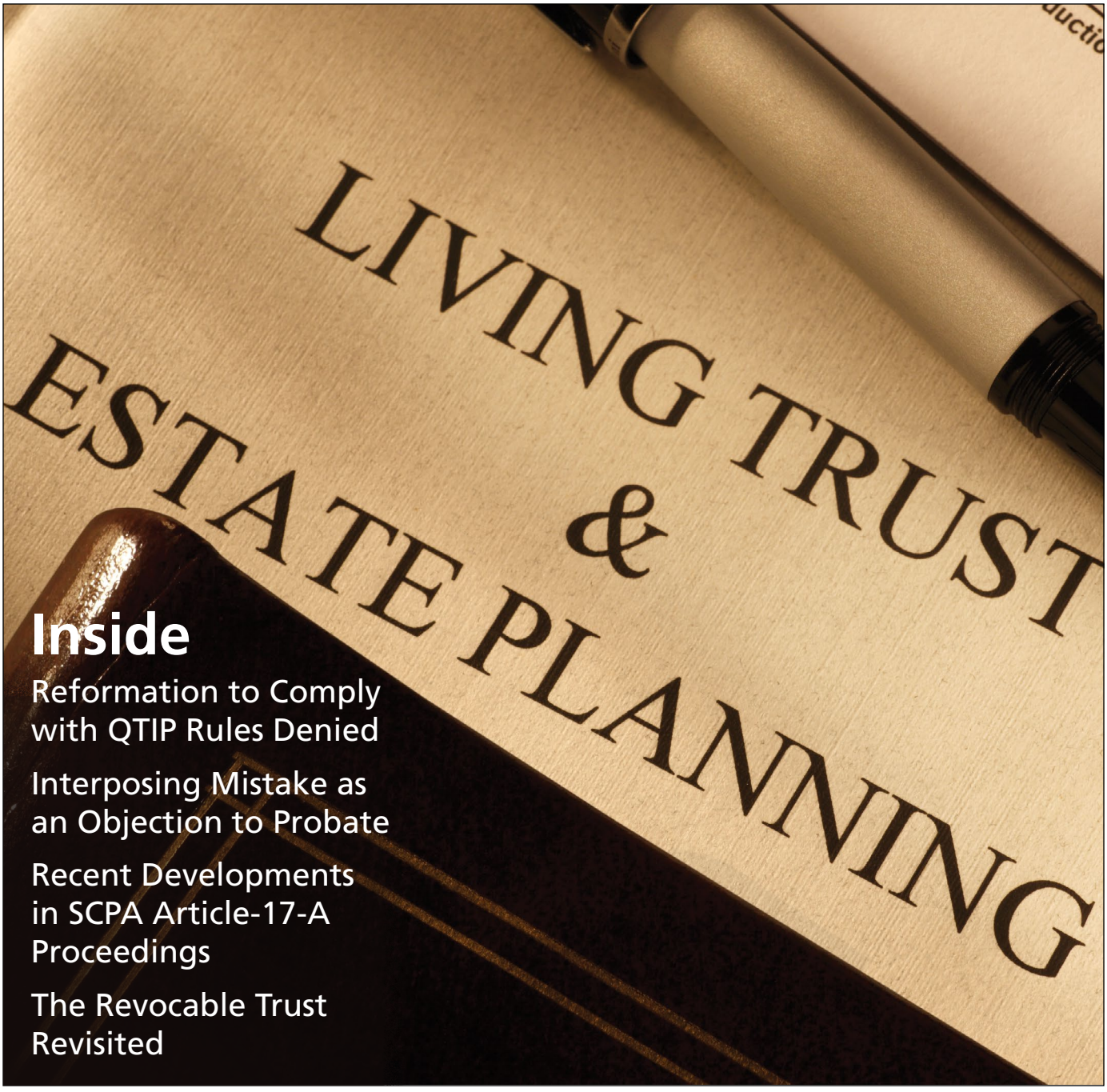
NYSBA SPRING 2017 | VOL. 50 | NO. 1

Trusts and Estates Law Section Newsletter

A publication of the Trusts and Estates Law Section
of the New York State Bar Association



Inside

Reformation to Comply with QTIP Rules Denied

Interposing Mistake as an Objection to Probate

Recent Developments in SCPA Article-17-A Proceedings

The Revocable Trust Revisited

Interposing Mistake as an Objection to Probate

By Daniel J. Reiter

I. Introduction

It has long been held in New York that in order for a propounded Will to be admitted to probate the instrument must contain the will of the testator.[1] The Surrogate must be satisfied not only that the instrument has been validly executed, but that the mind of the testator accompanied the act and that the instrument executed speaks his or her language and really expresses his or her will.[2] As a condition of probate, proponents must show affirmatively that the testator had an intelligent knowledge of the contents of the purported Will.[3]

But what of instances where a mistake or error is made by the attorney-drafter in preparing the instrument? Can such a mistake be grounds for objection to probate, or are such questions limited to a construction proceeding? A string of recent cases confirm that *mistake* remains a valid objection to probate, the outcome determined by the specific factual circumstances, the type of mistake, and the presence of testimony from the attorney-drafter or supervising attorney. To sustain the objection of mistake as a ground to deny probate, it must be shown that either (a) the decedent did not understand the provisions of the propounded instrument (at least in certain circumstances); or (b) the drafting attorney erred in misinterpreting the testator's instructions.[4]

II. Mistake in Action

In *Will of Rivera*, the objectant interposed "mistake" as a separate and distinct objection, and proponent brought a motion for summary judgment dismissing mistake and all other objections.[5] The Surrogate's Court of Kings County found there to be material issues of fact as to whether the decedent could understand, read, or write English, opining:[6]

> [W]hereas here the testator is not fluent in English [the proponent] has a greater burden in establishing "that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will."[7]

The Surrogate found that issues of material fact existed with respect to testamentary capacity and due execution because of the undisputed evidence that the propounded instrument was written, and the entire ceremony executed, in English.[8] Although *mistake* was interposed as an objection separate and distinct from testamentary capacity and due execution, the Surrogate analyzed the issue of mistake as relevant to these objections.[9]

The Surrogate's Court of Queens County in *In re Cookson* entertained mistake both as a separate and distinct objection and a factor in testamentary capacity.[10] In *Cookson*, the objectants alleged that that the propounded instrument was executed by the testatrix "by mistake in that she did not understand the contents of the instruments offered for probate," arguing that the decedent had a very different understanding of the value of her residuary estate at the time the propounded instrument was executed, and what the value would be at the time of her death.[11] The Surrogate described the objection as "nonsensical" in determining that a mistake on the part of the testator as to the size of her estate at the time of death is not grounds for denial of probate.[12] Consistent with longstanding precedent, the Surrogate opined, "What the testator has done, not what she meant but failed to do, is to be given effect (citations omitted)."[13]

Although the Surrogate dismissed the objection due to the *type* of mistake made by the testator, the *Cookson* decision solidifies the notion that *mistake* may be interposed as a valid objection to probate. The species of mistake, however, clearly factors into the Surrogate's analysis. A mistake of fact, as alleged in the *Cookson* case, is insufficient.[14]

Another factor that the Surrogate will consider when determining the validity of an instrument tainted by mistake is an attorney-drafter's sworn testimony regarding the circumstances of the mistake. In *Estate of Eleanor Martinico*, the objectants alleged two mistakes which the Surrogate analyzed under the objection of lack of due execution.[15]

First, objectants argued that an erroneous substitution of names in the attorney-drafter's notes led to the disinheritance of one of the objectants.[16] Second, the objectants argued that if the instrument had been duly executed, the decedent would have objected to the instrument when read aloud to her by the attorney-drafter because the instrument referred to the decedent as a male rather than female and the proponent as a female rather than a male.[17] With regard to objectant's first argument, the Surrogate rejected the notion that the error led to disinheritance, relying, in part, on an affidavit proffered by the attorney-drafter affirming that the decedent's recollection of her family tree was accurate.[18] In addition, the Surrogate determined that the erroneous gender designations in the propounded instrument "does not negate [its] execution in accord with EPTL 3-2.1, nor does it negate the testimony of the two witnesses, both attorneys, who knew the decedent for many years, and represented her on other matters."[19]

Attorney testimony also played a crucial role in *Estate of Andrew Walker*, in which the Appellate Division, Third Department, affirmed the decree of the Surrogate's Court of Broome County denying probate.[20] In *Walker*, the petitioner, prior to the testator's death, wrote down the decedent's wishes in changing a provision of his will, and delivered same to the office of the decedent's attorney.[21] However, on appeal, the attorney denied having drafted the alleged instrument, and acknowledged that, although his secretary typed the instrument, he never saw it or approved it.[22] The Appellate Division, citing *Rollwagen*, stated, "in light of the uncertainty surrounding the drafting and execution of the will, we decline to disturb the decree of Surrogate's Court denying admission of the will to probate."[23]

III. The Fifth Objection

It is important to note that our learned Surrogates have not gone rogue in entertaining mistake as a valid objection to probate over the years. The usual four objections, (i) failure of due execution, (ii) lack of testamentary capacity, (iii) fraud, and (iv) undue influence, are not exclusive. Indeed, with the enactment of Section 202 of the Surrogate's Court Procedure Act ("SCPA"), the Surrogate's Court "is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by [the SCPA] or other provisions of law, notwithstanding that the jurisdiction sought to be exercised in the proceeding is or may be exercised in or incidental to a different proceeding."[24]

In *Will of Nancy Artope*, a probate contest, objectants interposed a fifth objection alleging facts seeking to establish a constructive trust for the benefit of objectant.[25] In permitting "a joinder of the objection relating to the imposition of a constructive trust in this probate proceeding," Surrogate C. Raymond Radigan wrote that SCPA 202 "has in effect eliminated the holdings in those cases which have limited this court's equity powers to only those incidental to a specific statute or proceeding provided for in the SCPA (citation omitted)."[26]

Accordingly, a mistake that may be more appropriately analyzed in a construction proceeding may be complained of prior to probate. Of course, the practitioner should be mindful of the issues of claim preclusion, issue preclusion, and contractual release, in deciding whether to interpose mistake as an objection in a probate proceeding or reserve the allegation for a construction proceeding or other avenue of relief.[27]

IV. Interposing Mistake as an Objection

If counsel for an objectant determines to interpose mistake as an objection to probate, the language used should be stated in general terms.[28] Specifics are not necessary, and the objection of mistake need only give sufficient notice.[29] Counsel should be mindful of the case-specific facts, but will not be required to describe the mistake with particularity.[30] Moreover, the objectant is only required to furnish a bill of particulars after it has had an opportunity to conduct and conclude examinations before trial.[31]

A question does arise, however, as to which party bears the burden of proof. The answer is not entirely clear. In *Estate of Obermeyer*, the Surrogate held that the burden fell on the objectant.[32] However, *Obermeyer* analyzed mistake as a separate and distinct defense, and one could argue this general rule does not apply in cases where mistake goes to the issues of due execution or testamentary capacity, where the proponent bears the burden.[33]

"The usual four objections, (i) failure of due execution, (ii) lack of testamentary capacity, (iii) fraud, and (iv) undue influence, are not exclusive."

V. Conclusion

Mistake is an unusual, but oftentimes valid, objection to probate. Before interposing mistake as an objection, counsel should carefully consider whether a probate contest is the most appropriate forum to litigate mistake, as compared to a construction proceeding. The risks of claim preclusion, issue preclusion and contractual release should be carefully considered. In interposing mistake as an objection, the objectants should state the objection in general terms, assured that particulars need not be supplied until the conclusion of pre-trial examination. Whether objections will be successful will be heavily dependent on the particular facts and circumstances, the nature of the mistake, and whether, despite the mistake, "the instrument speaks the language and contains the will of the testator."[34]

Endnotes

1. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876).
2. *In re Watson*, 325 N.Y.S.2d 347, 348 (3rd Dep't 1971) citing *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876); *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).
3. *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).

4. *Estate of Obermeyer*, 2014 WL 1255193 at *3 (Sur. Ct., N.Y. Co. 2014); *But see In re Cookson*, N.Y.L.J., Dec. 16, 2015, p. 34, col. 4 (Sur. Ct., Queens Co. 2015); *In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934, 939 (Sur. Ct., New York Co. 1963); *In re Tousey*, 34 Misc. 363, 364, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
5. *Will of Rivera*, N.Y.L.J., June 20, 2016, p. 26 (Sur. Ct., Kings Co. 2016).
6. *Id.* at *6.
7. *Id.* at *5-*6.
8. *Id.* at *6.
9. *Id.* at *4-*7.
10. *In re Cookson*, N.Y.L.J., Dec. 16, 2015, p. 34, col. 4, at *7-*8 (Sur. Ct., Queens Co. 2015).
11. *Id.* at *7.
12. *Id.* at *7-*8.
13. *Id.* at *8; *see also In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934 (Sur. Ct., N.Y. Co. 1963); *In re Tousey*, 34 Misc. 363, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
14. *In re Estate of Devine*, 41 Misc. 2d 211, 216, 244 N.Y.S.2d 934 (Sur. Ct., N.Y. Co. 1963); *In re Tousey*, 34 Misc. 363, 364, 69 N.Y.S. 846 (Sur. Ct., N.Y. Co. 1901).
15. *Probate Proceeding, Will of Eleanor Martinico*, N.Y.L.J., Oct. 28, 2016, p.41 (Sur. Ct., Kings Co. 2016).
16. *Id.* at *6.
17. *Id.*
18. *Id.*
19. *Id.*
20. *In re Estate of Walker*, 124 A.D.3d 970, 2 N.Y.S.3d 628 (3d Dep't 2015).
21. *Id.* at 630.
22. *Id.* at 630.
23. *Id.* at 631.
24. N.Y. Surrogate's Court Procedure Act 202.
25. *In re Will of Nancy Artope*, 144 Misc. 2d 1090, 545 N.Y.S.2d 670, 671 (Sur. Ct., Nassau Co. 2016).
26. *Id.* at 1092.
27. *In re Klasson*, 2004 N.Y. Slip Op. 50440(U) (Sur. Ct., Nassau Co. 2004).
28. *In re Schneider's Will*, 64 Misc. 2d 299, 314 N.Y.S.2d 587 (Sur. Ct., Westchester Co. 1970).
29. *Id.* at 301.
30. *Id.*
31. *In re Tribble's Will*, 34 Misc. 2d 130, 230 N.Y.S.2d 74 (Sur. Ct., Suffolk Co. 1962); *see also In re Estate of Meyers*, 158 Misc. 942, 287 N.Y.S. 81 (Sur. Ct., N.Y. Co. 1936).
32. *Estate of Obermeyer*, 2014 WL 1255193 at *3 (Sur. Ct., N.Y. Co. 2014).
33. *In re De Castro*, 32 Misc. 193, 194, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900); *Will of Rivera*, N.Y.L.J., June 20, 2016, p.26 (Sur. Ct., Kings Co. 2016).
34. *In re Watson*, 37 A.D.2d 897, 325 N.Y.S.2d 347, 348 (3d Dep't 1971) *citing Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876); *In re DeCastro*, 32 Misc. 193, 66 N.Y.S. 239 (Sur. Ct., N.Y. Co. 1900).

Daniel J. Reiter is an estate litigator and Surrogate's Court practitioner based in New York City. Mr. Reiter is a member of the NYSBA Trusts and Estates Law Section's Committee on Estate Litigation. He can be reached at djr@djrattorney.com.

NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION
One Elk Street, Albany, New York 12207-1002

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

NEW YORK STATE BAR ASSOCIATION

Access Your Publication Online

Visit Us Online to Access the Following Features:

- Past Issues (2000-present) of the *Trusts and Estates Law Section Newsletter**
- *Trusts and Estates Law Section Newsletter* Searchable Index (2000-present)

Your PDF editions include bookmarks and clickable Table of Contents pages

**You must be a Trusts and Estates Law Section member and logged in to access the* Newsletter. *Need password assistance? Visit our website at www.nysba.org/pwhelp. For questions or log-in help, call 518-463-3200.*

www.nysba.org/TrustsEstatesNewsletter