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When can a judge judge whether a judge can judge? In Re The Estate of Mary Ann Wilson, 238 Ill.2d 519 (2010)

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Once a judge has made substantive rulings, a party may still seek a substitution of judge 'for cause'.¹ Justice Maureen E. Connors,² then a trial judge sitting in the Cook County Probate Division hearing disabled adult guardianship matters, was faced with such a Motion to Substitute filed by the designated agent of an alleged disabled adult, claiming Judge Connors was prejudiced against her.

The requirements for proper presentation of a motion for substitution for cause are set forth in 735 ILCS 5/2-1001(a) (3). That section provides that the petition seeking substitution should "set[] forth the specific cause for substitution... The petition shall be verified by the affidavit of the applicant."³ The procedure for resolution of the petition for substitution of judge is as follows: "Upon the filing of a petition for substitution of judge for cause, a hearing to determine whether the cause exists shall be conducted as soon as possible by a judge other than the judge named in the petition."⁴

At issue in *Estate of Wilson* was whether the judge against whom the petition for substitution was filed was entitled to decide whether the petition was facially sufficient to require a hearing.⁵

Mary Ann Wilson was the subject of a disabled adult guardianship proceeding seeking the appointment of Ms. Wilson's cousin, Arnetta Williams, as guardian of Ms. Wilson, due to Ms. Wilson's alleged dementia. Karen Bailey claimed to be the designated agent in a power of attorney purportedly signed by Ms. Wilson prior to the initiation of the guardianship proceeding. Bailey filed a motion to vacate the guardianship order. Judge Connors held an evidentiary hearing on that petition and denied it. Subsequently, Williams filed a Citation to Discover against Bailey. Bailey then filed her Motion for Substitution of Judge.

Bailey moved for substitution on the basis that "[Judge Connors] did not believe [Bailey] after questioning her on matters 'of an adverse nature' at a prior hearing" and "would be predisposed not to believe [Bailey] at a hearing on the pending motions of ... Williams to revoke the powers of attorney." Bailey failed to include an affidavit or other verification.⁶ Judge Connors had commented, during a prior hearing, that "The concept of a POA [power of attorney] seems to be lost on you" and "Folks, I don't believe that."⁷ Williams responded to the Motion for Substitution and raised as bases for denial: 1) untimeliness; 2) lack of verification or affidavit; 3) the source of any bias asserted against Judge Connors was not extrajudicial, but as a result of Judge Connors' presiding over hearings in the matter at hand; and 4) the Motion was brought for an improper purpose—delay—rather than in good faith.⁸ Judge Connors denied the Motion for Substitution on the basis that it was facially insufficient. After Judge Connors ruled on pending motions related to the revocation of powers of attorney, Bailey appealed the denial of the Motion for Substitution as well as the substantive rulings on the powers of attorney.⁹

The appellate court agreed with Bailey on the Motion for Substitution and reversed on the basis that Judge Connors should

have automatically sent the Motion for Substitution to another judge, even to determine whether it was facially sufficient.¹⁰ Justice O'Malley, in her dissent, felt that a trial judge is entitled to make the preliminary determination of whether the Motion is facially sufficient, i.e., supported by the statutorily required affidavit showing bias.¹¹

After granting the Petition for Leave to Appeal, Justice Karameier, for the Court, conducted a comprehensive and thoughtful analysis of both the civil substitution of judge provision at issue and the very similar criminal provision.¹² The analysis made it clear that, in both the criminal context—where this matter is more often litigated—and in the civil context, “a party’s right to have a petition for substitution heard by another judge is not automatic.”¹³ The party bringing the motion must “adhere to express statutory requirements. [Citation omitted.] Trial courts are required to refer a petition to another judge for a hearing on whether cause for substitution exists only if the party seeking the relief is able to bring himself or herself within the provisions of the law.”¹⁴ The Supreme Court found that Bailey’s motion for substitution failed to contain an affidavit and “did not adequately allege cause for substitution.”¹⁵

Because prejudice “must normally stem from an extrajudicial source, i.e., from a source other than from what the judge learned from her participation in the case before her.” “A judge’s previous rulings almost never constitute a valid basis for a claim of judicial bias or partiality.”¹⁶ Bailey’s Motion was therefore facially insufficient not only because it lacked an affidavit, but because the basis alleged for the bias was Judge Connors’ potential negative impression of Bailey from previous hearings in the case pending. Hence, “they would not suffice to establish ‘cause’ for substitution within the meaning of section 2-1001(a)(3).”¹⁷ Accordingly, “the trial court had no obligation under the statute to refer the matter to another judge for a hearing.”¹⁸

The Court also found that there were two additional bases why denial of the motion was proper: untimeliness and bad faith.¹⁹ The Motion for Substitution was filed some four (4) months after the hearing at which Judge Connors made the comments Bailey felt indicated bias and after numerous additional court hearings were had, pleadings were filed and orders were entered.²⁰ Finally, the motion was brought at the time of a hearing on a Petition for Citation against Bailey and after her deposition. At this time, the Court found “Bailey surely understood, if she had not understood earlier, that her prospects of prevailing were rapidly diminishing.”²¹ Hence, the Court found that the purpose of the Motion for Substitution was “the possibility that, at least temporarily, attention would be shifted away from the merits of the case and that she might gain additional time to devise some way to forestall being stripped of her powers of attorney and having to answer for expenditures she was never able to document or justify.”²² There was no evidence in the record of any other reason for the delay.²³ The Court held that “under these circumstances, it was not error for the trial judge to deny the petition for substitution without referring it to another judge for a hearing on the merits of whether cause for substitution could be established.”²⁴

Justices Thomas, Kilbride and Garman concurred, and Justice Freeman specially concurred, with Justice Burke joining. Justice Fitzgerald did not participate in the decision.

Justice Freeman’s special concurrence disagreed with the majority’s analysis of the statutory issues. He opined that Judge Connors should have transferred the Motion to another judge for hearing, but found Bailey’s failure to attach an affidavit to be fatal to the Motion for Substitution.²⁵

The effect of this Opinion is that the judge before whom the matter is pending, and about whom the petition for substitution is filed, may make the initial determination of whether the petition for substitution is facially sufficient to warrant transfer for hearing on the merits of the petition. This determination is not limited to whether the motion was properly verified, but extends to whether the allegations as to cause meet the threshold requirement of being proper, including stemming from an extrajudicial source. In some circumstances, it may even be proper for the trial judge to deny such a motion as untimely or brought for an improper purpose. ■

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1. 735 ILCS 5/2-1001(a)(3).

2. Justice Maureen E. Connors is referred to in this Note as Judge Connors to reflect her status at the time of the decision and her role in the matter. Justice Connors currently sits on the First District Illinois Appellate Court, 2nd Division.

3. 735 ILCS 5/2-1001(a)(3)(ii).

4. 735 ILCS 5/2-1001(a)(3)(iii).

5. *In re Estate of Wilson*, 238 Ill.2d 519, 555, 939 N.E.2d 426, 345 Ill.Dec. 583 (2010).

6. *Id.*

7. *Id.* at 532.

8. *Id.* at 543.

9. *Id.* at 551.

10. *Wilson*, 389 Ill.App.3d 771, 905 N.E.2d 957, 329 Ill.Dec. 119 (1st Dist. 2010).

11. *Id.*, at 787-94.

12. 725 ILCS 5/114-5(d) provides that "any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion."

13. *Wilson*, 238 Ill.2d, at 553.

14. *Id.*

15. *Id.* at 554.

16. *Id.*

17. *Id.*

18. *Id.* at 555.

19. *Id.* at 557.

20. *Id.*

21. *Id.*

22. *Id.* at 557-8.

23. *Id.* at 558.

24. *Id.*