

## IN PRACTICE

## ESTATE PLANNING

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## The Third Type of Will

Amendment to Probate Code allows courts to probate defectively executed wills

Wills in New Jersey have come, historically, in only two flavors: wills signed and witnessed in technical compliance with the Wills Act (L. 1977, c. 412) or holographic wills. Now there is a third: writings intended as wills.

The law has been that, "Dispositions which in the law are designated wills, unless they are made under the rigors of the Wills Act, are invalid." Clapp and Black, *Will and Administration*, rev. 3rd ed., 5 New Jersey Practice 2. Wills either comply with the technical requirements of the Wills Act (execution by or on behalf of the testator with two witnesses signing it), or they are holographic (entirely in the handwriting of the testator), or they are not wills. Judge Clarkson S. Fisher Jr., deciding whether to admit a purported will on a preprinted, fill-in-the-blanks form to probate, determined that, because the form had not been signed by two witnesses, "it must either be found to be a holographic will or decedent must be deemed to have died intestate; there are no other alternatives." *In re Will of Ferree*, 369 N.J. Super. 136, 142 (Ch. 2003), *aff'd*, 369 N.J. Super. 1 (A.D. 2004). A third alternative is now available.

The New Jersey legislature adopted amendments to the Uniform Probate Code in 2004 (L. 2004, c. 132), effective Feb. 27, 2005. The amendments retain a definition of a will similar to that in the Wills Act in the amended N.J.S.A. 3B:3-2.a. and provide for probate of documents that have traditionally been admitted to probate as holographic wills in N.J.S.A. 3B:3-2.b. However, in a new section codified as N.J.S.A. 3B:3-2.c, extrinsic evidence may now be provided to establish that a document is a "writing intended as a will" that can be admitted to probate pursuant to an entirely new N.J.S.A. 3B:3-3. These writings intended as wills are a wholly new type of wills in New Jersey.

Interestingly, New Jersey took an approach that is somewhat different than that of the UPC, which speaks of "harmless error" in analyzing documents to determine if they comply with the requirements of a will (Uniform Probate Code, § 2-503), rather than defining those documents as a new category of wills altogether. There appears to be no explanation for the difference in the legislative history of the 2004 statute. So far, there is not a single reported case interpreting the UPC amendments in New Jersey, and remarkably few in the 16 other states that have adopted the amendments to the UPC so far.

The adoption of the amendments to the UPC has some history. The Supreme Court of New Jersey confronted the issue of improperly executed wills in *Matter of Will of Ranney*, 124 N.J. 1 (1991). It decided in *Ranney* that technical defects in the execution of a will could be overcome by clear and convincing evidence that the will substantially complied with the requirements of the Wills Act, but cautioned that the doctrine of substantial compliance was to be used in only narrow circumstances to avoid inequitable results, not to avoid the consequences of careless draftsmanship or as an opening for fraud.

The doctrine of substantial compliance, however, did not extend to holographic wills, as the court in *Ferree* was later to decide. In *Ferree*, the decedent had filled in the blanks in a will form, signed the document and had one person sign as a witness. *Ferree* was determined to have died intestate, as the document did not meet the formal requirements of the Wills Act, and the substantial compliance standard of *Ranney* could not be extended to find a preprinted form to be a holographic will. Judge Fisher indicated in a footnote in *Ferree*, however, that the amendments to the UPC were then pending before the legislature and *Ferree*'s will might well have been probatable as a writing intended as a will if established as such by extrinsic evidence had the amendments already been adopted.

A matter currently before the Chancery Court in Mercer County, *In re: Estate of*



*Frank W. Leinak*, has a factual predicate similar to that of *Ferree* and tests this new type of will under N.J.S.A. 3B:3-3. In this case, one sister of the decedent is seeking to admit to probate a two page document entitled "Last Will & Testament," which was created on a preprinted, fill-in-the-blanks form (as in *Ferree*) in decedent's hospital room. This will named the sister as executrix and left the entire estate to this sister, her husband and her son. The sister propounding the will had filled in the blanks at her brother's direction, but he initialed both pages and signed the document. The form the decedent used had no signature lines for witnesses, and the notary at the hospital thought that no witnesses were necessary. At the notary's direction, the will was signed by the decedent, but not by any witnesses, even though there were several witnesses physically present. The will, therefore, is not in compliance with N.J.S.A. 3B:3-2.a. and is not a holographic will that could be probated under N.J.S.A. 3B:3-2.b. The decedent's other sister (and only other heir) filed a motion seeking to dismiss the plaintiff's complaint to admit the will, arguing that the alleged will did not comply with the formal requirements of a witnessed will nor with the requirements for a valid holographic will. Thus, the disinherited sister contends that the decedent must be deemed to have died intestate.

Judge Neil Shuster, Presiding Chancery Judge in Mercer County, denied the motion to dismiss, noting that the Legislature has indeed adopted and codified the more flexible approach with regard to permitting the probate of certain documents intended as wills that Judge Fisher had anticipated in the *Ferree* opinion. The sister that has offered the will she seeks to have it admitted to probate on the grounds that it falls squarely within the parameters of the newly enacted provisions of N.J.S.A. 3B:3-3, which state, in relevant part:

Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had been executed in compliance with N.J.S.A. 3B:3-2 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document to constitute: (1) the decedent's will...

Judge Shuster noted that the purpose of N.J.S.A. 3B:3-3 is to provide the court with authority to admit to probate a defectively executed will, subject to the requirement that the proponent establish by clear and convincing evidence that the decedent intended the document to constitute his will, and thus the defect was harmless to the purpose of the required will formalities, i.e., the prevention of fraud. Accordingly, Judge Shuster held that if the plaintiff can establish at trial by clear and convincing evidence that the decedent intended the alleged will to constitute his will, then the alleged will, although not executed in compliance with N.J.S.A. 3B:3-2, shall be treated as if it had been and thus be admitted to probate pursuant to N.J.S.A. 3B:3-3. The disputed portion of the case set after this decision was rendered.

The practical outcome of the adoption of the amendments to the UPC in New Jersey is that practitioners should not be discouraged when a client brings a defectively executed will to be probated. Even if a will is not witnessed, or has some other technical defect, and is not entirely in the decedent's own handwriting, there is the potential to have it admitted to probate as a writing intended as a will. This is not an invitation to sloppy practice, however, as such documents must be proven to have been intended as wills by clear and convincing evidence, and they cannot be probated by the surrogate as a matter of course. But if a decedent has created a defective will on his or her own, the careful practitioner no longer need deliver the bad news to the heirs that the will cannot be probated under any circumstances. ■

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