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2013 IL App (3d) 120219-U

Order filed September 24, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re ESTATE OF E. LEROY RUS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Deceased	)	Whiteside County, Illinois,
	)	
(Betty A. Meinema,	)	
	)	Appeal No. 3-12-0219
Petitioner-Appellant,	)	Circuit No. 09-P-148
	)	
v.	)	
	)	
Barbara Bielema, Donald Rus and Darrell Rus,	)	
	)	
	)	Honorable John L. Hauptman,
Respondents-Appellees).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Presiding Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing petitioner's citation to discover assets.

¶ 2 Petitioner, Betty Meinema, is a beneficiary of the estate of her deceased father, E. LeRoy Rus. She, like her three siblings, was also the beneficiary of one of four equal payable-on-death (POD) accounts created by sister Barbara, as LeRoy's power of attorney, shortly before LeRoy's

death. Betty, like her siblings, accepted $147,437.90 from the POD accounts upon LeRoy's death. LeRoy had named Betty as coexecutrix of his 2004 will, which was admitted to probate on November 20, 2009. Betty refused to serve. Two years after LeRoy's death, and after the expiration of the time for any of her siblings to contest the will, Betty started filing pleadings demanding that her siblings pay back to the estate the $147,437.90 that they each received by virtue of the POD accounts. Betty says this is required as Barbara's creation of those POD accounts exceeded her authority under the power of attorney. Ultimately, the trial court agreed with Betty's siblings that Betty's claims failed. The trial court dismissed Betty's claims. We affirm.

¶ 3 BACKGROUND

¶ 4 On September 6, 2002, E. LeRoy Rus appointed Barbara his agent under a statutory short-form power of attorney for property. Paragraphs 2 and 3 of the power of attorney read as follows:

> "2. The powers granted above shall not include the following powers or shall be modified or limited in the following particulars (here you may include any specific limitations you deem appropriate, such as prohibition or conditions on the sale of particular stock or real estate or special rules on borrowing by the agent):
>
> No limitations.
>
> 3. In addition to the powers granted above, I grant my agent the following powers (here you may add other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust

specifically referred to below):

No limitations."

¶ 5 LeRoy executed a will and testament on February 19, 2004. The will bequeathed the sum of $100 to Darrell Rus, $100 to Donald Rus and split E. LeRoy Rus's shares of stock in Rus Bros. LP Gas Company evenly between Betty and Barbara. The will also split the residue and remainder of the Rus estate equally between Betty and Barbara.

¶ 6 On January 26, 2008, while acting as LeRoy's agent pursuant to the power of attorney, Barbara established four certificates of deposit in LeRoy Rus's name. The certificates of deposit were payable upon his death to each of his four children. The original amount of each certificate of deposit (CD) was $147,437.90.

¶ 7 LeRoy died approximately two weeks later on February 9, 2008. The value of each CD totaled $147,437.90 at the time of his death. The circuit court admitted LeRoy's February 19, 2004, will to probate on November 20, 2009, and letters of office were issued to Barbara at that time. Betty, named as a coexecutrix in the will, refused to serve in that capacity.

¶ 8 On February 23, 2010, Betty filed an application for appointment of special administrator, alleging there was a "substantial issue" regarding the POD CDs. Betty never scheduled a hearing on the matter and filed no more documents supporting the application. This document bears a "Proof of Service" stamp, indicating Betty's attorney served the document on the attorneys for the parties of record "by e-mailing the same addressed to such attorneys at their business address as disclosed by pleadings of record herein."

¶ 9 On October 25, 2010, Barbara filed her final report, scheduling a hearing for November 2, 2010. Before the hearing, however, Betty filed an objection to the final report and petition for accounting. The hearing on the final report took place on January 6, 2011, at which time the trial

court directed Betty to file a petition for citation to recover assets within 14 days and set a briefing schedule for the citation. The court further ordered Barbara to file an inventory of the estate's assets.

¶ 10 Betty filed her petition for citation to recover assets on January 12, 2011. The petition alleged that LeRoy was mentally incapable of making gifts at the time the POD CDs were established, and that the power of attorney did not specifically provide Barbara the authority to change the nature of a bank account, resulting in the unauthorized creation of the POD CDs. Darrell responded with a motion to dismiss, which the other children joined. The motion details many theories as to why dismissal of the citation is appropriate, including arguments involving estoppel and the doctrine of election. The hearing on the motion to dismiss the petition for citations did not take place until September 14, 2011, at which time the trial court found that the citations must issue, but that respondents may thereafter renew their motions to dismiss them once they do issue.

¶ 11 The next day citations to recover estate property issued to Donald, Darrell and Barbara. Darrell then renewed his motion to dismiss the citations, which Donald and Barbara joined. In responding to the motion to dismiss, Betty withdrew allegations regarding LeRoy's mental capacity, conceding that "the power of attorney was effective at the time of the creation of the POD accounts" and that "there is no need to consider the decedent's mental capacity."

¶ 12 Ultimately, the trial court dismissed the citations. In doing so, the court stated that pursuant to *In re Estate of Shugart*, 81 Ill. App. 3d 538 (1980), the petition and citations must state a cause of action upon which recovery can be granted. The trial court found "that the resolution of the motion to dismiss turns upon the scope of the authority granted in the power of attorney." The court continued that the phrase "No limitations" in paragraph 3 of the short-form

power of attorney authorized the establishment of the POD CDs "and, on that basis, the motion to dismiss should be granted." The order dated December 19, 2011, included Supreme Court Rule 304(a) language.

¶ 13 Betty filed a timely motion to reconsider, which the trial court denied. This timely appeal followed.

¶ 14 ANALYSIS

¶ 15 A. Applicability of 2-619 to Citations

¶ 16 Betty's initial claim on appeal is that the trial court erred when finding section 2-619 of the Illinois Code of Civil Procedure (the Code) provided a proper avenue to dismiss the citations. 735 ILCS 5/2-619 (West 2010). Betty cites to *In re Estate of Weisberg*, 62 Ill. App. 3d 578 (1978), as her sole authority to support this contention while attempting to distinguish *Shugart*, the case relied upon by the circuit court.

¶ 17 *Shugart* involved an appeal from the dismissal of a petition to issue citations. *Shugart*, 81 Ill. App. 3d at 538. In *Shugart*, the executor of an estate filed the petition to issue citations against an attorney who drafted decedent's will. *Id.* at 539. The petition alleged the attorney owed a fiduciary duty to the decedent and that the estate of decedent's sister was unjustly enriched by a breach of that duty. *Id.*

¶ 18 This court stated in *Shugart*, "We are asked to hold that a citation petition to discover and order the conveyance of certain real property need not state a cause of action for recovery of such real property to warrant issuance of the citation." *Id*. at 540. The *Shugart* court found that request untenable and held, "Where the petitioner seeks to have the right and title to property determined by the court, the petition must be sufficient to state a cause of action and to afford the respondent an opportunity to prepare a defense." *Id.* The *Shugart* court continued that "where

the relief sought is the recovery of property, the petition must state a cause of action or be subject to dismissal." *Id.*

¶ 19 Betty attempts to differentiate *Shugart*, noting that the entity in possession of the property in *Shugart* was a trust. Betty notes that the *Shugart* court recited well-settled law that no "recovery can be made from a trust estate by a third party based on the tortious acts of the trustee." *Id.* at 541. Betty finds *Shugart* inapplicable, noting the citations in this case are directed against individuals, not a trust. While acknowledging that this court clearly stated a petition to issue citations must state a cause of action or be subject to dismissal, she argues "what it really meant was that the trust was not the proper target and never would be."

¶ 20 Betty is correct in noting that the *Shugart* court found that any relief sought could only be directed at the trustee, individually, and not against the trust estate. *Id.* at 541. However, that is precisely why the petition for a citation failed to state a cause of action and does not negate the *Shugart* court's path of analysis that a petition for citations must state a cause of action or be subject to dismissal.

¶ 21 Citing *In re Estate of Weisberg*, 62 Ill. App. 3d 578, Betty further claims that a petition need only inform the court and the parties as to the relief sought to be sufficient. Interestingly, the *Shugart* court cited to *Weisberg* to support the proposition that where "the petitioner seeks to have the right and title to property determined by the court, the petition must be sufficient to state a cause of action and to afford the respondent an opportunity to prepare a defense." *Shugart*, 81 Ill. App. 3d at 540 (citing *Weisberg*, 62 Ill. App. 3d 578).

¶ 22 The *Weisberg* court noted there are two types of citations. *Weisberg*, 62 Ill. App. 3d at 585. One type "requests only information" in which case the "court may not try the question of title and order property to be turned over." *Id.* The other type of citation involves "an allegation

that certain property belonging to the estate is in the possession of respondents" and seeks recovery of that property. *Id.*

¶ 23 In *Weisberg*, the trial court ordered respondents to turn over property to an estate for wrongfully violating "the trust and fiduciary responsibility owed to the incompetent." *Id.* at 584. The respondents argued that the trial court had no jurisdiction to enter such an order as the petition for the citation "was limited to discovery of information," *i.e.*, it was the first type of petition mentioned above "requesting only information." *Id.* The *Weisberg* court disagreed, noting that the petition "was sufficient to apprise respondents that petitioner sought recovery of property in their possession and control" and, therefore, "properly invoked authority of the court to adjudicate rights of property." *Id.* at 585.

¶ 24 The question before the *Weisberg* court was whether the petition was sufficient to invoke the jurisdiction of the court, not whether the petition was sufficient to withstand a motion to dismiss. The *Weisberg* court's detailed description of *In re Estate of Garrett*, 81 Ill. App. 2d 141 (1967), shows a singular focus on whether or not "the petition invoked the court's jurisdiction to adjudicate rights to property because the petition was sufficient to inform respondent that petitioner sought recovery." *Weisberg*, 62 Ill. App. 3d at 585. *Weisberg* merely sets forth the necessary pleading requirements a petition must incorporate to invoke the court's jurisdiction. It does not set forth the pleading requirements necessary to withstand a motion to dismiss pursuant to section 2-619 of the Code.

¶ 25 Undoubtedly, the petition herein pled sufficient facts to invoke the court's jurisdiction to decide the matter of whether respondents wrongfully possessed property belonging to the estate. Moreover, it is clear that Betty's petition to issue citations does not simply seek information concerning discovery of the allegedly improperly held property, but seeks issuance of the second

type of citation discussed above: one which seeks return of the property to the estate. As such, "the petition must state a cause of action or be subject to dismissal." *Shugart*, 81 Ill. App. 3d at 540. Section 2-619 of the Code allows for dismissal of claims when they are "barred by other affirmative matter[s] avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). We find no merit to Betty's argument that section 2-619 is inapplicable to petitions to issue citations seeking the return of assets to an estate. We hold section 2-619 does is, in fact, applicable to such citations.

¶ 26 B. Other Affirmative Matters

¶ 27 Having found section 2-619 applicable to such petitions to issue citations, we must now determine whether the trial court correctly granted respondents' motion to dismiss. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). We review dismissals pursuant to section 2-619 *de novo*. *Saichek v. Lupa*, 204 Ill. 2d 127, 134 (2003). We accept as true all well-pleaded facts along with all reasonable inferences that can be gleaned from those facts and must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital,* 227 Ill. 2d 343, 352 (2008).

¶ 28 A section 2-619 motion admits the legal sufficiency of a claim, yet asserts an affirmative defense or other matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). An affirmative matter is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact. *Doe ex rel. Doe v. Lawrence Hall Youth Services*, 2012 IL App (1st) 103758.

¶ 29 Betty's petition alleges that Barbara "changed the ownership of certain funds on deposit

*** such that there was added the designation 'POD' and the funds were divided four ways, one share for petitioner and one share for each of the respondents. Each share was $147,437.90." The petition continues that the "power of attorney given by the decedent to respondent Barbara Bielema, does not at paragraph 3 specifically list the authority to change how a bank account is titled, and therefore the creation of the aforementioned 'POD' accounts was unauthorized."

¶ 30 Respondents affirmatively pled that the power of attorney did, in fact, give Barbara the power to add the POD designation on the CDs. Specifically, respondents note that the power of attorney states:

> "3. In addition to the powers granted above, I grant my agent the following powers (here you may add other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below):
>
> No limitations."

¶ 31 The trial court found this language gave Barbara the power to change beneficiaries on CDs and correspondingly granted respondents' motion to dismiss. This court, however, may "affirm on any ground evident in the record." *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1023 (2010). We find petitioner is equitably estopped from attacking the creation of the CDs and, therefore, affirm the trial court's dismissal of the citation.

¶ 32 Respondents argue that both the doctrine of election and general equitable principles of estoppel should bar Betty from challenging Barbara's creation of the POD accounts at this late date. Specifically, respondents note that the doctrine of election is a "well-settled equitable doctrine in this State *** that any person who voluntarily accepts a beneficial interest under a

will is held thereby to ratify and confirm the entirety of the will which conferred the benefit. In other words, the beneficiary may not accept a bequest of the testator and at the same time set up any right or claim which would defeat or prevent the full operation of the will." *Kyker v. Kyker,* 117 Ill. App. 3d 547, 551 (1983). Citing to the First District appellate court case of *In re Estate of Boyar*, 2012 IL App (1st) 111013, respondents argue that the doctrine of election should be expanded beyond wills and trusts to include one who takes under any document then seeks to challenge it. While the First District discussed why it believed the doctrine of election should not only apply to a will but also a " 'deed or *other instrument'* " (emphasis in the original) (*id.* at ¶ 33) (quoting *Holzbaugh v. Detroit Bank & Trust Co.*, 371 Mich. 432, 436 (1963) (quoting *Jacobs v. Miller*, 50 Mich. 119, 126 (1883)), our supreme court recently reversed the First District's decision. *In re Estate of Boyar*, 2013 IL 113655.

¶ 33 When discussing the doctrine of election, the *Boyar* court noted that existing "Illinois case law offers little guidance on these questions" of whether the doctrine should be expanded beyond wills to trusts and other documents. *Id.* at ¶ 34. *Boyar* involved a party taking certain property under a trust but also challenging an amendment to that trust. *Id.* at ¶ 16. Ultimately, our supreme court reversed the appellate court's ruling that the doctrine of election barred the party from challenging the trust's amendment, noting that "there was no need for the lower courts to address whether the doctrine of election should be extended to living trusts ***." *Id.* at ¶ 1.

¶ 34 In reversing the lower court's application of the doctrine of election, our supreme court noted that the party opposing the challenge to the trust did so "based solely on the 'doctrine of election.' " *Id.* at ¶ 28. Although determining that lower courts erred in expanding the doctrine, the *Boyar* court noted other principles existed to prevent situations in which a party takes under a document, then challenges the validity of the same document. *Id.* at ¶ 40. In doing so, the court

stated:

> "Finally, we note that, separate and apart from the doctrine of election, there is a general principle of equity which holds that once one accepts some benefit, one cannot then challenge the validity of the thing by which the benefit was conferred. This principle has been applied in a variety of contexts, including challenges to divorce decrees [citation] and other judgments [citation], contract disputes [citations] and statutory challenges [citation]. It is based on principles of logic, fairness and consistency which are self-evident: Unless you acknowledge that a decree, statute, contract, etc., is valid, then by what right can you claim the benefit you accepted under its terms?" *Id.*

¶ 35 The *Boyar* court noted it did not need to address this general equitable principle as the party challenging a provision of the trust was "not attempting to accept a benefit while at the same time challenging the validity of the provisions by which the benefit was conferred." *Id.* at ¶ 41.

¶ 36 In the case at bar, however, the respondents opposed Betty's challenge to the creation of the POD accounts based upon the doctrine of election as well as equitable estoppel grounds. While we realize the *Boyar* court's discussion of general principles of equity is *dicta*, it is nonetheless instructive.

¶ 37 Respondents herein argue that after "it was too late for her brothers to contest LeRoy's will, Betty filed a citation formally challenging, for the first time, the POD accounts." Therefore, respondents claim she should be estopped proceeding with her challenge. We agree.

¶ 38 Equitable estoppel "has been defined as the effect of a person's conduct 'whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has thereby led to change his or her position for the worse.' " *Hahn v. County of Kane*, 2013 IL App (2d) 120660, ¶ 12 (quoting *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001)).

¶ 39 In *Geddes*, our supreme court revisited language more than 90 years old, noting that " 'Estoppel may arise from silence as well as words. It may arise where there is a duty to speak and the party on whom the duty rests has an opportunity to speak, and, knowing the circumstances, keeps silent. [Citations.] It is the duty of a person having a right, and seeing another about to commit an act infringing upon it, to assert his right. He cannot by his silence induce or encourage the commission of the act and then be heard to complain." *Id.* at 314 (quoting *Bondy v Samuels*, 333 Ill. 535, 546 (1929)).

¶ 40 Respondents noted below, and do again to this court, that Barbara submitted LeRoy's will to probate on November 20, 2009. Barbara as executrix, informed Betty and all potential heirs and beneficiaries that the six-month period in which to contest the validity of the will under section 8-1 of the Probate Act (755 ILCS 5/8-1 (West 2008)) expired on May 20, 2010. The respondents further note that despite allegedly taking issue with Barbara's creation of the POD CDs, Betty not only accepted the $147,437.90 from her CD, but waited until after the expiration of the six-month contestation period to bring any meaningful action to recover assets into the estate. Betty did not file her objection to the final report and petition for an accounting until October 29, 2010, more than five months after the contestation period expired. As noted above, Betty transformed her objection and request for an accounting into a petition for citations to recover estate property on January 12, 2011.

¶ 41 The record is clear, as her counsel admitted during oral arguments to this court, that Betty never sought to repay the $147,437.90 she received into LeRoy's estate. The record is also clear that the will admitted to probate, signed by LeRoy on February 19, 2004, was not the only will he executed during his lifetime. The record contains a previous will also signed by LeRoy on May 30, 2000.

¶ 42 Respondents argue this is the exact type of scenario principles of equitable estoppel are intended to prevent: a party taking under a document, remaining silent for 2½ years only to then later question the validity of that document. The respondents claim Betty's violation of those principles are especially egregious as she waited to take any meaningful action in opposition to the creation of the CDs through the power of attorney until after respondents could no longer contest the February 19, 2004, will. We agree.

¶ 43 We find Betty is estopped from challenging the power of attorney used to create CDs. Barbara used the power of attorney to establish the certificates on January 26, 2008. LeRoy died on February 9, 2008, at which time Betty became owner of one of the certificates valued at $147,437.90. Betty stuck the $147,437.90 granted to her by virtue of Barbara's exercise of the power of attorney in her pocket and then over two years later claimed that her siblings had no right to do the same. Betty never sought to return that money to LeRoy's estate and waited to present a meaningful challenge to the creation of the certificates until filing her objection to the final accounting on October 29, 2010: more than 2½ years after receiving the $147,437.90 and more than five months after expiration of the time to contest the validity of LeRoy's will. As principles of equity precludes Betty's challenge to Barbara's authority to create the CDs, we hold the trial court did not err in dismissing the petition for citations to recover estate property.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 46 Affirmed.

47. PRESIDING JUSTICE WRIGHT, dissenting.

48. LeRoy Rus executed a statutory short form POA on September 6, 2002, granting his daughter, Barbara, certain powers of attorney. Two years later, in 2004, LeRoy changed his previous will, by reducing his two sons' respective shares of his estate to merely $100 and equally dividing the remainder between his two daughters. Two weeks before LeRoy's death on February 8, 2008, Barbara exercised her authority as POA to withdraw $589,751.60 in cash from LeRoy's bank account. She used this cash to purchase four POD CDs, each designating one of LeRoy's four children as the sole beneficiary of $147,437.90. Following LeRoy's death, in 2008, the bank distributed the proceeds of the four individual POD CDs to the named beneficiaries, Betty, Barbara, Donald, and Darrel, in equal amounts of $147,437.90

49. The trial court found, as a matter of law, Barbara did not exceed her authority as POA by using $589,751.60 of LeRoy's assets to purchase the four POD CDs. Consequently, the court granted the 2-619 motion to dismiss Betty's citations to return the proceeds of the POD CDs to the estate in order to be distributed according to LeRoy's 2004 will.

50. The majority does not affirm the trial court's ruling based on the language of the short form POA. Instead, the majority affirms the dismissal of the citations after applying estoppel. This approach implies the majority is reluctant to affirm the trial court's ruling, as a matter of law, based on the language of the POA. I agree the trial court erroneously determined the language of the short form POA authorized Barbara's actions as POA, because LeRoy's 2004

will clearly provided each son would receive only $100 after LeRoy's death.

51. However, unlike my respected colleagues, I do not believe estoppel should be used as an alternative basis to affirm the dismissal of the citations to recover property for the estate. For this reason, I would simply reverse the trial court's order allowing the 2-619 motion to dismiss.

52. I. Estoppel

53. In this appeal, the majority adopts the respondents' argument that when "Betty filed a citation formally challenging, for the first time, the POD accounts," on January 12, 2011, "it was too late for her brothers to contest LeRoy's will." I respectfully dissent because the record does not support the observation that Betty *first* raised the issue related to Barbara's authority after it was too late for her brothers to challenge the 2004 will.

54. A short chronology of events may be helpful to understand my position. Shortly after LeRoy's death in 2008, each sibling received $147,437.90 from the bank, not the estate. Thereafter, in 2009, Barbara initiated the underlying probate proceedings on November 20, 2009.[1] Approximately 90 days later, on February 23, 2010, Betty filed an "Application for Appointment of Special Administrator" formally alleging a special administrator was necessary because Barbara, while previously acting as LeRoy's POA in 2008, engaged in the "unlawful creation of POD CDs by Barbara Bielema, in circumvention of the testator's wishes as expressed in his Last Will and Testament."[2]

55. Thus, Betty first formally challenged Barbara's authority on February 23, 2010, nearly

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[1] Although LeRoy's will designated both sisters as a co-executors, Betty opted not to act as a co-executor after the disagreement over the POD CD's arose.

[2] The record shows attorneys for the children exchanged letters, prior to the will being probated, questioning the validity of the POD CDs.

one year before the first citations issued on January 12, 2011. Based on this chronology alone, I conclude any one of Betty's siblings had an opportunity to file a timely challenge to their father's 2004 will after February 23, 2010. Therefore, I respectfully disagree that Betty's conduct foreclosed her siblings from contesting the 2004 will.

56. In addition, I note Barbara filed a final report and accounting on October 25, 2010. Four days later, on October 29, 2010, Betty once again raised the same issue with respect to Barbara's lack of authority as POA. On October 29, 2010, Betty objected to the final report on the basis that the $589,751.60 Barbara withdrew from LeRoy's accounts should be considered part of the estate and should not have been used to purchase the POD CDs. Thus, when Betty requested citations on January 12, 2011 it was the third time, rather than the first time, she raised this issue.

57. Based on this record, I contend estoppel should not be *decided* at this stage of the proceedings because there are many unresolved factual considerations. This is not to say estoppel may not apply at some point in the future when litigated by the parties. However, at this point, it is unclear whether Betty knew Barbara purchased the POD CDs, without her father's directive, in the last two weeks of his life. In addition, the record does not demonstrate whether Betty knew each brother would receive only $100, according to the 2004 will, until such time as the revised 2004 will was admitted to probate in 2009. To apply the theory of estoppel, as raised by respondents in this appeal, various factual determinations will be required by the trial court.

58. Therefore, I agree with the trial court's approach, and decline the opportunity to consider any theory of estoppel in the context of this 2-619 motion to dismiss the citations to recover assets. I respectfully dissent because I cannot affirm the trial court's ruling on this basis.

59. II. Ruling on the 2-619 Motion to Dismiss

60. Although the majority does not address this issue, I respectfully submit the merits of the court's ruling on the language of the POA should also be considered. Here, the trial judge decided respondents' section 2-619 motion to dismiss, as a matter of law. The court found the "[n]o limitations" language in paragraph 3 of the POA authorized Barbara to use LeRoy's money to create the four new POD CDs, naming all four children as equal beneficiaries, shortly before his death.

61. The legal issue presented in this appeal is whether the language of the POA provided authority for Barbara to use LeRoy's funds, during his lifetime, to purchase POD CDs as gifts for her brothers (both named beneficiaries of LeRoy's will) in an amount that far exceeded the amount LeRoy bequeathed to each son according to his 2004 will. To me, the answer to this very narrow question of law is that, pursuant to statute, Barbara could not rely on paragraphs 1 and 3 of the short form POA to authorize her decision to use LeRoy's funds during his lifetime to purchase the POD CDs designating her brothers as beneficiaries of more than $100 each. 755 ILCS 45/3-1; 3-4 (West 2010). I submit her actions were unauthorized by the POA because she gifted, or redistributed, LeRoy's existing assets shortly before his death, contrary to the intent expressed in his will. Therefore, I would reverse the courts ruling on the 2-619 motion to dismiss for the reasons set forth below.

62. Paragraph 1 of LeRoy's POA lists the standardized statutory powers granted under a short form POA in subparagraphs (a) through (o) (755 ILCS 45/3-4 (West 2010)), and paragraph 2 of LeRoy's POA lists "No limitations" on those standardized statutory powers. Paragraph 3 of LeRoy's POA is the clause at issue in the instant case and requires interpretation. That clause of LeRoy's POA provides:

"*In addition to the powers granted above*, [subparagraphs (a) through (o)] I grant my

agent the following powers (here you may add other delegable powers including, without limitation, power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants or revoke or amend any trust specifically referred to below):

No limitations." (Emphasis added.)

63. I observe the plain language of this clause states that additional *delegable* powers must be specified in the paragraph "below." First, section 3-4 of the Illinois Power of Attorney Act (the Act), provides the short form POA does not give rise to the power to make *"*gifts of the principal's property."

64. Further, the language "[n]o limitations" does not denote a specific additional power. It is well-established in Illinois that a general catchall phrase in a POA, without specifying those additional powers of the agent, will not expand powers not expressly enumerated in the POA. See *Nicholls,* 2011 IL App (4th) 100871, ¶ 27 (holding the general grant of power in the document was insufficient to authorize the agent to name or change beneficiaries for the certificates of deposit and no specific authorization of the power to change beneficiaries appeared in the POA); *Fort Dearborn*, 316 Ill. App. 3d at 496 (omission of paragraph three completely from POA evinces an intent that the agent not be granted any additional powers, such as the power to name or change beneficiaries); *Romanowski*, 329 Ill. App. 3d at 775 (leaving a blank space under paragraph 3, which provided that if the principal wished to grant the agent the power to name a beneficiary, did not show intent of principal to authorize agent to name beneficiaries).

65. I conclude that, since Barbara was not *specifically* given the authority to make gifts of LeRoy's property or to redesignate beneficiaries for LeRoy's property upon his death, Barbara

was bound to act in LeRoy's interests and comply with his expressed intent, which is verified by his will, while acting as his agent under the POA. See 755 ILCS 45/3-4 (West 2010). Thus, no matter how well-intentioned Barbara's actions may have been with respect to her brothers, the legal issue dictates the outcome of this appeal. Based on my analysis, Barbara may still have opted to sharing her portion of the estate equally with her brothers after final distribution of her father's estate.

66. I would respectfully reverse the trial court's dismissal of Betty's citations to recover estate property and remand the matter to the trial court. Upon remand, the parties may litigate the issue of estoppel in another procedural context, if so desired, thereby allowing the trial court to make the appropriate factual determinations following remand.