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TRUSTS AND ESTATES UPDATE

Expert Analysis

Notable Decisions On Probate of Wills

The close of 2010 was marked by several notable decisions regarding the validity of wills and the circumstances under which a probate decree will be vacated. These opinions impinge on the essentials of due execution, testamentary capacity, fraud and undue influence, and, as such, are of import to the estate practitioner.

By **Ilene Sherwyn Cooper**

Capacity and Undue Influence

In a contested probate proceeding, the Bronx County Surrogate's Court held a bench trial on the issues of testamentary capacity and undue influence. The court had previously granted the proponent's request for summary judgment on the remaining issues.

The decedent was survived by five children, three of whom post-deceased her. The propounded will was executed in July 1986, about one year before the decedent's death at the age of 89. The proponent of the will was the administrator of the estate of her post-deceased son Richard. The probate petition was not filed until 20 years after the decedent's death and three years after Richard's death.

Three sets of objections were filed to the will. The sole asset of the estate was the decedent's home, which she devised and bequeathed to Richard subject to certain conditions. The residue of the estate was devised and bequeathed in equal shares to the decedent's children.

The record revealed that the decedent suffered a stroke 10 years before her death resulting in her partial paralysis, and required the assistance of an aide for the rest of her life. The testimony also indicated that after the stroke, the decedent's children assisted in her daily affairs, and that she enjoyed a close relationship with all of them. The decedent resided in the top level of her two-family home until her death, and the decedent's son, Richard, occupied the lower level of the premises until his death.

The attorney-draftsman of the instrument testified that he had practiced law for 52 years, during which time he drafted and supervised the execution of more than 1,000 wills. On the day prior to the execution of the instrument, he testified that Richard called him and provided him with instructions as to the dispositive provisions of the instrument, which he followed.

The following day, the attorney and his wife arrived at the decedent's home to serve as the attesting witnesses, admittedly without any knowledge of the decedent's competency. Nevertheless, the attorney stated that he read and explained each provision of the will to the decedent, and she acknowledged that she understood its terms. The decedent, when asked, provided the reason why she favored her son, Richard, over her other children. Although the attorney noted that the decedent had some difficulty in signing the instrument, she ultimately did so to the best of her ability. Thereafter, the attorney, his wife, and the decedent's aide signed as witnesses. The will had an attestation clause and, according to the attorney, was executed in accordance with the statutory formalities.

> In 'In re Ford,' no explanation was provided by the decedent's son as to why the decedent favored him over her other children, who apparently also had a close relationship with her.

The attorney did not question the decedent as to her knowledge of the nature and extent of her assets as he explained that Richard had told him that the house was her sole asset. On cross-examination, the attorney conceded that it was unusual for him to receive the instructions for a will from its principal beneficiary. The attorney testified that he had never met Richard prior to the execution of the decedent's will.

The testimony of the attorney-draftsman's wife was essentially the same as her husband's; the third witness did not testify at trial.

One of the decedent's children testified at trial that, inter alia, the decedent would not have understood the terms of the instrument when it was executed, and could not engage in any meaningful conversation. In addition, two of the decedent's grandchildren testified. One grandchild stated that she visited with the decedent twice a month and stayed with her at her home for approximately half a week. She stated that in her opinion the decedent had no knowledge of her assets, and never left her home after her stroke. The decedent's children took care of all her personal needs and finances. Prior to the execution of the propounded will, Richard fired the decedent's long-time aide, and her condition markedly deteriorated. The witness testified that Richard prevented this aide from visiting the decedent, and was controlling in other ways as well.

The second grandchild who testified stated that by 1985 neither she nor her mother could have lengthy conversations with the decedent, and that any responses elicited from her were generally monosyllabic. This witness confirmed that the decedent's condition worsened after her long-time aide departed, and thereafter, she hardly spoke.

After a thorough examination of the applicable law on the issues of testamentary capacity and undue influence, the court concluded that the totality of the proof established that Richard controlled the decedent's life to a significant extent. This was as a result of his residing at the premises, but was evidenced by his unilateral decision to fire the decedent's long-time aide, and thereafter, his refusal to let the aide visit with her, as well as his control over what food was delivered to the decedent. Moreover, the court found the evidence to be clear that the decedent was incapable of handling her financial and personal affairs, and that Richard principally exercised control over these matters as demonstrated by his selection of the attorney-draftsman of the will, and his involvement with its terms and execution.

Based on these circumstances, the court found that a confidential relationship existed between Richard and the decedent, which gave rise to an inference of undue influence. No explanation was provided by Richard as to why the decedent favored him over her other children, who apparently also had a close relationship with her, provoking the conclusion that the instructions given to the attorney by Richard were the result of his own dispositive scheme, rather than the decedent's testamentary wishes.

Further, while the attorney-draftsman and his wife testified as to the decedent's apparent capacity, neither one had any dealings with her, either before or after the execution of the will, or was aware of the fact that she was unable to handle her financial affairs, or instruct others regarding her personal needs. Additionally, the court found it troubling that the will was executed the day after Richard spoke with the draftsman, leaving the decedent no time to consider whether the will accurately reflected her wishes, or to discuss the will and its provisions with others.

Under the circumstances of the decedent's health and deteriorating condition, the court was not persuaded that the decedent's affirmative responses to her understanding of the will and its terms was reflective of her testamentary capacity.

Accordingly, based on the foregoing, and the

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remaining proof adduced, the court held that the proponent had not met his burden on the issues of testamentary capacity and undue influence, and denied probate of the propounded instrument.

In re Ford, NYLJ, Dec. 13, 2010, p. 22 (Sur. Ct. Bronx County) (Sur. Holzman)

Lack of Due Execution

In *In re Demis*, the objectants moved for summary judgment denying probate of the propounded instrument, and its duplicate original, on the grounds of lack of due execution.

The record revealed that the decedent died survived by his spouse, who offered the instruments for probate, and eight children, who objected to probate alleging, inter alia, lack of due execution, fraud, duress and undue influence. SCPA §1404 examinations were held of the attorney-draftsman, who was the first witness to the will, as well as his law office assistant, who was the second witness, and a third person, who was a document preparer in the draftsman's office.

The Albany County Surrogate's Court noted that while the self-proving affidavit affixed to the instrument recited all the essential elements necessary to establish due execution, upon examination by the proponent, the witnesses and scrivener both testified that they had not seen the purported wills before. In fact, they each stated that the instruments were in a font that was not used in their law office, that the font did not match the font utilized on the attestation page or the self-proving affidavit, and that the documents offered for probate were not the wills that were prepared and executed in their office.

Although the proponent argued that the witnesses' memories were faulty and could not be relied upon for summary relief, the court disagreed, finding that the witnesses were clear in their recollection and testimony that the wills that were being offered for probate were not the documents they attested to and witnessed. In significant part, the court quoted from the testimony of the scrivener who noted that the dispositive language contained in the instruments had never been utilized by him when drafting a will. Moreover, the court noted that the attestation clause was on a separate page from the documents submitted, and had nothing to link it to the wills offered for probate.

While the genuineness of the decedent's signature was not an issue, the court nevertheless held that the proponent had failed to satisfy the elements of due execution, and granted summary judgment in objectants' favor.

In re Demis, Index No. 2008-397, Dec. 15, 2010 (Sur. Ct. Albany County) (Sur. Doyle)

Vacatur and Discovery

Before the Appellate Division, Third Department, in *Matter of Kelsall* was an appeal by the executor of the decedent's estate from an Order of the Surrogate's Court, Essex County (Meyer, S.), which, inter alia, granted the executor's application for preliminary letters testamentary, with limitations, and partially granted the application by the decedent's brother for discovery.

The decedent died in March 2008, leaving a will that had been executed in March 1994. The affidavit of attesting witnesses to the instrument was executed three years later, in May 1997. The instrument left the decedent's entire estate to the petitioner and named him as the executor. Although the decedent's brother received a copy of the will prior to its probate, he did file objections, and the instrument was admitted to probate in December 2008.

Thereafter, the executor instituted a proceeding against the decedent's brother to set aside a deed to the brother purportedly conveying to him one of the principal assets of the decedent's estate. In connection with that proceeding, counsel for the brother reviewed the decedent's legal files and allegedly found documents and obtained information therefrom that cast doubt on the validity of the will that had been probated. As a consequence, the brother moved by order to show cause for vacatur of the probate decree, permission to file objections and obtain discovery. Pending the return date, the authority of the executor was temporarily suspended. Petitioner cross-moved for an order vacating his temporary suspension, and for an order of protection suppressing all documents obtained by respondent's counsel.

The Surrogate's Court granted the brother's motion insofar as it sought discovery regarding the propriety of the execution of the will, but reserved decision as to whether to vacate the decree. The executor's motion for an order of protection was denied, but the court granted his application for preliminary letters testamentary with limitations.

In 'Matter of Kelsall,' the Third Department held that while SCPA §1404(4) does not explicitly provide that a decree of probate must be vacated prior to allowing discovery, the statute has been clearly interpreted to require vacatur as a prerequisite.

On appeal, the executor maintained that the Surrogate erred in granting discovery prior to vacatur of the probate decree. The Appellate Division agreed, holding that while SCPA §1404(4) does not explicitly provide that a decree of probate must be vacated prior to allowing discovery, the statute has been clearly interpreted to require vacatur as a prerequisite. Accordingly, the court held that the brother's motion for discovery should have been denied pending a determination of whether the brother was entitled to an order vacating the probate decree. In view of the discretionary nature of this relief, the court remanded the matter to the Surrogate's Court for a determination of this issue. Further, the court held that the Surrogate's determination to issue limited preliminary letters was a proper exercise of its discretion.

Matter of Kelsall, ____N.Y.S.2d ___, 2010 N.Y. Slip Op. 08839 (3d Dept.)

Execution of Later Will

In a contested probate proceeding, the decedent's former spouse moved to vacate the decree admitting his 1989 will to probate, and requested probate of a 2005 instrument.

The decedent's will, dated 1989, left his entire estate of $4.9 million to his son, whom he named as the executor. Almost three years after the instrument was admitted to probate, his former spouse petitioned for vacatur of the probate decree and requested probate of an instrument dated June 2005. That document was one page, and, in pertinent part, left the decedent's entire estate in trust for his son, but made no provision for the remainder. The decedent's former wife was named trustee of the trust.

The decedent's son opposed the relief requested alleging that the later instrument was invalid on the grounds, inter alia, of lack of due execution. At the conclusion of the non-jury trial of the matter, the objectant-son moved to dismiss the proceeding alleging that the petitioner had failed to establish a prima facie case for due execution.

The New York County Surrogate's Court granted the motion concluding that due execution of the 2005 instrument had not been established. In reaching this result, the court referred to the testimony of the attesting witnesses of the instrument, one of whom was the draftsman of both the 1989 will and the 2005 will. Notably, the court found that the draftsman did not testify as to any discussions with the decedent as to why he wanted to change his will, nor did he inquire of the decedent as to his reasons for naming his former wife as trustee. Further, the court noted that the testimony failed to establish whether the draftsman made any effort to determine decedent's intention as to the disposition of his estate if his son predeceased him, or what property was subject to disposition by the instrument. Finally, he had no independent recollection of the information he might have relied on in drafting the will, and had no notes in connection with the decedent's consultation.

On the date of the will execution, the decedent was in the hospital, and according to the testimony of the draftsman, appeared to be sick. While he stated that the decedent signed the instrument in his presence, he did not testify that the decedent read the instrument, or that anyone read the instrument to him. Further, he did not state that the decedent acknowledged the instrument as his will.

The second witness to the will testified that he saw the decedent sign the instrument, and, as compared to the draftsman, stated that the decedent appeared to be in perfect condition at the time. This witness also testified that he did not see the decedent read the will, or anyone read the will to him. Although he testified at trial that he heard the decedent declare the instrument as his will, the court noted that this testimony was contradicted by deposition testimony months earlier. Neither the draftsman nor the second witness could identify whether they signed the instrument as witnesses before or after the decedent.

Based upon the foregoing, the court held that the petitioner had failed to establish that the 2005 will was executed in accordance with the statutory formalities. Although recognizing that the failed recollection of witnesses will not necessarily deprive a will of probate, the court opined that this was more likely the case when the witnesses were strangers to the decedent rather than, as in the instant case, familiar with the decedent and his family members.

Accordingly, the petition for probate of the 2005 will was denied.

In re Estate of Yuster, NYLJ, Dec. 16, 2010, at 41 (Sur. Ct. New York County) (Webber, S.)