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Applying the Ancient Document Rule in Probate Proceedings

By Robert M. Harper

Whether the validity of a testamentary instrument is contested or not, the instrument's proponent must prove that the instrument was duly executed in accordance with the statutory formalities of Estates, Powers and Trusts Law ("EPTL") § 3-2.1. The proponent of a testamentary instrument generally will seek to carry that burden with the testimony of the attesting witnesses in a contested proceeding, and with the witness' self-proving affidavit in an uncontested proceeding. However, where the attesting witnesses cannot be located, with reasonable diligence, to testify in favor of a testamentary instrument and did not sign a self-proving affidavit, the proponent may, nevertheless, be able to prove the instrument's validity based upon the ancient document rule. This article discusses the rule's application in probate proceedings.

Under the ancient document rule, "when a writing is old, is shown to be in the possession of the natural custodian, and is unsuspicious in appearance in that it appears itself to be free from indications of fraud or invalidity, it may be introduced into evidence or admitted to probate without the necessity of a hearing."[1] The ancient document rule typically applies when the propounded instrument is more than 30 years old,[ii] although some Surrogate's Courts have relied upon the rule in probating testamentary instruments that are between 20 and 30 years of age.[iii] That the propounded instrument contains an attestation clause is entitled to weight in determining whether the statutory formalities of due execution have been met.[iv]


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Former Bronx County Surrogate Lee L. Holzman's decision in *Matter of Sims* is highly instructive. There, the decedent and his wife executed a joint will, which left the estate of the first spouse to die to the spouse who survived and, on the death of the surviving spouse, provided for the estate to pass to the wife's son and his two children.[v] Thirty years later, after the deaths of the decedent and his wife, the wife's son was unable to locate the attorney-draftsperson or attesting witnesses to testify or sign attesting witness affidavits in support of the joint instrument, as the law firm where the will was executed had gone out of business. Nevertheless, the wife's son located the original joint will in a metal box marked "important papers" in a dresser drawer in the decedent's bedroom. Noting that the will bore an attestation clause, was unsuspicious in nature, and dated back more than 30 years prior to the decedent's death, Surrogate Holzman admitted it to probate under the ancient document rule.

The lesson to take away from this article is that, while the proponent of a testamentary instrument generally will need to prove that the testator duly executed the instrument through either the testimony or self-proving affidavit of the attesting witnesses, it may be possible to have the instrument admitted to probate where the attesting witnesses cannot be located with reasonable diligence and did not sign a self-proving affidavit. Indeed, to the extent that the instrument is at least 20 years old; is in the possession of its natural custodian; and is free from any indicia of fraud or invalidity, the proponent may be able to have the instrument admitted to probated based upon the ancient document rule.

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1. 3 *Warren's Heaton on Sur. Ct. Prac.* § 41.10; *Matter of Haugh*, N.Y.L.J., June 21, 2012, at 27 (Sur. Ct., Queens County); *Matter of Cunningham*, N.Y.L.J., Apr. 14, 1999, at 30 (Sur. Ct., Nassau County).
2. *Matter of Koehl*, N.Y.L.J., Mar. 28, 2002, at 22 (Sur. Ct., Suffolk County).
3. *Matter of Kempen*, N.Y.L.J., Apr. 7, 1998, at 26 (Sur. Ct., Nassau County).
4. *Matter of Homburger*, N.Y.L.J., Apr. 2, 2013, at 22 (Sur. Ct., New York County).
5. *Matter of Sims*, N.Y.L.J., Feb. 8, 2006, at 25 (Sur. Ct., Bronx County).