Initial Probate and Confronting Challenges in Probate Such as Defectively-Executed Wills or Writings Intended as Wills

Robert I. Aufseeser, Esq.

Valid Execution of a Will

§ 3B:3-9. Laws determining valid execution of will

A written will is validly executed if executed in compliance with N.J.S. 3B:3-2 *or* N.J.S. 3B:3-3

or its execution was in compliance with the law of the place where it was executed

or in compliance with the law of the testator's domicile (either at time of execution or time of death)

Valid Execution of a Will

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

1) in writing;

2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and

3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

4) (and be self-proved in compliance with 3B:3-4)

Valid Execution of a Will

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

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1) in writing;

In re Est. of Wasowicz, No. A-3620-21, 2023 N.J. Super. Unpub. LEXIS 2109 (App. Div. Nov. 21, 2023)

- You can't have an agreement "akin to a will". –No oral wills
- Accordingly, the trial court did not err in finding there was no valid claim asserted based on any oral will.
- But you can have a contractual arrangement to make a will if done properly under N.J.S.A. 3B:1-4. See ***In re Estate of O'Mealia***, 2016 N.J. Super. Unpub. LEXIS 425.

Valid Execution of a Will

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

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2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction;

In re Estate of Counselman, No. A-1456-21, 2023 N.J. Super. Unpub. LEXIS 1075 (App. Div. June 28, 2023)

- In accordance with N.J.S.A. 3B:3-3, unsigned wills can be admitted to probate when "the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute [a will]" and "(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it." Macool, 416 N.J. Super. at 310. The charities and the State contend this standard was not satisfied in the court's summary disposition of this dispute.

- Key takeaway is that an unsigned document purporting to be a will can be admitted to probate in certain circumstances

Valid Execution of a Will

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will;

In re Will of Ranney, 124 N.J. 1 (1991)

- Signatures on a self-proving affidavit do not literally satisfy the requirements of N.J.S.A. 3B:3-2 as signatures on a will.
- However, a will may be admitted to probate if it **substantially complies** with those attestation requirements

Holographic Wills

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

b. A will that does not comply with subsection a. is valid as a **writing intended as a will**, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

Holographic Wills

§ 3B:3-2. Execution; witnessed wills; writings intended as wills

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, **if the signature and material portions of the document are in the testator's handwriting**.

- ***In re Will of Ferree***, 369 N.J. Super. 136 (Super. Ct. 2003) AFFIRMED In re Will of Ferree, 369 N.J. Super. 1 (App. Div. 2004)
- ***Matter of Estate of Heffley***, N.J. App. Div., unpublished, 2018 WL 2406320 (Decided May 29, 2018)
- ***Matter of Estate of Malsberger***, N.J. App. Div., unpublished, 2017 WL 2991773 (Decided July 14, 2017)

Holographic Wills - Heffley's "Last" Letter

Considering my place was just appraised at $60,000 I'll need to go somewhere much cheaper. Not moving immediately, but maybe [i]n the next two years or so.... I'd like it very much if I could leave my home, crappy car [and] personal effects to you except for a few I have promised out. And, of course I wish—like if sudenly [sic] I died or something without the will that you folks could have my house even. But, as I said, I need to get $60,000 cash for it, in order to pay for my new place.

Holographic Wills - Malsberger's "Last" Letter

I'm Alice Malsberger—I wish to be cremated upon my death—along with my husband Joe—our ashes placed in a similar (illegible) and placed in mausoleum. I wish my estate be sold & divide in three and 1/3 granted to Fr. Emmanuel, one third to Patricia White, and one third to Dionysis & Anna Nicholaou. I want Pat White to be executrix. I intend to see a lawyer & to validate everything.

Writings Intended as Wills

§ 3B:3-3. Writings intended as wills

Although a document or writing was not executed in compliance with 3B:3-2, the document or writing is treated as if it had been executed in compliance with 3B:3-2 **IF:**

the proponent of the document or writing establishes by **clear and convincing evidence** that the decedent intended the document or writing to constitute:

1) the decedent's will;

2) a partial or complete revocation of the will;

3) an addition to or an alteration of the will; or

4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will.

Writings Intended as Wills

In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 298 (App. Div. 2010)

The proponent of the document or writing must establish by **clear and convincing evidence** that the decedent intended the document or writing to constitute a will.

To accomplish this the proponent must establish, by clear and convincing evidence, that.

1) the decedent actually reviewed the document in question; and

2) thereafter gave his or her final assent to it.

Writings Intended as Wills

- ***In re Estate of Connolly***, No. A-3855-17T1, 2019 N.J. Super. Unpub. LEXIS 858 (App. Div. Apr. 12, 2019)
  - Accepting appellants' invitation to focus exclusively on a decedent's intent, without the additional evidence *Macool* requires, would open the door to fraud and essentially vitiate the requirement of a written will.

Writings Intended as Wills

In re Estate of Ehrlich, 427 N.J. Super. 64 (App. Div. 2012)

Applies the test setout in *Macool* with different facts

Here we have an experienced trusts and estates attorney, who mails his original will to his named executor and keeps a copy of the original.

The copy is marked: “Original mailed to H.W. Van Sciver, 5/20/2000”

On these facts there was no doubt that the decedent viewed this writing, and the handwritten note was evidence of his “final assent”.

The copy was admitted to probate.

Writings Intended as Wills

In re Estate of Ehrlich, 427 N.J. Super. 64 (App. Div. 2012)

> "The fact that the document is only a copy of the original sent to decedent's executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in [3B:3-3] that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged."

Writings Intended as Wills

- ***In re Estate of Iapalucci***, No. A-3670-20, 2022 N.J. Super. Unpub. LEXIS 1830 (App. Div. Oct. 5, 2022)
- ***In re Estate of Russomanno***, No. A-3760-20, 2022 N.J. Super. Unpub. LEXIS 1332 (App. Div. July 22, 2022)
- ***In re Est. of Andrews***, No. A-1332-22, 2023 N.J. Super. Unpub. LEXIS 2170 (App. Div. Nov. 29, 2023)

Lost or Destroyed Wills

- The law is well settled in New Jersey that the Chancery Division has jurisdiction to establish a will which has been lost, stolen or destroyed without knowledge of the testator.

  -- ***In re Schultz's Will***, 102 N.J. Eq. 14 (Prerog. 1923)

- "the will may be established upon satisfactory proof of the destruction of the instrument, and of its contents or substance. Whether the proof be by one witness, or by many, it must be clear, satisfactory, and convincing."

  -- ***Wyckoff v. Wyckoff***, 16 N.J. Eq. 401, 405-406 (Ch. 1863)

Lost or Destroyed Wills

§ 3B:3-13. Revocation by writing or by act

A will or any part thereof is revoked:

a. By the execution of a subsequent will that revokes the previous will or part expressly or by inconsistency; or

b. Performing a "revocatory act on the will" with the intent to revoke the will or any part of it

Lost or Destroyed Wills

§ 3B:3-13. Revocation by writing or by act

- A "revocatory act on the will" includes:
  - Burning;
  - Tearing;
  - Obliterating or destroying.
- ***In re White's Will***, 25 N.J. Eq. 501 (Prerog. 1874) [acts of tearing and pencil marks were sufficient to revoke the will]

Lost or Destroyed Wills

- If the will was in the testator's custody, or if the testator had ready access to it, at the time it was lost, a presumption exists that the testator destroyed the will.
- The presumption is rebuttable.
  - —***In re Calef's Will***, 109 N.J. Eq. 181, 184 (Ch. 1931)
  - —***Campbell v. Cavanaugh***, 96 N.J. Eq. 724, 727 (Ch. 1923)

Lost or Destroyed Wills

- When the will is given to another for safe keeping, the law "does not require an *actual tracing* of the will back into possession of the testatrix, but is satisfied by a showing of access; that is, opportunity of repossession, and upon such showing the presumption of revocation remains until rebutted by evidence which is clear, convincing, and satisfactory".

  —***In re Calef's Will***, 109 N.J. Eq. 181, 186 (Ch. 1931)

  See also, ***Matter of Estate of Becker***, unreported, 2017 WL 745748 (Decided February 27, 2017) – [Prison Will Case]

Lost or Destroyed Wills

- Where the will is "lost or destroyed while in the possession of the testator, the loss or destruction must be without his knowledge, or the presumption of revocation is not overcome".

  —***Campbell v. Cavanaugh***, 96 N.J. Eq. 724, 727 (Ch. 1923)

- In addition, several courts have gone further to hold that the proof offered to rebut the presumption must be sufficient to exclude every possibility of a destruction of the will by the testator.

  —***In re Lawrence's Will***, 138 N.J. Eq. 134, 134-135 (Prerog. 1946)

  —***In re Estate of Jensen***, 141 N.J. Eq. 222, 225 (Prerog. 1947), aff'd, 142 N.J. Eq. 242 (E. & A. 1948)

Lost or Destroyed Wills

- The burden of proof is upon the proponent to prove the lost, stolen or destroyed will by **clear and convincing evidence**.
- This clear and convincing evidence must be shown with reference to

    1. the execution of the alleged lost will,
    2. the contents of said will, and
    3. the circumstances under which the will was lost, stolen or destroyed.

    -- ***In re Roman's Will***, 80 N.J. Super. 481, 483 (Hudson Co. Ct. 1963)

Lost or Destroyed Wills

- Proving the circumstances under which the will was lost or destroyed is not always required.
- the key issue in a case such as this is whether the testator had the intent to revoke the missing will, even assuming he or she may have had the opportunity to do so.
- ***In re Estate of Schenecker***, Unpublished Opinion, 2011 WL 812815 (Decided March 10, 2011)

How to Probate a Photocopy of a Will

- Establish how the original will was lost
- Obtain appearances and consents from all interested parties, if possible
- Introduce evidence in the form of affidavits and certifications establishing:
  - That the decedent signed the will and intended for it to be his will;
  - That the decedent did not revoke the will;
  - The circumstances under which the original was lost;
  - If possible, that the decedent actually reviewed the copy and gave indications that it reflected his will.

Key Takeaways

- You can probate a photocopy of a will if you can prove the decedent's intent to create that will and keep it in force by clear and convincing evidence.
- You can probate an unsigned writing intended as a will upon a showing that the testator reviewed the document and gave his final assent.
- If you're presented with a situation where strict formalities can't be followed, your approach should be to do as much as you can to demonstrate the testator's intent to create a will.
  - And that might include having witnesses appear via zoom
  - It might include using a remote notary
  - It might include any number of other factors that a court could interpret in evaluating testator intent

Robert I. Aufseeser, Esq.

732-201-6460

lawoffice@robertaufseeser.com