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Expert Analysis

Partial Probate in New York

BY RAYMOND RADIGAN AND KRISTOFER J. KASNICKI

Beginning in the early 19th century, the vast majority of American jurisdictions have endorsed the proposition that allows a court to refuse probate to portions of a will that may be invalid, while leaving the remaining portions intact if such other portions are severable from the invalid ones. Alan R. Gilbert, Annotation, Partial invalidity of a will: may parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence, 64 A.L.R. 3d 261 (1975).

New York law is no different in allowing this notion of partial probate. The surrogate must admit a will to probate regardless of the invalidity of any of its provisions, where the surrogate is satisfied that the will is genuine, that the testator was of sound mind, that such testator was not under any restraint, and that the will was executed in accordance with statutory requirements. *In re Piekarski's Will*, 2 Misc.2d 189, 121 N.Y.S.2d 190 (Sur. Ct. 1953).

In re Lawler's Estate, 123 Misc. 72, 205 N.Y.S. 271 (Sur. Ct. 1924), aff'd, 215 A.D. 506, 213 N.Y.S. 723 (1st Dep't 1926). Those portions of the will that are invalidated can be stricken and the remainder of the will would be allowed to stand only if the invalid portions can be removed without defeating the testator's intent or destroying the overall testamentary scheme.

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While ample cases exist in New York regarding partial probate when sections of a will are invalidated due to improper execution or because of undue influence or fraud, there exists very little in the case law where partial probate is allowed when there is invalidation due to a lack of mental capacity. This article will discuss some of the cases where partial probate has been allowed in New York where there was invalidation due to improper execution and undue influence/fraud, and explore different scenarios where partial probate may be permissible when there is invalidation due to a lack of testamentary capacity.

Improper Execution

Some of the earliest cases in New York where partial probate

RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* KRISTOFER J. KASNICKI *is of counsel at Ruskin Moscou Faltischek, P.C. and in the firm's Trusts and Estate Department and Estate Litigation Practice Group.*

was allowed involved wills where portions where stricken due to improper execution pursuant to the statutory requirements of the time. In *In re Foley's Will*, after the testatrix had read over the will and affixed her mark, the attorney-draftsman filled in several blanks in the testimonium clause. The testatrix then published and declared the propounded instrument to be her last will and testament and requested the attorney-draftsman and another person to become the attesting witnesses. *In re Foley's Will*, 76 Misc. 168, 136 N.Y.S. 933 (Sur. Ct. 1912).

Despite evidence that showed that the writings in the blanks by the attorney-draftsman were completed after the act of subscription but before the act of publication and declaration by the testatrix, the court held that probate would be allowed for the words written prior to the act of subscription but would be disallowed for the words that were written on the instrument thereafter. In so deciding, the court stated: "The probate proceeding being in rem, the surrogate must determine, in disputed cases in the first instance, what writings constitute the will and are proceeded on for probate. He is bound to refuse probate to such parts of a paper propounded as have not been executed in conformity with the statute of wills, and he may admit to probate such parts as are well and duly executed if separable and integral or independent." Id. at 939.

Undue Influence and Fraud

New York courts have also consistently allowed for partial probate where it can be shown that a section of the will should be invalidated due to undue influence or fraud upon the testator, provided that those sections can be removed without obliterating the testator's original intent and testamentary scheme. Most often these cases have involved instances of undue influence or fraud isolated only to the section of the will naming the executor, since removing these sections would largely preserve the intentions of the testator and keep the testamentary scheme completely intact. This is what occurred in *In re Weinstock's Will,* where the court held that when two attorneys falsely represented to testator, who was an elderly, and forgetful man with limited ability to read and write English, that more than one executor was necessary and failed to disclose that only one executor would suffice, both attorneys exercised constructive fraud on testator, invalidating portion of the will naming them as executors. *In re Weinstock's Will*, 78 Misc.2d 182, 355 N.Y.S.2d 966 (Sur. Ct. 1974).

A unique decision regarding partial probate in cases involving undue influence and fraud was handed down by the Nassau County Surrogate's Court in *Will of Atlas*, 101 Misc. 2d 677, 421 N.Y.S.2d 815 (Sur. Ct. 1979). In that case, the decedent's mother was of advanced age and of limited means, and the decedent provided for her in the will by establishing and funding a trust for her benefit. Objections were filed that alleged undue influence and fraud concerning the residuary clause of the will alone. There were no objections to the provisions of the will that established and funded the trust for decedent's mother and all parties consented to its probate. While partial probate had been allowed by New York courts before, the question in *Atlas* was whether it was permissible to allow partial probate *prior* to determining whether or not the rest of the will should be probated. In all other previous cases, the decision of whether there would be partial probate of a will occurred at the final determination. Although it was a novel question, the court saw no reason why partial probate should not be granted given the fact that all parties consented.

The decision in *Atlas* therefore allowed other courts statewide the flexibility to allow for the immediate probate of provisions of a will to which there were no objections and to which all parties would agree to probate, rather than to have these provisions procedurally bogged down with the rest of the will in the mire of litigation.

Lack of Testamentary Capacity

It should come as no surprise that there is little in the way of case law in New York regarding partial probate of wills where the court found that the testator lacked testamentary capacity. Indeed, there seems to be only one case which even mentions such a possibility. In *Burger v. Hill*, (1850, NY) 1 Bradf 360, the Surrogate in discussing his power to grant relief from a mistake of the testator declared that "part of a will may be established, and part refused probate, if incapacity, fraud, or imposition be shown at the time of the execution of the latter part." This seems to be the only direct judicial support for partial probate in cases of mental incapacity in New York.

Unlike improper execution and undue influence or fraud which can definitively be isolated to specific portions of a will, a lack of testamentary capacity would seem to inherently negate a will in toto. In order to show that a testator possessed testamentary capacity, the court must look to the following factors: (1) whether the testator understood the nature and consequences of executing a will; (2) whether they knew the nature and extent of the property they were disposing of;

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and (3) whether they knew those who would be considered the natural objects of her bounty and her relations with them." *Matter of Slade*, 106 A.D.2d 914, 915, 483 N.Y.S.2d 513; see also *Matter of Delmar*, 243 N.Y. 7, 152 N.E. 448.

Suppose a testator already has a will that was executed at a time when they had full testamentary capacity. They later decide they want to execute a codicil. The testator knows the objects of their bounty, who they want to provide for, that they have a previous will, and they know the consequences of executing a codicil to change their beneficiary allocations. What the testator does not know is the nature and extent of their property. If the testator understands enough to simply state that they want to provide half their estate to their children and half to a specific charity should their inability to know their general nature and extent of their property limit their ability to execute the codicil?

Also what if you have a testator with a serious neurodevelopmental disorder such as Autism, who understands the natural objects of their bounty and that they want to provide for them through a will, however they have a very limited concept of money. Certainly, people who have these serious neurodevelopmental disorders do not understand the nature and extent of their property. But should that matter if they know which specific people in their lives they want their property to go to? Does it matter that they have no concept of how much or how little they own? Perhaps partial probate may be the answer to these questions. But it would appear that if it is to be the answer, it must come through legislative action rather than through the case law.