Probate E-Filing Question and Answers

Q: Why do last wills and testaments, commissions, surety bonds, and limited access account agreements have to be physically filed with the court since the purpose of e-filing is to avoid the paper filings?

A: E-filing is a procedural innovation that achieves a number of laudable goals, not the least of which is convenience and time savings for the practicing bar. However, it does not and was never intended to modify or repeal any of the procedural formalities prescribed by the probate code, particularly those relating to the admission to probate of testamentary instruments and securing the performance of court-appointed fiduciaries.

With respect to wills, the bar is reminded that the law in Missouri is very explicit regarding the requirements for "presentment" of a will. The definition of "presentment" in Section 473.050, RSMo, as amended in 1996, provides two means to "present" a will to probate.

> "**First, the will can be delivered to the probate division of the circuit court. § 473.050.2(1). [Author's emphasis added which does not appear in the opinion.]** This presumes the document delivered is a will satisfying the requirements of section 474.320. Second, if a will is not available, a verified statement stating why the will is not available *and* setting forth the known provisions of the will can be filed. ***Id.*** Either of these methods for presenting a will must also have either an affidavit requesting probate, a petition seeking to admit to probate, or an authenticated copy of the order admitting the will elsewhere. § 473.050.2(2)." ***Hawkins v. Lemasters***, 200 S.W.3d 57, 60 (Mo. App. W. D. 2006).

A will that is e-filed in accordance with the Rule 103.4(a), Mo. R. Civ. Proc., is merely a copy in PDF format, and the court cannot discern from the e-filed submission if it is an original, in which case the first means of presentment referenced above applies, or it is itself a copy, in which case the second means of presentment referenced above applies. Therefore, if an original will exists and is in the possession of the petitioner or counsel, if must be physically presented. If the original cannot be presented, then the e-filed submission must be treated as a copy for purposes of Section 473.050.

With respect to commissions, this is one of the procedures to obtain admission of a last will and testament to probate involving special circumstances. The testimony of two subscribing witnesses is required for admission of a will to probate. Section 473.053.1, RSMo. If a subscribing witness is unavailable at the time the will is produced, a commission may issue to an officer authorized by law to administer oaths and to take testimony of and certify the attestation of the witness. Of particular importance is the effect of testimony given by an attesting witness pursuant to the commission. The testimony has the same force and effect "as if taken before the court or clerk." Section 473.060, RSMo. The clerk is required to certify the testimony. Section 473.063, RSMo. This record of certified testimony is then admissible in evidence in any action challenging the validity of the will. Id.

The practicing probate bar must remember that the presentment and admission of a testator's last will and testament in accordance with the provisions of the probate code is a statutory alternative to a solemn proceeding to prove the will. The standard for the integrity and credibility of testimony adduced in the prescribed statutory proceeding should be no less compelling than testimony adduced in person in a courtroom, under oath, in a solemn proceeding. Therefore, it is the considered opinion of this court that, in order to constitute admissible evidence, the certified record of the testimony of a subscribing witness taken pursuant to a commission must contain the original record bearing original signatures, not copies from a PDF-formatted submission.

With respect to surety bonds, the bonds are required to be filed under Section 473.157, RSMo, to secure faithful performance of the personal representative's administration of an estate. The bond is a contract with the court that the surety's principal will faithfully administer the estate on pain of forfeiture of the bond. See ***State, to Use of Renfro's Adm'rs v. Price,*** 15 Mo. 375, 377 (1852). The statute expressly requires that the bond be executed and filed with the court and approved by the judge or clerk. This requirement also applies to fiduciaries appointed under the provisions of Chapter 475. Section 475.020, RSMo.

Under Section 473.207, RSMo, when a breach of the obligation of the bond of a fiduciary occurs, the court may, on its own motion or by other means, summarily determine damages as a part of administration and, by appropriate process, enforce collection from those liable on the bond. In such instances, the only competent evidence of the obligation securing performance is the instrument itself. It is, once again, the considered opinion of this court that, in order to commence enforcement proceedings against a surety bond, the court must have in its physical possession the original of the bond against which enforcement proceedings are commenced.

The same rationale applies to limited access account agreements. These account agreements are authorized by Section 473.160, RSMo, in lieu of the posting of a surety bond, and Section 473.207, concerning surety bonds, applies to a depository which has executed a certification pursuant to section 473.160 to the same extent as a commercial surety in the event of the failure of the fiduciary to faithfully perform his or her duties. ***In re Estate of Bourque***, 862 S.W.2d 500, 502 (Mo. App. E. D. 1993). Liability of a depository under a limited access account agreement is limited, however, to the extent of the assets in the custody of the depository. In other words, the limited access account agreement serves the same purpose as a surety bond. Consequently, the court must have the original of the account agreement in its physical possession for the same reasons as a surety bond.

Q: Is it permissible to mail the original of a last wills and testaments, commissions, surety bonds, and limited access account agreements to the court in lieu of physical presentment?

A: The probate code contains no specific directions regarding the manner of delivery of documents which must be physically presented to the court. However, the practicing bar is cautioned that, if a document is lost in the mail, an original of the document must still be physically delivered to the court. Commissions will have to be requested a second time and surety bonds and account agreements will have to be reissued by the surety or depository.

The obvious exception to this requirement is a last will and testament. If the original of the will is lost in mailing, it cannot be replaced with another original. The applicant will be forced to seek admission of a copy of the will under the second alternative means of presentment discussed above. In the opinion of this court, this is an extremely dangerous practice.

If counsel chooses to mail an original will to the court, the best practice would be to use some form of mail delivery which permits daily tracking of the location of the submission. Ordinary mail should not be relied on as a means of physically presenting a will.

Q: Local Rule 72.2, paragraphs (b) and (k) refer to "48 business hours." How is this time period calculated?

A: The time period of "48 business hours" contained in Local Rule 72.2 was borrowed from the local court rules adopted by the 16th Judicial Circuit (Jackson County) for purposes of uniformity in terminology. However, that phrase is not interpreted in the same manner in the 21st Judicial Circuit as it is apparently interpreted in the 16th Judicial Circuit.

In the 21st Judicial Circuit, the business hours of this court are defined in Local Rule 2.1 as the hours of 8:00 AM and 5:00 PM, Central Time, Monday through Friday. Moreover, this court applies Rule 44.01, Mo. R. Civ. Proc., when calculating due dates of pleadings or other submissions required to be filed with the court. Rule 44.01 excludes from time calculations the day a document is served or ordered to be filed (in this instance, the day the document is e-filed), weekends, and public holidays.

Therefore, for purposes of Local Rule 72.2, paragraphs (b) and (k), "48 business hours" is five (5) days and three (3) hours (between the hours of 8:00 AM and 5:00 PM, Central Time, not counting the day the document is e-filed and excluding weekends and public holidays).

Example: If a last will and testament is submitted electronically on a Wednesday at 2:00 PM and the next Monday is a public holiday, the will must be physically presented to the court on or before 11:00 AM on Friday of the following week. In this hypothetical, Rule 72.2(b) allows a little more than eight (8) calendar days to physically present the will. As a practical matter, if the will is presented on or before 5:00 PM on the day it is due, presentment will be considered timely.

Q: What should I do if a document that is required to be physically presented for inspection within 48 business hours cannot be produced within that time frame?

A: If a document cannot be presented for physical inspection within 48 business hours, as defined above, counsel should e-file a request for extension of time to present the document accompanied by a brief explanation of the circumstances preventing timely presentment and an estimate of the amount of additional time that will be necessary to physically present the document. Although not applicable in all probate proceedings, in granting these extension requests, the court will be guided by Rule 44.01(b), Mo. R. Civ. Proc. Counsel may rest assured that extensions will be freely given if justice so requires.

Q: Why does Local Rule 72.2(k) require documents verified in accordance with Section 472.080, RSMo, which includes virtually every document filed in probate, to be physically presented for inspection by the court within 48 business hours of submission, since the purpose of e-filing is to eliminate paper filings?

A: If Local Rule 72.2(k) is read carefully, it only applies to documents which are submitted bearing a facsimile signature in the following form: "/s/ (printed name of signatory)." While Rule 103.4(d), Mo. R. Civ. Proc., allows an electronic document requiring a signature to be signed in the following manner: "/s/ John or Jane Person," this court has determined that it will not accept a signature in that form in a verified document for the following reason.

In most cases, the court is requested to grant relief during administration in the form of ex parte orders authorizing or ratifying acts taken by court-appointed fiduciaries. Any relief granted by the court is binding on all persons interested in an estate, even if later modified or vacated by the court. See Section 472.150, RSMo. No hearing is conducted and the only competent evidence available to the court upon which an order granting relief may be based is testimony contained in the submission seeking relief and documentary exhibits attached thereto and incorporated therein.

It is precisely for this reason that Section 472.080 and this court require these submissions to be verified. The bar is referred to the excellent discussion of this issue in ***Estate of Bell***, 292 S.W.3d 920, 926-27 (Mo. App. W.D. 2009), where a personal representative, who was also an attorney, gave unsworn testimony in a court hearing on the fairness and reasonableness of the settlement of a claim:

> "Accordingly, even if the personal representative was a trusted attorney at law, fiduciary, or otherwise referred to as an officer of the court, it is well-established that a person's designation as such affords him no special privileges when he actively participates as a testimonial witness in a hearing or a trial. An officer of the court is not allowed to give unsworn testimony regarding facts not in evidence or disregard the evidentiary rules of admissibility….In short, Missouri courts require sworn testimony as a procedural safeguard to ensure that evidence presented is competent and reliable." ***Id.*** [Internal citations omitted.]

Based upon the foregoing, in the opinion of this court, it necessarily follows that a verified pleading requesting ex parte relief which is e-filed should, at the very least, bear hand-written signatures of the petitioner and his or her counsel in some form, preferably an original signature as opposed to stamped or electronic graphic signature. The impact of this requirement is easily avoided by simply affixing the original signature of the fiduciary and counsel on all verified pleadings, as previously required by this court before e-filing, and converting the document bearing the original signatures to PDF format for electronic filing in accordance with Rule 103.4(a), Mo. R. Civ. Proc. If this procedure is followed, the original does not have to be presented to the court for inspection. Rather, counsel must retain the original in their estate file and make it available for inspection by the court or introduction into evidence, if necessary.