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TRUSTS AND ESTATES UPDATE

Expert Analysis

The Probate And Construction of Wills

By
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Although much has been written on the issues of testamentary capacity and undue influence, decisions addressed to the preparation and execution of a will, particularly in the context of an uncontested proceeding, while instructive, are less often the subjects of commentary. This month's column will discuss some of these opinions, as well as a recent opinion by the Appellate Division, Fourth Department, regarding the construction of a will.

Attesting Witness/Beneficiary

Over the past several years, Surrogates throughout the state have addressed the provisions of EPTL 3-3.2 as they relate to the situation where an attesting witness is also a beneficiary under the propounded instrument. The decisions in *Matter of Margolis*, NYLJ, Feb. 23, 2007, at p. 3 (Sur. Ct. New York County), *Matter of Maset*, NYLJ, Dec. 1, 2009, at p. 29 (Sur. Ct. Dutchess County), and *Matter of Altstedter*, NYLJ, Jan. 2, 2013, at p. 18 (Sur. Ct. Suffolk County) each provide instruction regarding the application and scope of the statute, as well as possible avenues available in order to avoid its harsh effects on the unsuspecting witness.

Before the New York County Surrogate's Court in *Margolis,* an uncontested probate proceeding, was the question of whether the disposition of the entire estate to the decedent's sister contained in the propounded instrument was void pursuant to the provisions of EPTL 3-3.2(a)(1) because she was one of the two attesting witnesses. The petitioner requested that the court treat the signature of the attorney who notarized the self-proving affidavit as that of one of the attesting witnesses in order to salvage the sister's bequest.

The decedent was survived by her sister and five nieces and nephews, who were children of predeceased siblings. Under the propounded instrument, she left her entire estate to her sister, or, in the event she failed to survive her, then equally among a nephew and two nieces. The propounded instrument was executed under the supervision of the attorney-draftsman and was witnessed by the decedent's sister and one other person, who was the nominated executrix. The will contained an attestation clause, which was followed by the names and addresses of the witnesses, and a self-proving affidavit notarized by the attorney-draftsman.

In an effort to preserve the bequest to the decedent's sister, the petitioner proposed that the attorney's signature as notary on the self-proving affidavit be treated as that of an attesting witness. The court opined that in order for the signature of a notary public to be treated as that of an attesting witness, inquiry should be made as to whether the individual signing as notary was merely signing in that capacity, or as a witness at the request of the testator. To this extent, the testimony of the attorney, which was taken before a court attorney, revealed that he had signed the propounded instrument only in his capacity as notary public.

Accordingly, the court held that the testimony of the decedent's sister was needed to prove the will, and the bequest to her was held void. Nevertheless, because her interest in intestacy was less than her dispositive interest under the will, the court held that the decedent's sister would be entitled to take her intestate share of the decedent's estate, pursuant to the provisions of EPTL 3-3.2(a)(3).

In *Matter of Maset*, the Dutchess County Surrogate's Court was also confronted with the provisions of EPTL 3-3.2; however, in that case there were three witnesses to the will, two of whom were beneficiaries, and one of whom was the nominated executrix. Moreover, of the two witness/beneficiaries, one was a distributee of the decedent. The propounded will contained an attestation clause followed by the names and addresses of the witnesses, and each witness submitted a self-proving affidavit.

Within this context, the court was asked to determine whether the dispositions to the witness/beneficiaries were void, and whether the nominated executrix was disqualified from serving because of her status as a witness.

The court opined that the provisions of EPTL 3-3.2 (a)(1) void the disposition to an attesting witness unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition under the propounded instrument. The court noted that there was nothing in the record to suggest that the court should even consider the notary to the self-proving affidavits as an attesting witness to the propounded instrument.

Based on the foregoing, the court held that the statutory commissions payable to the nominated executrix did not constitute a testamentary disposition within the scope of EPTL 3-3.2 so as to disqualify her from serving as fiduciary or deprive her from receiving her compensation in order to qualify as an attesting witness to the will.

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Moreover, in the exercise of its discretion, and in the interests of justice, the court dispensed with the testimony of one of the witness/beneficiaries, concluding that he should not have to forfeit, through no fault of his own, the modest monetary bequest that the decedent wanted him to receive. Instead, the court held that the testimony of the second witness/beneficiary, who was also a distributee of the deceased, would be required for probate, for the "practical" reason that although the dispositions to her under the will were void, she would nevertheless be entitled to receive the lesser of those bequests or her intestate share.

Most recently, the Suffolk County Surrogate's Court in *Altstedter* was confronted with a novel issue under EPTL 3-2.2 addressed to whether a beneficial disposition to an entity under a propounded instrument will be void when employees of the entity were utilized as attesting witnesses.

Pursuant to the provisions of Article Fourth of the propounded instrument in *Altstedter*, the decedent bequeathed $150,000 to the Peconic Landing Community Fund for the unrestricted use by the fund directors. In Article Fifth of the instrument, the decedent bequeathed $100,000 to the Peconic Landing Employees Appreciation Fund. All three witnesses to the will were employees of Peconic Landing at the time of its execution.

In support of his request that the provisions of Articles Fourth and Fifth remain unaffected by the provisions of EPTL 3-3.2, the petitioner submitted documents to the court, including, inter alia, a description of the Community Fund and the Peconic Landing Resident Handbook. From these documents, the court found that because the exclusive purpose of the Community Fund was to benefit residents of Peconic Landing, there was no beneficial disposition to the attesting witnesses to the will which would cause the bequest to the fund to fail.

On the other hand, based upon its review of the Resident Handbook, the court determined that because the monies contributed to the Employees Appreciation Fund could be utilized for the benefit of the three attesting witnesses to the will, the disposition to the fund was void pursuant to EPTL 3-3.2(a)(1) and (2).

'Sign at the End' Requirement

Pursuant to the provisions of EPTL 3-2.1, the statute setting forth the requirements for due execution, every will must be "signed at the end thereof by the testator…" In *Matter of Mobley*, NYLJ, March 20, 2009, p. 35 (Sur. Ct. New York County), the court was asked to determine whether the will of the decedent comported with the statutory criteria when the signature of the testator appeared after the body of the will, the attestation clause and the signature of the attesting witnesses, as well as a pre-printed affidavit of attesting witnesses, which had not been signed by the witnesses.

The propounded instrument was a two-page form document, which had typed provisions and handwritten additions. Although the document had two lines on it after the dispositive provisions that were intended for the signature of the testator, these lines were blank. Instead, following the attestation clause, and the signature of the witnesses, the testator signed on one of the blank spaces appearing on the self-proving affidavit affixed to the instrument.

Over the past several years, Surrogates have addressed the provisions of EPTL 3-3.2 as they relate to the situation where an attesting witness is also a beneficiary.

The court opined that a will can be admitted to probate as long as the statutory formalities are complied with, even if the procedure for execution and attestation do not take place in the order set forth in EPTL 3-2.1. To this extent, the court noted that a testamentary instrument will not be invalid if the witnesses' signatures appear before the signature of the testator. Indeed, the court held that the statutory requirement that the testator "sign at the end" of the instrument is not violated despite the fact that the testatrix affixes her signature after the attestation clause and the signatures of the attesting witnesses, so long as the dispositive material precedes the signature of the testator in order to prevent the possibility of fraudulent additions to the instrument.

Accordingly, based upon the proof submitted, the court admitted the propounded instrument to probate.

Matter of Mobley, NYLJ March 20, 2009, at p. 35 (Sur. Ct. New York County)

Extrinsic Evidence

In *Matter of Phillips*, the Appellate Division, Fourth Department, modified an Order of the Surrogate's Court, Erie County, which granted respondent's cross-motion for summary judgment, and remanded the matter for further proceedings on the issue of the construction of the decedent's will.

The record revealed that the decedent's will left his estate to his three daughters and to his live-in girlfriend. In pertinent part, his estate consisted of his home, and the lot on which it was situated, and 88 acres of farmland adjacent to the lot. In Article Four of his will, the decedent bequeathed his residence, and the "plot of land appurtenant thereto" to his girlfriend, and the balance of his estate in equal shares to his daughters.

In her proceeding for construction of the instrument, one of the decedent's daughters sought a determination that the bequest of the decedent's home included only the land on which it was situated, and not the adjacent farmland. Petitioner attached extrinsic evidence supporting the proposed construction. Respondent, girlfriend of the decedent, opposed the petition, and more particularly petitioner's use of extrinsic evidence to support her application, contending that the will was clear and unambiguous that she was entitled to the decedent's home, lot and farmland. Both sides moved for summary judgment, and the Surrogate found for the respondent, concluding that the decedent's intent could be inferred from the will, and that reference to extrinsic evidence was improper.

The Appellate Division disagreed. The court opined that while the best indicator of a testator's intent will generally be found within the four corners of the will, where a provision in the instrument is ambiguous, extrinsic evidence is properly considered in determining intent.

The court noted that while the definition of the term "appurtenant" suggests something incidental, that does not have an independent existence, the intent of the testator in utilizing that term in his will could not be gleaned by reliance on a dictionary, but rather from the context in which the will was created. To this extent, the court held that the provisions of the will were unclear as to what the decedent intended. Indeed, the court found that the submissions of the parties raised issues of fact concerning the decedent's intent.

Specifically, the court noted that the evidence offered by the petitioner consisting of the deposition of the attorney-draftsman, and a questionnaire completed by the decedent suggested that the decedent intended his girlfriend to only receive his home and the plot of land on which it stood, while the evidence submitted by the decedent's girlfriend indicated that when the decedent originally purchased the lot and farmland it consisted of one parcel, and the decedent partitioned the parcel only in anticipation of his impending divorce. Additionally, the respondent asserted that the utilities located on the farmland were attached to the meters located inside the residence.

Accordingly, the court concluded that the parties should be given the opportunity to present extrinsic evidence at a hearing before the Surrogate regarding the decedent's intended distribution.

Matter of Phillips, 101 A.D.3d 1706 (4th Dept. 2012).