

WHITE PAPER

PROPOSED LEGISLATION CHANGE REGARDING ESTABLISHING PRIMA FACIE EVIDENCE IN WILL CONTESTS

I. SUMMARY

In proceedings contesting the validity of a will, Florida Statutes § 733.107 provides that “the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation.” Occasionally, at the time of testator's death, witnesses to the execution and attestation of a will are dead or otherwise unavailable (i.e. they cannot be located, are incapacitated, or perhaps have no recollection of the signing ceremony). Because the rules of evidence are applicable to probate proceedings, a self proving affidavit or oath of an attesting witness taken outside of the probate proceedings could be excluded as hearsay making it difficult or impossible for the proponent of the will to meet the burden of presenting prima facie proof of due execution and attestation in a will contest, particularly for wills that were executed many years or even decades ago. Should the present unavailability of the attesting witness, who has previously given a sworn statement regarding due execution and attestation, thwart the testator's constitutional right to dispose of his property by will as recognized by the Florida Supreme Court in Shriners Hospital For Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990)? The proposed legislation amends Florida Statute §733.107 to permit self-proving affidavits and oaths of attesting witnesses executed in compliance with the Florida Probate Code to be admitted into evidence to establish the prima facie evidence needed to meet the initial burden of proving formal execution and attestation in contested probate proceedings.

II. CURRENT FLORIDA LAW

In ex parte proceedings, the Florida legislature has addressed the types of evidence which may be offered to admit a will to probate. Florida Statutes § 733.201 provides:

- (1) Self-proved wills executed in accordance with this code may be admitted to probate without further proof.
- (2) A will may be admitted to probate upon the oath of any attesting witness taken before any circuit judge, commissioner appointed by the court, or clerk.
- (3) If it appears to the court that the attesting witnesses cannot be found or that they have become incompetent after the execution of the will or their testimony cannot be obtained within a reasonable time, a will may be admitted to probate upon the oath of the personal representative nominated by the will as provided in subsection (2), whether or not the nominated personal representative is interested in the estate, or upon the oath of any person having no interest in the estate under the will stating that the person believes the writing exhibited to be the true last will of the decedent.

However, in proceedings contesting the validity of a will, Florida Statutes § 733.107 provides that “the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation.” It is unclear under Florida law whether a self proving affidavit

or an oath of an attesting witness would be admissible in a contested proceeding to meet the prima facie test of Florida Statutes 733.107 if the attesting witness is unavailable to testify. In particular, Florida Probate Rule 5.170 provides that the rules of evidence in civil actions are applicable to proceedings under the Florida Probate Code unless specifically changed by the Florida Probate Code or the Florida Probate Rules. Under the Florida Evidence Code, a self proving affidavit or oath of an attesting witness would be considered an out of court statement and could be excluded as hearsay.

The current statutory dichotomy between ex parte and contested proceedings as it relates to proof of due execution and attestation encourages a will contest in circumstances where the attesting witnesses are unavailable and potentially increases the contestant's chance of success. In addition, contrary to our public policy, this statutory scheme potentially fails to give effect to the testator's intent simply because the witnesses to the execution, which may have taken place many years before the testator's death, are no longer available.

III. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed legislation amends subsection (1) Florida Statute §733.107 to add the following sentence: "A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the Will." This addition is not intended to and will not foreclose a will contestant from presenting evidence impeaching or contradicting the affidavit or otherwise presenting evidence that the will was not executed in compliance with Florida law. It simply has the effect of allowing the proponent to meet its initial burden of presenting prima facie evidence of due execution and attestation through a self proving affidavit or oath executed in compliance with Florida Statutes § 733.201(2). The burden of proof will then be on the contestant to attack the credibility of the self proving affidavit or oath.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal does not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues that arise as a result of this proposal.

VII. OTHER INTERESTED PARTIES

None.