PROBATE CORNER

By: David M. Garten, Esq.

ARTICLE: Failure To Include A Residuary Clause In Your Client's Will May Result In Partial Intestacy

The case of Basile v. Aldrich, 2011 Fla. App. LEXIS 13243; 36 Fla. L. Weekly D 1868 (Fla. 1st DCA 8/23/11) is a good example of why your clients should not purchase a form Will.

In 2004, the decedent, Ann Aldrich ("Ann"), wrote her will on an "E-Z Legal Form" and directed that certain specific property go to her sister, Mary, and that if Mary predeceased her, that the specific property went to her brother, James. The will did not contain a residuary clause.

In 2007, Mary died leaving Ann certain cash and real estate located in Putnam County. Neither the cash nor the real estate were referenced in Ann's Will.

Ann passed away in 2009 and James was appointed the personal representative of her estate. After a court order authorized him to sell the Putnam County real property, James filed a petition for construction of the will. The petition asked the court to decide who should receive the proceeds of the sale of the Putnam County real property and the cash Ann had inherited from Mary. In his petition, James took the position that the most reasonable and appropriate construction of the will was that Ann intended her entire estate, including what she had inherited from Ann, to pass to him, citing: (1) the will itself, which names only Mary and James as beneficiaries, and which devised all of the property then owned by Ann; (2) §732.6005(2), Fla. Stat. which provides that a will is to be construed to pass all property that a testator owns at death, including property acquired after the execution of the will; and (3) the legal presumption that in making a will a testator intended to dispose of her entire estate, as well as the legal presumption against a construction that results in partial intestacy.

The appellate court held that where a will fails to dispose of all of a decedent's property (Ann's will has no residuary clause), "partial intestacy" results; and that property Ann owned at the time of her death not disposed of by her will passes to her intestate heirs, in the manner prescribed by sections 732.101 - .111, Fla. Stat. The court reasoned:

> Section 732.6005(2) is, after all, a rule of construction. Rules of construction are to be resorted to only if the testator's intent cannot be ascertained from the will itself. [Citations omitted]. The presumption against partial intestacy is designed to resolve ambiguities where they exist. The presumption should not be applied to create ambiguities in a will where none would otherwise exist.
>
> In the present case, Ann's will makes her intent when she executed it

> crystal clear. "There are simply no conflicting provisions of the . . . will [in any way concerning the disputed property] which require construction." Barker, 448 So. 2d at 31. "'If the terms of a will are such as to permit two constructions, one of which results in intestacy and the other of which leads to a valid testamentary disposition, the construction is preferred which will prevent intestacy.' [Citations omitted]. The terms of Ms. Aldrich's will do not dispose of any property other than the property the will specifically identifies, and cannot fairly be construed otherwise.

PRACTICE TIPS: If Ann had a prior will which contained a residuary clause, the residuary beneficiaries under the prior will could argue that they are entitled to take under the doctrine of "dependent relative revocation". *See* Carey v. Rocke, 18 So. 3d 1266 (Fla. 2nd DCA 2009).

Would the outcome have been different if §732.615, Fla. Stat. (effective 7/1/11) had been in effect at the time of Ann's death? Sec.732.615 reads: "732.615 Reformation to correct mistakes.-Upon application of any interested person, 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."