

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

---

<i>In re</i> ESTATE OF MARY D. O'BRIEN,	)	Appeal from the
Deceased,	)	Circuit Court of
	)	Cook County.
MAUREEN V. O'BRIEN and DANIEL P.	)	
O'BRIEN, III,	)	No. 13 P 515
Petitioners-Appellants,	)	
v.	)	Honorable
MARGARET O'BRIEN SCHULZE and	)	Susan M. Coleman,
RICHARD SCHULZE, as Co-Executors of	)	Judge, presiding.
the Estate of Mary D. O'Brien,	)	
Respondents-Appellees.	)	

---

PRESIDING JUSTICE COBBS delivered the judgment of the court.  
Justices Fitzgerald Smith and Howse concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court substantially followed statutory procedure in denying a petition to remove estate executors, and its decision was not against the manifest weight of the evidence.

¶ 2 Petitioners, Maureen V. O'Brien and Daniel P. O'Brien, III, filed a petition to remove respondents, Margaret O'Brien Schulze and Richard Schulze, as co-executors of the estate of Mary D. O'Brien, pursuant to the Probate Act of 1975 (Probate Act) (755 ILCS 5/1-1 *et seq.*

(West 2014)). Petitioners appeal from an order of the circuit court of Cook County denying the petition. For the following reasons, we affirm.

¶ 3

#### BACKGROUND

¶ 4 Initially, we observe that respondents challenge the accuracy and fairness of petitioners' statement of facts in their appellants' brief. Respondents contend that petitioners' statement of facts "is inaccurate, incomplete and argumentative," and lacks adequate citation to the record. Illinois Supreme Court Rule 341(h)(6) requires the statement of facts to be "stated accurately and fairly without argument or comment, and with appropriate reference to the pages of record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Although this court may strike the statement of facts or dismiss the appeal based on violations of Rule 341(h)(6), we will not do so in the case at bar because petitioners' alleged violations do not hinder our review. However, we will disregard any noncompliant portions of petitioners' statement of facts in our review. See *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.*, 2015 IL App (1st) 133472, ¶ 80; *John Crane Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 698 (2009).

¶ 5 The record contains the following pertinent facts. On March 20, 2013, the circuit court entered an order admitting the will of Mary D. O'Brien (Mary's estate) to probate (2013 P 515). At one point Mary's estate had three independent co-executors: Mary's daughters Maureen V. O'Brien and Margaret O'Brien Schulze, and Margaret's husband Richard Schulze.

¶ 6 The estate of Daniel P. O'Brien, Sr. (Dan's estate) is also currently being administered in probate (2012 P 4381). Dan, who was Mary's husband, predeceased her. Margaret is also the executor of Dan's estate. The parties agree that Mary's estate, or Dan's estate, or both, holds all

of the stock or controlling interest in six entities.<sup>1</sup> Also, Mary's estate and Dan's estate each holds 50% of the stock in five corporations.<sup>2</sup>

¶ 7 The duly elected directors of the corporations and the estate-controlled entities are Margaret, Richard, and Margaret's son, James West. Also, James serves as president and Margaret serves as secretary. Maureen and one of Mary's grandsons, Daniel P. O'Brien, III, also served as corporate directors until their removal by shareholders.

¶ 8 On December 16, 2015, Maureen was granted leave to resign as co-executor of Mary's estate. That same day, petitioners filed the instant petition to remove respondents as executors in both Mary's estate and Dan's estate pursuant to section 23-2 of the Probate Act, listing several statutory grounds for removal (755 ILCS 5/23-2 (West 2014)). The petition prayed for the issuance of a citation directing respondents to show cause why they should not be removed as executors of Mary's estate and Dan's estate.

¶ 9 The circuit court never issued a citation to respondents. Rather, petitioners served respondents with the petition; respondents served petitioners with an answer; and petitioners served respondents with a reply. On February 11, 2016, the circuit court held a hearing on the "petition to issue the citation to remove." After hearing argument, the court denied the petition and entered a separate order for each estate.

¶ 10 On March 9, 2016, petitioners filed a single notice of appeal for both estates. However, petitioners attached only the order entered in Mary's estate. On respondent's motion, this court dismissed petitioners' appeal as to Dan's estate, but concluded that petitioners' perfected their

---

<sup>1</sup> Wheel Inn, Inc.; Wilson Road, Inc.; Casino Pizzeria, LLC; Domino's Restaurant, LLC; O'Brien Inn, Inc.; and MADO Groups, Inc.

<sup>2</sup> Berrien County Associates, Inc.; MMMD Investments, Inc.; Whittaker Woods Golf Associates, Inc.; GL Property Holdings, Inc.; and Citywide Management, Inc. In turn, these corporations are the general partners in several limited partnerships.

appeal regarding Mary's estate. Additional pertinent background will be discussed in the context of our analysis of the issues.

¶ 11

## ANALYSIS

¶ 12 Before this court, petitioners assign error to the circuit court's denial of their petition to issue a citation. Initially, we agree with respondents that petitioners' brief fails to set forth well-reasoned legal arguments and otherwise violates several provisions of Illinois Supreme Court Rule 341(h). Ill. S. Ct. R. 341(h) (eff. Jan. 1, 2016). Where a party's brief does not comply with these rules, or fails to articulate an organized and cohesive argument for the court to consider, this court has discretion to strike and dismiss the brief for failure to comply and dismiss the appeal. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 18. However, none of the deficiencies in petitioners' brief prevent us from ascertaining the relevant legal issues to be resolved. Thus, we choose to exercise our discretion and consider the merits of petitioners' arguments. See, e.g., *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Ass'n*, 2015 IL App (1st) 150169, ¶ 24.

¶ 13 In our view, petitioners raise essentially two issues. First, whether the circuit court substantially complied with the statutory removal procedure; and, second, whether the court erred in failing to remove respondents as executors of Mary's estate.

¶ 14

### I. Removal Procedure

¶ 15 Petitioners contend that the circuit court failed to follow the statutory procedure for removal of an executor. Article XXIII of the Probate Act provides for the removal of estate representatives. Section 23-2(a) of the Probate Act provides that "[o]n petition of any interested person or on the court's own motion, the court may remove a representative" based on one or more of ten listed grounds. 755 ILCS 5/23-2(a) (West 2014). Section 23-3 provides in pertinent part:

“Procedure on removal. (a) Before removing a representative for any of the causes set forth in Section 23-2, the court shall order a citation to issue directing the respondent to show cause why he should not be removed for the cause stated in the citation. The citation must be served not less than 10 days before the return day designated in the citation and must be served and returned in the manner provided for summons in civil cases. \*\*\* (c) The representative whose removal is sought may file a pleading to the petition or charges for removal on or before the return day designated in the citation or notice or within such further time as the court permits. If on the hearing the court finds that he should be removed for any cause listed in Section 23-2, the court may remove him and revoke his letters.” 755 ILCS 5/23-3 (West 2014).

¶ 16 Initially, respondents contend that petitioners forfeited this contention for review. The record shows that petitioners did not raise the issue of compliance with section 23-3 of the Probate Act in the circuit court. Thus, ordinarily, petitioners would be deemed to have forfeited this issue. See *In re Estate of Talty*, 376 Ill. App. 3d 1082, 1091-92 (2007).

¶ 17 However, application of the forfeiture rule is less rigid when the basis of the objection is the trial court’s conduct. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 41; *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 212 (2007). The instant petition prayed that the circuit court “issue a citation directing [respondents] to show cause why they should not be removed as executors.” The circuit court did not issue a citation. Rather, respondents filed a response and accompanying memorandum, in which they argued that “[p]etitioners’ allegations \*\*\* are baseless, and *insufficient to warrant issuance of the citation they request*.” (Emphasis added.) At the start of the hearing on the petition, the circuit court asked petitioners: “Okay. So this comes before the Court on a petition \*\*\* for rule [to show cause] to issue a citation to remove?” Counsel for petitioners answered: “At this point we’re asking the Court to issue the

citation \*\*\* for the executors to show cause why they should not be removed. The purpose of the citation is to notify the executors of the allegations made against them. This is not a hearing on the issues themselves. This is just to determine if we've set forth enough allegations to issue a citation and to warrant an evidentiary hearing.”

¶ 18 The record is clear that the circuit court, then respondent, and lastly petitioner, all acted with a consistent view regarding the requirements under section 23-3. Thus, based on this record, we choose to examine the issue on its merits.

¶ 19 Petitioners contend that section 23-3 required the circuit court to issue a citation to respondents and hold an evidentiary hearing. Respondent argues that section 23-2 provides that the court *may* remove an executor based on the listed grounds for removal. If the court *does* decide to remove an executor for any of those reasons, then the court *must* follow the procedure set forth in section 23-3. In other words, according to respondent, a section 23-2 petitioner does not have an automatic “right” to issuance of a citation or an evidentiary hearing pursuant to section 23-3. Rather, the need for an evidentiary hearing arises only where the circuit court actually chooses to issue the citation, which then directs the executor to show cause why he or she should not be removed for the reasons stated in the citation.

¶ 20 Respondents’ argument misapprehends the function of a citation in section 23-3 of the Probate Act. Generally, a “citation” refers, *inter alia*, simply to “[a] court-issued writ that commands a person to appear at a certain time and place to do something demanded in the writ.” Black’s Law Dictionary 277 (9th ed. 2009). In probate proceedings, a “citation” is the counterpart of a summons, and is the method for bringing all adverse parties before the court. *Matter of Estate of Van Dyke*, 772 P.2d 1049, 1052 (Wash. App. 1989); *In re Garmand’s Estate*, 277 P.2d 602, 606 (Kan. 1954).

¶ 21 Section 23-3 recognizes this generally accepted understanding of a citation. “The purpose of the citation is to notify the respondent about the alleged causes for removal and to give him an opportunity to defend at a hearing.” *In re Estate of Austwick*, 275 Ill. App. 3d 665, 671 (1995). In Illinois, the role of the citation in the removal of an estate representative is established:

“According to section 23-3 of the Probate Act of 1975, proceedings to remove an executor *are commenced when the court issues a citation* directing the representative to show cause why he should not be removed from office. \*\*\* [T]he issuance of a citation does not place the burden of proving fitness to retain office on the executor. Rather, the challenged representative must *answer the citation* by admitting or denying the allegations in support of removal. If the representative admits the allegations, and the admissions establish a *prima facie* showing of removal based on reasonable grounds for removal, the representative bears the burden of proving fitness to retain office. If the representative denies *the allegations of the citation*, \*\*\* the court commences proceedings on the petition for removal by conducting an evidentiary hearing. \*\*\* At the hearing, petitioners bear the burden of providing a *prima facie* case for removal by introducing evidence establishing reasonable grounds for removal. If the petitioners sustain their burden, the burden then shifts to the executor to prove his fitness to retain office.” (Emphases added.) *In re Estate of Kirk*, 242 Ill. App. 3d 68, 73 (1993); accord *In re Estate of Smith*, 41 Ill. App. 2d 86, 91-92 (1963) (stating that predecessor provision of section 23-3 “requires” that a citation be issued to representative requiring her to show cause why she should not be removed).

¶ 22 Clearly, it is the function of the citation *to begin* the procedure to remove an executor. However, in the case at bar, the circuit court, respondents, and petitioners placed the issuance of the citation *in the midst of a procedure that had already begun*.

¶ 23 Although the procedural requirements for removal were not strictly followed, substantial compliance with section 23-3 is sufficient. See *In re Estate of Denaro*, 112 Ill. App. 3d 872, 877-78 (1983). Here, the circuit court never issued a citation. However, petitioners and respondents were notified and appeared at a hearing. The circuit court heard their arguments and considered their pleadings, which had documentary evidence attached. We conclude that this procedure was substantially sufficient to ensure compliance with the intent and purpose of the Probate Act. See *Austwick*, 275 Ill. App. 3d at 671.

¶ 24 II. Good Cause for Removal

¶ 25 Having decided that the circuit court substantially followed the section 23-3 removal procedure, we now turn to the issue of whether the court correctly found that there was no good cause to remove respondents. Once reasonable grounds to support the removal are introduced into the record, the executor has the burden of proving his or her fitness to retain office, and the circuit court's power to remove an executor may only be exercised for good cause reflected in the record. *In re Estate of Lucas*, 71 Ill. 2d 277, 281-82 (1978). Section 23-2(a) of the Probate Act lists the ten grounds for which a court may remove an executor. 755 ILCS 5/23-2(a) (West 2014). The list is exhaustive; the court may remove an executor only for the reasons stated in the statute. *In re Estate of Kuhn*, 87 Ill. App. 2d 411, 416 (1967). Further, we are mindful that "an executor should not be removed for errors or omissions which are satisfactorily explained, [or] errors of judgment not amounting to malfeasance." *In re Estate of Breault*, 29 Ill. 2d 165, 180 (1963).

¶ 26 The standard of review for removal of an executor pursuant to section 23-2 is whether the decision of the circuit court is against the manifest weight of the evidence. *Kirk*, 242 Ill. App. 3d at 74; *In re Estate of Debevic*, 195 Ill. App. 3d 891, 897 (1990). A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident, or where the



decision is unreasonable, arbitrary, and not based on any evidence. *Lyon v. Department of Children and Family Services*, 209 Ill. 2d 264, 271 (2004).

¶ 27 The instant petition accused the respondents of wasting and mismanaging both estates, and failing to perform their fiduciary duties. The petition also alleged that Richard, due to illness, was incapable of or unsuitable for the discharge of his duties. In their response and supporting memorandum, respondents denied each ground. In their reply, petitioners did not pursue their allegation regarding Richard's fitness to discharge his duties.

¶ 28 At the hearing on their petition to remove, petitioners limited their grounds for removal to waste and mismanagement of Mary's estate. 755 ILCS 5/23-2(a)(4) (West 2014). The circuit court viewed the bulk of petitioners' allegations regarding waste and mismanagement as going to mere disagreement with the operation of the O'Brien family business. However, the court found that two allegations "were actually estate administration issues."

¶ 29 Petitioners alleged that Margaret, as executor of Dan's estate, paid her son, James, approximately \$312,000 from Dan's estate "for services not performed" or "duplicative of other persons' efforts." Respondents pled in their response that James' services were requested and his fee was earned. At the hearing, respondents argued that the appropriate forum to challenge this payment was a citation to discover or recover, not a citation to remove an executor. The circuit court agreed and rejected this allegation. However, as we earlier observed, petitioners failed to perfect their appeal as to Dan's estate. Therefore, the court's rejection of this allegation is not before us on review.

¶ 30 Petitioners also alleged that real estate taxes on various parcels of real estate, which were indirectly controlled by the estate, were in arrears. Further, "a substantial number of parcels of real estate" had been sold at tax sales and the redemption periods were running. However, respondents pled in their response that the taxes had been paid and none were past due. At the

hearing, respondents explained that the arrearage was due to cash flow problems of the various entities that own the real estate. The circuit court rejected this allegation as a ground for removal. After reviewing the record, we conclude petitioners failed to sustain their burden of proving a *prima facie* case for removal. Accordingly, we hold that the circuit court's finding was not against the manifest weight of the evidence.

¶ 31 As this court has observed:

“While the right of a testator to name an executor is not an unrestricted right to have that person so act, the selection should not be set aside lightly. \*\*\* [T]he selection of an executor is left neither to chance nor to the choice of others. The [testator] has designated, for reasons that may be obvious or unknown, the \*\*\* executor that he or she wants to take charge of this responsibility.” *Kuhn*, 87 Ill. App. 2d at 423.

¶ 32 Petitioners may desire a different executor because they do not like the manner in which respondents have proceeded in the probate of Mary's estate. However, we must honor Mary's choice of executors, and can alter that choice only for the specific reasons enumerated in section 23-2 of the Probate Act (755 ILCS 5/23-2 (West 2014)). We agree with the circuit court that petitioners failed to sustain their burden of proving grounds for removal.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the order of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.