O.C.G.A. § 53-5-21

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53-5-21. Procedure.

(a) A will may be proved in solemn form after service of notice upon the persons required to be served, upon the testimony of all the witnesses in life and within the jurisdiction of the court, or by proof of their signatures and that of the testator as provided

in Code Section 53-5-23; provided, however, that the testimony of only one witness shall be required to prove the will in solemn form if no caveat is filed. If a will is self-proved, compliance with signature requirements and other requirements of execution is presumed subject to rebuttal without the necessity of the testimony of any witness upon filing the will and affidavit annexed or attached thereto.

(b) The petition to probate a will in solemn form shall set forth the full name, the place of domicile, and the date of death of the testator; the mailing address of the petitioner; the names, ages or majority status, and addresses of all the heirs, stating each such heir's relationship to the testator; and whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounders and the names, addresses, and ages or majority status of the beneficiaries under the other purported will. If a testamentary guardian is being appointed in accordance with subsection (b) of Code Section 29-2-4, the names and mailing addresses of any persons required to be served with notice pursuant to such Code section shall be provided by the petitioner. In the event full particulars are lacking, the petition shall state the reasons for any omission. The petition shall conclude with a prayer for issuance of letters testamentary. If all of the heirs acknowledge service of the petition and notice and shall in their acknowledgment assent thereto, and if there are no

other proceedings pending in this state with respect to the probate of another purported will of the decedent, the will may be probated and letters testamentary thereupon may issue without further delay; provided, however, that letters of guardianship shall only be issued in accordance with Code Section 29-2-4.

History

Code 1981, § **53**-**5**-**21**, enacted by Ga. L. 1996, p. 504, § 10; Ga. L. 2014, p. 780, § 4-2/SB 364; Ga. L. 2020, p. 377, § 1-22/HB 865.

Annotations

Notes

Amendments.

The 2020 amendment, effective January 1, 2021, in subsection (a), substituted "service of notice upon the persons required to be served" for "due notice" and substituted "Code Section 53-5-23; provided, however, that the testimony" for "Code Section 53-5-23. The testimony";

and substituted "all the heirs, stating each such heir's relationship" for "the surviving spouse and of all the other heirs, stating their relationship" in subsection (b).

Commentary

COMMENT

This section carries forward the witnessing requirements of subsections (a) and (c) of former OCGA Sec. 53-3-13 and the requirements for the contents of the petition set out in subsection (b) of former OCGA Sec. 53-3-13. The section clarifies that it is not necessary to list the exact age of those individuals who have achieved majority status at the time the petition is filed. See Chapter 11 for general provisions regarding the filing of petitions in the probate court.

JUDICIAL DECISIONS

Editor's notes.

In light of the similarity of the statutory provisions, decisions under former Code 1933, § 113-602, and former O.C.G.A. § 53-3-13 are included in the annotations for this Code section.

Propounder who offered a will for probate assumed the non-shifting burden of persuasion as to the validity of that document, including the requirement of showing by a preponderance of the evidence that the signature was that of the decedent. Heard v. Lovett, 273 Ga. 111, 538 S.E.2d 434, 2000 Ga. LEXIS 850 (2000).

It was error for the superior court to direct a verdict in favor of a propounder because under O.C.G.A. § 53-4-46 the propounder was required to prove that the propounder's mother did not deliberately discard or destroy the original of the will with the purpose of revoking the will, but the

propounder did not satisfy the propounder's statutory duty, and the propounder should have filed a petition to probate a copy of a will in lieu of a lost original, which would have notified the probate court of the appropriate standards and burdens of proof; the plain language of O.C.G.A. § 53-4-46(b) clearly requires that the presumption of intent to revoke be rebutted in order for a copy of a will to be probated, and Georgia law does not allow a propounder to probate a will without fulfilling the pertinent evidentiary requirements, even when no caveat has been filed. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235, 2011 Ga. LEXIS 269 (2011).

It was error for the superior court to direct a verdict in favor of a propounder because pursuant to current Ga. Unif. Prob. Ct. R. 5.3.3 the propounder was required to provide a caption on the propounder's petition to probate a will purported to be the last will and testament of the propounder's mother that set out the exact nature of the pleading or the type of petition, which was to probate a copy of a will in lieu of a lost original; however, not only did the propounder fail to caption the propounder's petition properly, the propounder also failed to make any interlineations or provide the requisite additional information in the petition as required by Georgia Probate Court Standard Form 5 to use that form to probate a copy of the mother's will. Tudor v. Bradford, 289 Ga. 28, 709 S.E.2d 235, 2011 Ga. LEXIS 269 (2011).

Admission of self-proved will. —

Under O.C.G.A. § 53-4-24(c), when a will is self-proved, it "may be admitted to probate without the testimony of any subscribing witness." In fact, compliance with the requirements of execution are presumed without the live testimony or affidavits of witnesses; that is, under O.C.G.A. § **53**-**5**-**21**(a), the affidavit creates a presumption regarding the prima facie case, subject to rebuttal. Singelman v. Singelman, 273 Ga. 894, 548 S.E.2d 343, 2001 Ga. LEXIS 443 (2001).

In a sister's challenge to her brother's will, the probate court erred in finding that the will was not sufficiently proven due to the executor's failure to produce the witnesses; the will had an attached self-proving affidavit and could be admitted without other proof that formalities

of execution were met, pursuant to O.C.G.A. § 53-4-24. Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641, 2015 Ga. LEXIS 490 (2015).

Former statute unconstitutional. —

See McKnight v. Boggs, 253 Ga. 537, 322 S.E.2d 283, 1984 Ga. LEXIS 1029 (1984) (decided under former Code 1933, § 113-602).

Statute prescribes certain essential prerequisites before a valid judgment probating a will in solemn form can be rendered. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

Application to probate in solemn form affords opportunity to all parties interested for a hearing by the court on any objection the parties may have to the probate of the will, and those with notice are concluded by the judgment of probate. While the caveator has the burden of proving the grounds of the caveat, the initial burden is upon the propounder to prove the testamentary capacity of the testator, and that the testator acted freely and voluntarily in the execution of the will. Jones v. Dean, 188 Ga. 319, 3 S.E.2d 894, 1939 Ga. LEXIS 532 (1939) (decided under former Code 1933, § 113-602).

Proper attestation clause presumes statutory execution of will. —

Attestation clause stating that testator signed will "in the presence of witnesses who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses the same day and date," is a sufficient attestation clause such that its introduction into evidence raised a presumption of the proper execution of the will. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744, 1962 Ga. LEXIS 539 (1962) (decided under former Code 1933, § 113-602).

Judgment of probate and domicile is a judgment in rem and therefore, as an act of the sovereign power, its effect cannot be disputed within the jurisdiction. Riley v. New York Trust Co., 315 U.S. 343, 62 S. Ct. 608, 86 L. Ed.

885, 1942 U.S. LEXIS 915 (1942) (decided under former Code 1933, § 113-602).

Probate of later will requires prior reversal of judgment ordering probate of first will. When a person who filed a caveat to a will which was probated in solemn form thereafter attempted to probate an alleged later will, without setting aside or reversing the judgment ordering the probate of the first will in solemn form, a verdict was demanded against probate of the alleged later will. Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774, 1953 Ga. LEXIS 441 (1953) (for comment, see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955)) (decided under former Code 1933, § 113-602).

Proof generally. —

Proof of the execution of a will in case of probate in solemn form and proof of the execution of a will in a case to establish and probate a copy when the will is missing may be made in precisely the same manner and by the same character of evidence; and in both evidence other than the testimony of the subscribing witnesses, after the available witnesses have been produced at the hearing, is admissible for the purpose of proving the execution of the will, and in each this may be done despite the testimony of the witnesses against the will. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45, 1946 Ga. LEXIS 489 (1946) (decided under former Code 1933, § 113-602).

Proof may be made in any legal form. —

Law directs that on an application to probate in solemn form the proof be made by the witnesses, yet such proof may be made by any legal evidence, and is not limited to the testimony of the subscribing witnesses, and despite the fact that the witnesses may testify against the will. Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45, 1946 Ga. LEXIS 489 (1946) (decided under former Code 1933, § 113-602).

Propounder must make prima facie case as to factum of will. —

On the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is on the propounder to make out a prima facie case by showing the factum of the will, and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making the will, acted freely and voluntarily. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224, 1947 Ga. LEXIS 491 (1947), superseded by statute as stated in Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641, 2015 Ga. LEXIS 490 (2015) (decided under former Code 1933, § 113-602).

On the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is on the propounder to make out a prima facie case, by showing the factum of the will, and that at the time of the will's execution the testator apparently had sufficient mental capacity to make the will, and, in making it, acted freely and voluntarily. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535, 1948 Ga. LEXIS 412 (1948) (decided under former Code 1933, § 113-602).

Propounder, upon offering will for probate, shall produce to the court the witnesses to the will's execution, to prove the factum of the will, that it was freely and voluntarily made, and also apparent testamentary capacity. Johnson v. Sullivan, 247 Ga. 663, 278 S.E.2d 640, 1981 Ga. LEXIS 814 (1981) (decided under former Code 1933, § 113-602).

Personal appearance by all available witnesses not required. —

Propounder of a will is required only to prove the will in accordance with O.C.G.A. Ch. 11, T. 9, which does not, of necessity, require personal appearance by all available witnesses in solemn form proceeding. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910, 1982 Ga. LEXIS 649 (1982) (decided under former O.C.G.A. § 53-3-13).

Prima-facie case of will's authenticity made. —

When the record of the superior court proceedings shows that the record of the probate court, where the will was shown to be executed with requisite formalities, was brought up and introduced into evidence, this probate record included a photostatic copy of the original will, which original was retained by the clerk of the probate court as required by former O.C.G.A. § 53-3-5, and according to the two attesting witnesses to the will, the testator apparently had sufficient mental capacity to make the testator's will and in making the will acted freely and voluntarily in 1972, the propounder made out a prima facie case, showing the factum of the will and that the will was freely and voluntarily executed. Pendley v. Pendley, 251 Ga. 30, 302 S.E.2d 554, 1983 Ga. LEXIS 694 (1983) (decided under former O.C.G.A. § 53-3-13).

Summary judgment sustained. —

Undisputed testimony of witnesses admitted in probate court will sustain superior court's grant of summary judgment admitting the will to probate. Norton v. Georgia R.R. Bank & Trust, 248 Ga. 847, 285 S.E.2d 910, 1982 Ga. LEXIS 649 (1982) (decided under former O.C.G.A. § 53-3-13).

Production of witnesses indispensable to prima facie case by propounder. —

Probate in solemn form requires that "all the witnesses" be produced, if the witnesses be in life and within the jurisdiction of the court; if a will has four witnesses, all must be produced if the witnesses are accessible. Bloodworth v. McCook, 193 Ga. 53, 17 S.E.2d 73, 1941 Ga. LEXIS 574 (1941) (decided under former Code 1933, § 113-602); Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

To make out a prima facie case, where a caveat has been filed and to be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224, 1947 Ga. LEXIS 491 (1947), superseded by statute as stated in Reeves v. Webb, 297 Ga.

405, 774 S.E.2d 641, 2015 Ga. LEXIS 490 (2015) (decided under former Code 1933, § 113-602).

If a caveat has been filed all subscribing witnesses must be introduced for examination, even though the propounder knows that the witnesses' testimony will be unfavorable to the propounder, and if some or all of the subscribing witnesses cannot testify as to the testamentary capacity and mental condition of the testator, or give testimony adverse to the propounder and favorable to the caveator, such failure of memory or hostility will not necessarily defeat the will, since the propounder may make the proof required by law by other witnesses who can testify as to the essential facts, and upon sufficient proof being made the will may be probated. Spivey v. Spivey, 202 Ga. 644, 44 S.E.2d 224, 1947 Ga. LEXIS 491 (1947), superseded by statute as stated in Reeves v. Webb, 297 Ga. 405, 774 S.E.2d 641, 2015 Ga. LEXIS 490 (2015) (decided under former Code 1933, § 113-602).

To make out a prima facie case, and to be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535, 1948 Ga. LEXIS 412 (1948) (decided under former Code 1933, § 113-602).

To be entitled to a judgment of probate in solemn form, the propounder must introduce at the hearing all the subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible. The witnesses must be introduced, for examination, even though the propounder knows that their testimony will be unfavorable to the propounder. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

Upon the trial of an application to prove a will in solemn form, the witnesses are, all of them, unless accounted for, indispensably necessary witnesses. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

When four persons affixed their signature below the signature of the testator and three were present at the

probate proceedings and testified (the fourth was out of the state and her signature was proved by her mother), all four persons were properly accounted for. Thornton v. Hulme, 218 Ga. 480, 128 S.E.2d 744, 1962 Ga. LEXIS 539 (1962) (decided under former Code 1933, § 113-602).

Probating in solemn form. —

Will cannot be probated in solemn form upon the affidavits of the subscribing witnesses to the will. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

When witness outside jurisdiction of court, proof of signature may substitute for presence. —

When a witness is inaccessible at the time of probate in solemn form by reason of being without the jurisdiction of the state, proof of the witness's signature may be made. Dennis v. McCrary, 237 Ga. 605, 229 S.E.2d 367, 1976 Ga. LEXIS 1319 (1976) (decided under former Code 1933, § 113-602).

Presence of witnesses affords opportunity for cross-examination. —

Main reason of the rule for calling all witnesses in a proceeding for probate in solemn form is to give the other party an opportunity of cross-examining the witnesses. Miller v. Miller, 104 Ga. App. 224, 121 S.E.2d 340, 1961 Ga. App. LEXIS 647 (1961) (decided under former Code 1933, § 113-602).

Prima facie case by propounder shifts burden of proof to caveator. —

When propounder, in will contest, established the factum of the will and codicil and by proof of the attendant circumstances indicating mental capacity and freedom of will and action, a prima facie case for the validity of the will and codicil was made such as would shift the burden upon the caveator to show that the instruments were invalid by

reason of a degree of undue influence exercised upon the testator, such as would deprive the testator of the testator's own free will and substitute therefor that of the beneficiary. Ehlers v. Rheinberger, 204 Ga. 226, 49 S.E.2d 535, 1948 Ga. LEXIS 412 (1948) (decided under former Code 1933, § 113-602).

Probate of self-proved will upheld. —

Because testimony from the attorney who prepared and witnessed the decedent's self-proved will, an associate who also witnessed the will's execution, and the legal secretary who notarized the will supported a finding that the decedent had the testamentary capacity at the time the will was executed, the trial court did not err in admitting the will to probate. Tuttle v. Ryan, 282 Ga. 652, 653 S.E.2d 50, 2007 Ga. LEXIS 842 (2007) (decided under former O.C.G.A. § 53-3-13).

Opinion Notes

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes.

In light of the similarity of the statutory provisions, opinions under former Code 1933, § 113-602, are included in the annotations for this Code section.

Probate in solemn form required notice to all heirs at law

under former Code 1933, § 113-602 and such notice should be personal if the party resides in the state, but may be made by publication upon proper order of court when such party resided outside the state or was unknown under former Code 1933, § 43-5-21. 1954-56 Ga. Op. Att'y Gen. 916 (decided under former Code 1933, § 113-602).

Research References & Practice Aids

Cross references.

Subscribing witness's testimony, § 24-9-903.

Law reviews.

For comment on Byrd v. Riggs, 209 Ga. 930, 76 S.E.2d 774 (1953), see 16 Ga. B.J. 338 (1954); 18 Ga. B.J. 211 (1955).

For comment on the constitutionality of Ga. L. 1958, pp. 657, 658; as amended by Ga. L. Ex. Sess., 1964, pp. 16, 17, reducing the number of required witnesses to a will to two, in light of the constitutional provision that no law shall refer to more than one subject matter, see 1 Ga. St. B.J. 126 (1964).

For article discussing methods of summary distribution and settlement of decedent's estate, see 6 Ga. L. Rev. 74 (1971).

RESEARCH REFERENCES

Am. Jur. 2d.

79 Am. Jur. 2d, Wills, § 735 et seq. 80 Am. Jur. 2d, Wills, §§ 808 et seq., 816, 906 et seq., 920, 921.

C.J.S.

95 C.J.S., Wills, §§ 447 et seq., 472, 473, 616 et seq., 800 et seq.

ALR.

Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and

remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Probate of copy of lost will as precluding later contest of will under doctrine of res judicata, 55 A.L.R.3d 755.

Wills: challenge in collateral proceeding to decree admitting will to probate, on ground of fraud inducing complainant not to resist probate, 84 A.L.R.3d 1119.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

Hierarchy Notes:

O.C.G.A. Title 53

O.C.G.A. Title 53, Ch. 5

O.C.G.A. Title 53, Ch. 5, Art. 3

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