

TRUSTS AND ESTATES UPDATE

Expert Analysis

Opening Up

This month's column, coming on the heels of New York's re-opening, provides a glimpse of the important work the Surrogate's Court has been involved with since the beginning of the year. Covering such matters as the republication of wills, summary judgment, and relief from a default judgment, a discussion of the opinions that address these issues follows.

Republication and Revocation of Will

Before the Surrogate's Court, Queens County, in *In re Weiner*, was an uncontested probate proceeding in which the petitioner sought admission to probate of a 2014 Will, a copy of a codicil, dated Jan. 11, 2017, and a second codicil, dated Jan. 26, 2017. *In re Weiner*, N.Y.L.J., Jan. 17, 2020, at 17 (Sur. Ct. Queens County). The differences in the instruments lay in the appointment of the estate fiduciary. By her Will, the decedent nominated her daughter as the executor of her estate; in the first codicil to the

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instrument, she nominated both of her children as the executors of her estate, and otherwise ratified and confirmed her Will; and in the second codicil, she appointed her attorney, the draftsman of all three instruments, as the executor of her estate, and again, ratified and confirmed her Will.

In support of the petition, the attorney-draftsman submitted an affirmation indicating that she retained the Will and codicils after their execution, but was unable to locate the first codicil following the decedent's death. As such, she requested that the first codicil be admitted to probate as a lost will, together with the original Will and second codicil.

The court opined that a codicil is a supplement to a Will, which does not necessarily revoke it in its entirety, and which republishes it as of the date of the codicil. To

this extent, the court found that while each of the codicils republished the Will, the second codicil did not republish the first codicil, but instead, changed the provision appointing the estate fiduciary. In view thereof, the court held that there was no need to probate the copy of the first codicil, and admitted the Will and the second codicil to probate.

Summary Judgment Denied

In *In re Brown*, the Surrogate's Court, Kings County, denied the petitioner's motion for summary judgment dismissing the objections to probate as premature. *In re Brown*, NYLJ, May 7, 2020, at 18 (Sur. Ct. Kings County).

The decedent died at the age of 99 without a spouse or issue. The petitioner described himself as a "godson" of the decedent, and the objectant described herself as a "goddaughter by love", who also bore no relation to the decedent. Pursuant to the pertinent provisions of the propounded Will, dated Jan. 31, 2014, the decedent devised and bequeathed his real estate, personal property, and residuary estate to the petitioner, and named the petitioner's

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son as the contingent beneficiary. The objectant received a \$25,000 bequest under the instrument.

By comparison to the propounded Will, a prior will of the decedent, dated Dec. 1, 2004, devised all of his real estate in equal shares to the petitioner and the objectant, or, in the event that both of them should fail to survive the decedent, to the objectant's children. The 2004 will further bequeathed all personal property to the objectant, and the decedent's residuary estate to the proponent and objectant, with the objectant's children as contingent beneficiaries.

The instrument was drafted and its execution was supervised by an attorney, who, the court noted, had since been disbarred. The instrument was also witnessed by three individuals, who signed self-proving affidavits before a notary public, which attested to the due execution of the Will, and stated that in the opinion of the witnesses the decedent was of sound mind, and not under restraint, duress, or undue influence.

SCPA 1404 examinations of the three witnesses were conducted, yet the examination of the attorney draftsman had yet to proceed. Two of the witnesses testified that they were lifelong friends and distant relatives of the petitioner, and that they attended the Will execution ceremony at the request of the petitioner. The third witness testified that she attended the Will execution ceremony at the request of her cousin, who was also a witness.

In support of the motion, the petitioner submitted an affidavit stating that the decedent informed him in or about 2009 that she wished to change her will, asked him to be present at the execution thereof, and to bring three witnesses as instructed by the attorney. He stated that he was unaware of the changes to the will being made, and that at the time of execution the decedent was of sound mind and memory and not under restraint. More specifically, the petitioner indicated that the decedent's mental faculties did not begin to fail

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until after the propounded Will was executed, as evidenced by the hospital record she provided in support of the motion.

The hospital record revealed that decedent had been taken to the hospital by ambulance after she was found wandering outside without shoes. It further indicated that the objectant had reported to hospital staff that she was acting as the decedent's caretaker and that the decedent had several incidents of wandering in the past. In this regard, the record stated that the decedent had dementia, likely the result of "her previously diagnosed Alzheimer's."

In opposition, the objectant argued that the motion was premature

because the parties had not conducted CPLR discovery following the filing of objections. Specifically, the objectant alleged that the attorney-draftsman and the petitioner had yet to be deposed, and additional medical records had to be produced. Further, the objectant claimed that she had lived with the decedent for many years, until the petitioner moved her to his mother's home, and then to an unknown location, and that she believed the petitioner held a power of attorney for the decedent. Further, objectant claimed that at the time the Will was executed, the decedent was suffering from advanced Alzheimer's disease, and was unable to manage her financial affairs.

The court held that "a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *In re Brown, citing Lambert v. Bracco*, 18 AD3d 619, 620 (2d Dep't 2005). In this regard, the court noted that petitioner had not yet been deposed, and because of his presence at the will execution ceremony, and his request that the three attesting witnesses be present, his testimony was of critical probative value to the issues in the proceeding. Further, the court observed that the hospital record submitted by the petitioner in support of the motion raised questions as to when the decedent's Alzheimer's and general mental decline began, and consequently, additional discovery was required.

Accordingly, given the numerous unanswered issues presented by the record, summary judgment was denied as premature, without prejudice to renewal upon completion of discovery.

Vacatur of Default Denied

Before the Surrogate's Court, Orange County, in *In re Menzies*, was a petition to vacate a decree admitting the decedent's Will to probate, revoke letters testamentary, and for leave to conduct SCPA 1404 examinations and to file objections to the validity of the Will. *In re Menzies*, N.Y.L.J., Mar. 20, 2020, at 21 (Sur. Ct. Orange County).

The record revealed that prior to the initial return date of citation, the petitioner's counsel filed a Notice of Appearance with the Court, which was rejected for certain deficiencies. On the return date of citation, counsel appeared with a facsimile of an Authorization of Appearance containing the petitioner's signature. Following the return date, the matter was adjourned for the issuance of supplemental citation. According to petitioner, his counsel was informed by the Clerk of the Court that he was not required to appear on the next return date, but was required to file an original Authorization of Appearance and an Amended Notice of Appearance indicating the distributees he would be representing.

Although the documents were filed with the court in advance of the return date of supplemental citation, petitioner's counsel failed to file objections on that date on

petitioner's behalf or request SCPA 1404 examinations. Accordingly, a decree was entered admitting the propounded instrument to probate.

Almost one year later, the petitioner instituted the proceeding sub judice to vacate the decree. The petitioner alleged that the Will was invalid on the grounds of lack of due execution, undue influence, and/or lack of capacity, inasmuch as the decedent had executed the instrument while in the hospital, after sustaining serious head/brain injuries from which he later died. Notably, it took petitioner almost

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three years to complete jurisdiction in the proceeding.

The court opined that in order to vacate a decree of probate made upon a default and obtain leave to file objections, the applicant must demonstrate: (1) a reasonable excuse for the default/delay and the absence of willfulness; and (2) a meritorious claim, which is not established by allegations in conclusory form, but instead, sets forth sufficient facts to afford a substantial basis for the contest and a reasonable probability of success. Further, the court noted that whenever the time to file objections in a proceeding has expired, objections shall not be accepted

for filing unless accompanied by a stipulation of all parties to extend the time or unless ordered by the court.

Within this context, the court found that while ostensibly, petitioner failed to file objections or take affirmative steps to preserve his rights after the initial return date, petitioner's counsel could have reasonably believed that objections were not due until further notice from the court or opposing counsel, neither one of which was forthcoming. As such, the court accepted the petitioner's excuse for default as a reasonable excuse.

However, the court held that petitioner had submitted nothing more than conclusory allegations in support of his proposed objections to probate, and thus failed to establish meritorious grounds for contesting the decedent's Will. Accordingly, petitioner's application was denied.