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Expert Analysis

Anatomy of a Probate Contest, Part 5: The Trial

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This article is the fifth in a series about contested probate proceedings in the Surrogate's Court. We hope that this series proves useful to practitioners as they navigate each phase of a probate contest. We conclude the series here by focusing on the trial and pre-trial considerations.

Pre-Trial Considerations

Pre-Trial Conferences and the Note of Issue/Certificate of Readiness. The Uniform Rules for Surrogate's Court sets forth rules governing pre-trial procedures, though, in some instances, it allows the Surrogates discretion as to how they implement such procedures. See generally 22 NYCRR 207.29-207.35.

Typically, courts will hold periodic status conferences during discovery. This process generally culminates with the scheduling of a pre-trial conference. See Rule 207.29(c).

Once the case is certified ready for trial, the courts generally impose practical measures to streamline the trial.

Many Surrogates will use the pre-trial conference to see if the matter can be settled. To that end, Rule 207.29(c) permits the court to require the parties' attendance. Another principal purpose of the conference is to ascertain whether the case is ready for trial and to provide for a procedure for the parties to certify their readiness. In that regard, Uniform Rule 207.29 provides that a court "*may*" require the filing of a note of issue and certificate of readiness before it will fix a trial date in a "form prescribed by the court …" 22 NYCRR 207.29(b) (emphasis added). (It is always important to ascertain the Surrogates' local rules in addition to being familiar with the Uniform Rules.) Most Surrogates do require a note of issue.

Once the case is certified ready for trial, the courts generally impose practical measures to streamline the trial. For example, Uniform Rule 207.29 provides that the court "may direct parties to submit for inspection documents and exhibits, may require counsel to stipulate as to facts and issues, and may direct severance of or consolidation of issues."

Often, courts require parties to exchange exhibit lists and to confer regarding stipulating uncontroverted exhibits into evidence. The intent is not to waste trial time laying a foundation or establishing the admissibility of exhibits where there is no material dispute as to admissibility. Additionally, courts often direct a

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conference to pre-mark exhibits for identification.

Statement of Issues. Uniform Rule 207.30 provides that, at least 10 days before the trial, petitioner shall file a written statement setting forth the issues to be tried, identifying the party with the burden of proof as to each issue and identifying any objections the petitioner concedes or that the objectant has withdrawn. The objectant may file a counter-statement of issues. The court will generally have the parties confer to try to work out any differences here so it is advisable to confer in advance of filing.

Jury Trial and the Order Framing Issues. SCPA 502(1) specifically grants the right to a jury trial in a contested probate proceeding, though the parties must assert that right at the pleading stage. See SCPA 502(5).

If there is to be a jury trial, then there must be an order framing issues instead of a statement of issues. Any party can submit a proposed order framing issues, which must be settled on five days' notice, and when signed, must be served at least fifteen days before the trial date. 22 NYCRR 207.31.

Burdens, Standards and General Elements of Proof

There are generally four objections to probate, to wit, failure of due execution, lack of capacity, undue influence and fraud.

Due Execution. The proponent of the will bears the burden to prove due execution. The standard of proof is by preponderance of the evidence. Proponent must prove, (1) that the will was signed at the end by the testator, (2) in the presence of at least two attesting witnesses, (3) who shall, within one 30-day period, each attest to the testator's signature and sign their names and addresses to the instrument at the request of the testator, (4) which instrument, the testator must declare to be his or her will. See EPTL 3-2.1.

Testamentary Capacity. The proponent must prove, by a preponderance of the evidence, that the decedent understood the nature and consequences of making a will, knew the nature and extent of the property being disposed of, and knew who would be the natural objects of his or her bounty and his or her relationship to them. *Matter of Friedman*, 26 A.D.3d 723 (3d Dept. 2006).

Undue Influence. Objectant bears the burden of proof with respect to undue influence by clear and convincing evidence. The objectant must show that the "influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which he was … unable to refuse or too weak to resist." *Matter of Zirinsky*, 43 A.D.3d 946, 947-948 (2d Dept.), lv. to app. Den., 9 N.Y.3d (2007). The elements of an undue influence claim are motive, opportunity and the actual exercise of undue influence. *Matter of Ryan*, 34 A.D.3d 212, 213-14 (1st Dept. 2006).

Because undue influence is seldom practiced in the open, objectant's proof may consist of circumstantial evidence. *Matter of Panek*, 237 A.D.2d 82, 84 (4th Dept. 1997).

In virtually all legal contexts, when parties to a transaction "place themselves in a relationship of trust and confidence … a special burden may be shifted to the party in whom the trust is reposed … to disprove fraud or overreaching." *Matter of Greiff*, 92 N.Y.2d 341, 345 (1998). In the context of wills, this concept is commonly known as the Putnam Doctrine, first enunciated in the seminal case, *Matter of Putnam*, 257 N.Y. 140 (1931). The Putnam Doctrine (though not technically a burden shift) holds that where a will is made in favor of one in a confidential relationship with the testator, such will is looked upon with great suspicion by the law and, in the absence of a satisfactory explanation, the trier of fact is warranted in drawing an inference of undue influence. Id.; *Matter*

of Eckert, 93 Misc. 2d 677 (Sur. Ct. New York Co., 1978).

Fraud. On the issue of fraud, Objectant must prove by clear and convincing evidence that, a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the fraudulent statement. *Matter of Evenchuk*, 145 A.D.2d 457 (2d Dept. 1993).

Evidentiary Considerations

It is critical to understand the rules of evidence in order to succeed at trial. It is not possible here to provide a detailed survey of the rules of evidence. However, it is sufficient to illustrate this point by way of a few examples that are particularly common in probate contests.

Much of the evidence in a probate contest concerns transactions and conversations with the testator. New York still has a "Dead Man's Statute" codified in CPLR 4519. The Dead Man's Statute is complex and nuanced, but in general, it bars interested parties from testifying about transactions and conversations with the testator. This may also prevent a litigant from getting a vital document into evidence if the only person that can authenticate it, is barred from doing so because he or she has to testify as to a transaction with the testator simply to lay a proper foundation.

Similarly, hearsay is often a challenge in probate contests inasmuch as all conversations with the testator are out of court statements not subject to cross-examination. It is important to understand whether such statements are hearsay (i.e., whether the statement is being offered for its truth) or whether it is being offered for some other probative reason, such as the testator's state of mind; or, whether one of the many hearsay exceptions apply.

Experts are often employed to testify as to disputed issues such as the testator's handwriting or medical condition. One must be sure that he or she has served proper and timely expert witness disclosures (CPLR 3101(d)), understands how to examine an expert and to be sure that the expert's report and testimony are based on admissible evidence.

The point is that it is great to have developed facts during discovery. However, to succeed at trial, you have to know how to get admissible evidence into the record, and when to challenge the admissibility or foundational basis for your adversary's evidence.

Conclusion

This article touched on some of the myriad of procedural, substantive and practical considerations involved trying a will contest. The takeaway is that preparing for the probate trial begins the moment you take the case. Everything you do, from SCPA 1404 examinations and the filing of objections through discovery, to pre-trial proceedings, should be viewed with the trial in mind. Understanding what you will have to do at trial and how to accomplish it, during each of these preliminary phases, can make the difference between success and failure at trial.