

# Vacating Probate Decrees

By Robert M. Harper

Vacatur of a probate decree 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,<sup>1</sup> courts have applied heightened standards in cases concerning vacatur of probate decrees, requiring parties seeking such relief to do much more than merely allege facts which might be sufficient to question a probated instrument's validity.<sup>2</sup> This article addresses the standards applied by the courts in granting and denying applications to vacate probate decrees. Practitioners should be mindful of these standards when counseling clients as to how best to make—or, for equal measure, oppose—a vacatur application.



a few weeks after being diagnosed with terminal gall bladder cancer and moving into her brother's home for care,<sup>11</sup> that, at the time, the decedent "was in a severely weakened condition"; and that the propounded instrument was "an unexplained departure" from the decedent's decades-long testamentary plan to benefit the petitioner.<sup>12</sup>

When the respondents moved to dismiss the petition, pursuant to CPLR 3211(a)(7), the Surrogate's Court granted the motion and the Appellate Division affirmed.<sup>13</sup> The Court of Appeals affirmed as well.<sup>14</sup> In doing so, the Court 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."<sup>15</sup> As the Court explained: "Permitting 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."<sup>16</sup>

## Vacatur Without a Waiver and Consent

The standard that is most frequently applied by the courts is the one that governs when a party seeking vacatur has not previously executed a waiver consenting to the issuance of a decree admitting the propounded instrument to probate. Such a party must establish "a substantial basis for its contest and a reasonable probability of success" on the merits in order to prevail on a vacatur application.<sup>3</sup>

The Court of Appeals adopted this standard in 2008, in *American Committee for the Weizmann Institute v. Dunn*.<sup>4</sup> 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").<sup>5</sup> 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.<sup>6</sup>

Several months later, the petitioner, a charitable organization, commenced a proceeding to vacate the decree, arguing, *inter alia*, that the respondents unduly influenced the decedent to execute the propounded instrument.<sup>7</sup> As support for its position, the petitioner alleged that the "decedent had long intended to make a sizeable donation to" the petitioner;<sup>8</sup> that the decedent and her husband executed reciprocal wills leaving their respective residuary estates to the petitioner;<sup>9</sup> and that the decedent subsequently pledged to donate her apartment to the petitioner.<sup>10</sup> In addition, the petitioner alleged that the decedent executed the probated will just

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."<sup>17</sup> 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."<sup>18</sup>

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.<sup>19</sup> 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 [the decedent] while she received hospice care for terminal cancer during her final days."<sup>20</sup> 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 Surrogates have done so in both granting and, more frequently, denying vacatur petitions.<sup>21</sup>

*In re Efros* is one example of a case in which vacatur was found to be warranted.<sup>22</sup> There, the decedent died in September 2005, at ninety-three years of age, survived by two nephews.<sup>23</sup> A will benefiting the nephews was admitted to probate by decree in February 2006.<sup>24</sup>

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.<sup>25</sup> Additionally, the investment advisor 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.<sup>26</sup> The investment advisor's recollection was bolstered by recordings of daily conversations that he had with the decedent, which were made because he worked on an active trading floor.<sup>27</sup>

Based upon the foregoing, the investment adviser delivered transcripts of the recordings to JP Morgan Chase Bank, N.A. ("JP Morgan"), the corporate fiduciary that served as co-executor with the nephews.<sup>28</sup> JP Morgan moved to vacate the probate decree and for the removal of the nephews as co-executors.<sup>29</sup> Several of the charities which were treated more favorably in the decedent's prior will joined in the motion.<sup>30</sup>

Former New York County Surrogate Kristin Booth Glen granted JP Morgan's motion, finding the bank had presented a substantial basis for contesting the probated instrument (based upon undue influence) and a probability of success on the merits.<sup>31</sup> 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. The Surrogate 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."<sup>32</sup> Accordingly, based upon the particularly egregious facts of the case, vacatur was warranted.<sup>33</sup>

In sum, when the 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. The failure to do so likely will result in the denial of the party's prayer for relief.

### **Vacatur and Consents to Probate**

In contrast to circumstances in which a party seeking vacatur has not consented to the admission of a testamentary instrument to probate, 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.<sup>34</sup> Specifically, such a party must show that his or her 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 justifies the reopening of the decree."<sup>35</sup>

*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.<sup>36</sup> After Kings County Surrogate Margarita Lopez-Torres issued a decree admitting the instrument to probate, the movant sought to have the decree vacated.<sup>37</sup> 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.<sup>38</sup>

Neither the Surrogate nor the Second Department was persuaded by the movant's allegations.<sup>39</sup> The movant had failed to demonstrate the "substantial cause" necessary for vacatur for a variety of reasons, not the least of which was that the medical records upon which the movant relied in seeking vacatur were in his possession at the time that he signed the waiver and consent to probate.<sup>40</sup>

Thus, 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; resulted from a misrepresentation or misconduct; or should be excused by virtue of newly discovery evidence, clerical error, or other sufficient cause. Otherwise, the vacatur application likely will be denied.

### **Vacatur in the Interests of Justice**

In those circumstances where the party seeking vacatur fails to meet the aforementioned standards for such relief, a Surrogate's Court may, nevertheless, vacate a probate decree in the interests of justice.<sup>41</sup> Although it is rarely granted, vacatur in the interests of justice may be warranted when "it appears that substantial justice will be served and injustice prevented" through vacatur.<sup>42</sup>

*In re Blaukopf* is illustrative.<sup>43</sup> There, the decedent's distributees moved for an order vacating the decree admitting the decedent's alleged will to probate; granting them the opportunity to examine the witnesses to the instrument's execution; and directing that probate objections be filed within a reasonable time.<sup>44</sup>

Former Nassau County 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 state-

ments"; the proponent 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 the probated will differed substantially from the copy of a prior instrument that the distributees provided to the court.<sup>45</sup> 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.<sup>46</sup>

On appeal, the Second Department affirmed, finding that the Surrogate's Court properly "exercised its inherent powers to 'vacate its own [decree] for sufficient reason and in the interests of substantial justice.'"<sup>47</sup> As the Appellate Division explained, "the fact that the petitioner filed a total of three different petitions for probate and letters testamentary wherein she made several conflicting statements" was sufficient to warrant vacatur.<sup>48</sup>

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 engaged in egregious conduct. Such egregious conduct certainly includes 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 seeking such relief have requested pre-vacatur disclosure in an effort to improve their chances of success on the merits.<sup>49</sup> Despite those efforts, however, the Court of Appeals and Appellate Division have found that pre-vacatur discovery is impermissible.<sup>50</sup>

Notably, in *In re Kelsall*, the Third Department addressed this very issue.<sup>51</sup> 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.<sup>52</sup> Nonetheless, the instrument was admitted to probate in December 2008, without objection by the respondent.<sup>53</sup>

Shortly thereafter, the instrument's proponent, the nominated fiduciary and sole beneficiary, sought to invalidate a deed conveying real property previously owned by the decedent to the respondent.<sup>54</sup> As part of that litigation, the respondent's attorney examined the decedent's legal files and spoke with the witnesses to the will's execution.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> The Surrogate's Court agreed, in part, issuing an order granting the respondent's request for discovery, pursuant to SCPA 1404, and reserving decision on vacatur, pending completion of disclosure.<sup>58</sup>

On appeal, the Third Department reversed, holding that "discovery cannot be permitted unless the decree of probate is set aside."<sup>59</sup> In making that determination, the Appellate Division opined: "While SCPA 1404... does not explicitly provide that a decree of probate must be vacated prior to allowing discovery, the statute has clearly been interpreted by the Court of Appeals as requiring such vacatur."<sup>60</sup>

Thus, as challenging as it may be, a party petitioning for vacatur of a probate decree must be prepared to carry its burden without the aid of discovery. This is because a Surrogate's Court is unlikely to permit discovery unless it concludes that vacatur is warranted.

### 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;"<sup>61</sup> 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."<sup>62</sup>

*In re Loverme* addresses 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 his third wife (who was also the niece of his first wife).<sup>63</sup> 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.<sup>64</sup>

Although the Surrogate's Court dismissed the vacatur petition without a hearing, the Second Department reversed.<sup>65</sup> 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, suffering from memory loss and confusion, and operating under his third wife's undue influence at the time that he executed the instrument.<sup>66</sup> 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.<sup>67</sup>

Conversely, in *In re Leslie's Estate*, the Surrogate's Court denied an alleged distributee's motion to vacate a probate decree without holding a hearing on the matter. The First Department affirmed, finding that the circumstances did not warrant either a hearing or the taking of any evidence.<sup>68</sup> 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.”<sup>69</sup>

While a hearing may be warranted before dismissal in certain circumstances, such as the ones that existed in *Loverme*, a hearing is not necessarily always required. For a party seeking vacatur to ensure that he or she receives a hearing, the party should be prepared to make a showing of “some degree of probability that [his or her claim] is well founded, and that, if afforded an opportunity, [he or she will] be able to substantiate it.”<sup>70</sup>

### 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 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 will prove successful.

*In re Nappo* is illustrative.<sup>71</sup> There, the decedent's stepson commenced a proceeding to vacate a decree admitting the decedent's 2008 will to probate.<sup>72</sup> Inasmuch as 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, a 2007 will.<sup>73</sup> 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.<sup>74</sup>

In ruling for the respondent, Suffolk County 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.<sup>75</sup> 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.<sup>76</sup>

Former New York County Surrogate Renee R. Roth reached a similar conclusion in *In re Stern*.<sup>77</sup> There, the

beneficiaries under the decedent's 1981 will petitioned for vacatur of the decree admitting his 1993 will to probate.<sup>78</sup> 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.<sup>79</sup> Surrogate Roth 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.<sup>80</sup> As a result, the Surrogate directed the parties to complete discovery concerning the validity of the 1981 will and to appear before her for a lost will hearing.<sup>81</sup>

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.<sup>82</sup> In *In re 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.<sup>83</sup> However, Surrogate McCarty may have been influenced by the fact that both the prior will and the probated instrument were lost wills.<sup>84</sup>

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, as the failure to do so may give rise to laches. Laches is “defined as unreasonable delay resulting in prejudice to other parties.”<sup>85</sup> It 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.<sup>86</sup>

The First Department's decision in *In re Bryer* is instructive.<sup>87</sup> In *Bryer*, after the petitioner consented to the admission of his mother's will to probate, a decree issued admitting that instrument to probate.<sup>88</sup> Twelve years later, the petitioner sought to have the decree vacated, alleging that his father used “financial leverage” over him to obtain his consent.<sup>89</sup>

Neither the Surrogate's Court, nor the Appellate Division was persuaded by the petitioner's argu-

ments.<sup>90</sup> Former Surrogate Roth granted the respondent's motion for summary judgment, finding that the petitioner was guilty of gross laches.<sup>91</sup> In affirming the Surrogate's order, the First Department held that the petitioner had failed to present a valid excuse for his twelve-year delay in seeking to vacate the probate decree.<sup>92</sup>

In short, the failure to promptly commence a proceeding to vacate a probate decree may prove to be fatal to the 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/or codicils.<sup>93</sup> While these provisions are strictly construed,<sup>94</sup> at least one Surrogate, former Surrogate Glen, has found (in the context of a construction proceeding) that petitioning to vacate a probate decree would trigger an *in terrorem* clause contained in the instrument admitted to probate.<sup>95</sup> Practitioners should be forewarned as to that possibility.

Nonetheless, 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 militate in favor of vacatur. For evidence of this, counsel need not look any farther than Surrogate Czygier's decision in *In re King*.<sup>96</sup>

In *King*, the respondents' counsel appeared on the return date of citation to request S.C.P.A. § 1404 examinations.<sup>97</sup> After the examinations were scheduled, the propounded instrument's attorney-draftsperson died and the examinations were adjourned *sine die*.<sup>98</sup> 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 issued.<sup>99</sup>

Several weeks later, after learning of the decree, the respondents moved for an order of vacatur, which the Surrogate granted.<sup>100</sup> 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."<sup>101</sup> 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.<sup>102</sup>

Practitioners should be mindful of the possibility that their clients will trigger *in terrorem* clauses by com-

mencing 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 the courts' aversion to post-probate will contests and inefficiency in the administration of estates, parties seeking to vacate probate decrees are required to satisfy the heightened standards established for such relief. The failure to meet these rigorous standards articulated by the courts generally will prove fatal to a vacatur application, as courts are loathe 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, especially those that are discussed in this article.

### Endnotes

1. *In re Efos*, 19 Misc. 3d 1113(A), at \*4, 859 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2008).
2. *In re Bobst*, 165 Misc. 2d 776, 782, 630 N.Y.S.2d 228 (Sur. Ct., N.Y. Co. 1995).
3. *Am. Comm. for the Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 94, 854 N.Y.S.2d 89 (2008); *In re Rizzuto*, 66 A.D.3d 1033, 886 N.Y.S.2d 819 (2d Dep't 2009).
4. *See Weizman Inst.*, 10 N.Y.3d at 94.
5. *See id.* at 86-87.
6. *See id.*
7. *See id.*
8. *See id.* at 87-88.
9. *See id.*
10. *See id.*
11. *See id.* at 89-90.
12. *See id.*
13. *See id.*
14. *See id.* at 89-91.
15. *See id.* at 94.
16. *See id.* at 96.
17. *See id.* at 94-97.
18. *See id.* at 97.
19. *See id.* at 97-98.
20. *See id.* at 98.
21. *In re Shanok*, N.Y.L.J., Oct. 12, 2010, p. 30, col. 6 (Sur. Ct., Queens Co.).
22. *In re Efos*, 19 Misc.3d 1113(A), at \*1-5, 859 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2008).
23. *See id.*
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*

30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*
34. *In re Coccia*, 59 A.D.3d 716, 716-17, 874 N.Y.S.2d 224 (2d Dep't 2009).
35. *See id.* (citations omitted); *In re Ancona*, 17 A.D.3d 584, 584, 792 N.Y.S.2d 876 (2d Dep't 2005).
36. *See Coccia*, 59 A.D.3d at 716-17.
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *In re King*, N.Y.L.J., May 27, 2008, p. 46, col. 3 (Sur. Ct., Suffolk Co.); *Efros*, 19 Misc. 3d at \*5.
42. *Efros*, 19 Misc. 3d at \*5; *In re Musso*, 227 A.D.2d 404, 642 N.Y.S.2d 322 (2d Dep't 1996); *see also In re Macior's Will*, 52 N.Y.S.2d 389, 391 (Sur. Ct., Erie Co. 1945) (citations omitted) ("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.'").
43. *In re Blaukopf*, 23 Misc. 3d 1103(A), at \*1-5, 881 N.Y.S.2d 361 (Sur. Ct., Nassau Co. 2009), *aff'd*, 73 A.D.3d 1040, 900 N.Y.S.2d 657 (2d Dep't 2010).
44. *See id.*
45. *See id.*
46. *See id.*
47. *See Blaukopf*, 73 A.D.3d at 1041.
48. *See id.*
49. *Am. Comm. for the Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 94-95, 854 N.Y.S.2d 89 (2008); *In re Kelsall*, 79 A.D.3d 1234, 1234-35, 911 N.Y.S.2d 702 (3d Dep't 2010).
50. *See id.*
51. *See Kelsall*, 79 A.D.3d 1234-35.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. Charles J. Groppe *et al.*, 2 Harris 5th N.Y. Estates: Probate, Admin. & Litigation § 21:107 (2011).
62. *In re Leslie's Estate*, 175 A.D. 108, 109-11, 161 N.Y.S. 790 (1st Dep't 1916) affirming the Surrogate's Court's refusal to take evidence upon the question of whether the probate decree should be vacated.
63. *In re Loverme*, 27 A.D.3d 747, 812 N.Y.S.2d 631 (2d Dep't 2006).
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *In re Leslie's Estate*, 175 A.D. 108, 109-11, 161 N.Y.S. 790 (1st Dep't 1916).
69. *See id.*
70. *See id.*
71. *In re Nappo*, N.Y.L.J., June 4, 2010, p. 42, col. 4 (Sur. Ct., Suffolk Co.).
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *In re Stern*, N.Y.L.J., July 20, 1994, p. 25, col. 5 (Sur. Ct., N.Y. Co.).
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *In re Shanok*, N.Y.L.J., Oct. 12, 2010, p. 30, col. 6 (Sur. Ct., Queens Co.) finding that the beneficiaries under a prior will had standing to seek vacatur, despite the fact that original prior instrument was lost.
83. *In re Kramer*, N.Y.L.J., June 17, 2011, p. 36 (Sur. Ct., Nassau Co.).
84. *See id.*
85. *In re Bobst*, 165 Misc.2d 776, 782, 630 N.Y.S.2d 228 (Sur. Ct., New York Co. 1995).
86. *In re Andrasko*, 13 Misc.3d 1245(A), at \*1-3, 831 N.Y.S.2d 357 (Sur. Ct., Rockland Co. 2006).
87. *In re Bryer*, 72 A.D.3d 532, 532-33, 901 N.Y.S.2d 160 (1st Dep't 2010).
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. Robert M. Harper, "Triggering In Terrorem Clauses With Out-Of-State Will And Trust Contests," *available at*: <http://www.nyestatelitigationblog.com/2009/09/articles/trusts-1/triggering-in-terrorem-clauses-with-outofstate-will-and-trust-contests/> (last viewed October 29, 2012).
94. *In re Ellis*, 252 A.D.2d 118, 127-28, 683 N.Y.S.2d 113 (2d Dep't 1998).
95. *In re Cohn*, N.Y.L.J., Mar. 11, 2009, p. 32, col. 5 (Sur. Ct., N.Y. Co.).
96. *In re King*, N.Y.L.J., May 27, 2008, p. 46, col. 5 (Sur. Ct., Suffolk Co.).
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.* (citation omitted).
102. *See id.*

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