

December 14, 2006

The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1925
Via: Federal Express Tracking No. 85251695 2633

Re: Case No. SC06-2040

Proposed Change to Rule 2.430/Records Retention Schedule,
Florida Rules of Judicial Administration – Adverse Effect from
Premature Destruction of Probate Files

To Whom it May Concern:

I write this letter to express my grave concerns over both the current and proposed destruction schedule of probate/guardianship files as reflected in the proposed change to Rule 2.430 (Old Rule 2.075). Rule of Judicial Administration [Ref. The Florida Bar News, November 15, 2006, Page 11].

My practice involves substantial probate and real estate, and both the current and proposed destruction timeframes are both very troublesome and very disturbing to my type of practice, because the very files we need and rely upon will be destroyed.

Under existing rule, all Probate & Guardianship court files can be destroyed in only 10 years, which is bad enough; the proposed change would reduce that to 5 years.

Both short time periods are ill-advised, and ultimately will create huge problems with both real property titles and personal property entitlements, as well as adversely affect creditor rights. As a personal example, one of my first probate & real estate problems forced me to go back more than 100 years, and review court files and records from 1865, and bring the family beneficiaries & heirs through deaths, marriages, etc to the current rightful owners. Without those old records, it would have been impossible & if forced to dream up the various heirs & relationships, would have given an unjust result & ownership.

While some probate orders are recorded in the deed records, most are not; and it is up to each clerk to determine what gets recorded & then up to a deputy clerk to assure that it is done. The original petition of administration is not recorded, but is under oath and usually provides the names and addresses of heirs and beneficiaries, as well as marital relationships & prior (predeceased) deaths of heirs. Other records are also under oath. Likewise, receipts & inventories reflect both assets and acceptance of benefits. If an estate is "bankrupt", a verified discharge petition will pro-rate available assets among the various classes of creditors, all of whom are entitled to be paid if future assets are located. Under both the old & new rules, the files are destroyed and the only thing kept is the docket, which tells us little, except that a death occurred.

Among the possible problem areas (there are more):

- a. A decedent's will is filed as required by statute, but for any number of reasons, not probated. The file is technically closed upon filing the will, & under the rule could be

destroyed in 5 years. How can the heirs & beneficiaries ever recover their inheritance?

b. Assets, such as bonds & stock are subsequently located and must be transferred to heirs or cashed out to pay creditors. In my practice, I have had to deal with bearer bonds, as late as 15 years AFTER the probate was closed. Without a court file, such a transfer may prove impossible.

c. If real property (& with increasing frequency nowadays, royalty interests) are located in other states, authenticated copies of COURT DOCUMENTS are required to proceed in another state. Often, it is many years before folks learn about the other real property interests, usually because some aged uncle has been taking care of things for "the family." If the court file has been destroyed, then no-one can obtain proper authenticated copies, and the heirs lose their proof of inheritance.

d. The same thing can happen when the decedent owns real property in other Florida counties.

e. Under Federal Estate & Income Tax law, the Personal Representative may be liable for taxes for up to seven years, and sometime longer, as are the beneficiaries who received property. -- The court files are needed to sort it out.

f. For years and years, probate attorneys have been filing **original** documents, affidavits, agreements, IRS Estate Tax closing letters & other pertinent evidence in probate files, as the **safest** place to keep them for **posterity**. This view is supported by the fact that since before the American Revolution, all the states have always retained and preserved their probate records. Further, practically speaking, as attorneys age, come & go, retire, die, etc., their own files are destroyed or thrown out. Under both the old & new rule, the judicial system has failed the beneficiaries & heirs by destroying the very records they need to prove & pursue future rights, and assert ownership of assets, including real property.

g. Probate files are intertwined in the real estate titles of this state; this record destruction rule is going to cause a major headache & possibly uninsurable titles, because of no historical records or proof.

h. Minors, who inherit property, have claim & law-suit rights upon reaching majority. No court file solves that problem -- no proof for a cause of action, and the minor loses.

i. A fellow probate attorney, pointed out that the folks who are going to be hurt the most, are probably those with low income, and least able to deal with the issues. Often probate skips individuals, and even generations due to ignorance, belief the system automatically takes care of ownership problems, and/or lack of ability to pay. Some probates will be done & some will not. Problems arise 25, 50 & even 75 years later when current heirs finally try to sell the land, or even receive money from things like a DOT road widening condemnation. If the earlier probate files are destroyed, the judicial system has failed our citizens.

j. If an estate was bankrupt with unpaid creditors, & 5, 10 or 15 years later assets are found, or another inheritance flows through that probate. SORRY. No files; no proof; no payment for valid claims; etc.

The above list represents practical legal issues and litigant's problems for which the records

should be retained for a very long time, without any consideration of destruction.

In addition, however, pursuant to §28.13 and §28.24(12)(e) 1, Fla. Stats., all of the court files (probate, criminal, civil, etc.) are "property of the State of Florida," for which the clerks of the various circuit courts are the statutory state custodians. Pursuant to §28.30(2) F.S., the Division of Library & Information Services of the Department of State, sets the retention rules and guidelines for all court files and records, and apparently must consent to destruction on a case-by-case basis.

The old Rule 2.075(d)/2.430(d) specifically recognizes the authority of the Secretary of State, (without the statutory reference), but the proposed rule removes all reference to the statutory requirement. On its face, the proposed rule allows quick destruction by the clerk, whether or not there are legal, litigant, and/or property right issues, and/or historical/genealogical purposes set by the Secretary of State.

On its face, this rule (both old & new) will do more damage to the historical and genealogical records of this state than General Sherman did when he burned his way across Georgia. At least Sherman's march was focused; this rule will destroy ALL records in the entire State of Florida, and in a very short time.

In my opinion, the probate files should **never** be destroyed, and certainly kept **over 75 years**. This opinion is shared by those probate attorneys I have talked with. Also digitizing records is insufficient because of the rapidly changing technology, elimination of computers capable of reading older media and lack of longevity and endurance among the various digital media. Only microfilm has endured the test of time, but there is NO requirement to microfilm the probate court records -- only destroy them.

Therefore, I respectfully suggest (1) the 5-year destruction rule not be implemented; (2) change the rule for probate/guardianships to PERMANENT retention, and (3) require the clerks to follow the Chapter 28 statutory requirements in the rule for considering destruction.

Respectfully submitted,

/S/

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