Litigators Beware: The Need To Challenge Facially Valid Previous Wills In Revocation Proceedings, Even If Not Offered To Probate

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When representing clients wishing to challenge the validity of a last will and testament, whether the challenge is based upon undue influence, lack of capacity, fraud, or any of the various other theories that may exist, lawyers face a minefield when it comes to advising clients of the potential statutory bars that could eviscerate the client's opportunity to challenge the will at issue. For example, if your client is an interested person who was served with a copy of a notice of administration but failed to object within three months from service of the notice of administration, your client may be forever barred from contesting the will.[1] Similarly, if a nominated personal representative or other interested person served your client a petition for administration with formal notice and your client failed to serve a response within 20 days of service, they also may be forever barred.[2] Consequently, given the potential disaster that both the client and attorney could face for failing to comply with one of the aforementioned statutory deadlines, many probate litigators have committed these statutory time requirements to memory, implemented redundant calendaring systems to ensure no deadlines are blown on their watch, and availed themselves to available prophylactic mechanisms, such as the filing of a caveat, in order to ensure that their clients don't unknowingly allow one of these statutory deadlines to lapse.[3]

While the forgoing safeguards may help probate litigators (and their respective carriers) sleep a bit easier after the workday, they may not be, in and of themselves, sufficient to ensure that your client will be able to survive the pleading stage of a will contest. Rather, lurking in the annals of Florida decisional law lies another body of law that every probate litigator should be aware of, however counter-intuitive this body of jurisprudence may seem at first blush. Stated simply, it may very well be that if your client has failed to challenge a will that has not even been offered to probate, but which is "before the court," he or she may be barred from challenging the only will that has actually been offered for, or admitted to, probate.

Cates and *Wehrheim*: The "facially valid previous will"

In the seminal case of *Cates v. Fricker*,[4] the Second District Court of Appeal affirmed a trial court's order granting summary judgment. The grant of summary judgement denied a petition for revocation of probate filed by a child of the decedent, who was seeking to revoke a will that excluded said child as a beneficiary of their father's estate. The Court reasoned that "[t]he basis for the summary judgment was that appellant 'was specifically excluded as a beneficiary in two (2) previous Wills, the validity of which have not been questioned....'" [5] Consequently, while "Section 733.109(1), Florida Statutes (1987), provides that any 'interested person' may bring an action for revocation of probate" and "[a]n 'interested person' may be an heir at law," the *Cates* Court held that "it was properly determined in this case that appellant is not an heir at law and thus is not such an 'interested person.'" [6] The Court reasoned that "when an at least facially valid previous will is before the court, the burden is on the potential heir at law who wishes to contest a will to show that the previous will which excluded the contestant was invalid or that the doctrine of dependent relative revocation did not apply." [7] Finally, the Court noted

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that "[s]uch facial validity may be shown . . . through copies of previous wills which include copies of the signatures of the testator and witnesses and of the notary certificate."[8]

Revocation proceedings such as the one in *Cates* are considered adversarial in nature, and therefore governed by the Florida Rules of Civil Procedure. However, Florida Courts have held that "[w]hile in most types of civil cases standing is generally considered an affirmative defense that can be waived if not properly pled, this is not the case in adversarial probate proceedings to contest the validity of a decedent's will or to attempt to remove the designated personal representative."[9] Rather, as the Fifth District Court of Appeal explained in *Wehrheim*, "[i]n this instance, it is the burden of the petitioner seeking to revoke the present will to establish that the previous will, which also excludes the petitioner as a beneficiary, is invalid."[10] Consequently, under the body of law developed around *Cates* and *Wehrheim,* Courts recognize that "a petitioner may not be an interested person in revocation and removal proceedings if previous and presumptively valid wills have been discovered that, similar to the current will, do not include the petitioner as a beneficiary of the estate."[11]

The *Gordon v. Kleinman* Workaround

What does this all mean for a probate litigator and his or her clients? Well, for one it means that the lawyer and client should discuss early on in the representation whether any other "facially valid previous will" exists or may exist. But what if a probate litigator learns from his or her client that there is, in fact, one or more "facially valid previous wills," and the client's only avenue to receiving a benefit through the estate is under the laws of intestacy or another estate planning document that pre-dates the "facially valid previous will?" Does this mean the client has reached the end of the road? Does the jurisprudence owing to *Cates* and *Wehrheim* make the very existence of such a "facially valid previous will" the proverbial dagger to the heart of your client's will contest? Fortunately, the answer to that question is no, or at least not necessarily, as Florida courts have also set forth a potential workaround to *Cates* and *Wehrheim*. Nevertheless, in order to take advantage of this judicially created solution, a probate litigator must be cognizant of what is required to avoid the pitfall of being bounced out of Court based on a *Cates/Wehrheim* lack of standing argument.

In *Gordon v. Kleinman*,[12] a case that post-dates *Cates* by nearly twenty-five years, the Fourth District Court of Appeal first acknowledged the doctrine set forth by its sister Courts in *Cates, Wehrheim,* and their progeny, and observed that "whether a person is an 'interested person' is an element that must be established by the petitioner seeking revocation of probate." In *Gordon*, the trial court had granted a "motion to dismiss arguing that petitioner lacked standing to assert the claims and she failed to allege any facts supporting her claim of undue influence."[13] Before announcing its holding in *Gordon*, the Fourth District Court of Appeal cited to *Wehrheim* for the proposition that "a petitioner may not be an interested person in revocation and removal proceedings if previous and presumptively valid wills have been discovered that, similar to the current will, do not include the petitioner as a beneficiary of the estate."[14] However, unlike the result in *Cates* and *Wehrheim*, the Fourth District Court of Appeal in *Gordon* ultimately reversed the trial court's dismissal of the petition for revocation, holding that because "petitioner alleged that she was the beneficiary of the 1983 will and that *all of the prior wills* under which she was not a beneficiary were the result of undue influence and/or testamentary incapacity and therefore invalid," the "Petitioner has pleaded sufficient allegations of standing and the trial court erred in dismissing her petition."[15]

Conclusion

In light of the forgoing, and notwithstanding how counter-intuitive it may seem to challenge a will that has not even been offered to probate, that is precisely what probate litigators should be advising their clients if a "facially valid previous will" is known to exist and their client either takes under the laws of intestacy or pursuant to another will that pre-dates said facially valid previous will. Moreover, to avoid the risk that an unknown "facially valid previous will" may eventually be brought before the Court, a probate litigator would be well advised to counsel their clients to include a prophylactic allegation modelled after the allegation included in the petition that the Fourth District Court of Appeal reviewed in *Gordon*, i.e., an allegation such as "client is a beneficiary under the laws of intestacy/the XX/XX/19XX will and *all of the prior wills* under which client was not a beneficiary were the result of undue influence and/or testamentary incapacity and therefore invalid." At a minimum, the inclusion of such an allegation should ensure that your client has pleaded sufficient allegations of standing to survive a motion to dismiss if a "facially valid previous will" is already before the court or comes before the court subsequent to the institution of the will contest.

Endnotes

1 *See* Fla. Stat. §733.212(3).
2 *See* Fla. Stat. §733.2123.
3 *See* Fla. Stat. §731.110.
4 *Cates v. Fricker,* 529 So.2d 1253 (Fla. 2d DCA 1988).
5 *Id*. at 1254.
6 *Id*.
7 *Id*. at 1254-55.
8 *Id*. at 1255.
9 *See Wehrheim v. Golden Pond Assisted Living Facility*, 905 So.2d 1002, 1005-06 (Fla. 5th DCA 2005).
10 *Id*. at 1006.
11 *Id*.
12 120 So.3d 120, 121 (Fla. 4th DCA 2013)
13 *Id*. at 121.
14 *Id*. at 121-122.
15 *Id*. at 122.