The Trusts and Estates Expert Witnesses—Who Are They?

By Hillary A. Frommer

We expect certain expert witnesses to appear and play pivotal roles in certain types of cases. For example, a valuation expert often takes center stage in a business divorce matter. A physician expert witness is required in a medical malpractice action. In the trusts and estates arena, however, there is not one particular expert witness who must or will always testify. From planning to administration to litigation, trusts and estates matters involve a wide range of issues, which can lead to the utilization of almost any type of expert, such as appraisal experts, physicians, attorneys, scholars, and accountants, to name a few. This article discusses some of the most commonly utilized expert witnesses in trusts and estates litigations.

Psychiatric Experts

Psychiatric experts are frequently utilized (either by giving testimony or submitting affidavits) in proceedings where the testator’s capacity is at issue. It is very common for an objectant in a probate proceeding to present expert psychiatric testimony to establish that a testator lacked testamentary capacity at the time a will was executed. Similarly, petitioners in discovery and/or turnover proceedings under Article 21 of the Surrogate’s Court Procedure Act (SCPA) often present psychiatric experts to show that a decedent lacked the capacity to make a particular gift, or execute a contract or a deed.

Such expert testimony was critical in In re Clines, and In re Pashad, both SCPA Article 2103 proceedings. In In re Clines, the Appellate Division was persuaded by the expert testimony of the decedent’s treating psychiatrist that the decedent was not competent when he purportedly made gifts to the respondent totaling $250,000.3 Finding that the respondent failed to rebut that evidence, the court held that the special referee should have ordered that the subject assets be returned to the decedent’s estate.

The Surrogate’s Court in In re Pashad found that the expert testimony of the decedent’s attending physician established that the decedent “was not competent to understand and appreciate the nature of the transaction that took place at his bedside,” in which the decedent executed a deed transferring his home to the respondents.4 Because the respondents failed to come forward with any expert rebuttal evidence, and relied instead on only the testimony of lay witnesses that the decedent was “alert” and “responsive,” the court granted the petitioner’s motion for summary judgment and declared the deed at issue “invalid, null and void.”5 Not all psychiatric experts carry the day, however. Often, the expert opinion comes from professionals who never actually treated the decedent, but rather formed their expert opinions by reviewing medical records. It is well-settled in New York that the courts afford very little, if any, weight to such expert testimony, and the decisions in this regard are legion.6 One such case is In re Swain,7 a contested probate proceeding in which the Surrogate’s Court was reversed because it admitted this type of expert testimony at a jury trial. The decedent’s treating physician testified in support of the propounded will that the decedent was lucid and rational each time he saw her. The objectant then presented testimony from an expert psychiatrist that the testator was impaired by a stroke and could not have known the nature and extent of her assets or the natural objects of her bounty. The jury rendered a verdict that the decedent lacked testamentary capacity, and the Surrogate’s Court subsequently entered a decree denying the decedent’s will to probate. The petitioner appealed, and the Appellate Division reversed. It found the objectant’s expert had never treated the decedent, nor consulted with anyone who had treated her, and based his opinion on reviewing the medical records. Thus, the opinion was purely speculative and “entitled to no weight.”8

Handwriting Experts

Handwriting experts are frequently utilized in probate proceedings where the genuineness of a testator’s signature on a will is at issue. For example, in In re Halpern,9 the petitioners produced a handwriting expert to authenticate the signatures of the decedent and supervising attorney on the will offered for probate. In fact, a handwriting expert can be a key witness in contesting a will based on due execution. In In re Sylos estri,10 to refute the testimony of the attesting witnesses, the objectant presented a handwriting expert who compared the signature on the propounded will to signatures that were undisputedly those of the testator, and opined that the signature on the propounded will was not that of the testator. The Court of Appeals upheld the Surrogate’s Court jury verdict which denied probate based on that expert’s testimony.11

A handwriting expert was also a critical witness in In re Grancaric,12 a probate proceeding, where the Appellate Division affirmed the decree declining to admit the will to probate after a jury determined that the decedent’s will was not properly executed in accordance with EPTL 3-2.1. At the trial, the proponent established a presumption of due execution by offering the testimony of the attorney who supervised the will execution and the three witnesses who signed the will, who
testified that there were “indications” that the decedent signed the will.\textsuperscript{13} The objectant rebutted that presumption by presenting a handwriting expert who opined, based on comparing the propounded will with other original documents known to have been signed by the decedent, that the signature on the will was not the decedent’s. The jury was free to credit or disregard the expert’s testimony, and apparently found it persuasive, which was not against the weight of the evidence.

**Investment Experts**

Financial investment experts commonly testify in contested accounting proceedings as to whether a fiduciary complied with the prudent investor rule, which provides that “[a] trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard.”\textsuperscript{14} The prudent investor standard requires a trustee “to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument.”\textsuperscript{15} In *In re Rowe*,\textsuperscript{16} for example, a bank was appointed the trustee of a charitable lead trust which was funded solely by IBM stock. The respondents objected to the fiduciary’s accounting of the trust on several grounds, including that the fiduciary imprudently managed the trust’s assets. They presented a seasoned investment manager and CFA (chartered financial analyst) as an expert to testify how the fiduciary’s failure to diversify the trust’s assets was imprudent. Notably, the same expert testified in *In re James*,\textsuperscript{17} the frequently cited Court of Appeals case in which the Surrogate’s Court had found that the fiduciary had acted imprudently by failing to diversify the estate’s high concentration of Kodak stock. In that seminal decision addressing the prudent investor rule, the Court of Appeals affirmed the finding of liability, but reversed the Surrogate’s calculation of damages based “lost profits.”\textsuperscript{18}

An expert testifying as to a fiduciary’s prudence need not necessarily be an “investment” expert. Just about anyone can testify as an expert witness so long as he or she satisfies the standard and possesses the “requisite skill, training, education, knowledge or experience from which it can be assumed that the...opinion rendered is reliable.”\textsuperscript{19}Regardless of his profession, an expert must have the appropriate background and experience necessary to persuade the trier of fact of his position. In *In re Kopek*,\textsuperscript{20} an estate accounting proceeding, the objectant put forth expert testimony of a financial planner to support his theory that the executor was liable for losses the estate sustained due to the post-9/11 stock market decline. The objectant relied heavily on his expert’s testimony that cash was the proper investment method of a short-term investment, and that the executor breached the Prudent Investor Act by maintaining stocks rather than selling them “immediately” and converting them to cash.\textsuperscript{21} The executor’s rebuttal expert was an attorney “with considerable experience in representing fiduciaries of estates.”\textsuperscript{22} That lawyer ultimately proved to be the better choice for an expert witness on the issue. The court found that the objectant’s financial expert lacked credibility because “he sought to apply his idea of prudent liquidation time lines for brokers and financial planners to an estate relationship. [The executor’s] expert, on the other hand, was addressing prudence solely with respect to estate administration, and as such his testimony is more relevant and due more weight.”\textsuperscript{23} In fact, the court found the financial planning expert to be a “poor witness overall,” and disregarded his testimony.\textsuperscript{24}

**Foreign Law Experts**

Experts in the laws of foreign countries are commonly utilized in various Surrogates’ Court proceedings, where the court must apply a foreign law in determining property or distribution rights. That was the situation in *In re Monsen*,\textsuperscript{25} a construction proceeding, where the decedent was a New York domiciliary and resident of Norway, and had executed a will which purported to dispose of property located in New York, Norway, and England. The effectiveness of the will to dispose of the New York property was established through an affidavit of an expert in Norwegian law.

Experts in Swiss law were critical in *In re Schneider*,\textsuperscript{26} an accounting proceeding, where the decedent was a naturalized American citizen of Swiss descent, a New York domiciliary, and owned real property in Switzerland. The decedent’s will purported to dispose of the real property in a manner contrary to Swiss internal law. The New York court was called upon to determine property rights and whether the decedent had the power to dispose of the property in Switzerland under his will.

**Conclusion**

The foregoing is only a small sampling of the types of experts who are utilized in trusts and estates matters. Litigants have utilized many other types of expert witnesses, including experts who seem out of the ordinary for Surrogate’s Court proceedings. Consider the following two cases: *In re Friedman*,\textsuperscript{27} a SCPA Article 2103 proceeding in which three experts testified as to the regular method of dealing between artists and art dealers; and *In re Post*,\textsuperscript{28} where an expert in the field of nursing testified as to changes in the profession where relief was sought under the *cy pres* doctrine concerning the decedent’s will. Indeed, the various issues that can arise in Surrogate’s Court proceedings can allow for just about any type of testifying expert witness, so long as the individual’s knowledge, skill, and expertise in a particular area will assist the trier of fact.
Endnotes
3. Clines, 226 A.D.2d 269.
5. Id.
6. In re Chiurazzi, 296 A.D.2d 406, 744 N.Y.S.2d 507 (2d Dep’t 2002) (affirming the Surrogate Court’s decision admitting the will to probate following a non-jury trial, the court noted that the objectants put forth testimony of an expert psychiatrist who had never treated the decedent, but concluded that such testimony was not entitled to weight on the issue of capacity); In re Tracy, 221 A.D.2d 643, 634 N.Y.S.2d 198 (2d Dep’t 1995); In re Callahan, 155 A.D.2d 454, 547 N.Y.S.2d 113 (2d Dep’t 1989); In re Buchanan, 245 A.D.2d 642, 665 N.Y.S.2d 980 (3d Dep’t 1997) (stating that the psychiatric expert was a long-time acquaintance of the testator’s but had never treated him); In re Estate of Bogen, No. 32844[U], slip op. (Sur. Ct., N.Y. Co. Nov. 14, 2014).
7. 125 A.D.2d 574, 509 N.Y.S.2d 643 (2d Dep’t 1986).
8. Id. at 576.
9. 76 A.D.3d 429, 906 N.Y.S.2d 253 (1st Dep’t 2010).
11. Id.
13. Id. at 1281.
15. EPTL 11-2.3(b)(3)(C).
18. Id.
21. Id. at 903.
22. Id. at 908.
23. Id. at 909.
24. Id.
27. 64 A.D.2d 70, 407 N.Y.S.2d 999 (2d Dep’t 1978).

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