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VACATING PROBATE DECREES IN NEW YORK

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INTRODUCTION

Vacatur of a probate decree in New York is an extraordinary remedy that disrupts the orderly administration of estates. Given that public policy and judicial economy disfavor post-probate will contests and, more generally, inefficiency in the administration of estates, New York courts have applied heightened standards in vacatur proceedings, requiring parties seeking such relief to do much more than merely allege facts which might be sufficient to question a probated instrument's validity.[1] This article addresses the standards applied by the courts in granting and denying vacatur; the parties' entitlement to pre-vacatur disclosure and evidentiary hearings; the affirmative defenses that may be available in opposition to a vacatur application; and the countervailing policy interests that arise when the instrument in question contains an *in terrorem* clause.[2] Practitioners should consider the standards for vacatur, entitlement to discovery and evidentiary hearings, and affirmative defenses that may be available when advising their clients as how to best make—or, for equal measure, oppose—a vacatur application.

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[1] *In re* Bobst, 630 N.Y.S.2d 228, 232 (N.Y. Sur. Ct. 1995).

[2] *In re* Ellis, 683 N.Y.S.2d 113, 119-20 (N.Y. App. Div. 1998) (addressing *in terrorem* clauses, which provide for the forfeiture of a will beneficiary's interest to the extent the beneficiary unsuccessfully contests the instrument's validity).

VACATUR WITHOUT A WAIVER AND CONSENT

The standard applied by New York State courts when a party seeking vacatur has not previously executed a waiver consenting to the issuance of a decree admitting the propounded instrument to probate requires that such a party establish "a substantial basis for its contest and a reasonable probability of success" on the merits in order to prevail on a vacatur application.[3]

The court of appeals adopted this standard in 2008 in *In re American Committee for the Weizmann Institute of Science v. Dunn*.[4] There, the decedent executed a will five days before she died, nominating her brother as executor and bequeathing her apartment to her niece (collectively, the "respondents").[5] After the decedent's death, her brother petitioned to have the will admitted to probate, which was granted by a decree of the surrogate's court.[6]

Several months later, the petitioner, a charitable organization, commenced a proceeding to vacate the decree, arguing that the respondents unduly influenced the decedent to execute the propounded instrument.[7] As support for its position, the petitioner alleged that the "decedent had 'long intended to make a sizeable donation'" to the petitioner;[8] that the decedent and her husband executed reciprocal wills leaving their respective residuary estates to the petitioner;[9] and that the decedent subsequently pledged to donate her apartment to the petitioner.[10] In addition, the petitioner alleged that the decedent executed the probated will just a few weeks after being diagnosed with terminal gallbladder cancer and moving into her brother's home for care, and at the time, the decedent "was in a severely weakened condition."[11] Further, the propounded instrument was "an unexplained departure" from the decedent's decades-long testamentary plan to benefit the petitioner.[12]

When the respondents moved to dismiss the petition, pursuant to the relevant statute, the surrogate's court granted the motion and the appellate division affirmed.[13] The court of appeals affirmed as

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[3] *In re* Am. Comm. for the Weizmann Inst. of Sci. v. Dunn, 883 N.E.2d 996, 1005 (N.Y. 2008).
[4] *Id.* at 1004.
[5] *Id.* at 998.
[6] *Id.* at 999.
[7] *Id.*
[8] *Weizmann Inst.*, 883 N.E.2d at 999.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1000.
[12] *Id.*
[13] *Weizmann Inst.*, 883 N.E.2d at 1001.

well.[14] In doing so, the court specifically rejected the petitioner's argument that "a probate decree should be vacated . . . if a party's verified petition contains allegations that, if taken as true, would cause a reasonable person to be uncertain that the probated will was validly made."[15] The court explained that "[p]ermitting vacatur of a probate decree based upon mere allegations . . . would be unduly disruptive and could encourage specious claims in the hope of securing unjustified settlements that would upset the legitimate expectations of a decedent's intended beneficiaries."[16]

In order to avoid such a result, the court held that "a probate decree should [only] be vacated . . . if [the] petitioner can demonstrate facts constituting a substantial basis for challenging the proffered will and a reasonable probability of success on the merits of its undue influence claim."[17] Applying that standard, the court rejected the petitioner's argument that it had met its burden by "showing a dramatic departure from a longstanding testamentary plan by a testator who, at the time the challenged will was executed, was in a weakened condition and in the care of persons benefitting from that will."[18] The court noted that although the petitioner's documentary proof might have established her intent to benefit the petitioner at one time, it did not show that the decedent possessed that intent in the years before her death.[19] Additionally, the surrogate's denial of vacatur—and the appellate division's affirmance—were further supported by "the fact that the challenged will left [the] decedent's co-op to her niece, a close relative whose father—decedent's brother and executor—opened his home to . . . while she received hospice care for terminal cancer during her final days."[20] Accordingly, vacatur was not warranted.

Since *Weizmann Institute*, surrogate's courts have routinely applied the standard articulated by the court of appeals in deciding whether to vacate probate decrees. The surrogate courts have done so in both granting and, more frequently, denying vacatur petitions.[21]

In re Efros is one example of a case in which vacatur was found to be warranted.[22] There, the decedent died in September 2005, at ninety-three years of age, survived by two nephews.[23] A will

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[14] *Id.* at 1002.
[15] *Id.* at 1004.
[16] *Id.* at 1005.
[17] *Id.* at 1004.
[18] *Weizmann Inst.*, 883 N.E.2d at 1006.
[19] *See id.*
[20] *Id.* at 1007.
[21] *See* Estate of Shanok, N.Y. L.J., Oct. 12, 2010, at 30 (N.Y. Sur. Ct. 2010).
[22] *In re* Efros, No. 4036-2005, 2008 WL 880518, at *8 (N.Y. Sur. Ct. March 18, 2008).
[23] *Id.* at *1.

benefitting the nephews was admitted to probate by decree in February 2006.[24]

In August 2006, the decedent's friend and investment adviser (who was also a legatee of a small bequest under the probated instrument) learned that the decedent's testamentary plan had been substantially altered from her penultimate will and that the decedent's long-time attorney had not supervised the execution of the probated will.[25] Additionally, the investment adviser recalled that the decedent had suffered a stroke in the months before she executed the probated instrument; that the decedent's nephews had assumed increased control over her finances after the stroke; and that the nephews had pressured the decedent to alter her will during that period.[26] The investment adviser bolstered his recollection with recordings of daily conversations that he had with the decedent which supported allegations of undue influence by the nephews, made because he worked on an active trading floor.[27]

The investment adviser delivered the transcripts of the recordings to JPMorgan Chase Bank, N.A. ("JPMorgan"), the corporate fiduciary, who served as co-executor with the nephews.[28] JPMorgan moved to vacate the probate decree and for the removal of the nephews as co-executors.[29] Several charities, which were treated more favorably in the decedent's prior will, joined in the motion.[30]

Surrogate Kristin Booth Glen granted JPMorgan's motion, finding that the bank presented a substantial basis for contesting the probated instrument (based upon undue influence) and a probability of success on the merits.[31] As support for her conclusions, Surrogate Glen found that the taped conversations provided "sufficient evidence of motive, opportunity and actual undue influence" being practiced upon the decedent.[32] Surrogate Glen explained that "the facts presented . . . paint[ed] a picture of a 93 year old woman who believed she 'had no choice' but to change her will to accord with the unremitting demands of her closest family members."[33] Accordingly, based upon the particularly egregious facts of the case, vacatur was

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[24] *Id.*
[25] *Id.* at *1-2.
[26] *Id.* at *2.
[27] *Efros*, 2008 WL 880518, at *2.
[28] *Id.*
[29] *Id.* at *4.
[30] *Id.*
[31] *Id.* at *8.
[32] *Efros*, 2008 WL 880518 at *7.
[33] *Id.*

warranted.[34]

In sum, when a party seeking vacatur has not signed a waiver and consent to probate, that party must be prepared to present a substantial basis for contesting the probated instrument and a reasonable probability of success on the merits. Failure to do so will likely result in the denial of the party's prayer for relief.

VACATUR AND CONSENT TO PROBATE

In stark contrast to the circumstances discussed above, a party who has executed a waiver and consent to probate and subsequently seeks to vacate a probate decree must meet a more rigorous standard.[35] Specifically, such a party must show that his consent was obtained by fraud or overreaching; the consent "was the product of misrepresentation or misconduct"; or "newly discovered evidence, clerical error or other sufficient cause [which] justifies the reopening of the decree."[36]

In re Coccia provides a helpful analysis. In *Coccia*, the movant signed a waiver and consent with respect to the admission of a will to probate.[37] After Surrogate Margarita Lopez-Torres issued a decree admitting the instrument to probate, the movant sought to have the decree vacated.[38] The movant alleged that he "did not appreciate or understand the significance of the waiver and consent" and that the decedent lacked capacity at the time that she executed the will.[39]

Neither the surrogate court, nor the appellate division was persuaded by the movant's allegations.[40] The movant had failed to demonstrate the "substantial cause" necessary for vacatur, partially because the medical records upon which the movant relied were in his possession at the time that he signed the waiver and consent to probate.[41]

To summarize, when a party seeking to vacate a probate decree has signed a waiver and consent to probate, the party must demonstrate that the waiver was a product of fraud or overreaching; that it resulted from a misrepresentation or misconduct; or that it should be excused by virtue of newly discovered evidence, clerical error, or other sufficient cause. Otherwise, the vacatur application

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[34] *See id.* at *8.
[35] *See In re* Coccia, 874 N.Y.S.2d 224, 225 (N.Y. App. Div. 2009).
[36] *Id.*
[37] *Id.* at 224.
[38] *Id.* at 225.
[39] *Id.*
[40] *Coccia*, 874 N.Y.S.2d at 225.
[41] *Id.*

will likely be denied.

VACATUR IN THE INTERESTS OF JUSTICE

In circumstances when the party seeking vacatur fails to meet the heightened standards for such relief, a surrogate's court may nevertheless vacate a probate decree in the interests of justice.[42] Vacatur is warranted when "it appears that substantial justice will be served and injustice prevented" through it.[43]

In *In re Blaukopf*,[44] the decedent's distributees moved for an order to vacate the decree admitting the decedent's alleged will to probate, grant them the opportunity to examine the witnesses to the instrument's execution, and direct that probate objections be filed within a reasonable time.

Former Surrogate John B. Riordan granted the distributees' motion in the interests of justice, concluding that the proponent of the probated instrument "submitted false information to the court, and only when challenged did she change her sworn statements"; amended the probate petition to omit information reflecting her status as the decedent's "live-in companion" to avoid the appearance of a confidential relationship; and that the probated will differed substantially from the copy of a prior instrument that the distributees provided to the court.[45] In doing so, Surrogate Riordan opined that his "paramount concern [was] to admit only valid wills to probate" and that the proponent's apparent dishonesty was a cause for concern in that regard.[46]

On appeal, the second department affirmed, finding that the surrogate's court properly "exercise[d] its inherent powers to 'vacate its own [decree] for sufficient reason and in the interests of substantial justice.'"[47] As the appellate division explained, "the fact that the petitioner filed a total of three different petitions for probate

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[42] Estate of King, N.Y. L.J, May 27, 2008, at 46 (N.Y. Sur. Ct. 2008); *In re* Efros, No. 4036-2005, 2008 WL 880518, at *8 (N.Y. Sur. Ct. Mar. 18, 2008).

[43] *Efros*, 2008 WL 880518, at *8. *See In re* Musso, 642 N.Y.S.2d 322, 323 (N.Y. App. Div. 1996). *See also In re* Macior's Will, 52 N.Y.S.2d 389, 391 (N.Y. Sur. Ct. 1945)

> (There should be finality and permanency to decrees of the Court and the same should not be vacated and set aside without careful consideration, but the Court should also be slow to say that an injustice may not be corrected. It has been stated that "the right to reopen or modify in the interests of justice is not open to question.")

(internal citations omitted).

[44] No. 348307, 2009 WL 864207, at *1 (N.Y. Sur. Ct. Mar. 31, 2009), *aff'd*, 900 N.Y.S.2d 657 (N.Y. App. Div. 2010).

[45] *Id.* at *5.

[46] *Id.* at *6.

[47] *Blaukopf*, 900 N.Y.S.2d at 657.

and letters testamentary wherein she made several conflicting statements" was sufficient to warrant vacatur.[48]

While vacatur in the interests of justice is not appropriate in most cases, a surrogate's court may grant it in the exercise of its discretion, when the party that proffered the probated instrument to the court engages in egregious conduct, including dishonesty that causes the surrogate's court to question the validity of a probated instrument.

PRE-VACATUR DISCLOSURE

Recognizing the difficulty of meeting the standard for vacatur, litigants have requested pre-vacatur disclosure in an effort to improve their chances of success on the merits.[49] Despite those efforts, however, the court of appeals and appellate division have found that pre-vacatur disclosure is impermissible.[50]

Notably, in *In re Kelsall*, the appellate division addressed this very issue.[51] There, the decedent's will was dated March 1994, although the self-proving witness affidavit was not executed until three years later, in May 1997.[52] Nonetheless, the instrument was admitted to probate in December 2008, without objection from the respondent.[53]

Shortly thereafter, the instrument's proponent, who was also the nominated fiduciary and sole beneficiary, sought to invalidate a deed conveying real property previously owned by the decedent to the respondent.[54] As part of that litigation, the respondent's attorney examined the decedent's legal files and spoke with the witnesses with regard to the will's execution.[55] The respondent's counsel's review of the decedent's legal files and conversations with the witnesses caused the respondent to question the will's validity.[56]

Given his questions, the respondent commenced a proceeding to vacate the decree admitting the will to probate, arguing that he should be permitted to file objections to probate and to obtain discovery concerning the circumstances of the will's execution.[57] The

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[48] *Id.*

[49] *In re* Am. Comm. for the Weizmann Inst. of Sci. v. Dunn, 883 N.E.2d 996, 1005 (N.Y. 2008); *In re* Kelsall, 911 N.Y.S.2d 702, 704 (N.Y. App. Div. 2010).

[50] *See Weizmann Inst.*, 883 N.E.2d at 1005. *See also Kelsall*, 911 N.Y.S.2d at 704.

[51] *See generally Kelsall*, 911 N.Y.S.2d at 704.

[52] *Kelsall*, 911 N.Y.S.2d at 703.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 704.

[56] *Kelsall*, 911 N.Y.S.2d at 704.

[57] *Id.*

surrogate's court agreed in part, and issued an order granting the respondent's request for pre-objection disclosure of the attorney-draftsman and attesting witnesses, pursuant to Surrogate's Court Procedure Act ("S.C.P.A.") section 1404,[58] and reserved decision on vacatur, pending completion of disclosure.[59]

On appeal, the appellate division reversed, holding that disclosure "cannot be permitted unless the decree of probate is set aside."[60] In making that determination, the appellate division opined: "[w]hile SCPA 1404(4) . . . does not explicitly provide that a decree of probate must be vacated prior to allowing [disclosure], the statute has clearly been interpreted by the Court of Appeals as requiring such vacatur."[61]

Thus, a surrogate's court is unlikely to permit disclosure unless it concludes that vacatur is warranted. As challenging as it may be to do so, a party petitioning for vacatur of a probate decree must be prepared to carry its burden without the aid of disclosure.

ENTITLEMENT TO AN EVIDENTIARY HEARING

The issue of whether a party seeking vacatur is entitled to an evidentiary hearing before the party's petition is dismissed is not necessarily settled. On the one hand, at least one commentator has opined that "[a]n application to vacate a decree should not be denied without first providing the petitioner with an opportunity to be heard at a hearing."[62] On the other hand, case law suggests that a hearing is not required when the party seeking vacatur fails to show "some degree of probability that his [or her] claim is well founded, and that, if afforded an opportunity, he [or she] would be able to substantiate it."[63]

In re Loverme[64] is the most recent reported case to address this issue. In *Loverme*, the petitioner, the niece of the decedent's second wife, sought to vacate a decree admitting a will to probate, based upon allegations that the decedent executed it under the undue influence of

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[58] S.C.P.A. section 1404 authorizes certain interested parties to take the objections of the attorney-draftsperson, attesting witnesses, and (where the propounded will contains an in terrorem clause) the proponents of a will offered for probate before filing objections to probate. N.Y. SUR. CT. PRO. ACT § 1404.

[59] *Kelsall*, 911 N.Y.S.2d at 704.

[60] *Id.*

[61] *Id.*

[62] CHARLES J. GROPPE ET AL, 2 HARRIS NEW YORK ESTATES: PROBATE, ADMINISTRATION & LITIGATION § 20:109 (6th ed. 2011).

[63] *In re* Leslie, 161 N.Y.S. 790, 794 (N.Y. App. Div. 1916) (affirming the surrogate's court's refusal to take evidence upon the question of whether the probate decree should be vacated).

[64] 812 N.Y.S.2d 631 (N.Y. App. Div. 2006).

his third wife (who was also the niece of his first wife).[65] Notably, the probated will, which the decedent executed two years after marrying his third wife, left the entirety of his estate to his third wife and disinherited the relatives for whom he provided in a prior instrument.[66]

Although the surrogate's court dismissed the vacatur petition without a hearing, the second department reversed.[67] In doing so, the appellate division referenced the "substantial basis" that the petitioner presented for contesting the probated instrument, including medical records and a missing person's report demonstrating that the decedent was afflicted with Alzheimer's Disease, suffered from memory loss and confusion, and suggested that he had been operating under his third wife's undue influence at the time that he executed the instrument.[68] All of those factors, taken in conjunction with the fact that the decedent previously expressed an intention to benefit members of his extended family with whom he was close, constituted a "substantial basis for contesting the . . . will" and necessitated an evidentiary hearing.[69]

Conversely, in *In re Leslie's Estate*,[70] the surrogate's court denied an alleged distributee's motion to vacate a probate decree without holding a hearing on the matter. The appellate division affirmed, finding that the circumstances did not warrant either a hearing or the taking of any evidence.[71] The appellate division reasoned that a hearing is not necessary absent a showing of "some degree of probability that [the claim of the party seeking vacatur] is well founded, and that, if afforded an opportunity, [the party would] be able to substantiate it."[72]

While a hearing may only be warranted before dismissal in certain circumstances, such as the circumstances in *Loverme*, a hearing is not always required. Counsel should be so advised when seeking a hearing before dismissal.[73]

STANDING, VACATUR, AND LOST WILLS

When the standing of a party seeking to vacate a decree admitting a will or codicil to probate is based upon that party's status

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[65] *Id.* at 632.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 633.
[69] *Loverme*, 812 N.Y.S.2d at 633.
[70] 161 N.Y.S. 790 (N.Y. App. Div. 1916).
[71] *Id.* at 793.
[72] *Id.* at 794.
[73] *Id.*

as a legatee in a prior testamentary instrument, and the original prior testamentary instrument cannot be located, the proponent of the probated will or codicil may move to dismiss the vacatur petition for want of standing. In certain circumstances, the proponent's efforts may prove successful.

In re Nappo is illustrative.[74] There, the decedent's stepson commenced a proceeding to vacate the decree admitting the decedent's 2008 will to probate.[75] Since the stepson was not one of the decedent's distributees, his standing to seek vacatur of the probate decree rested upon his status as a legatee in the decedent's prior will, executed in 2007.[76] As the original 2007 will had been retained by the decedent and could not be located, the respondent, the executor under the 2008 will, argued that the stepson lacked standing to seek vacatur of the decree admitting the 2008 will to probate.[77]

In ruling for the respondent, Surrogate John M. Czygier, Jr. opined that, as the original 2007 will was last known to be in the decedent's possession and could not be located, the stepson would have to overcome the presumption that the instrument had been revoked.[78] Given that the likelihood of the stepson overcoming that presumption was "too remote to afford [him] standing," the surrogate denied the stepson's petition for vacatur of the decree admitting the 2008 will to probate.[79]

Former Surrogate Renee R. Roth reached a similar conclusion in *In re Stern*.[80] There, the beneficiaries under the decedent's 1981 will petitioned for vacatur of the decree admitting his 1993 will to probate.[81] Although Surrogate Roth found that the beneficiaries had established a substantial basis for contesting the validity of the 1993 will, she declined to vacate the decree admitting that instrument to probate.[82] She reasoned that the beneficiaries had to prove that the 1981 will was a valid testamentary instrument and was not revoked, as the beneficiaries were not distributees of the decedent and could not locate the original 1981 will.[83] As a result, Surrogate Roth directed the parties to complete discovery concerning the validity of

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[74] *See In re* Nappo, N.Y. L.J., June 4, 2010, at 42 (N.Y. Sur. Ct. 2010).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *In re* Nappo, N.Y. L.J., June 4, 2010, at 42 (N.Y. Sur. Ct. 2010).
[80] *See In re* Stern, N.Y. L.J., July 20, 1994, at 25 (N.Y. Sur. Ct. 1994).
[81] *Id.*
[82] *Id.*
[83] *Id.*

the 1981 will and to appear before her in a lost will hearing.[84]

While *Nappo* and *Stern* stand for the proposition that a lost will is not, in and of itself, sufficient to confer standing upon a party seeking to vacate a probate decree, several surrogates have reached contrary conclusions on this issue.[85] Most recently, in *In re Will of Kramer*, Nassau County Surrogate Edward W. McCarty, III held that the beneficiaries under a lost will had standing to petition for vacatur of a decree admitting the decedent's last will and testament to probate.[86] In *Kramer*, however, the surrogate may have been influenced by the fact that both the prior will and the probated instrument were lost wills.[87] Insofar as the standing of the proponents of the probated will rested upon a lost will, it was disingenuous for them to argue that the beneficiaries under the prior lost will lacked standing.

A lost will may not be sufficient to confer standing upon a beneficiary whose status rests upon the lost instrument, even if the beneficiary presents facts and circumstances sufficient to warrant vacatur on the merits. To ensure that standing exists, a beneficiary under a prior will must either obtain the original instrument under which he or she benefits (and, of course, file the same with the surrogate's court) or be prepared to satisfy the requirements for having a lost will admitted to probate, especially as they relate to the presumption of revocation.

LACHES AS AN AFFIRMATIVE DEFENSE

A party seeking to vacate a probate decree should petition for such relief as quickly as possible. Failure to do so may give rise to "laches, defined as unreasonable delay resulting in prejudice to other parties."[88] Laches has been recognized as a basis for denying vacatur in cases involving delays of as little as eight months between the entry of a probate decree and the commencement of a vacatur proceeding.[89]

The appellate division's decision in *In re Bryer* is instructive.[90] In *Bryer*, after the petitioner consented to the admission of his mother's will to probate, the court issued a decree admitting that

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[84] *Id.*

[85] Estate of Shanok, N.Y. L.J., Oct. 12, 2010, at 30 (N.Y. Sur. Ct. 2010) (finding that that the beneficiaries under a prior will had standing to seek vacatur, despite the fact that the court did not have the original prior instrument).

[86] *In re* Will of Kramer, N.Y. L.J., June 17, 2011, at 36 (N.Y. Sur. Ct. 2011).

[87] *See generally id.*

[88] *In re* Bobst, 630 N.Y.S.2d 228, 232 (N.Y. Sur. Ct. 1995).

[89] *In re* Andrasko, No. 2005,610/B, 2006 WL 3524354, at *3 (N.Y. Sur. Ct. Dec. 6, 2006).

[90] *In re* Bryer, 901 N.Y.S.2d 160, 161 (N.Y. App. Div. 2010).

instrument to probate.[91] Twelve years later, the petitioner sought to have the decree vacated, alleging that his father used "financial leverage" over him to obtain his consent.[92]

Neither the surrogate's court nor the appellate division was persuaded by the petitioner's arguments.[93] Former Surrogate Roth granted the respondent's motion for summary judgment, finding that the petitioner was guilty of gross laches.[94] In affirming the surrogate's order, the appellate division held that the petitioner had failed to present a valid excuse for his twelve-year delay in seeking to vacate the probate decree.[95]

In short, the failure to promptly commence a proceeding to vacate a probate decree may prove to be fatal to a petitioner's application. Indeed, in certain circumstances, such a failure may give rise to gross laches, thereby precluding vacatur.

VACATUR AND *IN TERROREM* CLAUSES

"In terrorem provisions, which are more commonly known as 'no contest' clauses, generally state that beneficiaries forfeit their interests in estates by contesting the validity of the governing [wills and codicils]."[96] While these provisions are strictly construed,[97] at least one surrogate, Surrogate Glen, has found (in the context of a construction proceeding) that a party's petitioning to vacate a probate decree would trigger an *in terrorem* clause contained in the instrument admitted to probate.[98] Practitioners should be forewarned as to that possibility.

However, there are limited circumstances in which the presence of an *in terrorem* clause in a probated instrument, when taken in conjunction with other factors, may work in favor of vacatur. For evidence of this, counsel need not look any further than Surrogate Czygier's decision in *Estate of King*.[99]

In *King*, the respondents' counsel appeared on the return date

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[91] *See id.*
[92] *Id.*
[93] *See id.*
[94] *Id.*
[95] *Bryer*, 901 N.Y.S.2d at 161.
[96] Robert M. Harper, *Triggering In Terrorem Clauses With Out-Of-State Will And Trust Contests*, NY STATE LITIGATION BLOG (Sept. 11, 2009), http://www.nyestatelitigationblog.com/2009/09/articles/trusts-1/triggering-in-terrorem-clauses-with-outofstate-will-and-trust-contests/.
[97] *In re* Ellis, 683 N.Y.S.2d 113, 119 (N.Y. App. Div. 1998).
[98] Estate of Cohn, N.Y. L.J., Mar. 11, 2009, at 32 (N.Y. Sur. Ct. 2009).
[99] N.Y. L.J., May 27, 2008, at 46 (N.Y. Sur. Ct. 2008).

of citation to request S.C.P.A. section 1404 examinations.[100] After the examinations were scheduled, the propounded instrument's attorney-draftsperson died and the examinations were adjourned *sine die*.[101] Insofar as the respondents' attorney did not reschedule the examinations, or even attend the next court appearance, a decree admitting the propounded instrument to probate was issued.[102]

Several weeks later, after their counsel learned of the decree, the respondents moved for an order vacating it, which the surrogate granted.[103] As Surrogate Czygier explained, the probated will contained an *in terrorem* clause, which "[made] the ability to conduct 1404 examinations particularly valuable, since a potential objectant [can] conduct 1404 examinations without triggering the in terrorem clause."[104] Accordingly, given the circumstances of that case, "the competing interests evident in the courts' reluctance to vacate their own decrees when juxtaposed against the similar reluctance to enforce in terrorem clauses," allowed for vacatur of the probate decree.[105]

Practitioners should be mindful of the possibility that their clients will trigger *in terrorem* clauses by commencing vacatur proceedings. The failure to do so may have several unintended consequences, not the least of which is the forfeiture of a bequest under a will containing an *in terrorem* clause.

CONCLUSION

Given their aversion to post-probate will contests and inefficiency in the administration of estates, courts require parties seeking to vacate probate decrees to satisfy the heightened standards established for such relief. The failure to meet the rigorous standards articulated by the courts will generally prove fatal to a vacatur application, as courts hesitate to undo the decrees that they have issued admitting testamentary instruments to probate. In counseling clients as to how best to make or oppose a vacatur application, practitioners should be mindful of the heightened standards and the issues attendant thereto, including a party's entitlement to disclosure and an evidentiary hearing and affirmative defenses that may be available. The failure to do so may prove adverse to clients seeking to vacate a probate decree or opposing such an application.

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *King*, N.Y. L.J., May 27, 2008, at 46.
[105] *Id.*