New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 261—NO. 46
MONDAY, MARCH 11, 2019

TRUSTS AND ESTATES LAW

Expert Analysis

Anatomy of a Probate Contest, Part I: Planning to Avoid a Contest

By **Raymond Radigan**

And **Lois Bladykas**

This article is the first in a series of articles concerning contested probate proceedings in Surrogate's Court. We are hopeful that this series will provide practitioners with a resource concerning each stage of a probate contest.

Planning to Avoid a Probate Contest

It goes without saying that every attorney draftsperson of a Will must keep in mind that the instrument he or she is preparing for the client may have to be "probated" (from the Latin probare, to test or to prove). To probate a Will, there must be proof of the testator's capacity and due execution. Planning attorneys should be mindful of the common claims of lack of due execution, undue influence, lack of capacity, and fraud by beneficiaries, distributees or others. The attorney drafter should take extra precautions to ensure that there is adequate evidence to rebut these claims.

> Planning attorneys should be mindful of the common claims of lack of due execution, undue influence, lack of capacity, and fraud by beneficiaries, distributees or others. The attorney drafter should take extra precautions to ensure that there is adequate evidence to rebut these claims.

Proper note taking during meetings with the testator, as well as after the Will execution, may ease this potential problem. In addition, an established, documented practice concerning the attorney's usual modus operandi concerning capacity and due execution may be very helpful in establishing the proponent's prima facie case for probate.

The draftspersons of Wills are often experienced trusts and estates attorneys, and will be familiar with the statutory requirements of making a valid will. See EPTL §3-2.1. The Will should be reviewed in detail with the client; the client must sign the Will, publish the Will, and request at least two witnesses (one may be the attorney drafter) to witness the Will. In turn, the witnesses must, along with the testator, sign the Will. Parties other than the testator, witnesses and notary should not be present at the execution. Best practices may include stapling the Will before it is signed

RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* LOIS BLADYKAS *is an associate in the trusts and estates department and estate litigation practice group at the firm.*

by the testator and witnesses, to avoid a claim down the line that pages were removed, revised or added after the Will was signed.

Practitioners should familiarize themselves with what is commonly known as a "self-proving affidavit," which is an affidavit attached to the Will which may be used as an alternative to live witness testimony in a probate proceeding. The affidavit, signed under oath by the witnesses, typically sets forth the witnesses' observations and opinions as to the formalities of the Will execution as well as the testator's testamentary capacity. In the absence of a self-proving affidavit, the proponent of the Will may be required to produce the witnesses for live testimony concerning the execution. Practitioners should keep in mind that witnesses are frequently unavailable and difficult to track down, either because they have passed away, moved out of state, or are no longer affiliated with the testator or attorney draftsperson.

If the Will is executed under the supervision of an attorney, there is a presumption of due execution. It is strongly recommended that only one original Will be executed, as they may be a presumption of revocation if other originals cannot be located, especially if one original was in the decedent's possession prior to death.

An attorney draftsperson should also consider whether he or she should retain the original Will on behalf of the client for safekeeping, and to ensure that there will be no tampering by those who may be disappointed with the terms of the Will. Very often, attorneys retain the original and keep it under lock and key in a fire and damage proof vault or safe. Other attorneys may choose to give the original Will to the client with instructions to retain it or give to another for safekeeping, such as to the nominated executor or a vault or safe deposit at a bank or other similar institution. An original Will may also be filed with the Surrogate's Court for safekeeping.

Each of these options presents benefits and potential pitfalls. A more experienced attorney may find him or herself with thousands of client Wills from decades of practice, with no obvious way of determining whether those Wills have been superseded by future Wills, or whether the clients have passed away. A client who is given possession of the original Will may misplace it, or a disgruntled family member may tamper with or destroy it. An original Will placed in a bank safe deposit box or bank vault would require a Surrogate's Court proceeding for permission to open the box to search for the Will. SCPA §§ 2003; 1401. Those attorneys and testators who choose to file their Wills with the Surrogate's Court should keep in mind that beneficiaries who are removed in a later Will, will be entitled to notice that they have been so removed. That may open the door for even more litigation.

Attorney draftspersons who are not litigators and are not familiar with contested proceedings might consult with a litigator colleague if a possible contest is envisioned at the time the Will is executed. For example, if a testator is cutting out a spouse or child, leaving his or her estate to non-family members, or if a blended family or second marriage is involved, these precautions should be considered. Best practices include documenting any concerns or irregularities in the attorney's file, which may be used to adequately rebut claims of lack of due execution, undue influence, fraud and incapacity in the future.