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Joseph T. La Ferlita on

Whether the Distinction Between Construction and Reformation Proceedings in New York Surrogate's Court Still Exists

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Trusts and estates practitioners likely will, at some point, confront a testamentary provision that is either ambiguous or seemingly impossible to reconcile with the otherwise apparent intent of a testator. While the need for court intervention may be clear, the appropriate procedural mechanism to address the situation can be less clear. In New York, the question often centers on whether a proceeding for construction or reformation is appropriate and, more importantly, whether extrinsic evidence would be admissible. [*See* SCPA 1420.]

Construction Proceedings. Construction of a will occurs when a court ascertains the testator's intent as expressed in the words of the will. [*See, e.g., In* re Estate of Stahle, 225 N.Y.L.J. 15, Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County).] SCPA 1420 allows a court to construe a will in one of three procedural contexts: (1) an independent construction proceeding, (2) an accounting proceeding, and (3) a probate proceeding. [*See* New York Estate Administration § 3.11 (LexisNexis 2008 ed.).]

A court will construe when certain language of the will is ambiguous, making it impossible to carry out the testator's intent. The goal of every construction is "to ascertain [the] decedent's intent in order that it may be effectuated." [*In re* Estate of Richard, N.Y.L.J., July 7, 2003, at 20, col. 1 (Sur. Ct. New York County); *see In re* Scale, 38 A.D.3d 983, 830 N.Y.S.2d 618 (3d Dep't 2007).] "That intent is to be ascertained 'not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed.'" [*In re* Bieley, 91 N.Y.2d 520, 525, 673 N.Y.S.2d 38, 695 N.E.2d 1119 (1998) (emphasis omitted) (*quoting In re* Fabbri, 2 N.Y.2d 236, 159 N.Y.S.2d 184, 140 N.E.2d 269 (1957)).] When the testator's intent as expressed in the entire will is clear and unambiguous, courts will not look further than the instrument itself to ascertain the meaning of that part of the will that is ambiguous. [*See In re* Manufacturers & Traders Trust, 42 A.D.3d 936, 839 N.Y.S.2d 642 (4th Dep't 2007). "[I]t is a fundamental principle of will and trust construction that[,] where the document in question … is clear, it must be enforced as written, without reference to parol evidence with respect to the original intent of the grantor" (quoting *Hemingway v. Hemingway Foundation,* 193 A.D.2d 559, 598

N.Y.S.2d 221 1st Dep't 1993).] If such intent is not ascertainable from the four corners of the will, the courts sometimes utilize certain canons of construction [*see* Warren's Heaton on Surrogate's Court Practice Chapter 187 (LexisNexis 7th ed. 2007)] to discern the testator's probable intent. However, in its frequently-cited case, *In re Fabbri*, the New York Court of Appeals emphasized that "[t]he prime consideration [in all construction proceedings] is the intention of the testator as expressed in the will. All rules of interpretation are subordinated to the requirement that the actual purpose of the testator be sought and effectuated as far as is consonant with principles of law and public policy." [*In re* Fabbri, 2 N.Y.2d 236, 239, 159 N.Y.S.2d 184, 140 N.E.2d 269 (1957); *see also* Warren's Heaton on Surrogate's Court Practice § 187.01[3][a].]

Extrinsic evidence of the testator's intent "is admissible to clarify an ambiguity in a will's language for which the intent of the testator cannot be gleaned from the four corners of the will." [Warren's Heaton on Surrogate's Court Practice § 187.01[5][a].] However, "if the terms of the will are clear and unambiguous, extrinsic evidence will not be admitted to contradict those terms." [*In re* Cole, 18 Misc. 3d 1105A, 2007 N.Y. Misc. LEXIS 8400, 2007 NY Slip Op 52417U (Sur. Ct. Nassau County 2007).]

Reformation Proceedings. Reformation of a will involves the court changing the language of the will by the addition or deletion of words. [*See, e.g., In re* Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County).] Unlike construction, which is necessitated when the testator's intent is questionable and needs to be ascertained, reformation can be appropriate only when the testator's intent is determinable but the terms of the instrument do not comport with such intent [*see In re* Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County)] due to, for example, a mistake or change in the law. [*See, e.g. In re* Estate of Meyer, N.Y.L.J., Feb. 26, 2002, at 18, col. 5 (Sur. Ct. New York County) (allowing reformation due to drafting error).] Many of the principles and rules of construction may also apply in a reformation proceeding. [*See* Warren's Heaton on Surrogate's Court Practice § 188.02[2].]

"Courts are generally loathe to reform testamentary instruments and, as a rule, will not, unless reformation effectuates the testator's intent." [*In re* Estate of Hyman, 14 Misc. 3d 1232A, 836 N.Y.S.2d 493 (Sur. Ct. Nassau County 2007).] "Moreover, when the will itself is clear any alleged mistake must be evident on the face of the document itself." [*In re* Patrick, N.Y.L.J., July 9, 2001, at 28, col. 3 (Sur. Ct. Onondaga County 2001) (denying reformation of unambiguous will even though extrinsic evidence suggested that will contained a mistake); *compare In re* Estate of Herceg, 193 Misc. 2d 201, 747 N.Y.S.2d

901 (Sur. Ct. Broome County 2002) (adopting Restatement (Third) approach and admitting extrinsic evidence of testator's intent when will is unambiguous). Surrogate Wells explained that the logic behind the traditional rules is that "testamentary intent is best found in the unambiguous language of the instrument itself … . In short, to reform a will that has not ambiguities results in a will that is against the decedent's wishes (*In* re Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County).] As discussed in the next section, some courts, in a departure from traditional notions, have reformed wills due to mistakes or ambiguities that come to light only through the use of extrinsic evidence.

The Blurring of the Line Between Construction and Reformation. Although the distinction between construction and reformation may at first seem clear, in recent years the line between them sometimes gets blurred. [*See In re* Estate of Schumer, N.Y.L.J., July 9, 2003, at 24, col. 5 (Sur. Ct. Suffolk County) (noting the trend of "the blurring of the distinctions between a will construction … and a will reformation … ."); Warren's Heaton on Surrogate's Court Practice § 188.02[2].] For example, one Surrogate noted that "[i]n many instances reformation to correct mistakes has been sought in proceedings initiated under the guise of 'construction and reformation'. [*In* re Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County).]

This blurring of the line, whether intentional or not, seems linked to calls by some to liberalize the reformation process with respect to the admission of extrinsic evidence. [*See* Marilyn G. Ordover and Charles F. Gibbs, "Correcting Mistakes in Wills and Trusts," N.Y.L.J., Aug. 6, 1998, at 3, col. 1; *see also* Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003) ("A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.").] Such calls have been welcomed by some [*see, e.g.,* Warren's Heaton on Surrogate's Court Practice § 188.02[2]] and rejected by others [*see, e.g., In* re Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County)] and have sparked a debate among Surrogate's Court practitioners [*see, e.g., In re* Schumer, N.Y.L.J., July 9, 2003, at 24, col. 5 (Sur. Ct. Suffolk County) ("The construction and reformation of wills is presently the subject of debate among scholars in the field")] over the appropri-

ate means by which a court attempts to ascertain a testator's intent. [*Compare, e.g., In re* Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 (Sur. Ct. New York County 2004) (rejecting reformation of unambiguous will) *with In re* Will of Kamp, 7 Misc. 3d 615, 790 N.Y.S.2d 852 (Sur. Ct. Broome County 2005) (allowing reformation of unambiguous will).] The debate comes into sharp focus when parties seek to use extrinsic evidence to reform an unambiguous will. [*See generally* Ordover & Gibbs, "Correcting Mistakes in Wills and Trusts," N.Y.L.J., Aug. 6, 1998, at 3, col. 1.]

On one side of the debate are those who adhere to the traditional view that "courts are without power to reform unambiguous wills even though there was a mistake of fact or law, whether in expression or inducement. When the words in a will are clear and definite, the court is powerless to change them." [*In re* Estate of Schumer, N.Y.L.J., July 9, 2003, at 4, col. 5 (Sur. Ct. Suffolk County); *see* Decision by Surrogate John Czygier (case name not given), N.Y.L.J., Dec. 26, 2007, at 39, col. 4 (Sur. Ct. Suffolk County), and *In re* Estate of Braverman, 18 Misc. 3d 1105A, 2007 N.Y. Misc. LEXIS 8400, 2007 NY Slip Op 52417U (Sur. Ct. Nassau County 2007).] The adherents of this view would argue that EPTL 3-2.1 mandates this result. [*See generally In re* Estate of Schumer, N.Y.L.J., July 9, 2003, at 24, col. 5 (Sur. Ct. Suffolk County).] The primary notion here is that "[t]he intention of a will maker is to be found in the words used in the will … ." [*In re* Watson's Will, 262 N.Y. 284, 293, 186 N.E. 787 (1933).] Therefore, it would be inappropriate to consider extrinsic evidence when the will is unambiguous on its face even though extrinsic evidence may suggest that the testator's intent is different than what is clearly expressed in the four corners of the will. [*See* Decision by Surrogate John Czygier (case name not given), N.Y.L.J., Dec. 26, 2007, at 39, col. 4 (Sur. Ct. Suffolk County) and *In* re Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County) ("The Court is not unaware of the current agitation to dilute the sanctity of wills and to ease the time honored standards with respect to reformation. It is respectfully suggested that courts should refuse to join the parade in this regard but rather continue [to adhere to the traditional view]."]

On the other side of the debate are those for whom, in certain cases, "[t]he existence of clear and unambiguous language … is not a bar to the reformation of a testamentary trust." [*In re* Estate of Longhine, 15 Misc. 3d 1106A, 836 N.Y.S.2d 500 (Sur. Ct. Wyoming County 2007). *See In re* Estate of McHugh, 12 Misc. 3d 219, 810 N.Y.S.2d 635 (Sur. Ct. Broome County 2006) (considering extrinsic evidence and granting reformation even when will is unambiguous); *In re* Will of Kamp, 7 Misc. 3d 615, 790 N.Y.S.2d 852 (Sur. Ct. Broome County 2005) (same); *In re* Estate of Herceg, 193 Misc. 2d 201, 747 N.Y.S.2d 901 (Sur. Ct. Broome County 2002) (same). For a concise statement of this

more liberal rule, see Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003); *see also* Ordover & Gibbs, "Correcting Mistakes in Wills and Trusts," N.Y.L.J., Aug. 6, 1998, at 3, col. 1.] The primary notion here is that extrinsic evidence of the decedent's intent, when strong enough [Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003) requires such evidence to be clear and convincing], justifies a departure from the strict adherence to the four corners of the will. In order to avoid a conflict with EPTL 3-2.1, "[courts] have labored to identify ambiguities in a will in order to justify altering its terms." [*In re* Schumer, N.Y.L.J., July 9, 2003, at 24, col. 5 (Sur. Ct. Suffolk County).]

It is precisely this "laboring" to find an ambiguity or mistake in a facially unambiguous will through the use extrinsic evidence that blurs the line between construction and reformation, leaving some New York estate practitioners wondering if the traditional distinction between them is really one without a difference. [*See* Ilene Sherwyn Cooper, "Key Practice Issues: Will Construction, Paternity Determination," N.Y.L.J., Sept. 18, 2003, at 3, col. 1.]

Certain trends regarding the willingness of courts to reform unambiguous wills have emerged. It is widely known that reformation "is often available" for tax relief. [Ordover & Gibbs, "Correcting Mistakes in Wills and Trusts," N.Y.L.J., Aug. 6, 1998, at 3, col. 1; *see generally In re* Choate, 141 Misc. 2d 489, 533 N.Y.S.2d 272 (Sur. Ct. New York County 1988) (allowing reformation for tax reasons).] Even then, however, "the intention of the testator [must be] plain and unambiguous and the reformation [must] not in any way alter the testator's dispositive scheme." [*In re* Carucci, 2 Misc. 3d 632, 637, 769 N.Y.S.2d 866, 870 (Sur. Ct. Nassau 2003).] A much more recent trend, which has been the subject of several recent decisions, relates to the qualification a testamentary trust as a supplemental needs trust. [*See In re* Estate of Hyman, 14 Misc. 3d 1232A, 836 N.Y.S.2d 493 (Sur. Ct. Nassau County 2007) (allowing reformation of unambiguous instrument to qualify as a supplemental needs trust); *In re* Estate of Longhine, 15 Misc. 3d 1106A, 836 N.Y.S.2d 500 (Sur. Ct. Wyoming County 2007) (same); *In re* Will of Kamp, 7 Misc. 3d 615, 790 N.Y.S.2d 852 (Sur. Ct. Broome County 2005) (same); *compare In re* Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 (Sur. Ct. New York County 2004) (rejecting reformation of unambiguous will sought to qualify as supplemental needs trust).] The reasoning set forth in the latter type of cases comports more with that of the Restatement (Third) [Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003)], which relies on the more liberal approach to reformation, than with that of the traditional New York reformation cases. It remains to be seen whether such reasoning will further permeate New York law.

Notwithstanding the existence of this policy debate over the use of extrinsic evidence [*see generally In* re Estate of Stahle, N.Y.L.J., Jan. 23, 2001, at 32, 2001 N.Y. Misc. LEXIS 1353, 225 N.Y.L.J. 15 (Sur. Ct. Onondaga County)], it seems that, in New York, the traditional view is still the norm, albeit with occasional exceptions, some of which are noted above. [*See, e.g., In re* Estate of Schumer, N.Y.L.J., July 9, 2003, at 4, col. 5 (Sur. Ct. Suffolk County) (referring to efforts to liberalize the construction and reformation process via legislation and the present state of New York statutory law, which still conforms with the traditional notions). Also, note that the provisions of Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003) have not been adopted by the New York State Legislature. Nevertheless, some Surrogates have relied on its precepts in certain situations (*see, e.g., In re* Estate of Herceg, 193 Misc. 2d 201, 747 N.Y.S.2d 901 (Sur. Ct. Broome County 2002) (admitting extrinsic evidence of testator's intent when will is unambiguous).] Accordingly, it is still important for the New York trusts and estates practitioner to appreciate the basic, traditional distinctions between construction and reformation proceedings. [*Accord* Cooper, "Key Practice Issues: Will Construction, Paternity Determination," N.Y.L.J., Sept. 18, 2003, at 3, col. 1.]

Conclusion. New York trusts and estates practitioners should be familiar with the traditional distinction between construction and reformation, which still applies in most situations. At the same time, however, in order to best serve their clients, practitioners should also be aware of recent attempts to liberalize the rules regarding reformation proceedings as they relate to the use of extrinsic evidence, as well as the existence of case law that coincides with such attempts.

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