# Will Contests and Related Litigation: Formal Prove-Up of Wills and Removing Representatives

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# Illinois: A Double Will Challenge State

1. Traditional Will Challenge, i.e. lack of capacity and undue influence

2. Formal Prove-Up of Wills

(why we are here)

# Today's Discussion

1) Formal prove-up of wills

and

2) Recourse after the fact

# Formal Prove-Up of Wills

755 ILCS 5/6-21

"any person entitled to notice under Section 6-10 may file a petition within 42 days after the effective date of the original order admitting the will to probate to require proof of the will pursuant to this section."

# Formal Prove-Up of Wills

## UH OH

It's been forty-five days since admission of the will and I failed to file a Petition Requesting Formal Proof

## IT'S GOING TO BE OK!

The 42 day requirement only affects one's ability to have a prove-up hearing.

It does not affect one's ability to challenge a will for lack of capacity or undue influence.

# FORMAL PROVE-UP OF WILLS

# HOWEVER…

"The time for filing a petition to contest a will under Section 8-1 [lack of capacity and undue influence] is **not** extended by the filing of the petition under this Section…" 755 ILCS 5/6-21

# Formal Prove-Up of Wills

- A petition for formal proof of the will has been filed. NOW WHAT?!

Prior to 1980, very easy…

# Formal Prove-Up of Wills

"where the attestation clause to a will recites all the particulars of good execution… such clause will be prima facie evidence of due execution of the will. Such proof will often prevail over the testimony of the attesting witnesses which tends to show that some of the requisites are wanting." *Hart v. Hart*, 290 Ill. 476, 483-4 (Ill 1919).

BUT…

# Formal Prove-Up of Wills

Effective January 1, 1980, 755 ILCS 5/6-21 "… require[s] proof of will pursuant to this section…"

# WHAT'S THAT?

# Formal Prove-Up of Wills

Requires testimony of witnesses

Before the Court

or…

By Deposition

# Formal Prove-Up of Wills

If by deposition…

- Witness must reside outside of the county of probate OR be unable to attend court;
- Person seeking probate of the Will must petition the Court for permission to depose the witness; and
- Notice must be given to all interested persons.

See 755 ILCS 5/6-5

# Formal Prove-Up of Wills

Since enactment of 755 ILCS 5/6-5…

Formal Proof of Will via attestation clause?

NOT SUFFICIENT

Formal Proof of Will via affidavit?

NOT SUFFICIENT

# Formal Prove-Up of Wills

Since enactment of 755 ILCS 5/6-5…

Formal Proof of Will via affidavit signed at the time of attestation and which forms a part of the will?

NOT SUFFICIENT

# Formal Prove-Up of Wills

What must the witnesses testify to?

# Formal Prove-Up of Wills

Will Formalities

1. Witness "was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness or the testator acknowledged it to the witness as his act";

2. "the will was attested by the witness in the presence of the testator"; and

3. the witness "believed the testator to be of sound mind and memory at the time of signing or acknowledging the will".

# Formal Prove-Up of Wills

Hearing is limited to will formalities…

Proof of undue influence or lack of capacity is outside the scope of permissible testimony.

*See e.g. In re Marcucci's Estate*, 54 Ill. 2d 266, 269 (Ill. 1973) (proof necessary to entitle a will to probate is confined to the essential elements fixed by statute… and is for the purpose of establishing whether a Prima [*sic*] facie case of validity has been made… [N]o contradictory evidence is admissible…"

# Formal Prove-Up of Wills

In fact, "[t]he proponent has no duty to show the will is valid in all respects, but only the duty to prove the essential elements included in the statute." *In re Estate of Dicks*, 2014 IL App (1st) 132908-U, 15.

# Formal Prove-Up of Wills

Hypothetical

- Ken is a secretary for Barbie, a lawyer that exclusively does estate planning.
- Ken has witnessed hundreds of wills for Barbie.
- One of Barbie's clients passes away.
- Ken witnessed the client's will thirty years prior.
- One of the client's heirs requests a formal prove up of the will.
- Ken does not remember anything with regard to the execution of this specific client's will.

# Formal Prove-Up of Wills

Hypothetical

- At the hearing to admit the client's will to probate, Ken testifies that he does not remember anything about the execution of this specific will.
- Given, section 6-21's requirement of proof through testimony, should the court admit the will to probate?

# Formal Prove-Up of Wills

Hypothetical

**OF COURSE…**

# Formal Prove-Up of Wills

Where a will "contains an attestation clause which discloses that all of the statutory requirements have been met, and the signatures admittedly are genuine, then a prima facie case exists favoring due execution of the will, which can be **rebutted by positive testimony of the subscribing witnesses that a statutory requirement was not satisfied**." *In re Estate of Chlebos*, 194 Ill. App. 3d 46, 50 (1st Dist. 1990).

# Formal Prove-Up of Wills

- "The attestation clause is given the benefit of reasonable presumptions even if the witness fails to remember the surrounding events."
- "[W]here the testimony of an attesting witness is not affirmative and is contradictory, vague and lacking in conviction, then the trial court justifiably may reject it in favor of the attestation clause."
- "Execution of a will 'may be sufficiently proved where one attesting witness testified positively to the requisites of execution and the other witness does not recollect or denies compliance with the statutory requisites.'"
- *In re Estate of Chlebos*, 194 Ill. App. 3d at 50-51.

# Formal Prove-Up of Wills

So what good is a formal prove up?

Hypothetical

- Mother is in nursing home.
- Son comes in with a will from legal zoom that excludes daughter.
- Son gets two workers to witness mother sign the will.
- The two workers only see mother sign the will, sign an attestation clause, and then leave.
- Within one month of signing the will, mother passes away.
- Both witnesses testify that they remember the execution of the will and that mother did nothing to allow them to form an opinion as to whether she was of sound mind and memory.

# Formal Prove-Up of Wills

**No admission to probate!**

# BUT WHAT IF…

- You have petitioned for a formal prove-up of will, and the proponent properly proves it up.
- The will makes the proponent the executor, but you think the proponent procured the will from undue influence.
- You are afraid that the proponent will unjustly drain the estate before the end of your will contest action.

**CAN YOU DO ANYTHING TO STOP HIM OR HER?!**

# Removal of Representatives

"On petition of any interested person or on the court's own motion, the court may remove a representative…"

755 ILCS 5/23-2

# Removal of Representatives

Under the Probate Act, a "'representative' includes executor, administrator, administrator to collect, standby guardian, guardian and temporary guardian"

755 ILCS 5/1-2.15

# Removal of Representatives

However, removal may be invoked "only under one or more of the grounds set forth in the statute." *In re Long's Estate*, 1 Ill. App. 3d 372 (Ill. 2d Dist. 1971).

So what are the grounds in the statute?

# Grounds for Removal of Representatives

- (1) the representative is acting under letters secured by false pretenses;
- (2) the representative is adjudged a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code or is adjudged a person with a disability;
- (3) the representative is convicted of a felony;
- (4) the representative wastes or mismanages the estate;
- (5) the representative conducts himself or herself in such a manner as to endanger any co-representative or the surety on the representative's bond;

# Grounds for Removal of Representatives

- (6) the representative fails to give sufficient bond or security, counter security or a new bond, after being ordered by the court to do so;
- (7) the representative fails to file an inventory or accounting after being ordered by the court to do so;
- (8) the representative conceals himself or herself so that process cannot be served upon the representative or notice cannot be given to the representative;
- (9) the representative becomes incapable of or unsuitable for the discharge of the representative's duties;

**OR**

# Grounds for Removal of Representatives

(10) there is other good cause

But don't get too excited

# WHAT CONSTITUTES "OTHER GOOD CAUSE"

Apparently not much…

"The executor may not be removed for errors in judgment in the management of the estate unless they amount to malfeasance." *In re Long's Estate*, 1 Ill. App. 3d 372, 374 (Ill. 2d Dist. 1971)

A will contest generally does not constitute good cause for removal. *In re Kuhn's Estate*, 87 Ill. App. 2d 411, 422 (2d Dist. 1967).

# Removal of Representatives

You have found a ground for removal.

How do you do it?

File a Petition for removal. 755 ILCS 5/23-3

# Procedures on Removal

Upon the filing of petition for removal of a representative, the court must order a citation directing the respondent to show cause why the cause for removal stated in the petition is inappropriate.

Service of citation must occur at least ten days before the scheduled hearing

# PROCEDURES ON REMOVAL

- "The representative whose removal is sought may file a pleading responding to the petition or charges for removal on or before the return date designated in the citation or notice or within such further time as the court permits."
- "If on the hearing the court finds that [the representative] should be removed for any cause listed in Section 23-2, the court may remove [the representative] and revoke [the representative's] letters."

755 ILCS 5/23-3(c)

# Procedures on Removal

If there are grounds for removal, must act quickly, because…

"If the letters of a representative are revoked, all acts done by [the representative] according to law before the revocation of [the representative's] letters are valid." 755 ILCS 5/23-8

I don’t trust the representative, but cannot establish grounds for removal… IS ALL LOST?

ALL is not lost…

# Requesting Supervised Administration

Under supervised administration, the representative requires court approval to take numerous actions with respect to state property, i.e. selling and leasing real estate, selling and leasing personal property, and interim distributions.

The problem is…

Independent administration is the norm. See 755 ILCS 5/28-2(a)

# Requesting Supervised Administration

How to get supervised administration?

OBJECT

Per 755 ILCS 5/28-2, if an interested person objects to independent administration, the court shall require supervised administration, UNLESS

If an interested person objects to independent administration, the court shall require supervised administration, UNLESS

1) The will directs independent administration. If this is the case, "supervised administration shall be required only if the court finds good cause to require supervised administration."

**OR**

2) If the objector is a creditor or legatee, supervised visitation is required only if the court finds it necessary to protect the objector's interest. However, instead of supervised administration, the court may order such other actions as it deems adequate to protect the objector's interest.

# In other words…

If you cannot remove the representative…

You will have a hard time getting supervised administration.

# QUESTIONS?

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