OBJECTIONS TO PROBATE - A PROPONENT'S VIEW

The notion of personal freedom is deeply ingrained in American values. We permit, albeit with a jaundiced eye, the eccentric to make his abode in the park, carry his belongings in a shopping cart and travel the subways for a living.

Consistent with this principle, we do not question, and indeed heartily endorse, the idea that at death, one may dispose of one's property as one desires.[1] If the frail and elderly aunt, while fond of her nephews and nieces, excludes them in her will and elects to benefit her devoted home-health aide, will she succeed?

A will proponent's counsel must take advantage of every opportunity afforded to assist his client's efforts to allow the propounded will to be admitted to probate in order to effectuate the decedent's wishes. A brief exploration of these opportunities should aid him in facing the opposition in the ritualized warfare that constitutes a contested probate case.

FORMALITIES OF EXECUTION

By imposing adherence to certain formalities surrounding execution, we have, at the outset, determined that the testator should not enter lightly into a dispositive scheme. Estates, Powers and Trust Law ("EPTL") section 3-2.1 sets forth the requirements of creating a valid will.

As experienced estates practitioners know, the testator, or someone on his behalf, must sign at the end, in the presence of at least two (2) attesting witnesses. At some time during the ceremony of execution and attestation, the testator should declare to each of the attesting witnesses that the instrument to which his signature is affixed is his will. The witnesses must, within one thirty (30) day period, attest the testator's signature, as affixed

or acknowledged in their presence, and, at the request of the testator, sign their names and affix their addresses. The necessary ingredients are specific, but the procedure for the execution and attestation of wills “need not be followed in the precise order” enumerated in the statute. The statute was designed to prevent fraud in the execution of wills.[2] Surrogate’s Court Procedure Act (“SCPA”) section1408(1) provides that the court, before admitting a will to probate, “must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution.”[3]

Although the objectant to probate will routinely recite a failure of due execution, in most instances, the proponent will prevail, as the statute’s “beneficial purpose should not be thwarted by an unduly strict interpretation of its provisions.”[4] All that is required is “substantial and acceptable compliance.”[5]

Indeed, a reading of the cases cited under the statute reveals its benign application. Thus, we see a will or codicil admitted to probate with a missing page;[6] written in the form of a letter in decedent’s own handwriting, stating it was a Codicil to her will and closing with the words “Love, Mother”;[7] where the will consisted of a carbon copy;[8] where spouses mistakenly signed each other’s identical wills;[9] where decedent, who could not write, affixed her “mark” rather than her name;[10] where the will was signed by testatrix’s agent because she was physically incapacitated;[11] where decedent had folded two sheets of paper into four sections and the writing started on page one, continued on page four and concluded on page two.[12]

EPTL section 3-2.1 is aided by a presumption of due execution where the will was executed under the supervision of an attorney.[13] Furthermore, due execution is inferred by the presence of an attestation clause.[14] The uncontroverted testimony of the attesting

witnesses will be dispositive.[15] In short, while the burden is on the proponent to prove by a fair preponderance of the evidence that the will was executed in compliance with the statute, it is not a heavy burden to carry and the testator who exercised a modicum of judgment and sought the help of counsel of even modest competence should have his wishes carried out. Clearly, the proponent, discouraged under the weight of one or more of the above enumerated infirmities, should see his spirits lifted by a thorough review of these cases.

The real challenge for the testator and, later, the proponent of his will, lies in the examination of the testator's testamentary capacity and the manner in which the exercise of the testator's freedom of choice may, according to objectant, have been subverted by undue influence.

WHO MAY OBJECT TO PROBATE

Had she died intestate, decedent's property would have passed to those in the nearest degree of heirship, the distributees enumerated in EPTL section 4-1.1. The assumption is made, although it is not always justified, that testatrix, survived by her children, would wish to benefit them to the exclusion of her dearest friend, or her nephew.

The class of persons to whom process must issue when the will is offered for probate, as provided by SCPA section 1403, includes decedent's distributees, the executor, if another person is propounding the will, and a beneficiary or fiduciary whose rights are adversely affected by any other, later dated instrument, offered for probate. The court, in the exercise of its equitable powers, may require that others be served with process as well. SCPA section 1410 provides that "any person whose interest in property

or in the estate of the testator" would be adversely affected by the admission of the will to probate may file objections to all or part of a will.[16]

The distributee who is excluded in the will, or whose intestate share would have exceeded that which is given to him in the will, is the objectant whose emergence may be anticipated, unless the testator, in advance, secured the distributee's surrender of his right to object.[17]

THE ROLE OF THE PUBLIC ADMINISTRATOR

The objectant may not come alone, but may bring a retinue. Whenever there are unknown distributees or where the distributees named in the probate petition are related to decedent in the fourth degree of consanguinity,[18] or more remotely, the public administrator must be served with process as required by SCPA section 1123(2)(i)(2).

The public administrator "in his discretion," may "take any action in behalf of such person or persons as a person interested might" take.[19]

Such action may include the filing of objections.[20] In addition, the court may, in its discretion, direct the public administrator to appear in a proceeding as provided by SCPA section 1123(2)(i)(1). Where no distributee would be eligible to receive letters were the will denied probate, the public administrator is a person "otherwise interested in the will" entitling him to examine the subscribing witnesses.[21] The public administrator may assert this right even where the distributees at issue have consented to probate, as it is the duty of the Surrogate's Court before admitting the instrument to probate to satisfy itself with the genuineness of the will and the validity of its execution.

The proponent of decedent's last will and testament now not only must contend with

unhappy distributees, but with the possible opposition of the public administrator.[22] A quasi public officer, he is, nevertheless, an advocate. SCPA section 1124(l)(5) provides that his counsel "shall be allowed his reasonable fee. Such expenses and fees shall be payable either from the estate generally or from the shares or interests of the respective persons represented by the Public Administrator, as may be directed by the Court."[23]

This provision may provide some motivation on both sides. In *In re Schindhelm's Will*, the appellate division held that the Surrogate's Court should have granted proponent's motion to strike the appearance, authorization and objection to probate filed by respondent, the public administrator, as his participation was a "burdensome or unnecessary duplication of the function" of a special guardian appointed by the court to safeguard the interests of unknowns.[24]

Furthermore, it would seem, that, under appropriate circumstances, the passionate proponent might enlist the aide of the public administrator if it appears that there is no factual basis for objectant's persistence, or for his angling for a settlement offer. The public administrator may be honor-bound on behalf of the very unknowns he represents not to diminish the estate by his unnecessary fees and, instead, to provide an affidavit in support of proponent's position.

Where the public administrator's participation is not grounded upon his representation of unknown distributees and where there is vigorous opposition to probate by objectants, a motion made sometime during the discovery process by proponent to dispense with the public administrator's continued representation may be appropriate, unless the latter joins in the objections.

TESTAMENTARY CAPACITY

Turning to the issue of testamentary capacity, as stated by the New York Court of Appeals,

> ... [T]he proponent has the burden of proving that the testator possessed testamentary capacity and the Court must look to the following factors: 1) whether she understood the nature and consequences of executing a will; 2) whether she knew the nature and extent of the property she was disposing of; and 3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.[25]

The appropriate inquiry is whether the decedent was lucid and rational at the time the will was executed.[26] While the decedent may have suffered from senile dementia and was physically frail, such evidence is not necessarily in conflict with testamentary capacity.[27] Although the decedent was in a semi-conscious condition and unable to talk, when roused, he nodded his head to questions asked up to a time after the will was executed and the testimony of the witnesses who were present at the time the will was executed to that effect was persuasive.[28]

These cases illustrate that the kind of capacity required to execute a valid will differs from that required to contract in general. Furthermore, the testator is presumed to have testamentary capacity.[29]

The court will not allow probate, even without objections, unless it is satisfied that the decedent "was in all respects competent to make a will and not under restraint."[30] This language may lend some credence to the notion that the burden of proving absence of restraint is on the proponent as well. Although, as we shall see, the burden of proof of undue influence falls to the objectant, counsel for the proponent may feel forced into producing one giant stew of proof and shouldering the burden of freedom from undue

influence. Proof of capacity should be limited to its components as elucidated in *Kumstar*, and nothing more.[31] The court, in *In re Schillinger's Will*, addresses the issue fully:

> There can be no doubt that the meaning of the word "restraint" includes and covers the term "undue influence," or that the requirement that it must appear to the surrogate that the testator was not under restraint at the time he made his will before the will can be admitted to probate affords some basis to the theory that there is a burden resting upon the proponent of a will to prove absence of restraint, which, as we have seen, embraces undue influence. But the courts have not taken this view...[o]n the contrary, we find that upon the question of "restraint," the burden is upon the contestants.[32]

To the proponent who must try his case, this analysis will compel him to proceed properly and not do more than is necessary. He will begin the production of testimony by proving due execution and competency "at any length he may choose"... "either by offering the deposition of the attesting witnesses that is commonly used in a non-contested probate, or by offering the record of an examination [before trial]...Proponent may, at least, rest on such *prima facie* proof as raises the presumption of sanity."[33] Thereupon, objectant who claims that testator labored under restraint will address this as a "distinct matter of defense."[34] Even in framing her motion for summary judgment, proponent should be mindful of who must prove what.

THE OBJECTS OF ONE'S BOUNTY

As we have seen, in *Kumstar*, one of the ingredients of testamentary capacity is the knowledge of the "natural objects" of one's bounty.[35] Who are these lucky persons? An EPTL 4-1.1 distributee might smugly assume that his kinship to the decedent entitles him to this appellation. He may be mistaken. The cases do not always make clear exactly what is meant by the term. In *In re Stephani's Will*, the court reflected upon the testimony related to the testamentary capacity of a decedent who was an inmate of Dannemora State

Hospital for the criminally insane.[36] The psychiatrist testified that decedent knew "who his relatives were and who were the natural objects of his bounty."[37] Dr. Bailey, who helped out at the hospital for a short time, testified that decedent "knew the object of his bounty, and that he knew his relatives."[38] *[Suggesting that these were not necessarily the same]* The court opined, however, that testamentary capacity requires that testator "must know his relatives, sometimes called the object of his bounty."[39] *[Suggesting they are one and the same]*

The issue was before the court in *In re McCarty's Will*.[40] "It sounds well to declaim about the exclusion of those who are the natural objects of one's bounty, but before we assume fraud as against reputable citizens (*where fraud and undue influence were claimed*), we should inquire who these 'natural objects' are, and what claims they had upon testatrix's bounty."[41] Decedent's numerous cousins who resided all over the globe were not included in the class of natural objects of her bounty. The court commented about the degrees of kinship as set forth in the intestacy statutes and concluded that the interests of cousins are removed. "We are of the opinion that a person of sound and disposing mind might absolutely close his eyes and his mind to the existence of his cousins, and grant his entire estate to intimate business and social associates, without giving rise to the presumption of having been defrauded by undue influence."[42]

In fact, decedent, in *McCarty,* who provided for her brother's widow who had made a home with her was looking after "the natural object of her bounty."[43] Similarly, where the evidence established that decedent's friend was "like a daughter" the friend was a "natural object" of decedent's bounty, in contrast to her niece and nephew with whom decedent did not have a relationship.[44]

Even if one's distributees are the natural objects of one's bounty, one must know one's "relations with them."[45] Thus, where a testator substantially reduced the gift to his children and grandchildren because, as he complained to the drafter of the will, they did not love him and no longer visited him on special occasions like his birthday, objectants did not prevail because testator knew his relations with the objects of his bounty.[46] Similarly, in *Bush*, decedent failed to remember his two sisters and instead benefited his friends.[47] As there is "nothing in the record to indicate a close relationship which would lead to the conclusion that he should have remembered them in his will," decedent carried the burden of proving capacity.[48] Similarly, in *Matter of Steinman*, decedent's cousins had not presented any proof that they had a meaningful relationship with decedent.[49]

In short, the embattled proponent faced with the natural opposition of excluded distributees, may be heartened to know that they are not necessarily the natural objects of decedent's bounty. This principle may be contrary to commonly held convictions, but the fact finders should not be permitted to "mistake their functions as those of an ultimate testator...in order to make a will just in their opinion."[50]

Where counsel is the attorney draftsman and thus can take some precautions if distributees are excluded, it may be useful to make reference in the will to decedent's lack of a relationship to distributees, or, if this is undesirable for reasons of sensibility, to ask decedent to write a letter, in her handwriting, setting forth the reasons for excluding her nephews and favoring her dear friend.

UNDUE INFLUENCE

As we have seen, the concepts of capacity and freedom from restraint, or undue

influence, are closely interlaced but distinctly different. Counsel should be mindful of objectant's burden to prove undue influence which has been defined as "an affirmative assault on the validity of a will."[51]

The law can be briefly stated. Objectant must provide evidence of all three elements of undue influence, motive, opportunity and the actual exercise of undue influence. Such influence must amount to a moral coercion which restrained independent action and destroyed free agency, which "constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist."[52] The court may not submit the issue of undue influence to the jury where evidence that influence was actually utilized is insufficient.[53] To raise an issue of fact as to undue influence, more proof is required than mere conclusory allegations and speculation.[54] Since undue influence is not often the subject of direct proof, it can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the conditions of his health and mind, his dependence upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of that person to wield it, and the acts and declarations of such person.[55]

Where there is substantial disparity in power between the decedent and the person purportedly having exercised the undue influence, the law imparts a "confidential relationship," as held in *Ten Eyck v. Whitbeck*,[56] which, in turn gives rise to an inference of undue influence.[57] This inference may not automatically be drawn, where the donee has a close family relationship with decedent.[58] If the inference may be drawn, the burden of proof shifts from the objectants to proponent to "show the integrity of the bequest" made in the propounded instrument.[59]

THE MOTION FOR SUMMARY JUDGMENT

It should be readily apparent that an allegation of undue influence constitutes fertile ground for objections. It has long been settled that the remedy of summary judgment in contested probate proceedings is available where objectants have failed to raise a genuine and material issue of fact.[60] The regnant theory for years was that such relief could not lie where the objection was based on undue influence. Increasingly, however, a motion for summary judgment in favor of proponent may succeed even where the will is challenged on that ground.

In *In re Proceeding of Camac*, decedent began living with one of her two daughters shortly after the death of her husband.[61] Decedent left the bulk of her estate to her two daughters, leading to her son's objections on the grounds of undue influence. The court's denial of proponent's motion for summary judgment was reversed and the objection on the ground of undue influence dismissed. The court held that objectant had failed to raise a triable issue of fact. Appellant did not participate in the drafting or execution of the will. Until five weeks before her death, decedent was able to take care of herself and went to her office twice a week. The surrogate improperly relied on an inference of undue influence based upon a presumed confidential relationship between decedent and her physician daughter, as there was no evidence that the daughter had any direct involvement in the preparation or execution of the will.

In the last couple of years numerous successful summary judgment motions dismissing objections based on undue influence have been reported in the New York Law Journal.[62] In conclusion, the proponent no longer needs to feel restrained from moving for summary judgment on the issue of undue influence.

THE TIMING OF THE MOTION

Once issue is joined, a motion for summary judgment is available. However, the court will be more inclined to grant the motion where discovery has been completed.[63] Clearly, this is not to say that it may not be useful to wear opponent down with a number of summary judgment motions, forcing him, in the process, to lay bare his proof. This decision is partly driven by economics. Unfortunately, the wealthy estate is in a better position to mount a vigorous defense of the will than the modest one. Seward Johnson, of the multi-national health care manufacturer Johnson & Johnson, "left a massive portion of his estate to a woman more than half his age who had captured his heart and possibly his mind." [64] A full-time lawyer was employed whose only duty consisted of protecting the estate from excluded family members. In the usual case, counsel will be restricted by the financial resources of the estate and will wait until discovery is complete before filing the motion for summary judgment.

CONCLUSION

Although the receipt of objections is a distressing event for proponent, at the very least alerting him to the commencement of what may become a long and painful process, the proponent should be encouraged by all that works in his favor. A careful, orderly, parsing of the components of the proponent's burden, together with a properly timed, well crafted summary judgment motion will often lead to probate.[65]

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1. *But see* N.Y. EST. POWERS & TRUSTS LAW §5-1.1-A (Consol. 2003) (dealing with the right of election by the surviving spouse).

2. *See In re Will of Kobrinsky*, 51 Misc. 2d 222, 273 N.Y.S.2d 156 (Surr. Ct., Kings Co. 1966).

3. SURR. CT. PROC. ACT §1408(1) (Consol. 2003).

4. *See In re Will of Dupin*, 36 Misc. 2d 309, 310, 232 N.Y.S.2d 381, 383 (Surr. Ct., Nassau Co. 1962).

5. *See In re Andrews' Will*, 195 Misc. 421, 88 N.Y.S.2d 32 (Surr. Ct., Broome Co. 1949).

6. *See Estate of Zina Chugin*, N.Y.L.J., June 9, 2003, p. 35, col. 1 (Surr. Ct., Suffolk Co.); *In re Estate of Hall*, 118 Misc. 2d 1052, 462 N.Y.S.2d 154 (Surr. Ct., Bronx Co. 1983).

7. *In re Estate of Kenneally*, 139 Misc. 2d 198, 528 N.Y.S.2d 314 (Surr. Ct., Nassau Co. 1988).

8. *Estate of Saxl*, 32 Misc. 2d 481, 222 N.Y.S.2d 765 (Surr. Ct., New York Co. 1961).

9. *In re Estate of Snide*, 80 A.D.2d 276, 439 N.Y.S.2d 690 (3rd Dep't 1981).

10. *In re Irving's Will*, 153 A.D. 728, 138 N.Y.S. 784, *aff'd,* 207 N.Y. 765, 101 N.E. 1106 (1913); *In re Romaniw's Will*, 163 Misc. 481, 296 N.Y.S. 925 (Surr. Ct., Westchester Co. 1937).

11. *In re Gallagher's Will*, 123 N.Y.S.2d 912 (Surr. Ct., Queens Co. 1953).

12. *In re Peiser's Will*, 79 Misc. 668, 140 N.Y.S. 844 (Surr. Ct., New York Co. 1913). *See also In re Reid's Will*, 47 N.Y.S.2d 426 (Surr. Ct., Queens Co. 1944); *In re Hildreth's Will*, 36 N.Y.S.2d 938 (Surr. Ct., Westchester Co. 1942); *Will of Santo Sapienza*, N.Y.L.J., June 27, 2003, p. 33, col. 2 (Surr. Ct., Rockland Co.).

13. *See In re Estate of Philbrook*, 185 A.D.2nd 550, 586 N.Y.S.2d 394 (3rd Dep't 1992).

14. *See In re Will of Alden*, 52 A.D.2d 1051, 384 N.Y.S.2d 287 (4th Dep't 1976).

15. *See In re Estate of Matteo*, 134 A.D.2d 261, 520 N.Y.S.2d 594 (2nd Dep't 1987).

16. For the interplay of the statutes heretofore referenced, see Peter C. Valenti and Joann T. Palumbo, *Interplay of SCPA §§ 1403; 1410 and 709*, N.Y.L.J., Jan. 31, 1996, p. 3, col. 1.

17. *See* SCPA §1403(1)(a); SCPA §1001(1)(b); *In re Cook's Will*, 244 N.Y. 63, 154 N.E. 823 (1926). *Cf. In re Estate of Cagney*, 186 Misc. 2d 760, 720 N.Y.S.2d 759 (Surr. Ct., Dutchess Co. 2001), *aff'd*, *In re Cagney*, 293 A.D.2d 675, 740 N.Y.S.2d 448 (2d Dep't 2002). *See also* John C. Welsh, *2000-2001 Survey of New York Law: Estates and Trusts*, 52 Syracuse L. Rev. 375 (2002) (discussing the issue more fully).

18. The "fourth degree of consanguinity" may sound far away, but first cousins will so quality.

19. SCPA §1123 (4).

20. *See In re Estate of von Knapitsch*, 296 A.D.2d 144, 746 N.Y.S.2d 694 (1st Dep't 2002).

21. *See In re Wiberg's Will*, 197 Misc. 511, 98 N.Y.S.2d 930 (Surr. Ct., Queens Co. 1950).

22. The public administrator is not an arm of the court. SCPA §1128 provides that the operation of the offices of the public administrator is subject to guidelines established by an administrative board, consisting of thirteen members, five of whom shall be Surrogate's Court judges.

23. SCPA §1124(I)(5).

24. 11 A.D.2d 777, 778, 205 N.Y.S.2d 81,83 (2nd Dep't 1960).

25. *In re Estate of Kumstar*, 66 N.Y.2d 691, 692, 487 N.E.2d 271, 272 (2nd Dep't 1985); *In re Estate of Bush*, 85 A.D.2d 887, 446 N.Y.S.2d 759 (4th Dep't 1981).

26. *In re Estate of Long*, 176 A.D.2d 1059, 575 N.Y.S.2d 205 (3rd Dep't 1991); *Hedges*, 100 A.D.2d 586, 473 N.Y.S.2d 529.

27. *In re Estate of Ruso*, 212 A.D.2d 846, 622 N.Y.S.2d 137 (3rd Dep't 1995); *In re Hedges*, 100 A.D.2d 586, 473 N.Y.S.2d 529 (2nd Dep't 1984).

28. *In re Holcomb's Estate*, 150 Misc. 684, 271 N.Y.S. 225, *aff'd,* 242 A.D. 889, 275 N.Y.S. 481 (3rd Dep't 1934).

29. *In re Beneway's Will*, 272 A.D. 463, 71 N.Y.S.2d 361(3rd Dep't 1947).

30. SCPA §1408(2).

31. 66 N.Y.2d 691.

32. 231 A.D. 679, 680, 248 N.Y.S. 610, 612, *aff'd,* 258 N.Y. 186, 179 N.E. 380 (1932) (citations omitted).

33. *See In re Brown's Estate*, 144 Misc. 440, 442, 259 N.Y.S. 275, 277 (Surr. Ct., Monroe Co. 1932) (for an elegant exposition of proponent's burden at trial).

34. *See id.*

35. 66 N.Y.2d 691.

36. 250 A.D. 253, 294 N.Y.S. 624 (3rd Dep't 1937).

37. *Id.* at 256.

38. *See id.*

39. *See id.*

40. 141 A.D. 816, 126 N.Y.S 699 (2nd Dep't 1910).

41. *Id.* at 819.

42. *Id.* at 820.

43. *Id.* at 821.

44. *Estate of Eleanore E. Tobin*, N.Y.L.J., Oct. 2, 2000, p. 26, col. 3 (Surr. Ct., N.Y. Co.).

45. *Kumstar*, 66 N.Y.2d at 692.

46. *In re Elco*, 153 A.D. 2d 860, 545 N.Y.S.2d 377 (2nd Dep't 1989).

47. *Bush*, 85 A.D.2d 887.

48. *Id.* at 888.

49. N.Y.L.J., Aug. 31, 1998, p. 28, col. 1, (Surr. Ct., Bronx Co.); *cf. Estate of William Dolinsky,* N.Y.L.J., Feb. 29, 2003, p. 21, col 6. (Surr. Ct., Westchester Co.).

50. *In re Woods*, 189 A.D. 324, 325, 178 N.Y.S. 573 (2nd Dep't 1919).

51. *See Schillinger*, 231 A.D. 679 at 680.

52. *In re Will of Walther*, 6 N.Y.2d 49, 53,159 N.E.2d 665, 668 (1959) [quoting *Children's Aid Soc. v. Loveridge*, 70 N.Y. 387 (1877)].

53. *In re Will of Vukich*, 53 A.D.2d 1029, 385 N.Y.S.2d 905 (4th Dep't 1976), *aff'd*, *In re Estate of Vukich* , 43 N.Y.2d 263, 401 N.Y.S.2d 176, 372 N.E.2d 12 (1977).

54. *In re Estate of Young*, 289 A.D.2d 725, 738 N.Y.S.2d 100 (3rd Dep't 2001); *In re Estate of Dietrich,* 271 A.D.2d 894, 706 N.Y.S.2d 763 (3rd Dep't 2000); *In re Posner*, 160 A.D.2d 943, 554 N.Y.S.2d 666 (2nd Dep't 1990).

55. *Rollwagen v. Rollwagen*, 63 N.Y. 504 (1876).

56. 156 N.Y. 341, 50 N.E. 963 (1898).

57. *Hazel v. Sacco*, 52 A.D.2d 1042, 384 N.Y.S.2d 572 (4th Dep't 1976).

58. *See Estate of Raymond Revit*, N.Y.L.J., May 10, 1999, p. 31, col.2 (Surr. Ct., Westchester Co.).

59. *Estate of Eleanore E. Tobin*, N.Y.L.J., Oct. 2, 2000, p.26, col 3.

60. *In re Estate of Bartel*, 214 A.D.2d 476, 625 N.Y.S.2d 519 (1st Dep't 1995).

61. 300 A.D.2d 11, 751 N.Y.S.2d 435 (1st Dep't 2002).

62. *Estate of Fay Libby Weinberg,* 1 A.D.3d 523, 767 N.Y.S.2d 234 (2nd Dep't 2003); *See In re Estate of Sweetland*, 273 A.D.2d 739, 710 N.Y.S.2d 668 (3rd Dep't 2000); *In re Esberg*, 215 A.D.2d 655, 627 N.Y.S.2d 716 (2nd Dep't 1995); *Matter of Helen Godulias,* N.Y.L.J., September 29, 2004, p. 29, col. 4 (Surr. Ct., Queens Co.); *Estate of Barbara J. Noseworthy,* N.Y.L.J., June 27, 2003, p.31 col. 6 (Surr. Ct., Kings Co.); *Estate of Arthur Raeder*, N.Y.L.J., May 21, 2003, p. 20, col. 2 (Surr. Ct., Kings Co.); *Matter of Ilona Weltz*, N.Y.L.J., Mar. 27, 2003, p. 22, col. 4 (Surr. Ct., Queens Co.); *Estate of Andree Banner*, N.Y.L.J., Feb. 26, 2003, p. 23, col. 6 (Surr. Ct., Bronx Co.); *Estate of William Dolinsky*, N.Y.L.J., Jan. 29, 2003, p. 21, col. 6 (Surr. Ct., Westchester Co.); *Estate of George A. Scarpa*, N.Y.L.J., Oct. 29, 2002 p. 22, col. 6 (Surr. Ct., Kings Co.); *Estate of Michael Meth*, N.Y.L.J., Sept. 13, 2002, p. 23, col. 1 (Surr. Ct., Queens Co.).

63. *See Estate of Umberto Dominione*, N.Y.L.J., June 18, 2003, p. 25, col. 1(Surr. Ct., Nassau Co.); *Estate of George Scarpa*, N.Y.L.J., Oct. 29, 2002 p. 22, col. 6. (Surr. Ct., Kings Co.).

64. Heather Ellis, *Dealing with Mental Disability in Trust & Estate Law Practice: The Sanist Will*, N.Y. L. Sch. J. Int'l & Comp. L., 2003.

65. I wish to acknowledge the thorough review of all the above cited sources by my law clerk, Andrew Skouvakis, class of 2005, Penn State University, Dickinson School of Law.