



COMMITTEE REPORT: ESTATE PLANNING & TAXATION

By **Ilene Sherwyn Cooper**

Rebutting the Presumptions of Due Execution and Testamentary Capacity

When is enough, enough?

Presumptions play an important role in contested probate proceedings, particularly with respect to the issues of due execution and testamentary capacity. However, while judicial opinions provide useful instruction as to the kind of proof that will trigger these presumptions, the quantum of proof necessary to rebut them is less clear. Indeed, the vagaries and lack of uniformity among the courts within some states leave practitioners in a quandary as to how much evidence is enough to rebut these presumptions.¹ With the prevalence of motions for summary judgment in contested probate proceedings, the answer to this issue has particular import.

Presumption Defined

The absence of a clear definition of “presumption” has often led to divergent views as to its meaning and scope.² Those discrepancies largely result from opinions that historically classified a presumption in one of two categories: (1) a “presumption of fact” or “permissive presumption,” and (2) a “presumption of law.”

Commentators opine that a “presumption of fact” isn’t a presumption at all, but rather, a permissive inference that the trier of fact is authorized, but not required, to draw from the evidence in the case.³ “In other words, a presumption of fact leaves the [fact finder] at liberty to infer certain conclusions from a certain set of circumstances, but does not compel it to do so.”⁴

On the other hand, a presumption in its truest sense is commonly defined as an assumption that’s accepted as true unless it’s destroyed by proof.⁵ This type of

presumption is rebuttable and shifts the burden to the opponent to produce evidence to the contrary. If this burden is met, the presumption disappears from the trial.⁶ Alternatively, if the rebuttal evidence presents an issue of credibility, it will be left to the trier of fact to determine whether the presumption has been overcome.⁷

Proof

In every probate proceeding, the proponent of the will has the burden of proof on the issues of due execution and testamentary capacity.⁸

To prove the due execution of a will, the proponent must establish by a fair preponderance of the evidence that: (1) the testator signed at the end of the instrument or that someone else signed the instrument on the testator’s behalf in his presence and at his direction; (2) the testator signed before or acknowledged his signature to at least two witnesses, each of whom signed the instrument at the testator’s request and in his presence; (3) the attesting witnesses signed the instrument within 30 days of each other; and (4) the testator published the instrument as his will.⁹

Proof of testamentary capacity requires the proponent to prove by a fair preponderance of the evidence that the testator was of “sound mind and memory” when the will was executed.¹⁰ More specifically, proof of capacity requires a showing that at the time the will was executed, the testator understood: (1) the nature and extent of his property; (2) the natural objects of his bounty; and (3) the fact that he was executing a will and the scope of its dispositive provisions.¹¹

Presumptions

Certain rebuttable presumptions help the proponent to establish a prima facie case of due execution and testamentary capacity. These presumptions may arise based



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on the factual circumstances surrounding the preparation and execution of the proffered instrument. For example, a complete attestation clause in a will reciting an observance of all of the statutory formalities creates a presumption that the will was duly executed.¹² This presumption will subsist even when the witnesses to the will are unable to recall the execution ceremony, so long as the genuineness of the testator's and witnesses' signatures on the instrument are established.¹³

Further, when the execution of a will is supervised by an attorney who's familiar with the statutory requirements of execution, "there is a presumption of regularity that the will was properly executed in all respects."¹⁴

A self-proving affidavit¹⁵ affixed to a will, containing the signatures of the attesting witnesses, also creates a presumption of due execution.¹⁶ Additionally, the affidavit creates a presumption of the decedent's testamentary capacity on the date the will was signed.¹⁷ Moreover, until the contrary is shown, every person is presumed to be sane and mentally competent.¹⁸

Rebutting the Presumptions

For an objectant in a contested probate proceeding, it's often difficult to determine the quantum of proof necessary to rebut any existing presumptions of due execution and/or testamentary capacity. The answer is particularly significant in the context of a motion for summary judgment, when the ultimate outcome can result in the dismissal of one or both of these objections to probate.

While there's authority that alludes to the requirement that only some evidence need be produced to create a question for the jury,¹⁹ courts have generally taken a less defined approach to the issue, resulting in decisions holding that "presumptions are rebutted by substantial evidence to the contrary; by very convincing evidence; by clear, cogent and convincing evidence ... or by proof that goes beyond a mere preponderance of the evidence..."²⁰ The end result of the foregoing is to leave much to the discretion of the trial court and offer little certainty for the litigant.

In the context of contested probate proceedings, uniformity as to the quantum of evidence necessary to rebut the presumptions of due execution and testamentary capacity is equally as elusive, with New York courts, for example, relying on such standards as "sufficient evidence,"²¹ "specific evidence,"²² "positive proof,"²³ "proba-

tive evidence"²⁴ and "very clear and weighty evidence,"²⁵ as bases for finding that presumptions have been rebutted.²⁶ Indeed, some decisions are less descript, leaving it to the practitioner to glean from the circumstances the kind of proof necessary to rebut the presumption in each case.

For instance, in *Matter of Yuster*,²⁷ the court granted an objectant's post-trial motion denying probate on the grounds that the will wasn't duly executed. Although the court recognized the presumptions accorded the proponent when the will has an attestation clause and an attorney supervises the execution of the instrument,

In one case, the court found that the objectants successfully rebutted the presumption of due execution, apparently relying on evidence derived from the testimony of the attesting witnesses that the decedent hadn't signed the will in their presence or acknowledged his signature to them.

it held that "this is not the usual case" inasmuch as the attesting witnesses tended only to discredit, rather than support, the attestation clause that they had subscribed, as well as the quality of the legal supervision. Specifically, there was no testimony that the testator acknowledged that the document was his will or asked anyone to act as his attesting witnesses. Moreover, the testimony of one of the attesting witnesses, who was financially dependent on the proponent, was full of discrepancies, including that the testator was in "perfect condition" though he'd been in the hospital for a month with terminal cancer.

Similarly, in *Matter of Stachiw*,²⁸ the court found that



the objectants successfully rebutted the presumption of due execution and granted summary judgment in their favor. While a discussion of the quantum of proof necessary to achieve this result is absent from the opinion, in reaching its decision, the court apparently relied on evidence derived from the testimony of the attesting witnesses that the decedent hadn't signed the will in their presence or acknowledged his signature to them. In addition, the court found that: (1) there was no publication of the will; (2) there was a piecemeal attempt to comply with the statutory requirements; (3) the witnesses were hastily gathered; and (4) the execution process was rushed through without any consideration as to the decedent's medical condition or whether the decedent

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could and did understand what was happening.

In like manner, the Illinois Supreme Court, in *Matter of Balicki*,²⁹ affirmed an order of the Circuit Court denying probate, finding that the testimony of the subscribing witnesses rebutted the presumption of due execution arising from an attestation clause. The witnesses testified that they didn't see the decedent sign the will and didn't make any inquiries about the decedent prior to signing the will. Though the court didn't address the quantum of proof needed to rebut the presumption, and even noted that the adverse testimony of subscribing witnesses "is to be received with caution,"³⁰ it concluded that the attestation clause couldn't prevail over the positive testimony of both subscribing witnesses that the decedent didn't sign or acknowledge the will in their presence.³¹

Moreover, in *Matter of Kietrys*,³² the Appellate Court of Illinois affirmed a judgment of the Circuit Court in

favor of the executor of the estate. The court found that the petitioner, the decedent's brother, hadn't satisfied his burden of rebutting the presumption of sanity and proving that the testator lacked testamentary capacity. Specifically, without opining as to the quantum of proof required of the petitioner, the court held that evidence that the testator was an alcoholic was insufficient to create a question of fact in light of affidavits from four other individuals who witnessed the execution of the will and observed and spoke with the testator, stating that the testator was of sound mind and memory at the time. Further, the record indicated that the testator was able to transact and discuss his business affairs.³³

Perhaps the only presumption in which there's some consistency as to the quantum of proof necessary for its rebuttal is the presumption of due execution derived from an attorney-supervised will execution.³⁴ A review of case law and commentary suggests that the presumption originated from the presumption of regularity that attaches to official acts; that is, that "no official or person under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done."³⁵

In discussing the presumption of regularity in the context of an attorney-supervised will execution, it's been stated that "while the presumption will overcome minor irregularities in the execution of a will, such as a will being witnessed by two people but signed by only one attesting witness,"³⁶ it won't result in the court overlooking all irregularities. While not all cases define the quantum of evidentiary proof needed to rebut the presumption, leaving it to the trial judge to decide, some courts have held that "sufficient evidence" is required,³⁷ while others have found that the presumption of regularity will be rebutted when "positive proof" or "affirmative proof" is presented that the requirements of due execution weren't met.³⁸ "Positive proof" is defined as "direct or affirmative proof," and "affirmative proof" is defined as "evidence establishing the fact in dispute by a preponderance of the evidence."³⁹

In *Wooley v. Wooley*,⁴⁰ the court denied probate to the propounded codicil despite the presence of an attestation clause. The witnesses recalled the execution ceremony but, according to the court, provided positive testimony against the due execution of the instrument. Specifically, they testified that the decedent didn't sign the codicil in their presence or acknowledge her signature to the witnesses. Further, there was no proof



that the witnesses heard or knew the contents of the attestation clause. Moreover, the court found the proof “quite positive” that the decedent didn’t declare the instrument to be a codicil.

On the other hand, in *Matter of Pilon*,⁴¹ the court admitted the propounded will to probate, holding that to rebut the presumption of regularity, there must be positive proof that the formal requirements of execution weren’t met and finding that there was no affirmative proof that the decedent didn’t publish his intention that the document was his will.⁴²

Practical Guideposts

Aside from the presumption of regularity that arises from an attorney-supervised will, the quantum of proof necessary to rebut the presumptions of due execution and testamentary capacity remains unclear. The practical effect of this uncertainty is to leave the issue to the court’s discretion, based on an examination of the facts and circumstances of the case. Nevertheless, despite the lack of clarity and uniformity that this kind of analysis brings, some practical guideposts can be derived from the following factors considered relevant by the courts.

On the issue of due execution:

- 1) The adverse testimony of an attesting witness.⁴³
- 2) Questionable and/or confusing testimony by the attorney who supervised the execution of the will.⁴⁴
- 3) The testimony of a handwriting expert that the signature on the will wasn’t, with any degree of professional certainty, the testator’s.⁴⁵
- 4) Contradictory testimony as between the supervising attorney and witnesses to the will.⁴⁶
- 5) The failed memories of the supervising attorney and witnesses to the will.⁴⁷
- 6) Contradictions between the self-proving affidavit and Surrogate’s Court Procedure Act Section 1404 testimony of the attesting witnesses to the will.⁴⁸
- 7) Contradictory testimony of the attesting witnesses to the will.⁴⁹

On the issue of testamentary capacity:

- 1) Allegations and testimony in a guardianship proceeding concerning the decedent.⁵⁰
- 2) Testimony of the decedent’s physicians and the decedent’s medical and pharmaceutical records.⁵¹
- 3) Testimony and documentary proof that the decedent

was confused and may have been unable to organize, interpret and process information.⁵²

- 4) Conflicting testimony and documentary proof that the decedent had a history of mental illness and may have been suffering from an insane paranoid delusion.⁵³
- 5) Evidence that the decedent was in need of assistance in managing his personal affairs and the complexity of the decedent’s testamentary plan.⁵⁴
- 6) The nature and extent of discussions between the attorney-draftsman and the decedent regarding the decedent’s assets and the operative effect of the will.⁵⁵

An Area of Uncertainty

The lack of uniformity and certainty in the area of presumptions is the subject of much criticism by commentators and scholars, who’ve concluded that the law must be reformed.⁵⁶ Whether the judiciary and legislature share this desire for change remains to be seen. Thus far, change hasn’t been forthcoming, leaving the practitioner to wonder—how much proof is enough to rebut the presumptions of due execution and testamentary capacity? 🌐

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Endnotes

1. See, e.g., *Matter of Smart’s Will*, 84 Misc. 336 (Sur. Ct., N.Y. Co. 1914) (invoking a standard of “very clear and weighty evidence”); *Matter of James*, 17 A.D.3d 366 (2d Dep’t 2005) (requiring “sufficient evidence”); *In re Migliaccio*, N.Y.L.J., June 17, 2011, at p. 28 (Sur. Ct., Kings Co.) (requiring “positive proof”); *Matter of Succession of Deshotels*, 735 So.2d 826 (La. Ct. App. 1999) (requiring “clear and convincing evidence” to rebut the presumption of testamentary capacity); *Sylvester v. Fontenot*, 58 So.3d 675 (La. Ct. App. 2011) (requiring “exceptionally compelling evidence” to rebut the presumption of due execution); *Matter of Weeks*, 29 N.J. Super. 533 (N.J. Super. Ct. App. Div. 1954) (requiring “strong and convincing evidence, or perhaps beyond all reasonable doubt” to rebut the presumption of due execution); *Matter of DuBois*, 9 N.J. Super. 280 (N.J. Super. Ct. App. Div. 1950) (requiring “strong and convincing evidence” to rebut the presumption of due execution); *Matter of Thomas*, 6 Ill. App.3d 70 (Ill. App. Ct. 1972) (“positive testimony” required to rebut the presumption of due execution); *Conway v. Conway*, 14 Ill.2d 461 (Ill. 1958) (requiring “clear and affirmative proof” to rebut the presumption of due execution); cf. *Matter of Randall*, 2012 Ill. App. Unpub. LEXIS 896 (Ill. App. Ct. 2012) (requiring “clear and convincing evidence” to rebut the presumption of testamentary capacity); *Matter of Teed*, 112 Cal. App.2d 638 (Cal. Dist. Ct. App. 1952) (requiring “substantial evidence” to rebut the presumption of due execution); *Matter of Nolan*, 25 Cal. App.2d 738 (Cal. Dist. Ct. App. 1938) (requiring “satisfactory proof” to rebut

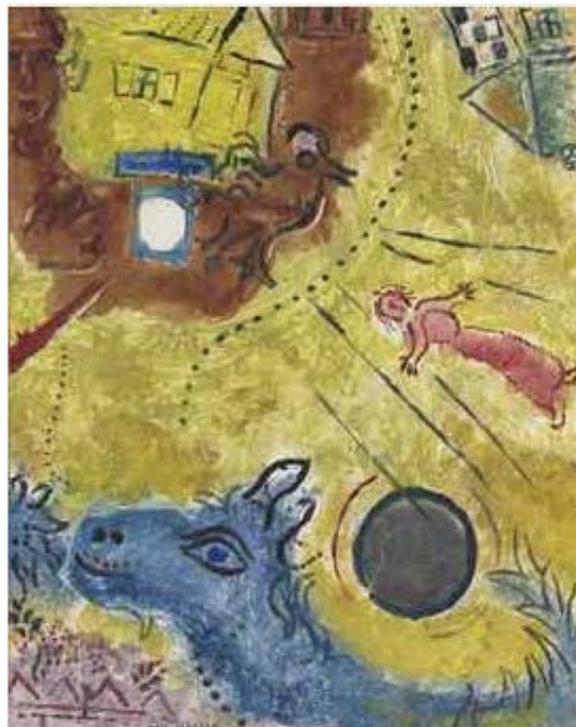


- the presumption of due execution).
2. See Robert A. Barker and Vincent C. Alexander, *Evidence in New York State and Federal Courts*, Section 301.2, at pp. 80-81; Edith L. Fisch, *Fisch on New York Evidence*, Section 1121, at pp. 625-626; R.D. Hursh, "Weight and effect of presumption or inference of due execution of will," 40 A.L.R.2d 1223, at *3.
 3. Richard T. Farrell, *Prince, Richardson on Evidence*, 11th ed., Section 3-102, at p. 54.
 4. *Platt v. Elias*, 186 N.Y. 374, 379 (1906).
 5. Fisch, *supra* note 2, Section 1121, at p. 627; Farrell, *supra* note 3, Section 3-104, at pp. 55-56.
 6. See 9 *Wigmore, Evidence*, 3rd ed., Section 2491 at p. 305 ("Nevertheless, it must be kept in mind that the peculiar effect of a presumption of law is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands to decide free from any rule.") (Emphasis supplied).
 7. Farrell, *supra* note 3, Section 3-104, at p. 56. *But see* R.D. Hursh, *supra* note 2, at *2, noting that "[t]he conflict in authority seems to be largely a matter of academic interest, since the courts, in ruling upon the operative effect of the presumption have, regardless of the particular legal label which they have placed upon it, reached the same conclusions."
 8. See, e.g., *Matter of Watson*, 37 A.D.2d 897 (3d Dep't 1971); *Matter of Kumstar*, 66 N.Y.2d 691 (1985); *Matter of Washburn*, 141 N.H. 658 (N.H. 1997); *Achin v. Pianka*, 2010 Conn. Super. LEXIS 1199 (Conn. Super. Ct. 2010); *Woodroof v. Hundley*, 133 Ala. 395 (Ala. 1901); *Matter of Fearn*, 314 P.3d 900 (Kan. Ct. App. 2013); Ariz. Rev. Stat. Section 14-2712; *cf.* Cal. Prob. Code Section 8252 ("At the trial, the proponents of the will have the burden of proof of due execution. The contestants of the will have the burden of proof of lack of testamentary intent or capacity...").
 9. N.Y. E.P.T.L. Section 3-2.1; see, e.g., Ariz. Rev. Stat. Section 14-2502 (requiring that witnesses sign within a reasonable time after witnessing the testator's signature or the testator's acknowledgment); D.C. Code Section 18-103 (requiring that the witnesses attest and subscribe in the presence of the testator; no mention of 30 day period); 75 ILCS 5/6-4 (same); Md. Estates & Trusts Code Ann. Section 4-102 (same). *Cf.* Cal. Prob. Code Section 6110 (requiring that the witnesses be present at the same time).
 10. See, e.g., N.Y. E.P.T.L. Section 3-1.1; Conn. Gen. Stat. Section 45a-250.
 11. *Matter of Kumstar*, 66 N.Y.2d 691 (1985); see, e.g., *Hendershaw v. Estate of Hendershaw*, 763 So.2d 482 (Fla. Dist. Ct. App. 4th Dist. 2000); *Matter of Fearn*, *supra* note 8; *Girard v. Girard*, 2008 Mass. App. Unpub. LEXIS 881 (Mass. App. Ct. 2008); *Matter of Angier*, 381 Pa. Super. 114 (Pa. Super. Ct. 1989); *Matter of Gillespie*, 183 Ariz. 282 (Ariz. 1995); *Matter of Turpin*, 19 A.3d 801 (D.C. 2011) (same); see generally 9-117 *Warren's Heaton on Surrogate's Court Practice*, Section 117.02(2)(a).
 12. See *Matter of Halpern*, 76 A.D.3d 429 (1st Dep't 2010), *aff'd* 16 N.Y.3d 777 (2011); see also *Matter of Balicki*, 408 Ill. 84 (Ill. 1951); *Matter of Schulz*, 102 Ohio App. 486 730 (Ohio Ct. App. 1956); *Groat v. Sundberg*, 213 Md. App. 144 (Md. Ct. Spec. App. 2013); *Matter of Thurman's Estate*, 13 Utah 2d 156 (Utah 1962).
 13. See *Matter of Collins*, 60 N.Y.2d 466 (1983); *Matter of Malan*, 56 A.D.3d 479 (2d Dep't 2008); see also *Matter of Dicks*, 2014 Ill. App. (1st) 132809-U (Ill. App. Ct. 2014); *Foster v. Foster*, 2010 Ark. App. 594 (Ark. Ct. App. 2010); *Matter of Speers*, 179 P.3d 1265 (Okla. 2008).
 14. *Matter of Moskowitz*, 116 A.D.3d 958 (2d Dep't 2014), citing *Matter of Tuccio*, 38 A.D.3d 791 (2d Dep't 2007); *Matter of Weltz*, 16 A.D.3d 428, 429 (2d Dep't 2005). Note, jurisdictions outside of New York don't appear to afford a presumption of regularity to an attorney-supervised will.
 15. See Surrogate's Court Procedure Act Section 1406; see also Code of Ala. Section 43-8-132; O.C.G.A. Section 53-4-24; 12 Del. C. Section 1305; K.S.A. Section 59-606; 84 Okl. St. Section 55.
 16. *Matter of Paige*, 53 A.D.3d 836 (3d Dep't 2008); *Matter of Pilon*, 9 A.D.3d 771 (3d Dep't 2004); *In re Demaio*, N.Y.L.J., May 2, 2014, at p. 34 (Sur. Ct., Queens Co.); see also *Duncan v. Moore*, 275 Ga. 656 (Ga. 2002); *Allen v. Mulberry*, 964 P.2d 922 (Ok. Ct. Civ. App. 1998), all holding that the presumption is rebuttable; *cf.* Ariz. Rev. Stat. Section 14-3406(B) ("If the will is self-proved, compliance with the signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit."); Neb. Rev. Stat. Section 30-2430(b) (same); 12 Del.C. Section 1310 (same). However, it's been held that the presumption won't apply if the formal requisites for execution aren't apparent on the face of the instrument. See *Matter of Flider*, 213 Neb. 153, 155 (Neb. 1982).
 17. See *Matter of Doody*, 79 A.D.3d 1380, 1381 (3d Dep't 2010); *In re Migliaccio*, *supra* note 1 at 28 (Sur. Ct., Kings Co.); *Matter of Feinberg*, 37 Misc. 3d 1206(A) (Sur. Ct., Queens Co. 2012); see also *Matter of Willich*, 2007 Tex. App. LEXIS 9936 (Tex. Ct. App. 2007).
 18. See, e.g., *Matter of Hirschorn*, 21 Misc. 3d 1113(A) (Sur. Ct., Westchester Co. 2008), citing *Matter of Coddington*, 281 A.D. 143 (3d Dep't 1952), *aff'd* 307 N.Y. 181 (1954); see also *Matter of Washburn*, *supra* note 8; *Achin v. Pianka*, *supra* note 8; *Girard*, *supra* note 11; *Melson*, 711 A.2d 783 (Del. 1998).
 19. 9 *Wigmore, Evidence*, *supra* note 6.
 20. Fisch, *supra* note 5, Section 1193, at p. 669; see also Neil S. Hecht and William M. Pinzler, "Rebutting Presumptions: Order Out of Chaos," 58 *B.U. L. Rev.* 527, 546 (1978).
 21. See *Matter of James*, *supra* note 1 (due execution); *Matter of Walker*, 80 A.D.3d 865 (3d Dep't 2011) (testamentary capacity).
 22. *In re Beecham*, N.Y.L.J., Dec 1, 2003, at p. 28 (Sur. Ct., N.Y. Co.) (testamentary capacity).
 23. *In re Migliaccio*, *supra* note 1 (due execution).
 24. *Matter of Clapper*, 79 A.D.2d 730 (3d Dep't 2001) (due execution).
 25. *Matter of Smart's Will*, *supra* note 1 (due execution).
 26. Nationally, the landscape is much the same as New York, with varying standards pervading the issue as to the sufficiency of evidence necessary



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- to rebut the presumptions of due execution and testamentary capacity. See *supra* note 1.
27. *Matter of Yuster*, 30 Misc. 3d 1211(A) (Sur. Ct., N.Y. Co. 2010).
28. *Matter of Stachiw*, 25 Misc. 3d 1236(A) (Sur. Ct., Dutchess Co. 2009).
29. *Matter of Balicki*, 408 Ill. 84 (Ill. 1951).
30. *Ibid.* at p. 88.
31. See also *Morris v. Estate of West*, 602 S.W.2d 122 (Texas Ct. App. 1980); *Estate of Snell v. Kilburn*, 165 Ohio App. 3d 352 (Ohio Ct. App. 2005); *Matter of Gill*, 111 Cal. App.2d 486 (Cal. Dist. Ct. App. 1952); and *Estate of Giuliano v. Giuliano*, 949 A.2d 386 (R.I. 2008), each failing to define the quantum of proof necessary to rebut the presumption derived from an attestation clause.
32. *Matter of Kietrys*, 104 Ill. App.3d 269 (Ill. App. Ct. 1982).
33. See also *In re Lyons*, N.Y.L.J. May 16, 2002, at p. 25 (Sur. Ct., Nassau Co.); see also *Scinto v. Appeal from Probate*, 2005 Conn. Super. LEXIS 2695 (Conn. Super. Ct. 2005); *Hemker v. Abdul*, 716 So. 2d 817 (Fla. Dist. Ct. App. 1998); *Estate of Gill*, *supra* note 31; *Paine v. Sullivan*, 79 Mass. App. Ct. 811 (Mass. App. Ct. 2011).
34. Research indicates that this presumption is applicable only in New York.
35. See Farrell, *supra* note 3, Section 3-120, at pp. 70-71, citing *In re Marcellus*, 165 N.Y. 70, (1900), in which the presumption was applied to the issue of whether an executor discharged his duty; see also Fisch *supra* note 2, Section 1136, at 652, stating that the presumption of regularity has been applied even to the acts of private individuals.
36. *Bender's New York Evidence*, Section 23A.03 [3].
37. *Matter of James*, *supra* note 1.
38. See, e.g., *In re Migliaccio*, *supra* note 1, at 28.
39. See *Black's Law Dictionary*, 7th ed. at p. 1231.
40. *Wooley v. Wooley*, 95 N.Y. 231 (1884).
41. *Matter of Pilon*, 9 A.D.3d 771 (3d Dep't 2004).
42. See also *Matter of Sperm's Will*, 71 Misc. 378 (Sur. Ct., N.Y. Co. 1911); *Matter of Buchting*, 111 A.D.3d 1114 (3d Dep't 2013); *In re Smolen*, N.Y.L.J., Jan. 29, 2001, at p. 31 (Sur. Ct., Kings Co.).
43. See *Lewis v. Lewis*, 11 N.Y. 220 (1854); *Matter of Nash's Will*, 76 A.D. 212 (3d Dep't 1902); *In re King's Will*, 130 Misc. 907 (Sur. Ct., Schohaire Co. 1927); *Matter of Bradley*, 817 S.W.2d 320 (Tenn. Ct. App. 1991).
44. See, e.g., *In re Barofsky*, N.Y.L.J., Nov. 20, 2007, at p. 34 (Sur. Ct., N.Y. Co.).
45. See, e.g., *Matter of Grancaric*, 68 A.D.3d 1279 (3d Dep't 2009); *Matter of Sylvestri*, 44 N.Y.2d 260 (1978); see also *Matter of Olson*, 1997 Minn. App. LEXIS 907 (Minn. Ct. App. 1997).
46. See, e.g., *Matter of Yuster*, *supra* note 27; *In re Cozzie*, N.Y.L.J., Feb. 7, 2011, at p. 23 (Sur. Ct., Queens Co.).
47. See, e.g., *Matter of Carvelli*, 2006 N.Y. Misc. LEXIS 4324 (Sur. Ct., Queens Co.); *Matter of Olson*, *supra* note 45.
48. See *In re Cozzie*, *supra* note 46, at p. 23; see *Morris v. Estate of West*, *supra* note 31; *Scribner v. Gibbs*, 953 N.E.2d 475 (Ind. Ct. App. 2011); *Whistlow v. Weaver*, 63 Tenn. App. 651 (Tenn. Ct. App. 1970).
49. See *In re Cozzie*, *supra* note 46, at p. 23; *Matter of Kelly*, 99 N.M. 482 (N.M. Ct. App. 1983).
50. See, e.g., *In re Gallagher*, N.Y.L.J., Oct. 19, 2007, at p. 19 (Sur. Ct., Kings Co.).
51. *Ibid.*; see, e.g., *In re Warych*, N.Y.L.J., April 9, 2004, at p. 30 (Sur. Ct., Kings Co.); *Paine v. Sullivan*, 79 Mass. App. Ct. 811 (Mass. App. Ct. 2010); *Matter of Gill*, *supra* note 31.
52. See *In re Warych*, *supra* note 51, at p. 30; see also *In re Marlowe*, N.Y.L.J., Sept. 8, 2000, at p. 32 (Sur. Ct., Nassau Co.); *Matter of McIntosh*, 2009 N.C. App. LEXIS 340 (N.C. Ct. App. 2009).
53. *In re Warsaski*, N.Y.L.J., Feb. 15, 1996, at p. 29 (Sur. Ct., N.Y. Co.); *Matter of Killen*, 188 Ariz. 562 (Ariz. Ct. App. 1996).
54. See, e.g., *In re Ford*, N.Y.L.J., Jan. 28, 2010, at p. 38 (Sur. Ct., Bronx Co.); *Matter of Gillespie* *supra* note 11.
55. See, e.g., *In re Clark*, N.Y.L.J., Aug. 23, 2013, at p. 38 (Sur. Ct., N.Y. Co.); *In re Ford*, *supra*; *In re Marlowe*, *supra* note 52; *Paine v. Sullivan*, *supra* note 51.
56. See Barker and Alexander, *supra* note 2, Section 301.5, at p. 94; Fisch, *supra* note 2, Section 1193, at pp. 668-670; Hecht and Pinzler, *supra* note 20.



SPOT LIGHT

Rise and Shine

"Le Matin" (19⁵/₈ in. by 15³/₄ in.) by Marc Chagall, sold for \$87,500 at Christie's recent Prints and Multiples Sale in New York on Oct. 23, 2014. The Russian-French Chagall is considered by many critics to be the quintessential Jewish artist. He created works in virtually every artistic medium, including painting, book illustrations, stained glass, stage sets, ceramic, tapestries and prints.