INSIDE THE MINDS

Strategies for Trusts and Estates in New York

Leading Lawyers on Analyzing Recent Developments and Navigating the Estate Planning Process in New York

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ASPATORE

Defensive Estate Planning

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Introduction

"An ounce of prevention is worth a pound of cure." – Benjamin Franklin

If you are an attorney who regularly prepares wills as part of your practice, you will likely have at least one occasion during your career when, at the drafting stage, a challenge to probate of a client's will is expected. The steps that you take, beginning with the initial meeting with the client, through how the will is drafted and executed, will have a direct impact on defeating any objections to probate. Carefully documenting how the attorney-client relationship was formed, meetings with the client, how drafts and correspondence were sent to and reviewed with the client, and controlling the circumstances of the will's execution, will prove just as important to implementing the client's plan as accurately recording the client's wishes for the disposition of his or her assets.

In some cases, careful drafting and documentation will avoid a contest completely. While these steps may increase expense at the drafting stage, the client should understand that protracted litigation presents substantial expense later and that a more modest investment presently may avoid, or minimize, both a substantial reduction to the client's gross estate due to litigation expense and the possibility of having his or her testamentary intentions nullified.

This chapter will identify those who have standing to challenge the will, the objections that may be asserted to deny probate, and strategies the planning attorney should consider to, if not prevent any objection, position the will's proponent for success in each objection by creating certain invaluable evidence at the drafting and execution stages.

Initial Considerations: Who May Contest and on What Basis?

Who May Contest?

In considering how to protect a will from a later challenge, the analysis begins by identifying those who will have standing to object to probate. New York's Surrogate's Court Procedure Act (SCPA) § 1410[1] provides, in relevant part:

[1] SCPA § 1410.

> Any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof except that one whose only financial interest would be in the commissions to which he would have been entitled if his appointment as fiduciary were not revoked by a later testamentary instrument shall not be entitled to file objections to the probate of such instrument unless authorized by the court for good cause shown.

Generally, this means the objectant will likely be:

- A distributee whose interest in the will, if any, is less than that in intestacy, or
- A person, or entity, whose interests in the decedent's estate is greater under a prior will than that, if any, under the propounded will.

A person falling into one of these categories who is under a disability will have his or interests represented by a guardian *ad litem,* and the interests of a charitable, religious, educational, or benevolent organization will be represented by the New York State Attorney General's Office (Estates, Powers, and Trusts Law [EPTL] § 8-1.1(f)).[2]

Once you, as the attorney draftsperson, have identified those who will have standing to challenge the client's will, your next step is to identify the legal bases on which may they may do so.

What Can Be Alleged?

Lack of Due Execution

The statutory elements that must be proved by the proponent to establish due execution of a will are set forth at EPTL § 3-2.1[3] and may be summarized as follows:

[2] EPTL § 8-1.1(f).
[3] EPTL § 3-2.1.

1. The testator must sign the will, at the end thereof.[4] If another person signs the name of the testator, it must be done in the presence of, and at the direction of, the testator, in accordance with the provisions of EPTL § 3-2.1(a)(1)(A)-(C).[5]
2. The testator must either affix his signature in the presence of each attesting witness or acknowledge to each attesting witness that the testator's signature was affixed by the testator or by his direction.[6]
3. The testator must declare to each of the attesting witnesses that the instrument to which the testator's signature has been affixed is the testator's will.[7]
4. At least two attesting witnesses must, within one thirty-day period:

    a. Attest the testator's signature, as affixed or acknowledged in their presence; and
    b. At the request of the testator, sign their respective names and affix their respective residence addresses at the end of the will.[8]

Forgery

Although the objection of forgery may be pled in addition to lack of due execution, it is actually part of due execution because the proponent must establish, as part of that case, that the testator signed the will or someone did so at his direction, *supra*.

Lack of Testamentary Capacity

To prove testamentary capacity, the proponent must establish that at the time the will was made, the testator:

1. Knew the nature and extent of his assets;
2. Knew those who would be considered the natural objects of his bounty and his relations with them; and
3. Understood the nature and consequences of executing a will.[9]

[4] EPTL § 3-2.1(a)(1).
[5] EPTL § 3-2.1(a)(1); EPTL § 3-2.1(a)(1)(A) to (C).
[6] EPTL § 3-2.1(a)(2).
[7] EPTL § 3-2.1(a)(3).
[8] EPTL § 3-2.1(a)(4).
[9] *Estate of Kumstar,* 66 N.Y.2d 691, 496 N.Y.S.2d 414, 487 N.E.2d 271 (1985).

The capacity to execute a valid will is minimal. It is lower than that required to execute most other legal documents or contracts.[10] The focus is the testator's competence at the time the will was executed.[11]

The Will Is the Product of Undue Influence

To establish undue influence, the objectant must show that the

> influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist.[12]

Stated differently, the objectant must establish by a preponderance of the evidence:

1. Motive by the alleged actor(s) to exert undue influence,
2. Opportunity to do so, and
3. Actual exercise of undue influence on the testator.[13]

A suspicion of undue influence may arise if any of the following circumstances is present:

- The testator had diminished mental or physical capacity;

[10] *In re Coddington's Will*, 281 A.D. 143, 118 N.Y.S.2d 525(3d Dep't 1952), order aff'd, 307 N.Y. 181, 120 N.E.2d 777 (1954).
[11] *Matter of Estate of Morris*, 208 A.D.2d 733, 617 N.Y.S.2d 513 (2d Dep't 1994). ("With respect to the issue of the decedent's testamentary capacity, evidence was presented at trial that, upon her admission to a nursing home, the decedent suffered periods of disorientation and confusion. However, the uncontroverted evidence establishes that, when the will was executed, the decedent was alert and understood what was taking place [cite omitted]."); *Matter of Hedges*, 100 A.D.2d 586, 473 N.Y.S.2d 529 (2d Dep't 1984), *appeal dismissed, Hedges, Matter of*, 63 N.Y.2d 944, 1984 WL 281188 (1984).
[12] *Children's Aid Society*, 70 N.Y. 387 at 394 (1877).
[13] *Matter of Fiumara's Estate*, 47 N.Y.2d 845, 418 N.Y.S.2d 579, 392 N.E.2d 565 (1979); *In re Walther's Will*, 6 N.Y.2d 49, 188 N.Y.S.2d 168, 159 N.E.2d 665 (1959); *Matter of Bosco*, 144 A.D.2d 363, 533 N.Y.S.2d 933 (2d Dep't 1988).

- The testator disinherits a natural object of his bounty;
- The testator favors one or more people in a similar class over others in that class (e.g., children not treated equally);
- The will represents a substantial change in the testamentary scheme reflected in prior wills, especially if the testator is ill or weak and/or the will has been drawn by an attorney new to the testator;
- Someone in a confidential or fiduciary relationship (i.e., attorney, physician, home health aide, nurse, attorney-in-fact) is a beneficiary or had involvement in preparation of the will; or
- The testator has been isolated from the natural objects of his affection.[14]

Mistake

To sustain an objection of mistake as a ground to deny admission of a will to probate, it must be shown that either the decedent did not understand the provisions of the will or the drafting attorney erred in implementing the testator's instructions. The burden of showing the decedent signed the instrument by mistake falls on the objectant. If a mistake is established, the court has the power to refuse probate to the relevant part of the will.[15]

Fraud

To prove fraud in the context of a will contest, the objectant must show by clear and convincing evidence that a false statement was made to the testator, inducing her to execute a will disposing of her property differently than she would have if she had not heard the fraudulent statement.[16]

Duress

> In the context of contested probate proceedings, New York State courts tend to blur the distinction between

[14] *In re Kaufmann's Will,* 20 A.D.2d 464, 247 N.Y.S.2d 664 (1st Dep't 1964), *order aff'd,* 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965), *aff'd, Matter of Kaufmann's Will,* 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864 (1965); *In re Zirinsky,* 43 A.D.3d 946, 841 N.Y.S.2d 637 (2d Dep't 2007).
[15] *Estate of Obermeyer,* 2014 WL 1255193 (N.Y. Sur. Ct. 2014).
[16] *Matter of Will of Coniglio,* 242 A.D.2d 901, 663 N.Y.S.2d 456 (4th Dep't 1997).

> duress and undue influence. Indeed, the New York State Pattern Jury Instructions do not even mention duress as a ground, separate and apart from undue influence, for contesting a will.[17]

Nonetheless, a *prima facie* case of duress has been established if:

- A wrongdoer threatens to perform, or performs, a wrongful act
- That induces fear into the testator and thereby coerces the testator
- To make a will he would not have made if he were exercising free will and judgment.[18]

Strategies to Consider: Will Drafting and Execution

As the attorney who oversees the execution of the will that you prepared for your client, you are uniquely situated to create documentary evidence and provide testimony to help overcome the due execution and forgery objections. Your involvement in selecting the attesting witnesses and documenting communications with your client throughout the process, including the execution ceremony, will aid in defeating the other potential objections to probate.

Stage 1: Initial Meeting and Subsequent Communications with the Client

Establish and Document Testamentary Capacity

To satisfy the elements of testamentary capacity, you should take care in exploring the testator's understanding of the nature of his assets and natural objects of his bounty/next of kin. Your testimony on these points, buttressed by contemporaneous notes, will prove to be critical evidence in any contest. Consider the facts of the following case.

In *Will of Marie Hedberg,* a jury verdict admitting a will to probate was vacated on objectant's motion for a directed verdict. The decision rested in part on the failure to establish the three elements of testamentary capacity through the testimony of the attorney draftsperson. The surrogate held:

[17] *Matter of Rosasco,* 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819 (Sur. Ct. 2011).
[18] *Id.*

> Here the testimony of the one attesting witness and the testimony of the attorney draftsman failed to meet Petitioner's initial burden of demonstrating Decedent's testamentary capacity. On this record, Petitioner failed to prove Decedent knew the nature and extent of her property she was disposing of, or that she knew the natural objects of her bounty. [The attorney-draftsperson] never spoke to Decedent until he met her on the day of the will's execution. There was no testimony that he ever discussed with Decedent her assets or even inquired of Decedent what her assets were. He never interviewed her or explored her wishes, rather he relied on the questionnaire which he testified he didn't know whose handwriting it contained. Even assuming the Decedent had filled out the questionnaire, it does not mention or list any property (personal or real) Decedent possessed. There was no showing she was aware she owned real property or had a retirement account which Petitioner testified contained approximately $50,000.00. There was no showing Decedent knew the natural objects of her bounty. [The attorney-draftsperson] never asked her about her next of kin, relying instead upon the questionnaire, which as already indicated, he didn't know whose handwriting was on it.[19]

Investigate Possible Undue Influence, Duress, or Fraud, and Document Conclusions

The starting point for exploring undue influence is identifying:

- How the client came to meet with you (e.g., longstanding relationship, recent referral and, if so, by whom, etc.);
- Who set up the meeting; and
- Whether anyone other than the client is asked to, or seeks to, attend any meeting or provide information or direction to you regarding the client's will.

[19] *In re Will of Hedberg,* 45 Misc. 3d at 656.

Every reasonable effort should be made to meet with the client alone at all times. Beneficiaries should be excluded from every part of the drafting process and execution ceremony if a contest is expected.

One exception to this guideline may be in cases where spouses are jointly represented by an attorney for devising a coordinated estate plan. However, this does not mean the presence of a spouse at all meetings will not, in certain situations, create questions potentially affecting probate of the will. With blended families increasing and conflicts arising between the testator's later spouses and issue from his or her prior marriages increasing, as well, you should take care to avoid the appearance that someone other than the testator (be it a spouse or other person) instructed you. Consider the following case.

In *Will of Kazan*, the proponent was the decedent's second wife, and the objectants included decedent's children from his first marriage. At issue was a codicil that served to disinherit the decedent's children and make the proponent/second wife the sole beneficiary of the estate. The draftsperson was unable to identify who requested that he draft the codicil. Nor could he recall from whom he took instructions regarding its contents, though he did recall that he never spoke to the decedent out of proponent's presence. The court, referring to the following facts, denied the proponent's motion for summary judgment dismissing the undue influence objection:

> In this instance the draftsman has testified that he never spoke to decedent out of the presence of his wife. Furthermore, his testimony that "they" came to him to have the codicil drafted and that the instrument was what "they" wanted, raises concern regarding whether the instrument is a result of decedent's or Maria's wishes. It is of note that the codicil was drafted after decedent had suffered a stroke and reflected a significant change in decedent's testamentary scheme, benefitting only Maria and disinheriting decedent's children who, as far as the draftsperson knew, had not fallen into disfavor with decedent.
>
> These factors coupled with objectants' testimony that decedent was frail, no longer able to communicate clearly,

> completely dependent on Maria, and inhibited by her from having contact with them at the time both instruments were executed, raise not only questions of undue influence, but give rise to the question of whether Maria and decedent were in a confidential or fiduciary relationship, such that would give rise to an inference of undue influence on her part, especially in light of the draftsman's testimony regarding her involvement in the preparation of the instruments.[20]

Probe the Client's Capacity and Exercise of Free Will

By asking certain questions and documenting the client's responses, you will be in a better position to prove capacity and testify why you were satisfied that the client's testamentary plan was that of the client acting under his or her own free will:

- Record name, address, date of birth
- Document family history (parents, siblings, children, spouse (current and former), grandchildren, nieces/nephews, aunts/uncles). Identify all distributees and the client's relationships to each (e.g., close, estranged, distant, never met).
    - Can you tell me about the important relationships in your family and others who are close to you?
    - Do you have a power of attorney or health care proxy? If so, who are the agents and why?
    - Can you describe the nature of any family or other disputes or tensions that may have influenced your distribution of assets?
- Explore the client's health (recent changes, hospitalizations).
- Explore dependency on any particular person and whether he or she is a beneficiary or related to, or associated with, a beneficiary.
- Does anyone assist you with any of the following: paying bills, administering medication, banking, cooking, routine traveling (e.g., grocery store, doctor's appointments)?

[20] N.Y.L.J., 1202609554508, at *1 (Sur. Ct. New York County; decided June 27, 2013).

- For a new client, how did you get my name? Have you hired a lawyer before for estate planning? If so, why the change?
- Have you spoken with anyone about what is to happen with your property when you die? Has anyone suggested/asked/insisted that you dispose of your assets in a certain way?
- Can you think of anyone who might expect to receive something from you when you die? Why or why not?
- Explore the client's history of gifting, including any recent changes or patterns.
- Explore any loans made or forgiven by the client.
- Has anyone offered to pay for you to do a will? Do you expect someone else to pay for my services?
- Explore assets:[21]

    - Begin with open-ended questions: How much do you believe everything you own is worth? Tell me about your assets.
    - Do you own a home (establish awareness of debt or mortgage, if any, and if it is owned with someone else, e.g., spouse, partner, sibling).
    - Bank accounts, investments, retirement accounts, life insurance, etc.
    - Artwork, jewelry, collectables.
    - Reconcile beneficiaries under existing documents (e.g., life insurance beneficiaries, Totten Trust/pay-on-death (POD) /joint survivorship account beneficiaries, retirement/ pension account beneficiaries) with those in will. Same? Different? Why?

- If there is a prior will, review it with the client and ask the reason(s) leading to the changes in the will.
- Why did you decide to divide the estate in this particular fashion?

[21] Attorneys may routinely obtain the client's authorization to have the client's accountant and/or financial advisor provide information to the attorney to aid in the planning. This could be particularly important if a contest is expected on capacity because it will allow the attorney to confirm the accuracy of the financial picture recited by the client. It may also be verified by the attorney's review of statements and other financial documentation provided by the client directly.

- If there is an estrangement with a family member or natural object of the client's bounty, explore the duration and reason for the rift and whether anyone else is aware of it.
- Is any part of your decision driven by information you received from someone else? Are you basing this decision in any way on something someone told you about any of [insert natural objects of bounty]?
- Have you considered how _____ might feel about having been excluded from the will or having been given a significantly lower amount than (other children/nieces/nephews) or less than a prior will?
- If a charity or other organization is favored, tell me why this charity/organization is important to you.

Explore Confidential and Fiduciary Relationships

As noted above, a suspicion of undue influence will arise if there is a gift to someone in a confidential/fiduciary relationship with the testator. Thus, if a client expresses an intention to make a gift to such a person, you should explore the client's relationship with the proposed legatee carefully. You should have notes on what the testator advised regarding the duration of that relationship, nature of the relationship, motivation for a legacy, and any other facts leading you to conclude the bequest is free of any undue influence or duress.

Attorney Beneficiary or Executor

The foregoing would not be of much aid to sustaining a bequest to an attorney drawing a will in which he is a beneficiary. There are special considerations for situations in which the testator wishes to leave a bequest to an attorney or name an attorney as executor.

Attorney beneficiary: If you learn that your client wishes to name you as a beneficiary in the will you have been asked to draw, you should consider carefully the admonition of the Court of Appeals in the seminal *Putnam* case: "Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. Any

suspicion which may arise of improper influence used under the cover of the confidential relationship may thus be avoided."[22]

Attorney executor: SCPA § 2307-a[23] requires a testator's written acknowledgment of disclosure when "an attorney prepares a will to be proved in the courts of this state and such attorney, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney is therein an executor-designee." The statute includes a model form.[24]

In the absence of such a writing, "the commissions of an attorney, or an employee of the attorney who prepared the will or a then affiliated attorney, who serves as executor shall be one-half the statutory commissions" that which the person would otherwise be entitled.[25]

Stage 2: Provisions of the Will

Among the more important provisions to consider including in a will that is expected to be challenged is an *in terrorem,* or "no contest," provision, addressed separately below (*see* In Terrorem *or "No Contest" Clauses*, *infra*).

Addressing a Disinheritance

As the draftsperson, you should consider, in appropriate circumstances, including within the will the testator's explanation for any disposition that may be considered unusual or challenged later. Consider the following illustration.

At the time of making his will, the testator, a recent widower, has four grown children (three sons and one daughter) who constitute all of his distributees. His only prior will leaves his estate to his late wife and, if she predeceases him, among his four children equally. The testator explains that he wishes to divide his estate in equal shares, as may be effectively disposed of, among his children (or their spouse/surviving issue, if any child predeceases him), with one notable exception.

[22] *In re Putnam's Will*, 257 N.Y. 140, 143, 177 N.E. 399, 79 A.L.R. 1423 (1931). The ethical rules related to a bequest to an attorney draftsperson are beyond the scope of this chapter, but should be carefully considered, as well.
[23] SCPA § 2307-a.
[24] SCPA § 2307-a(1).
[25] SCPA § 2307-a(5).

He advises that his daughter, Alice, recently left Steve, her husband of almost thirty years, to travel the world with a younger man she had met recently. Alice openly acknowledges that Steve was a good husband and father and that she left him only because she wanted "more excitement out of life." The testator explains that he does not believe in divorce, nor does he understand his daughter leaving Steve. Nevertheless, this does not alter his love and affection toward Alice. He explains that ever since Steve and Alice married long ago, Steve has always been around to help him and the rest of the family. The testator regards him as a "fourth son" who will always be a part of his family and, therefore, the share for Alice will be divided between her and Steve equally. He says Alice may not like this and may fight it, but this is his money, and he will do as he pleases.

Facing this situation, you should inquire whether the testator has discussed the client's plan with his family or anyone else.[26] Some clients who are disposing of assets in a way that may upset a child will prefer keeping that plan a secret. The client, understandably, is concerned about losing any relationship he may have with the child or otherwise straining the family relationship. That client may not wish to encounter the stress such disclosure will cause during his lifetime.

On the other hand, some clients may wish to explain their intentions while they are alive, in an effort to alleviate any shock or disappointment after their death. A client opting for the latter route will now have more witnesses who can attest to his state of mind.[27] That fact alone, however, should not compel lifetime disclosure by the client who, based on his or her knowledge of the family, recognizes it will result in more harm in life than benefit after death. As the attorney, you can take other measures to safeguard the plan against a successful attack.

Returning to the example above, the testator chose to inform his children and their spouses of his intention shortly prior to signing his will, which read in part:

[26] *See, e.g., Matter of Zirinsky, supra*. (The drafting attorney advised the client to inform her children during her lifetime of an unequal division of assets among them in her will. The client declined, but wrote an explanatory letter to be delivered to her children after she died.)

[27] The draftsperson should keep in mind the provisions of Civil Practice Law and Rules (CPLR) 4519 (the "Dead Man's Statute"), which will render people interested in the outcome of the probate contest incompetent to testify.

> Although I have discussed with my four children and their spouses, including Steve, the reasons for my further division between Alice and Steve of the share of my residuary estate provided for in this Paragraph, I shall repeat and restate them here in this my Will briefly. This bequest is not motivated out of any loss of love or lesser affection for my daughter Alice who I love dearly, but is rather motivated by my sincere fondness and respect for Steve who has been a valued and trusted member of my family for decades and will remain a valued and trusted member of my family regardless of any marital difficulties, including divorce or separation, that Alice and Steve may experience.

Thus, the will itself reflected a considered and rational basis for the "unusual" disposition.[28]

To vary the above hypothetical somewhat, if the testator wished to disinherit a child entirely, or someone else who would have standing to object, a different approach may be in order. This is especially so in instances when a parent dislikes a child intensely. After being advised the will is a publicly recorded document, the testator may decide against having the "parting shot" and elect not to air years of grievances in his will by referring to the motivation for the omission of that party. Indeed, in such a situation, the client's sensibilities notwithstanding, it might be advisable not to list every reason motivating the testator to disinherit that person, as doing so might encourage a challenge by opening old wounds and fueling an emotional charge against the will.

If the testator is disinheriting someone who would be a natural object of her bounty, there should be a reference to that person by name and relation in the will. Omitting any reference to that person might be viewed as a failure of the testator to recognize the natural objects of her bounty. A common provision is, "I have considered my son Paul in making this Will,

[28] *In re Llewellyn,* 135 A.D.3d at 500 ("Petitioners made a prima facie showing that decedent's decision to change his testamentary plan to leave the bulk of his estate to charity was the product of his own wishes. Numerous witnesses testified to decedent's strong interest in providing for the education of minority youth, and the will explained that there was no bequest to three of decedent's children because of provisions he had established for them during his lifetime.").

but for reasons best known to me, I make no provision for Paul [and/or any of Paul's lineal descendants]."

You should take copious notes as to why that party was omitted. You should place yourself in the shoes of that party's counsel in the SCPA 1404 exam, anticipate the likely questions regarding the plan, and allow yourself to be able to answer those questions completely.[29] If a fact does not make sense to you as the drafting attorney, pursue an explanation to avoid later giving an "I do not know" response to a legitimate question at the 1404.

An example is a client advising that she wishes to leave her entire estate to her favorite charity with nothing to her son (her only distributee and living relation) because he was given "enough" and "has plenty." Understanding the son's attorney will ask what the client meant by this, you must so inquire of the testator. You could then relate in later testimony that the client told you that she paid for her son's college and medical school tuition and gave him money to buy his first home and start his medical practice, which is doing well, given her observation of his lifestyle, including his houses, cars, and frequent vacations to exotic destinations. Thus, a rational motivation for the bequest can be explained more fully.

Considering the Client's Capacity in Drafting

Although possessed of testamentary capacity, a client with diminished capacity is far more likely to read and express an understanding of a five-page will that is read to or reviewed with him than a twenty-five-page document. For an elderly client with diminished capacity, implementing an overly complicated estate plan driven by technical tax considerations or other purposes might result in difficulty showing you had an engaged discussion with the client regarding the document.

In that regard, inapplicable boilerplate should be cut out. If the will does not provide for any pre-residuary bequests and disposes of the entire residue outright to a charity, then articles addressing gifts to minors or the

[29] SCPA § 1404 allows for a party to a probate proceeding to obtain discovery and depose, at a minimum, the attorney draftsperson, attesting witnesses, and, if the will contains an *in terrorem* provision, the nominated executor(s) and proponent(s) before (or after) filing objections.

terms of testamentary trusts should be removed. Not only will this elimination reduce the size of the will, but it will also aid in providing testimony about your thorough review of the instrument with your client. If the unnecessary boilerplate is included: Did the client ask why there was a provision about trusts when none was created?

Stage 3: Execution of the Will

Client's Advance Review of a Draft

You should send the client a draft in advance and review the will with the client before the execution ceremony. If the client asks questions, they should be recorded, as this will aid in showing the testator considered what was presented to him for signing.

The Attesting Witnesses

You should carefully select the attesting witnesses to aid the proponent in meeting his burden on due execution and testamentary capacity. If a contest is expected, the witnesses should be people who fall into one or both of the following categories:

- They are familiar with the statutory requirements for executing a will and/or
- They have known the testator for some time.

Ideally, a person who is a stranger to both the testator and the procedure for due execution of a will should not be asked to serve as an attesting witness when a contest is anticipated. For example, if the will is executed in a hospital, a floor nurse who is unfamiliar with due execution formalities and who may have had little or no interaction with the testator prior to that time (and certainly no interaction with the testator prior to his hospitalization) may not prove the best witness to relate the facts of the execution ceremony at a later deposition or trial.

A witness who is familiar with the execution ceremony may testify at deposition that prior to this date, he witnessed X number of wills for his employer/colleague/partner, knows the routine they follow, and can explain

that routine. Even if he cannot recall the fine details of the execution ceremony completely (e.g., the time of day, who sat where) he does not recall an instance when the supervising attorney deviated from that routine.[30] Further, an attorney who has an understanding of the formalities involved may testify that he understood the requirements of EPTL § 3-2.1[31] at that time and, if the acts of the supervising attorney and testator did not comport with the statute, he would not have signed as an attesting witness.

If capacity is expected to be an issue, having a witness who has known the testator well for some time is important because that witness will have a long baseline to draw upon in assessing the testator's conduct at the time of execution. Returning to the hospital example, if upon admission to the hospital, the testator exhibited confusion, forgetfulness, and disorientation, and notes recording this confusion were made on his chart, an objectant may argue that this behavior continued through the date of the will some days or weeks later. A friend or familiar acquaintance of the testator will have a reference point to draw from in recounting the execution ceremony at the hospital that a stranger (e.g., the floor nurse) will not.

For example, the friend would be able to have a conversation with the testator and testify that testator "was himself" and no different at the time of execution from the way he had been over the years. This witness could explain what he means by referring to the conversation (testator asked about the witness's family by name; testator discussed his own family, health condition, current events, prior experiences—all of which would support the witness's opinion that the testator was of sound mind). Further, someone known to the testator will be aware of any particular or "quirky" traits the testator may possess and recognize that as "normal"; whereas, a

[30] *In re Estate of Leach,* 3 A.D.3d at 764. (In rejecting the argument that issues of fact on due execution arose because the attesting witnesses had no specific recollection of the event, and affirming summary judgment to the proponent, the Appellate Division held:

> Both witnesses, the attorney who drafted the will and his secretary, were deposed. While neither could recall the particulars of this will signing, both testified that their will signing procedure never varied in that they were routinely in the client's presence while the client reviewed the document, declared it to be his or her last will and testament, and executed it; then, at the client's request while all three were present, they would sign as subscribing witnesses.

[31] EPTL § 3-2.1.

stranger to the testator might recall such conduct and later testify that it struck him as irrational or unusual behavior.

The supervising attorney should allow the witnesses ample opportunity to have a meaningful and substantive dialogue with the testator before turning to execution of the will. This will allow time for the witnesses to satisfy themselves that the testator possesses capacity. In probate contests, only two classes of people can testify as to their opinion on the testator's capacity: attesting witnesses and experts qualified by the court.

Although ordinarily the opinion of a lay witness is not admissible for determining soundness of mind, in probate proceedings, the testimony of a subscribing witness may be used for such purpose.[32] The testimony of the attesting witnesses is entitled to great weight.[33] Thus, especially when a contest is expected, careful selection of these witnesses is very important.

Consideration should be given to the witnesses' availability to testify at deposition or trial in the future. Thus, the age, stability, and overall health of the witnesses should be taken into account. Further, although the goal of the attorney is to dispose of any objection on a summary judgment motion (if not avoid any objections altogether), as New York permits objections to probate to be decided by a jury, someone who would present well and relate the events of the execution in a credible, confident, and articulate manner to the jury is to be preferred over someone less able.

Medical Evaluation

Even though you may conclude that, based on your discussions with the testator (at which the testator communicated a complete and accurate understanding of his assets, family [objects of bounty], and what a will accomplishes), your testimony will prove the three elements of testamentary capacity, there may, nevertheless, be occasions when bolstering this testimony is advisable if a contest on capacity is expected. In one such scenario, the testator might have suffered a stroke before the will or was hospitalized and some cognitive impairment was recorded on hospital records proximate to the date of the will signing.

[32] *In re Nogueira's Will,* 32 Misc. 2d 446, 223 N.Y.S.2d 334 (Sur. Ct. 1961).
[33] *Matter of Estate of Collins,* 60 N.Y.2d 466, 470 N.Y.S.2d 338, 458 N.E.2d 797 (1983).

You and the testator are able to secure evidence, beyond your testimony and that of subscribing witnesses, to better position the proponent for success if capacity is expected to be in issue. An opinion from a medical professional, based on an examination of the testator proximate to the execution ceremony, could be obtained.

As noted above, the only people who can opine on capacity are the attesting witnesses and an expert. This medical opinion could be critical evidence, as any expert the objectant may be able to offer would likely be a non-treating expert physician who only reviewed the medical records, but did not see or examine the testator. This opinion testimony has been recognized as the "weakest and most unreliable form of evidence."[34] Such evidence is routinely deemed insufficient to warrant submission of the issue of testamentary capacity to a jury.[35] Thus, if the expert examined the decedent, such testimony may be invaluable in determining capacity.[36]

Disinterested Attorney and Witnesses

The attorney who drafts the will and supervises its execution, as well as the attesting witnesses, should have no relationship with a beneficiary that may call their credibility into doubt. "Where a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact for the jury as to whether the proffered explanation is adequate."[37]

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[34] *Matter of Vukich's Will,* 53 A.D.2d 1029, 385 N.Y.S.2d 905 (4th Dep't 1976), order aff'd, 43 N.Y.2d 668, 400 N.Y.S.2d 817, 371 N.E.2d 535 (1977).

[35] *In re Will of Katz,* 103 A.D.3d 484, 959 N.Y.S.2d 481 (1st Dep't 2013) (affirming summary judgment to proponent. The objectant offered an opinion from a non-treating doctor, but the proponent showed "the decedent was examined shortly before she executed the will by a psychiatrist hired by her trust and estates lawyer and was found competent."); *Matter of Estate of Van Patten,* 215 A.D.2d 947, 627 N.Y.S.2d 141 (3d Dep't 1995), *lv. to appeal denied; Liu v. New York City Police Dept.,* 87 N.Y.2d 802, 638 N.Y.S.2d 425, 661 N.E.2d 999 (1995).

[36] *In re Llewellyn,* 135 A.D.3d at 500 (affirming summary judgment to proponent):

> Petitioners made a prima facie showing that decedent had testamentary capacity at the time of the will's execution, based on the testimony of decedent's treating physicians, who examined him the day before the execution and found him lucid, alert and able to understand the purpose of a will, his assets and the natural objects of his bounty [cite omitted].

[37] *In re Elmore's Will,* 42 A.D.2d 241 (internal citation omitted).

Attorney Supervision of the Execution Ceremony

Supervision of the execution ceremony by an attorney creates a presumption of due execution.[38]

You should ensure that nobody else beyond the testator and witnesses is present during the execution ceremony, especially if the presence of that person might call into doubt the ability of the testator to act freely and voluntarily.

Although only two witnesses are required by statute, having a third witness may be good practice when a contest is expected.

You should have a routine that satisfies the requirements of EPTL § 3-2.1, which might include the following questions:

- Are you familiar with and do you understand the contents of the document?
- Does this document reflect your intentions as to those matters?
- Do you publish and declare this instrument to be your last will and testament?
- Do you ask that _____, _____, and _____ act as witnesses to your execution of your will?
- Do you ask that _____, _____, and _____ sign an affidavit attesting to the circumstances under which you executed your will?

The Attestation Clause

A will containing an attestation clause gives rise to a presumption of validity.[39]

An attestation clause appears between the signatures of the testator and those of the attesting witnesses and would read as follows:

[38] *In re Will of Halpern*, 76 A.D.3d 429, 906 N.Y.S.2d 253 (1st Dep't 2010), order aff'd, 16 N.Y.3d 777, 919 N.Y.S.2d 503, 944 N.E.2d 1142 (2011), *aff'd; In re Estate of Halpern*, 16 N.Y.3d 777, 919 N.Y.S.2d 503, 944 N.E.2d 1142 (2011); *In re Weltz*, 16 A.D.3d 428, 791 N.Y.S.2d 141 (2d Dep't 2005).
[39] *Matter of Halpern, supra*.

> SIGNED, SEALED, PUBLISHED AND DECLARED by JOHN DOE, the above-named Testator, as and for his Last Will and Testament, in our presence, and we, at his request and in his presence and in the presence of each other, this clause having been first read aloud to us, have hereunto subscribed our names as witnesses this ___ day of _____, 20___.

The Self-Proving/Self-Executing (SCPA 1406) Affidavit

Immediately after the execution of the will by the testator and witnesses, you, as the supervising attorney, should have the attesting witnesses, at the testator's request, execute the self-proving affidavit, which will create presumptions as to due execution and capacity.[40]

You should advise the witnesses to read the self-proving affidavit so they may testify later that they did not just sign where indicated. It should be duly subscribed in the presence of a notary who takes the oath of the affiants as to its contents.[41]

The self-proving affidavit should be modified as necessary in the event the testator suffers from any impairment of sight, hearing, or speech, or if any other fact or circumstance is presented rendering one or more provisions of a boilerplate affidavit inapplicable. It will be embarrassing for you to use a boilerplate self-proving affidavit when your client, the testator, is actually blind and no revision is made to note that and how the will was executed by the testator. It is well settled that a testator's signature may be guided by another individual as long as the guiding hand solely acts to assist the testator.[42]

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[40] *In re Clapper,* 279 A.D.2d 730, 718 N.Y.S.2d 468 (3d Dep't 2001).

[41] A self-proving affidavit was "in effect a nullity for such purpose, since the affiants failed to subscribe their names to it in the presence of the notary who took their oaths as to its contents (*see* SCPA 1406[1])." *In re Bogen,* 2014 WL 5827936 at n.1 (N.Y. Sur. Ct. 2014).

[42] *See Matter of Morris, supra*; *In re Kearney's Will,* 69 A.D. 481, 74 N.Y.S. 1045 (2d Dep't 1902). ["so long as it is assistance," guiding a testator's signature "does not make the signature invalid, if the signing was in any degree an act of the testator, acquiesced in and adopted by him; for in such a case he simply summons outside physical power to supplement his impaired strength"]; *In re McCready's Estate,* 82 Misc. 2d 531, 369 N.Y.S.2d 325 (Sur. Ct. 1975). ["a signature by mark even with the testator's hand guided

Contemporaneous Memorandum Signed or Initialed by the Witnesses

Preparing a memorandum describing the events of the will execution ceremony, including the testator's statements, conversation among the testator and witnesses/supervising attorney and other points bearing on the testator's mental capacity, and free and voluntary actions, should be considered. If people known to the testator are used as witnesses, although helpful, they may not be able to recall offhand at a deposition in 2020 anything more than that the testator was "himself" when he made his will in 2016. They may recall only that he was alert and comprehending because, if he was not, they would have remembered that. The topics discussed and the give and take will not be reflected in the self-proving affidavit. The testator may have asked about the witness's son by name, recalled what college he was attending and what he was studying, that the witness's husband just celebrated his fiftieth birthday, lost a parent, or asked about a recent vacation the witness had told the testator she was taking. All of these points of conversation will allow that witness to refer to specific examples to illustrate how she concluded the testator was of sound mind and memory when he executed the will.

Including items such as how the testator arrived at the attorney's office, whether anyone else was present in the room or immediate area (reception), and how the witness appeared (e.g., calm, relaxed, jovial) will all help address inquiries on points related to undue influence and duress.

If the witnesses are shown the memorandum shortly after the execution and given an opportunity to read it and confirm it accurately reflects the events of the ceremony prior to initialing it, the document could be a useful tool to refresh the witnesses' recollection at a later point.

If such a memorandum is used as part of your standard practice, it is important to prepare it with care and not treat it as a boilerplate document. Use of a standard memo for all executions may lead to inaccurate statements casting doubt on the integrity of that document.

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is sufficient"]. In *Matter of Will of Bernatowicz,* 233 A.D.2d 838, 649 N.Y.S.2d 625 (4th Dep't 1996), the Appellate Division held that the operative question is whether a guided signature "was assisted rather than controlled." *Matter of Will of Bernatowicz,* 233 A.D.2d 838, 649 N.Y.S.2d 625 (4th Dep't 1996).

Stage 4: Post-Execution and Safeguarding the Will

The temporal scope of discovery in a contested probate proceeding extends two years from the date the subject will was executed or until the date of decedent's death, if earlier.[43] Thus, you should keep in mind that any communications, time entries, correspondence, or notes subsequent to the execution related to the client's estate planning will be sought in discovery.

With the time and effort having been devoted to getting his or her will prepared and executed, the client will not want to see that investment, and related peace of mind, lost if something after execution should complicate or prevent probate.[44] You should advise the client that a presumption of revocation of the will arises when the instrument was last in the client's possession and cannot be located after his or her death.[45] Thus, if others have access to his papers, they may take and destroy the original will while the client is ill or after his death.

Many attorneys maintain safes in their offices or at other facilities, such as a safe deposit box at a bank, to secure clients' wills. If so, the client may ask that the attorney store the original will there for safekeeping.

A client considering storing the will in his or her own safe deposit box should be advised that probate will be delayed so an *ex parte* order of the Surrogate's Court may be obtained to open the box and search for a will.[46] Further, as the client's safe deposit box would be considered in the client's possession, anyone who has access to the box could remove the will while the client is alive, such as someone acting under a power of attorney (either a forged power or an unscrupulous agent), in an attempt to trigger the presumption of revocation.

Another option available to the testator is filing the will for safekeeping in the Surrogate's Court in the county in which the testator is domiciled.[47] This may

[43] Uniform Rules for Surrogate's Court § 207.27.
[44] A lost or destroyed will may still be admitted to probate. SCPA § 1407(1).
[45] *In re Fox's Will,* 9 N.Y.2d 400, 214 N.Y.S.2d 405, 174 N.E.2d 499 (1961). If the testator's last will, which revoked all prior wills, is presumed revoked, that testator will have died intestate. *See* EPTL § 3-4.6(a) and *In re Estate of Huang,* 11 Misc. 3d 325, 811 N.Y.S.2d 885 (Sur. Ct. 2005).
[46] SCPA § 2003(1).
[47] SCPA § 2507.

be done for a filing fee of $45 (SCPA 2402(9)),[48] and it is not an irrevocable filing. During the testator's lifetime, the will may be returned to the testator "in person" (SCPA 2507(3)(a)) or "upon his written order duly proved by the oath of the testator which shall be duly acknowledged" (SCPA 2507(3)(b)).[49] This is important to keep in mind because if a later will eliminates or reduces the bequest to someone in the will on file, that person will be able to show standing to contest the later instrument with ease (*see* **Initial Considerations: Who May Contest and on What Basis?**, *supra*).

In Terrorem *or "No Contest" Clauses*

What *in Terrorem* Clauses Are

An *in terrorem,* or "no contest," clause imposes conditions on a disposition or other benefit provided for in the instrument (will or trust). A person will forfeit any benefit conferred by the instrument if the person engages in unprotected conduct that would trigger the conditions the testator attached to the benefit. These clauses can be used to avoid challenges to the validity of the will and, thereby, reduce the amount of estate assets expended on litigation and, further, avoid the delay caused by litigation in settling the estate.

"A testator has the right to annex to the disposition of her own property a condition of forfeiture."[50] The New York statute recognizing the validity of *in terrorem* conditions also includes a non-exhaustive list of actions that will not result in a forfeiture of a benefit under a will containing such a provision.[51] EPTL § 3-3.5 provides:[52]

> a) A condition qualifying a disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.

[48] SCPA § 2402(9).
[49] SCPA § 2507(3)(a); SCPA § 2507(3)(b).
[50] *In re Kalikow,* 23 Misc. 3d 1107(A), 885 N.Y.S.2d 712 (Sur. Ct. 2009) (citations omitted).
[51] Florida, on the other hand, does not recognize use of *in terrorem* conditions in wills (Fl. Stat. §732.517) or in trusts (Fl. Stat. § 736.1108).
[52] EPTL § 3-3.5.

b) A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:

1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.
2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.
3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.
B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.
C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.
D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial

importance or relevance to a decision to file objections to the will.

E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

An example of an *in terrorem* provision follows:

> In the event that any beneficiary named herein shall, directly or indirectly, under any pretense or for any cause or reason whatever, oppose the probate of my Last Will and Testament, or institute, abet, take, or share, directly or indirectly, in any action or proceeding against my estate to impeach, impair, set aside, or invalidate any of the provisions of my Last Will and Testament, or make any inquiry about my Last Will and Testament beyond that permitted by EPTL § 3-3.5 or SCPA 1404,[53] or make any agreement, direct or indirect, in connection with any of the foregoing, with any person instituting, abetting, taking or sharing in such action directly or indirectly, I do hereby revoke any and all dispositions, devises, bequests, trusts, or other provisions to or for the benefit of any such person or the issue of such person, and I direct that any such devises, bequests, trusts, or other provisions, to or for the benefit of any such person, shall become part of my residuary estate, except that if such person shall be entitled to share in my residuary estate, then the share of such person shall be disposed of as if such person had predeceased me without leaving issue surviving me.

What an *in Terrorem* Clause Cannot Do and Related Considerations

An *in terrorem* clause cannot:

- Defeat a surviving spouse's right of election.[54]

[53] EPTL § 3-3.5; SCPA § 1404.

[54] *In re Byrnes' Estate*, 141 Misc. 346, 252 N.Y.S. 587 (Sur. Ct. 1931), *aff'd*, 235 A.D. 782, 257 N.Y.S. 884 (1st Dep't 1932), *aff'd*, 260 N.Y. 465, 184 N.E. 56, 87 A.L.R. 223 (1933).

- Apply to an infant or incompetent or a beneficiary who is a "person under a disability" and for whom guardian *ad litem* (GAL) was appointed to protect his interest.[55]

  Thus, when drafting, the possibility of a GAL being appointed should be considered, as that could shape the plan. For example, if an older, terminally ill testator is disinheriting her distributees, who, at present, consist of two adult sons and the infant children of her predeceased daughter, while an *in terrorem* provision might dissuade the two sons from objecting, the GAL for the minor children of the testator's predeceased daughter would be entitled to lodge objections focused on invalidating the entire will.

- Prevent a beneficiary from pursuing the removal or suspension of a fiduciary based on the fiduciary's wrongdoing or otherwise questioning the fiduciary's conduct (e.g., demanding and objecting to an accounting).

  These provisions have been found violative of public policy and, thus, unenforceable.[56]

- Bar pre-objection SCPA 1404 discovery and further "safe harbor" discovery upon a showing of special circumstances. *(See Weintraub, infra)*

Inserting an *in terrorem* clause in a will expands the scope of SCPA 1404 discovery from the attesting witnesses and draftsperson to include the nominated executors and proponents, as well (SCPA 1404(4)).[57]

Thus, in considering a potential fiduciary with the testator, thought should be given to not only that person's ability to administer the estate faithfully and effectively, but the testimony the nominated executor(s) will give at the

[55] EPTL § 3-3.5 (b)(2); *In re Shuster,* 274 A.D.2d 397, 710 N.Y.S.2d 383 (2d Dep't 2000).
[56] *In re Estate of Rimland,* 2003 WL 21302910 (N.Y. Sur. Ct. 2003); *Matter of Fromartz,* NYLJ, Oct. 22, 2005, p. 29, col. 1 (Sur. Ct. Kings Co); *In re Egerer,* 30 Misc. 3d 1229(A), 924 N.Y.S.2d 308 (Sur. Ct. 2006).
[57] SCPA § 1404; SCPA § 1404(4).

SCPA 1404 deposition as to, among many other topics, his or her knowledge of the preparation of the will, the reasons for its provisions, the testator's relationship with family members, the testator's health, conversations with the testator regarding her assets, etc.

The goal is for the proponent to present compelling witnesses, and an equally compelling documentary record, that will give the potential objectant reason to conclude that going beyond any "safe harbor" discovery and objecting to the will is not worth the risk of forfeiting the benefit it provides.

In *Estate of Weintraub*, the will contained a broad *in terrorem* clause, and the decedent's son, who received less under the propounded will than in intestacy, after conducting 1404s, applied to the court alleging "special circumstances" supporting further discovery. Specifically, he wanted to depose the associate of the attorney who drafted the will and supervised its execution. The court granted the motion holding:

Here, the decedent had been diagnosed with Alzheimer's Disease prior to the execution of the will, which occurred in the hospital on February 9, 2011. The hospital record contains references to the decedent as "confused" and "disoriented." Also, [the associate's] notes of her meeting with the decedent in the hospital on February 7, 2011, two days prior to the will's execution, indicate that the decedent was not comfortable signing any documents on that date, that she was confused as to what she wanted, and did not even remember speaking with the attorney draftsman that day although she had. On this record, the court is satisfied that the movant has demonstrated that special circumstances exist to permit the deposition of [the associate] as part of the SCPA 1404 examination.[58]

What *in Terrorem* Clauses Can Do

In addition to causing a party's forfeiture of a benefit under the will if that party engages in conduct that is both violative of the condition and not protected by any statutory or case law "safe harbor" provision, an *in terrorem* provision can:

- Disqualify the beneficiary from taking under the will *and* in intestacy.

[58] *In re Will of Weintraub,* 40 Misc. 3d 1207(A), 975 N.Y.S.2d 370 (Sur. Ct. 2013).

In *Matter of Bernstein,* the *in terrorem* clause provided for forfeiture of "every gift made ... in this Will *or otherwise"* (emphasis added). When the beneficiary who had unsuccessfully challenged the will later sought a construction of the charitable residuary clause, the court held she lacked standing because she would not have shared if the residue had fallen into intestacy.[59]

- Prevent a party from exercising rights he or she enjoys independent of the will:

> The provision of the will directing the termination of the payments in question if petitioner interfered or involved himself with any of the businesses in which the estate has an interest, or commenced litigation adverse to such interests, is not against public policy. By requesting in his petition the dissolution of a business in which the estate held a controlling interest or, alternatively, a buy-out of his interest in that business, *petitioner made his choice, preferring enforcement of his rights as a minority shareholder in an estate business over continued receipt of the payments in question.*[60]

Construction of *in Terrorem* Clauses and Drafting Considerations

While *in terrorem* clauses are enforceable, they are not favored and must be strictly construed.[61] Thus, if a no-contest clause prohibits only certain acts, other acts by the beneficiary will not trigger it.[62]

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[59] *In re Bernstein,* 40 A.D.3d 1086, 837 N.Y.S.2d 228 (2d Dep't 2007), *lv denied, Bernstein v. Bernstein,* 9 N.Y.3d 813, 848 N.Y.S.2d 24, 878 N.E.2d 608 (2007).

[60] *Koeppel v. Koeppel,* 268 A.D.2d 282, 701 N.Y.S.2d 382 (1st Dep't 2000) (emphasis added; internal cites omitted); *see also Matter of Kalikow, supra* (finding parties triggered *in terrorem* provision and forfeited their interests under the will by pursuing litigation to enforce their rights under a partnership agreement).

[61] *In re Estate of Singer,* 13 N.Y.3d 447, at 451, 892 N.Y.S.2d 836, 920 N.E.2d 943 (2009).

[62] *In re Estate of Marin,* 40 Misc. 3d 1208(A), 975 N.Y.S.2d 367 (Sur. Ct. 2013) ("the Court must carefully parse the specific language employed by the testatrix and compare the respondents' violative acts alleged against the language of the *in terrorem* provision to see whether their specific conduct falls within such proscription."); *In re Estate of Stralem,* 181 Misc. 2d 715, 695 N.Y.S.2d 274 (Sur. Ct. 1999) (the *in terrorem* clause

Therefore, to be most effective at discouraging any conduct exceeding the "safe harbor" provisions, a broad *in terrorem* clause should be used. For example, in *Matter of Ellis,*[63] the will revoked the testator's sons' bequests if they contested the will "in any manner, directly or indirectly." The court found that the testator's son, by conducting two years of discovery and lawsuits in an effort to establish that the testator's daughter had exercised fraud and undue influence on the testator, violated the "in any manner" provision of the *in terrorem* clause despite the fact that he sought to withdraw his objections.

The attorney and testator should discuss who may, or is expected to, contest the will and what the testator may offer as an incentive to refrain from engaging in any challenge. That party must have something to lose by launching a contest for an *in terrorem* provision to have any effect or "teeth." The conversation should focus on:

1. The personality and financial situation of the party targeted by the provision: Is this someone who is risk-averse and in financial need, such that he or she will be more inclined to accept a quick and certain amount of money over waiting a long time to potentially receive more or nothing at all?
2. The estimated value of the probate estate
3. The estimated cost of litigation through summary judgment/trial
4. Is there likely to be a party, such as a minor or an incompetent, with whom an *in terrorem* provision would not be effective?
5. The circumstances of the testator at the time the will is made: A will made while the testator is younger, active in her community, socially engaged, and undeniably enjoying good physical and mental health presents facts that would not likely encourage a party to challenge the will; therefore, a more modest incentive may be in order than if the testator is older, ill, hospitalized, and experiencing episodes of confusion.
6. The nominated executor(s): As noted above, the deposition of the nominated executor(s) falls within the "safe harbor" statutory

prohibited beneficiaries from objecting to probate or moving to set aside trusts, so a proceeding to revoke letters of trusteeship did not violate it).

[63] *In re Ellis,* 252 A.D.2d 118, 683 N.Y.S.2d 113 (2d Dep't 1998), *appeal denied, In re Ellis,* 93 N.Y.2d 805, 689 N.Y.S.2d 429, 711 N.E.2d 643 (1999).

protection and, further, the testator will need to pick a fiduciary who can oversee any litigation and protect her testamentary plan appropriately (i.e., not settle with the objectant, on terms favorable to the objectant and not supported by the facts, just to be done with the inconvenience of any litigation).

Further Strategies and Options to Consider

Obtaining a Release from a Potential Objectant

A client may be able to negotiate with an estranged distributee, such as a son, for a release and waiver of his right to contest the client's will.[64] Even if the client or you as her counsel are not successful in negotiating such a bargained-for *quid pro quo* with her son, the record evidencing the client's attempt to exclude the son from her testamentary plan, and purchase his relinquishment of his right to contest, may be helpful evidence against any probate attack the son may lodge.

Lifetime Revocable Trusts

If all of the client's assets are effectively transferred to a valid revocable trust[65] (or otherwise pass by operation of law), there may not be a need to probate a will on notice to those who would have standing to object. Rather, after the settlor passes, the trustee may be authorized, by the terms of the instrument, to act without asking any relief of the court.

One may consider using a revocable trust to avoid probate and related objections. This strategy may work to prevent the appointment of a guardian *ad litem* in a probate proceeding involving unknown heirs of the decedent, but it will not otherwise dissuade a distributee intent on learning how the decedent's assets passed and pursuing his or her rights.

Those who have standing to set aside a revocable trust include a distributee of the settlor and a fiduciary of the settlor's estate, including one who received limited letters under SCPA 702(9).[66] They have six years from the

[64] *In re Probate of Will of DeCamaret,* 6 Misc. 3d 407, 789 N.Y.S.2d 673 (Sur. Ct. 2004).
[65] *See* EPTL §§ 7-1.17, 7-1.18.
[66] SCPA § 702(9); *Matter of Estate of Davidson,* 177 Misc. 2d 928, 677 N.Y.S.2d 729 (Sur. Ct. 1998).

date of the settlor's death to commence a proceeding to set aside the revocable trust.[67]

For a client with diminished capacity, this may not be the best option. Testamentary capacity is a lower standard of capacity than capacity to execute contracts, and courts have applied the higher latter standard to the execution of a trust agreement.[68]

One benefit to using a revocable trust over a will is that, unlike in a will contest, where the proponent has the burden to prove capacity and due execution, *supra*, the burden of proof on all issues in a trust contest is on the party seeking to set it aside.[69]

The use of *in terrorem* clauses has been recognized in trust contests. Although the statutory safe harbor provisions (EPTL § 3-3.5) are limited to wills, courts have extended their protections to lifetime trust beneficiaries in some cases.[70]

Joint Account with Right of Survivorship; Totten Trusts; Pay-on-Death Accounts

These accounts will pass by operation of law to the surviving tenant/beneficiary, so no notice to others is necessary. However, a distributee could seek letters of administration in an effort to commence a proceeding on behalf of the estate to bring the asset back into the estate by, for example, alleging a joint account was for convenience or that the opening of the accounts was done at a time when the decedent lacked capacity to enter into a contract.

Life Insurance Policies

The considerations for a life insurance policy, payable outright to a beneficiary, are similar to those for the accounts discussed above.

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[67] *Matter of Heumann,* 10/30/2006 2006 WL 6897055 p. 37, col. 6 (Sur. Ct. Westchester Co.).
[68] *In re Estate of Donaldson,* 38 Misc. 3d 841, 956 N.Y.S.2d 840 (Sur. Ct. 2012).
[69] *In re DelGatto,* 98 A.D.3d 975, 950 N.Y.S.2d 738 (2d Dep't 2012); *Donaldson, supra.*
[70] EPTL § 3-3.5; *Oakes v. Muka,* 31 A.D.3d 834, 818 N.Y.S.2d 647 (3d Dep't 2006); *Matter of Shamash,* N.Y.L.J., 6/16/2009, p. 38, col. 2 (Sur. Ct. New York Co.).

Lifetime Gifting

A client may look to reduce her probate estate by making gifts throughout her life to reduce the "pot" that an objectant may look to obtain in a will contest. This strategy is risky because a testator may outlive the reserve she retains after making such gifts. Further, a distributee could seek letters to pursue recovery of gifts made when the decedent allegedly lacked capacity or was unduly influenced or based on other facts that may negate establishing a completed gift. That claim could, however, be barred by the statute of limitations.

One gifting strategy a client may employ is making a gift on the same date as the will to the party who may challenge the will or to someone closely related to the possible objectant. For example, if a testator decides to leave her entire estate to a charity, and not to her son (her only distributee), she could give her son a check or fund a college savings account for his children the day she signs her will. If the son challenges the testator's will for lack of capacity, the lowest standard, how was he able to take the check for a gift or (presumably) express his appreciation to the testator for the check or the college savings account she opened for his children, both requiring a higher standard of capacity?

Periodic Reaffirmation of Overall Testamentary Plan

A client may change her will to increase a pre-residuary bequest to a charity, add another charity, remove a bequest to someone, and change fiduciaries, but each time expressly disinherit the person who is anticipated to object to her will. If the dispositions in the propounded will are similar to prior wills, it will more likely be viewed as part of the testator's continued testamentary scheme suggesting independent and free action on the part of the testator.[71]

[71] *In re Cutter's Will,* 175 A.D. 647, 162 N.Y.S. 545 (1st Dep't 1916); *In re Shearer,* 2014 WL 5326344 (N.Y. Sur. Ct. 2014) (in granting summary judgment dismissing the undue influence objection, among other factors considered by the court was "the fact that the propounded will substantially mirrors decedent's prior will, which also excluded objectant, supports the conclusion that the propounded will was not the product of undue influence …"); *In re Estate of Boyd,* 27 Misc. 3d 1230(A), 911 N.Y.S.2d 691 (Sur. Ct. 2010).

If the propounded will is denied probate, the next prior will may be offered for probate. Even if multiple prior wills disinherit the objectant, he or she will, nevertheless, have standing to object.[72] As to the undue influence objection, it is possible to have only those provisions arising from the undue influence being denied probate, thereby resulting in partial probate of the will.[73]

Videotaping the Will Execution

Recording the will execution ceremony may not be necessary if many of the steps outlined above are followed, especially as to the selection of the attesting witnesses, and doing so may actually hurt the proponent's case.[74]

Consider that a testator who appeared alert, robust, and competent to the attesting witnesses and supervising attorney at the execution ceremony may not appear the same on a screen to jurors accustomed to watching professional actors who are comfortable performing in front of a camera. The client may not be "photogenic" or may have certain health issues (such as drooling or being hard of hearing), but is otherwise perfectly competent. Displaying these medical problems on a videotape might be damaging.

If the testator is going to make a statement into the camera, how will he do so? Without the aid of any notes? Someone not used to extemporaneous speech may stumble over words or lose a train of thought and, thereby, appear less competent. If, instead, he reads from notes or cue cards, those will be discoverable, and questions will be raised about why the testator had to rely on such material to speak about familiar matters, such as family, assets, and making a will. Who prepared the notes? Was it the testator on

[72] *In re Satterlee's Estate,* 111 N.Y.S.2d at 281 (Sur. Ct. 1952) (proponent argued that the objectant, concededly the sole distributee of deceased, was not entitled to contest the propounded will because none of the twelve earlier wills contained provision for objectant's benefit. The court held:

> This contention is without merit in view of the fact that by reason of her status as sole distributee the contestant cannot be deprived of the right to attack the present paper despite the circumstance that she cannot succeed to the estate of deceased unless she is successful in attempts to deny probate to all of the wills previously executed by the testatrix.

[73] *Petition of Maguire,* 105 Misc. 433, 173 N.Y.S. 392 (Sur. Ct. 1918).

[74] *King v. Brown,* 280 Ga. 747, 632 S.E.2d 638 (2006) (jury invalidated a will where the execution was videotaped).

his or her own, or did someone assist? If the latter, why was such assistance necessary in identifying the nature of assets and/or objects of bounty?

Further, making a video in anticipation of a will contest might require consideration of spoliation laws.[75] What if the attorney was dissatisfied with the first recording of the execution and proceeds to do a second "take" on the recording? The first recording may be deemed relevant during discovery, and the attorney may have an obligation to preserve all recordings.

Conclusion

One of the unique attributes of contested probate proceedings is that such litigation allows an attorney to ethically create, control, and preserve much of the evidence that will ultimately be considered by the judge or jury. As a drafting attorney, you should seize this opportunity, especially when a challenge to the client's will is anticipated, to safeguard the client's testamentary wishes. As no two clients are exactly alike, some of the strategies discussed in this chapter may be appropriate for some clients, but not others. However, in every situation in which a lawyer draws a will, he or she is positioned to shape the facts and circumstances regarding the preparation and execution of the document for the benefit of the client.

Key Takeaways

- When drafting a client's will, anticipate challenges, and approach the process and the document with the intent of defeating objections to probate. The steps that you take, from the initial meeting with the client, through drafting and executing the will, have a direct impact on defeating those objections. Make sure to document how the attorney-client relationship was formed, what occurred in meetings with the client, and how drafts and correspondence were sent to and reviewed with the client. Controlling the circumstances of the execution of the will is just as important as accurately recording the client's wishes in the disposition of assets.

[75] *See* Margaret M. Koesel & Tracey L. Turnbull, Spoliation of Evidence, Ch. 1: Duty to Preserve Evidence (American Bar Association 2013) ("the duty to preserve potentially relevant evidence may arise before the commencement of a lawsuit if it is reasonably foreseeable that a lawsuit will be filed.").

- Impress on clients that while the care and extra time taken in creating a document more likely to withstand a contest will increase expenses now, this is preferable to the substantial expense presented by protracted litigation. An investment now could avoid, or minimize, both a substantial reduction to the client's gross estate due to litigation expense and the possibility of having his wishes stated in the will nullified.
- Identify who could have any possible standing to object to probate. Any person whose interest in the estate of your client would be adversely affected by the admission of the will to probate may file objections. Generally, this means a distributee whose interest in the will is less than that in intestacy, or a person or organization with interests in the estate that were greater under a prior will than under the propounded will.
- Once possible objectants are identified, analyze all the possible allegations they can bring in probate, so you can then take steps to nullify or mitigate these obstacles. Allegations include lack of due execution; forgery; lack of testamentary capacity; claims that the will is the product of undue influence; a mistake occurred, from either a lack of understanding on the part of the decedent or an error committed by the attorney; fraud was perpetrated, influencing the decedent's decisions in the will; or duress was employed on the decedent.
- Draft and execute the will with the viewpoint of creating documentary evidence and providing testimony to overcome the due execution and forgery objections. Select the attesting witnesses and document communications with the client throughout the process, including the execution ceremony, to aid in defeating the other potential objections to probate. Consider the following strategies: Establish and document testamentary capacity of the testator; investigate possible sources or incidents of undue influence, duress, or fraud, and document your conclusions; investigate the client's capacity and exercise of free will in the matter; explore any confidential and fiduciary relationships where the client wishes to leave a bequest to determine the bequest is free of any undue influence or duress.
- Prepare ahead of time for the execution of the will by first giving the client time and opportunity to review the draft of the will, and then carefully selecting the attesting witnesses. Keep in mind that

their testimony could be key if there are objections to probate. Review the will with the client before the execution ceremony. Record any questions the client asks to help show that the testator considered what was presented to him for signing. Witnesses should be two kinds of people: they should be familiar with the statutory requirements for executing a will, and/or they have known the testator for some time. Strangers to either the process or the testator will be of little help as witnesses, as they cannot testify that the execution was handled properly or that the testator was "himself" and knew what he was doing or what was happening at the time.

- Take precautions to safeguard the document itself. Any communications, time entries, correspondence, or notes subsequent to the execution related to the client's estate planning will be sought in discovery. Avoid incidents that could complicate or prevent probate. The client's loss of the document itself can lead to a presumption of revocation of the will. Others who have access to the client's papers could steal or destroy the original will during an illness or incapacity or after death. Offer to store the will for the client, as a safe deposit box or other storage maintained by the client could delay probate, requiring an *ex parte* order, or someone with access to that storage could remove the will. One option is to file the will for safekeeping in the Surrogate's Court.
- Thoroughly understand *in terrorem,* or "no contest," clauses so they can be used properly to defend your client's wishes. An *in terrorem* clause imposes conditions on a disposition or other benefit provided for in the will or trust. A hopeful beneficiary forfeits any benefit conferred by the will by triggering the conditions attached to the benefit. These clauses can be used to avoid challenges to the validity of the will to reduce the amount of estate assets expended on litigation and avoid the delay caused by litigation in settling the estate. Be as familiar with what a "no contest" clause cannot do as what it can and should do, and how to create them for the best possible effect. The clauses are not favored and must be strictly construed, meaning if the clause prohibits only certain acts, other acts by the beneficiary will not trigger it. To be most effective at discouraging any conduct exceeding the "safe harbor" provisions, a broad *in terrorem* clause should be used. Discuss with the client who may, or is expected to, contest the will and

what the testator may offer as an incentive to refrain from engaging in any challenge. The possible objectant should have something to lose by launching a contest; otherwise, the *in terrorem* provision will have no effect or "teeth."

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