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Fiduciary LITIGATION

On wills: Can you find a witness?

Many attorneys would agree that anyone who has passed the New York State Bar Examination should be able to supervise the execution of a valid last will and testament. The requirements of EPTL § 3-2.1, which governs the execution and attestation of wills, are fairly straightforward. The testator must sign the will "at the end thereof" and the will must be signed by "at least two attesting witnesses." But as anyone who has litigated extensively in Surrogate's Court would know, what seems simple in concept may be difficult to correctly apply.

By EDWARD C. RADIN
Daily Record Columnist

Let me recall a case I where I represented the girlfriend of the testator. The testator, a practicing attorney for quite a significant period of time, had lived with the girlfriend for many years. In fact, many thought they were spouses. The testator had an out-of-state attorney working on a fairly complicated estate plan for several years.

One of the complications was the testator's desire to provide for his girlfriend and grandchildren while cutting his son out of the will. He planned to accomplish these goals by leaving specific legacies and interests in real estate to his girlfriend and the residue of his estate, which represented quite a substantial amount, in trust for his grandchildren. He left nothing for his son. The estate planning went on for years and resulted in a very complex and comprehensive last will and testament that had gone through a number of drafts.

Realizing that he had never actually signed his last will and testament and further remembering that he was leaving for a long distance and extensive vacation, the testator contacted his out-of-state attorney, asked him to fax the latest version of his Will, and called his girlfriend to come to his office so that he could sign his will before leaving on the vacation. And that's when the trouble began.

The executed will was stamped "Draft" on each page but that was not the problem. Thinking that he needed a notary for the Affidavit of Attesting Witnesses, the testator decided to have his girlfriend and secretary serve as attesting witnesses and his paralegal could then notarize their signatures. Big mistake.

EPTL § 3-3.2 provides that any witness who is left a bequest remains a competent witness and may be compelled to testify regarding the execution of the will as if no such bequest was made. However, for obvious reasons (at least obvious to the legislature but not so obvious to the testator), it also provides that a bequest made to an attesting witness is void unless there are at least two other witnesses to the will. Thus, it would appear that the girlfriend would not receive the bequests that she was due under the will. But can anything come to her rescue?

SCPA § 1405(1) provides that a will may be admitted to probate based on the testimony of one attesting witness, and thus, the testimony of the secretary would seemingly save the day. But, unfortunately, the court could only dispense with the girlfriend's testimony, and save her legacy if she were dead or incompetent (she obviously was not), could not be found within the state (she obviously could), or could not testify due to physical or mental condition. None of these factors applied.

Perhaps SCPA § 1405(3), which permits a will to be admitted to probate even if a witness has forgotten the "occurrence" upon the examination of one other witness, could save the bequests to the girlfriend. Unfortunately (at least in this instance), the girlfriend had a good memory.

Even more unfortunate, the son — who was cut out of the will — applied to the court to examine all the attesting witnesses. Clearly SCPA § 1404(1) gave the son the right to have at least two of the witnesses examined in a so-called 1404 examination. The son, or his attorney, knew he would probably not be successful in setting aside the Will and thus receive the entire estate to the exclusion of the girlfriend and the grandchildren (i.e. the son's children). The son's goal, however, was to have the girlfriend's testimony required for the probate of the will, thus voiding her legacy and increasing the share of his children's bequests.

The will was valid in all respects, every "witness" remembered the hastily conducted ceremony, and none of the aforementioned SCPA exceptions applied. So what was the girlfriend to do? Who could be examined at the 1404 hearing without voiding the bequest to the girlfriend? Fortunately for the girlfriend, case law came to the rescue.

It has been held that "the designation of the individual whose signature appears on the propounded instrument as a 'notary'

Continued …

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Continued ...

does not itself determine the capacity in which he signed," *In re Ryan's Will*, 12 Misc. 2d 192, 193, 174 N.Y.S.2d 607, 608-09 (Nassau County, Sur. Ct. 1958).

Rather, the court should inquire "as to whether in fact he acted as a subscribing witness," and "[i]f the testimony bears this out, then the mere fact that the instrument describes him otherwise should not bar probate," *Id*. at 193, 174 N.Y.S.2d at 609; see also *In re McAvish's Estate*, 161 Misc. 887, 887, 293 N.Y.S. 246, 247 (N.Y. County, Sur. Ct. 1937) (admitting a will into probate where a witness "was a notary public and that he described himself as such and put his stamp under his name" because the evidence showed that the "he was asked to act as a subscribing witness because he was a notary public") (emphasis added), Cf, *In re McDonough's Estate*, 201 A.D. 203 (3d Dept. 1922) (affirming a denial of probate where the instrument "lack[ed an] attestation clause, use[d] 'witness' in the singular number, instead of the plural, and [had] a jurat subscribed by a person as notary, giv[ing] prima facie evidence of subscription by one witness only, and of signing by the third person as a notary, not as a witness.").

To review, at the execution ceremony, the secretary signed as a witness, the girlfriend signed as a witness, and the paralegal signed the instrument on the same page and stamped the page with her notarial seal. However, the paralegal's testimony would indeed be that she "was asked to witness the will" and signed the will as a witness. The testator thought that the attesting witnesses' signatures had to be acknowledged, but that is not what the law requires. In fact, EPTL § 3-2.1 does not require any acknowledgement whatsoever so long as the "signature of the testator [is] affixed to the will in the presence of each of the attesting witnesses." As such, the paralegal could be deemed an extra attesting witness. Accordingly, the paralegal could serve as the second attesting witness at the 1404 hearing, permitting the will to be admitted to probate without the testimony of the girlfriend, thus saving the bequest to the girlfriend who would not have to testify.

Our case was ultimately settled based on the strength of the case law and a carefully crafted Affidavit of Attesting Witnesses. The lesson to be learned? While statutory requirements may seem straightforward and even rigid, always examine applicable case law to appropriately represent the interests of your client.

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