expressly referenced in the trust document. 162 So.3d at 1092. In turn, the circuit court found that the trust was void ab initio because it failed to name any beneficiaries. Id. at 1094. However, on appeal, we concluded that reformation was available because the attorney committed a drafting error by failing to prepare and incorporate the Schedule of Beneficial Interests into the trust, which expressly referenced the Schedule. Id. at 1097. Thus we construed the error as one affecting the settlor's intent and the terms of the trust, not the execution of it. Indeed, the opinion makes clear that the settlor "executed the Trust with the requisite formalities for the execution of a will." Id. at 1091. Consequently, Megiel-Rollo does not mandate an affirmance here. [...]

Read in conjunction, Tolin and Allen make it clear that while the imposition of a constructive trust might be appropriate where a will (and thus a trust) has been validly executed, that remedy is not appropriate where there is an error in the execution of the document. We conclude that 1079*1079 that distinction should be extended to cases such as this one where an amendment to a trust was not validly executed. Because there was no valid, enforceable amendment, the imposition of a constructive trust on the Bradenton house "would only serve to validate an invalid" amendment. Allen, 826 So.2d at 248. Accordingly, we hold that the trial court erred by denying the petition for declaratory judgment, by applying section 736.0415 to reform the second amendment, and by requiring the transfer of the Bradenton house to Lindenau. Our reversal makes it unnecessary to decide a second issue raised solely by Judy in her capacity as successor trustee.[8] Reversed and remanded.

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