Fordham University School of Law

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Will of Fortune: New York Will Drafting–Part 2

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The Dementia Crisis

Special Issue for Attorneys, Their Loved Ones and Their Clients

By Robert Abrams, Editor
Will of Fortune: New York
| Will Drafting – Part 2

Part 1 of this two-part column, which appeared in the last edition of the Journal, outlined the basics of will drafting. This column is about the importance of clarity in will drafting.

It’s impossible in a column of this length to address all the areas of writing a will. Will drafting is often complex and always detail-oriented. This column focuses, instead, on select will-drafting topics in which clarity is critical. We’ll also include some pitfalls and solutions.

The purpose of a last will and testament is to wind up and settle the testator’s affairs and to communicate the testator’s intent and instructions for the orderly and efficient distribution of the testator’s assets. Without clarity, as well as specificity and thoroughness, the likelihood that a will might accomplish these goals becomes merely aspirational. An unclear will can be the cause of time-consuming and expensive legal proceedings, most often in the form of a construction proceeding or a contested accounting proceeding.

A will is also the instrument by which a testator appoints one or more persons of trust and confidence to accomplish the purposes set forth in the will and to do so according to the testator’s intent. In New York, the person responsible for carrying out the testator’s wishes is the executor. If the testator wants to create one or more testamentary trusts, the person responsible for administering a trust is called a trustee. Executors and trustees are fiduciaries. The responsibilities of fulfilling the testator’s intentions and desires as expressed in a will are called fiduciary duties. Carrying out these fiduciary duties requires a high standard of behavior and undivided loyalty. A will must provide clear directions to the fiduciary.

Although a will is the most basic of instruments to carry out a testator’s intentions, a will is also “often the most important . . . estate planning document.” Estate planning can be complex. It involves understanding and addressing a host of topics. These include the nature and value of the testator’s assets, family dynamics, earlier marriages and the children and grandchildren from those marriages, which family members have survived the testator, the quality of the relationships among the family members, the existence of preexisting planning devices (e.g., inter vivos trusts, earlier wills, contractual agreements such as IRAs, 401(k)s, pension and deferred compensation plans, annuities and life insurance), loans by the testator, business relationships, and debt.

The attorney draftsperson is charged with the responsibility of transcribing into a document the testators’ intentions about settling their affairs and disposing of their assets, so that the final document accomplishes the testators’ goals. The drafting attorney must gain detailed knowledge of the testator’s affairs to draw a will that communicates clearly and with specificity the testators’ intent and instructions for the orderly disposition of the estate. A court will determine the testator’s intent from the four corners of a will if the will is unambiguous. But a court will entertain extrinsic evidence if it finds that a disputed term in a will is ambiguous. This opens the door to introducing documents the testator might not have wanted made part of the public record. For these and other reasons, clarity in will drafting is critical.

Because New York’s Estates, Powers and Trusts Law (EPTL) both authorizes and governs wills in this state, and because other laws, most prominently the Surrogate’s Court Procedure Act (SCPA), also affect the drafting process, familiarity with these laws is crucial to draft a clear and concise will. The EPTL and SCPA establish many default provisions and rules. The EPTL and SCPA frequently contain a phrase emphasizing the importance of clarity in will drafting. That phrase is “unless the will specifies otherwise” or similar words to that effect. It’s up to the attorney draftsperson to be familiar with these opt-out provisions and to take advantage of the opportunities.

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they create to realize the testator’s intent.\textsuperscript{15}

This is no easy task. Will drafting requires attention to detail, difficult and sensitive question asking, a thorough understanding of many EPTL and SCPA provisions, as well as, quite often, banking, real-property, tax, and business corporation, LLC, and partnership laws. The extraordinary number of reported and unreported decisions construing will terms and declaring parties’ rights shows what happens when a will is unclear.

\textbf{Identifying Beneficiaries}

Perhaps most fundamental to will clarity is accurately and completely identifying the intended beneficiaries. Full names, including middle names or initials, and relationship to the testator are essential. If a name is common or if more than one person in a family shares a name, it’s appropriate to include the address of the beneficiary when the will is drafted.

Another area of importance in identifying beneficiaries is to name charitable organizations. Charities might have similar names. Charities may have multiple offices and divisions, or be located in more than one country. Drafting clearly which branch of a charity the testator wishes to benefit is important to avoid litigation among charities or between divisions of the same charity.\textsuperscript{16}

\textbf{Revocatory Effect of Divorce}

It’s also important to identify a spouse by name. This is so especially when gifts or powers of appointment are made to prior spouses or to avoid any question of which spouse the testator desires to be buried or interred with. When it comes to anticipating divorce, EPTL § 5-1.4(a) provides that divorce or annulment has the effect of revoking any testamentary gifts to a spouse named in a will.\textsuperscript{17} EPTL § 5-1.4(a) is one of the EPTL sections that contains a set of words to opt out of the statute.\textsuperscript{18} In this case, the words in EPTL § 5-1.4(a) are “Except as provided by the express terms of a governing instrument. . . .” Thus, it’s possible to draft a will making a testamentary gift to a former spouse if that’s the testator’s desire. The potential for litigation on this issue heightens the importance of drafting clearly, precisely, and specifically.

Divorce or separation also has the effect of revoking a nomination of a spouse as executor or trustee.\textsuperscript{19} This revocation, however, doesn’t apply to the spouse’s family members.\textsuperscript{20} It’s important for the estate-planning attorney to discuss what the testator’s wishes are concerning the in-laws in the event of a divorce so that the will can be drafted to contemplate what happens to appointments of in-law fiduciaries upon divorce. In In re Lewis, the Court of Appeals in dicta agreed with Surrogate’s Court that even though the decedent divorced her husband in 2007, her nomination of her father-in-law in a 1996 document purported to be her last will and testament was not revoked by the divorce.\textsuperscript{21} This might not necessarily be a clarity issue. Nevertheless, if the will had provided for the revocation of the appointment of the father-in-law upon divorce, the Lewis case might never have arisen.\textsuperscript{22}

\textbf{Identifying Who Gets What}

Bequests must be written clearly.\textsuperscript{23} Consider the following bequest: “I give the sum of $50,000 to my friend John D. Rockefeller, founder of Standard Oil, if he survives me. If he does not, then I give this gift to his wife, Laura, if she survives me.” Create a reciprocal bequest to Laura first and then contingently to John. So drafted, the bequests are clear, independent, and not subject to construction.\textsuperscript{24}

\textbf{Identifying the Property and the Bequest}

An area ripe with pitfalls concerns bequests of tangible personal property. It’s customary to draft will clauses giving specific items of the testator’s tangible personal property to particular persons. For example, a testator might make a specific bequest as follows: “I give and bequeath my collection of vintage Libby glassware, regardless of what design, pattern or condition, wherever located, to Edward J. McLaughlin, if he survives me.” Clear enough, but many cases demonstrate pitfalls for the unwary.

In In re Estate of Phillips, the decedent owned a house on a small lot and 88 acres of farmland adjacent to the lot the house was on. His will gave his “house and the plot of land appurtenant thereto” to his girlfriend and the residuary to his daughters. The Surrogate found that the preresiduary language unambiguously meant the house, the lot, and the farmland. On appeal, the Appellate Division ruled that it was impermissible to assume that the decedent knew what “appurtenant” meant and remitted the case to the Surrogate to consider extrinsic evidence.\textsuperscript{25}

Once the specific bequests of “things” are drafted, or if there’re no specific bequests, a clause giving the testator’s tangible personal property is typical. It might read like this:

I give my tangible personal property including without limitation, wearing apparel, personal effects, jewelry, furniture, furnishings, pictures, paintings, and other objects of art, silver, china, glassware, and other household effects, books, and automobiles to my children.
who survive me, to be divided among them in substantially equal shares as they may agree. To the extent my children do not agree, my executor shall make a determination how to distribute or to sell the property and my executor’s decision is final, absolute and unreviewable by any person interested or court of law.

Seems clear enough, but in In re Estate of Rothschild, the court found that a collection of stamps and coins worth millions of dollars wasn’t part of the bequest of tangible personal property but rather investment property that passed to the remainder beneficiary, which was a charity.26 This was so despite the words “without limitation” in the will.27 A contrary result was reached in In re Estate of Faggen,28 in which the court found that a coin and medallion collection was part of the specific bequest of tangible personal property because that bequest contained the words “of every kind” and, the court reasoned, the testator clearly favored his spouse over the remainder beneficiary.

## Digital Assets and RUFADAA

Perhaps one of the newest areas warranting clarity in drafting is accessing and controlling digital assets.29 Nothing is new about disputes between executors and the service providers who act as gatekeepers and custodians of digital assets and accounts over who may access digital assets. The main area of contention has been whether the Terms of Service (TOS) agreement or a decedent’s will controls who may have access to digital-asset accounts. After much negotiation with service providers, many states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). It provides a three-tiered approach: (1) Directions given in an online tool on the Web site of the service-provider controls; (2) if none, or if no tool is available, then directions in the user’s will or other document (e.g., will or power of attorney) prevails; (3) absent either an online tool or the decedent’s written direction, the TOS agreement

controls. The legislature introduced New York’s version of RUFADAA this year. On September 29, 2016, Governor Cuomo signed the bill into law.30 It took effect immediately.

### Conclusion

The topics in this column are but a few examples notching the importance of clear will drafting. The Legal Writer encourages readers to consult one of the several excellent treatises on New York will drafting and estate planning before drafting a will.

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1. A testator, most usually the client, is the living person who makes an oral declaration or puts in writing and declares the document to be the last will and testament. Once the testator dies, the testator is called the decedent.

2. Estates, Powers & Trusts Law (EPTL) § 1-2.19(a).


5. New York is a solemn-probate jurisdiction. The person or bank named in a will is the nominated executor who’ll become the executor only upon the court’s issuing a decree admitting the will to probate and directing that letters testamentary issue to the executor. See Surrogate’s Court Procedure Act (SCPA) §§ 1414(1), 1408(1) & 103(20).

6. An executor is a natural person who’s eligible to receive letters as a fiduciary, SCPA § 707, or a financial institution authorized to act as a fiduciary. Banking Law (NYBL) §§ 100(4), 131 & 201-b; SCPA § 103(20).

7. SCPA § 103(21).

8. See Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”); cf. In re Estate of Rothko, 43 N.Y.2d 305, 320, 372 N.E.2d 291, 296–97, 401 N.Y.S.2d 449, 455 (1977) (applying Meinhard standard to executors).


10. Estate planning often involves will or testamentary substitutes, among which the most prominent is the revocable living trust. Jointly owned assets that pass by right of survivorship and contractual agreements with designated beneficiaries such as IRAs, 401k, pension and deferred-compensation plans, annuities, and life insurance are almost generally not “probate assets” unless there’s no designated beneficiary or the estate is named as the beneficiary. Any further discussion of these topics exceeds the scope of this column.

11. See, e.g., In re Manufacturers & Traders Trust, 42 A.D.3d 936, 937, 839 N.Y.S.2d 642, 643 (4th Dep’t 2007); 11 Hershon et al., supra note 3, at §§ 187.01[2][a] & [4][a]-[b].


13. See EPTL § 1-2.19(a).

14. E.g., id. § 5-1.4(a) (“Except as provided by the express terms of [the will],” a divorce, judicial separation, or annulment revokes bequests in the will to the former spouse, powers of appointment to the former spouse and nominations of the former spouse to serve in any fiduciary or representative capacity); SCPA § 806 (whenever an executor or testamentary trustee is appointed “who is required to hold, manage or invest real or personal property for the benefit of another, he shall unless the will provides otherwise, execute and file a bond”); EPTL § 11-1.2(b) (“Unless otherwise expressly provided by a will under which a disposition is made to or for the benefit of the surviving spouse . . .”); EPTL § 2-1.8(c) (“Unless otherwise provided in a will under which a disposition is made to or for the benefit of the surviving spouse, . . .”); SCPA § 42 A.D.3d 936, 937, 839 N.Y.S.2d 642, 643 (4th Dep’t 2007); 11 Hershon et al., supra note 3, at § 187.01[5][a].

15. O’Connor, supra note 9, at § 4.0, at 4-3.

16. E.g., In re Estate of Scale, 38 A.D.3d 983, 985-87, 830 N.Y.S.2d 618, 620-22 (3d Dep’t 2007) (finding

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demonstrative bequests (“I direct that my gavel collection be sold and the proceeds I give to my sister, Agnes.”); and bequests of specific stock. For a thorough discussion of this topic, see O’Connor, supra note 9, at Chap. 4.

24. See, e.g., In re Estate of Levy, N.Y.L.J., Dec. 18, 2009, at 34, col. 3 (Sur. Ct. N.Y. Cnty) (determining, in a trust that directed the trustee to pay the principal to the then-surviving issue of two grandchildren upon the two grandchildren’s death, whether to pay principal upon the death of the first to die of the grandchildren or not until after all died).

25. Phillips, 101 A.D.3d at 1710, 957 N.Y.S.2d at 778. Similarly, in In re Application of D’Elia, the Surrogate found that when the will read that “I grant a life estate in the real property which I occupy as my primary residence at my death,” the testator meant to give a life estate only for his upstairs apartment and not for the entire two-family home he owned when he died. 2005 N.Y. Slip Op. 51700(U), **2–3, 862 N.Y.S.2d 807, 2005 WL 2715662, at **1–2 (Sur. Ct. Kings Cnty).


27. Id.


29. See Klein, supra note 22.


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