

TRUSTS AND ESTATES LAW

Expert Analysis

Anatomy of a Probate Contest, Part 2: The Probate Petition and Jurisdiction

This article is the second 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.

The Probate Petition And Jurisdiction

When it comes to probate, most estates are straightforward and only a small percentage are contested. To begin the process of probating a will, the attorney must file a petition to probate the will. The attorney filing the petition generally must use the official forms of the Surrogate's Court, which are recognized statewide.

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In some instances, the Surrogate Court of the respective county may have its own version, and in that

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case the best practice is to use the county's form. Additionally, some counties permit e-filing, but the attorney must check the county where the will is being probated to determine if this is available. The counties which do permit e-filing may require it for certain forms,

or may make it optional. As with regular filing, it is also the best to use the county's forms for e-filing.

The attorney must present the court with the Petition, will and death certificate for the court to determine whether it has subject matter jurisdiction. This decision is based on whether the proceeding is in the proper venue (county) and if it has jurisdiction over all the necessary parties. The necessary parties, or the "interested parties," are the parties that have an interest in the estate. The documents and instructions for jurisdiction can be found online through the court's website, and most often obtaining jurisdiction over the necessary parties is simple. In many instances, consents can be obtained from the necessary parties when there are not any under a disability. Therefore, most often waivers and consents are submitted and the will can proceed to decree without delay. Budgetary constraints have reduced the Surrogate Court staff

from what it once was, but Surrogate's do their best to issue decrees expeditiously.

Where other courts have plaintiffs and defendants, and summons and complaints, Surrogate Court has its own variations. In a probate proceeding, the petitioner is the proponent and the respondents, if they file objections, are objectants. The petition starts the proceeding, as a complaint does in other courts. When necessary parties will not consent to the proceeding, they must be served with a citation, like a summons in other courts.

In probate proceedings, there does not have to be a request for a jury trial until objections are filed, which is when issue is joined. However, the attorney for the proponent should consider filing a demand along with the initial petition, even though the objectant need not file a jury demand until filing objections. Pursuant to SCPA §502, the objectant must file a jury demand when filing objections and, if not already filed, the petitioner must make demand within six days after service upon him of the objections. It is important to note, if one party to a probate proceeding makes demand for a jury trial, this does not preserve the other party's right to a jury trial. Each party must make their

own demand; if the other party withdraws their demand and you have not made one, you have lost your right to a jury trial.

When there is a party under a disability, or one who will not consent to probate, citation must be issued. Service of citation enables the court to obtain jurisdiction over those parties. Citation issues after the attorney presents to the court the completed petition for probate and all related documents (waivers and consents, citations, etc.), but cannot get the consent of all of the necessary parties, whether they are competent or incompetent. However, unlike summonses in other courts, citation is issued by the court, and not by the attorney. The attorney only fills out the citation, but leaves the return date and signature blank. The original is submitted to the court, where the clerk inserts the return date and the Surrogate signs the citation. Once the Surrogate signs the citation, citation has "issued," and the original remains in the probate file of the court. The attorney may now serve citation by serving a copy thereof on the necessary parties. SCPA §1403 provides the persons to be served and the contents of process. The process of issuing citation, service of process, return date of citation, when service is complete and who may serve process is

covered under SCPA §§305 to 310.

The attorney for the petitioner, who is the attorney who filed the petition, should attend the calendar call on the return date of the citation. Those parties served by citation may appear on the return date, allowing the attorney for the proponent to find out what position each party will take as to the probate of the will. However, they do not have to appear and may not if they do not have any objection to the probate of the will. If no one appears on the return date for someone under a disability, such as an Article 17 guardian of a minor or an Article 81 guardian for an incapacitated person, the court will appoint a guardian ad litem under SCPA §403. If a guardian appears, the court must still determine the adequacy of the representation or whether a guardian ad litem should also be appointed. After the return date for citation, if all the necessary parties were served by citation or previously signed waiver and consents, jurisdiction is then complete.

Stay tuned for Part III of Anatomy of a Probate: SCPA §1404 Examinations.