New York State Bar Association

Conducting SCPA 1404 Discovery

by Anne C. Bederka[1]

The purpose of SCPA 1404 discovery is to allow potential challengers to a propounded will to test the instrument's validity before deciding whether to proceed with litigation. This pre-litigation discovery recognizes courts' paramount interest in admitting only valid wills to probate.

No showing is necessary to obtain SCPA 1404 discovery. Rather, SCPA 1404 presents an opportunity for a fishing expedition, allowing potential objectants to engage in full document discovery and limited examinations of the attorney-drafter, attesting-witnesses, and in some cases other persons before committing to a will challenge.

Familiarity with what must be proven and by whom, as well as with the parameters and mechanics of SCPA 1404 discovery, maximizes the chances that potential challengers will be able to make an educated decision on whether to proceed with a will contest.

STANDING TO CONTEST THE WILL

Who can contest a will? Any person whose pecuniary interests are negatively impacted by the propounded will has standing to challenge a propounded instrument.

That includes distributees who take less under the propounded will than they would in intestacy, legatees under prior wills on file with the court who take less under the propounded instrument than under the prior will on file, and persons adversely affected by a codicil to the will.

The list of persons with standing to contest does not include nominated executors under prior instruments unless they are able to show special circumstances and obtain the court's permission. See SCPA 1410.

---

[1] **Anne C. Bederka is a partner in the law firm of Greenfield Stein & Senior, LLP, specializing in trusts and estates litigation and Surrogate's Court practice. She previously served as Principal Law Clerk to Honorable Kristin Booth Glen in the New York County Surrogate's Court and has served as a court-appointed referee and a guardian ad litem in numerous proceedings, including contested probate**

PROVING THE NECESSARY ELEMENTS

The grounds for challenging a will are exclusive and include only lack of due execution (including forgery), lack of testamentary capacity, undue influence, fraud, and duress.

As a threshold issue, a potential objectant must know what he or she must prove to successfully challenge a propounded instrument and, equally important, what the proponent is charged with proving to obtain probate.

Proving Due Execution

It is proponent's burden to prove that the propounded will was properly executed in accordance with the statutory formalities set forth in EPTL 3-2.1.

Proof of due execution will require proponent to establish that the testator signed the instrument at the end or directed another person to sign his name to the instrument in his presence (and in the latter case, that the other person also separately signed his name to the instrument); that the instrument was signed in the presence of at least two attesting witnesses or that the testator, having signed the instrument outside their presence, acknowledged his signature to each of them; that the testator declared to the witnesses that the signed instrument was his will; and that the witnesses, at the testator's request, signed their names and affixed their addresses to the will within 30 days.

The testimony of the attesting witnesses and any attorney who supervised the instrument's execution is critical to meeting proponent's burden of establishing due execution. E.g., Matter of Falk, 47 A.D.3d 21 (1st Dep't 2007); Matter of Scalone, 170 A.D.2d 507 (2d Dep't 1991).

> Practice Note: If there appears to be an infirmity in some part of the execution process, look to the case law to determine whether a lack of due execution objection is viable.
>
> -E.g.: EPTL 3-2.1 requires a testator to declare to each of the witnesses that the instrument he is signing is his will. The witnesses may state that the testator made no such declaration. But the case law holds that it is enough that the witnesses knew the instrument to be the testator's will. So, if the witnesses state that the supervising attorney thanked them as they arrived for agreeing to act as witnesses to the testator's will, that will constitute compliance with the statutory execution formalities.

---

proceedings. Anne would like to thank her associate, Tzipora Zelmanowitz, for her invaluable assistance in updating this article.

Proving "Testamentary Capacity"

See: Matter of Kumstar, 66 N.Y.2d 691 (1985)

Matter of Schlaeger, 74 A.D.3d 405 (1st Dep't 2010)

Matter of Slade, 106 A.D.2d 914 (4th Dep't 1984)

Matter of Paigo, 53 A.D.3d 836 (3d Dep't 2008)

Testamentary capacity does not require a mind without fault or a memory without flaw. In fact, it has been described as the lowest level of capacity under the law. To have testamentary capacity, the testator must understand, and be able to recall without prompting:

(i) The nature and extent of her property.

-Need not be able to state from memory all property owned and its precise value.

-But must be able to call to mind in a general way her real and personal property.

(ii) The natural objects of her bounty.

-"Natural objects" has historically been defined as those persons who will take in the absence of the Will under EPTL 4-1.1.

-But "natural objects" have also been viewed by the Courts as those persons closest to the decedent.

-E.g.: If the testator – in giving his attorney a family tree – omitted a cousin he had never met or hadn't seen since childhood, his failure of recollection is not likely to be considered evidence of incapacity.

(iii) The Will's disposition of her property.

-The testator doesn't need to have a lawyer's understanding of the Will and the terms used in it.

-But the testator must understand the testamentary plan and the effect of the Will.

The burden is on the proponent to prove testamentary capacity by a preponderance of the evidence. The burden is eased, however, by a presumption that the testator has such capacity.

A presumption of testamentary capacity also arises where attesting witnesses have executed a self-proving affidavit. Where a Will has been prepared by an attorney, she has also typically prepared for the witnesses' signature a sworn statement – known as a self-proving affidavit or a "1406 affidavit" – attesting that the testator appeared to be of sound mind, memory and understanding and not under any restraint at the time of execution.

The self-proving affidavit is usually signed by the witnesses immediately following the execution of the Will. It is usually bound in with the Will at the very back.

The self-proving affidavit executed by the witnesses is prima facie evidence of capacity. As discussed below, in the absence of other evidence, the court can and will rely on the affidavit alone to establish capacity.

> Practice Note: The testimony of the attesting witnesses as to a testator's capacity often neutralizes other evidence, including medical records showing the testator has some impairment or has exhibited confusion. In fact, attesting witnesses are the only lay witnesses who are permitted to give an opinion as to the testator's mental capacity to make a will.

The testator need only have capacity at the exact moment of the exact hour of execution (known as a "lucid interval"). E.g., Matter of Hedges, 100 A.D.2d 586 (2d Dep't 1984); Matter of Buckten, 178 A.D.2d 981 (4th Dep't 1991); Matter of Woode, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.); Matter of Hall, 2019 NYLJ Lexis 2231 (Sur. Ct., Kings Co.). Consequently, evidence of capacity that is remote in time will be considered irrelevant.

A testator's depression, suicidal tendencies, physical infirmities, impaired attention, alcoholism, or mental illness will not necessarily negate capacity. E.g., Matter of McClosky, 307 A.D.2d 737 (4th Dep't 2003); Matter of Chiurazzi, 296 A.D.2d 406 (2d Dep't 2002).

In contrast, a will made in reliance on insane delusion is invalid. Matter of Honigman, 8 N.Y.2d 244 (1960); Matter of Zielinski, 208 A.D.2d 275 (3d Dep't 1995), app. dismissed, 86 N.Y.2d 861 (1995). But if there are facts from which the testator could have derived support for her belief, it is not an insane delusion. So, a mistaken belief by a rational testator does not invalidate a Will.

Proving Undue Influence

See: Matter of Walther, 6 N.Y.2d 49 (1959)

Matter of Paigo, 53 A.D.3d 836 (3d Dep't 2008)

Matter of Freilich, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co.)

Undue influence is said to occur when a beneficiary overcomes the free will of a testator and imposes her own will to procure a particular testamentary outcome. The influence exercised

must amount to a moral coercion which caused the testator to act against his free will and desire.

To prosecute an undue influence claim, an objectant must prove by a preponderance of the evidence:

(i) Motive to influence the testator.

(ii) Opportunity to influence the testator.

(iii) Actual exercise of undue influence.

Undue influence is an "all facts and circumstances" test. But in making their case, objectants cannot rely on conclusory allegations. They must point to statements or acts that constitute actual undue influence. Moreover, the evidence offered must not only support a finding of undue influence, it must also exclude any other reasonable explanation for the testator's acts. If the facts as established could support both the conclusion that the will resulted from undue influence and the conclusion that the will expressed the testator's voluntary intentions, objectants' challenge will fail.

If the testator is in a confidential relationship with a beneficiary accused of undue influence and there is circumstantial evidence supporting the claim (such as active involvement in the drafting/execution process or a prior relationship between the beneficiary and the attorney-drafter), an inference of undue influence can be drawn. E.g., Matter of Henderson, 80 N.Y.2d 388 (1992); Matter of Neenan, 35 A.D.3d 475 (2d Dep't 2006); Matter of Stein, 2018 N.Y. Misc. LEXIS 103 (Sur. Ct., New York Co.).

What is a "confidential relationship"?

-Presiding over the testator's finances or controlling his life.

-Serving as the testator's confidante (attorney, priest, doctor, etc.)

The inference does not shift the ultimate burden of proof, but it requires the beneficiary to provide a satisfactory explanation for the bequest (i.e., to establish the bequest was not the result of undue influence).

A close familial relationship operates to negate an inference of undue influence, and an explanation by the beneficiary is not required. E.g., Matter of Walther, 6 N.Y.2d 49 (1959); Matter of Scher, 2008 WL 4149757 (Sur. Ct., Kings Co. 2008). But if the facts indicate that the beneficiary did not act out of family duty and smell strongly of undue influence by a family member, the beneficiary will have an obligation to provide an adequate explanation for the bequest.

Proving Duress

See: Matter of Alini, 2017 NYLJ LEXIS 804 (Sur. Ct., Richmond Co.)

Matter of Rosasco, 31 Misc. 3d 1214(A) (Sur. Ct., New York Co. 2011)

NY's Pattern Jury Instructions for will contests do not include a jury charge for duress. The Restatement 3d of Property Section 8.3(c) defines duress as threatening to perform or performing a wrongful act that coerces the donor into making a transfer she would not otherwise have made.

Duress has often been considered a type of undue influence, but it is distinct. Duress involves threats which induce the testator to act or not act out of fear. It is often proved by showing an act of violence or menacing followed by threat or fear that the act will be repeated.

-E.g.: Testator told others that she was afraid to change her will because her grandnephew – who had been violent in the past – would find out about it and hurt his sister.

Proving Fraud

See: Matter of Paigo, 53 A.D.3d 836 (3d Dep't 2008)

Matter of Evanchuk, 145 A.D.2d 559 (2d Dep't 1988)

To establish fraud, an objectant must establish that a person knowingly made a false statement that caused the testator to dispose of his property in a manner different than he would have in the absence of the statement. To successfully assert fraud, the objectant must be able to establish: (i) a false statement knowingly made, and (ii) causation.

The burden is on an objectant to prove by clear and convincing evidence that a false statement was made and caused a change in disposition. Conclusory allegations won't do. Accordingly, an allegation that the testator never would have made a bequest in the absence of fraud will not win the day.

DOCUMENT DISCOVERY

Prior to conducting SCPA 1404 examinations, a challenger will want to conduct full document discovery, serving CPLR 3120 Notices of Examination and Inspection on the parties and subpoenas on third parties who may have relevant information.

As a threshold matter, potential challengers will want to seek the attorney-drafter's complete file.

-Under CPLR 4503(b) – known as the probate exception to the attorney-client privilege – the attorney-drafter is required to disclose information as to the preparation, execution, or revocation of any will or other relevant instrument. Furthermore, New York courts have ruled that objectants in a will contest can waive the attorney-client privilege. E.g., Matter of MacLeman, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co.); Matter of Bronner, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co.).

In reviewing the attorney-drafter's notes, counsel should be looking for references to the client's assets and next of kin (as evidence of capacity); the client's reasons for bequests and the general plan; and if major changes have been made, the reasons for the changes.

Counsel should also review prior wills and related instruments with an eye towards analyzing incremental versus drastic changes to the testator's historical estate plan.

In reviewing the attorney-drafter's time records, counsel should evaluate time spent with the testator and communications with third parties, especially an alleged undue influencer.

Medical and pharmacy records may also offer critical information about a testator's capacity to execute the propounded will.

-Under the Probate Exception to the Doctor-Patient Privilege – CPLR 4504 – the doctor-patient privilege can be waived in a will contest by the personal representative, spouse, next of kin, or any party in interest. The rationale for the rule is that the testator's mental/physical condition is the main issue.

-Exception: Doctors are not required to disclose privileged communications that would tend to disgrace the memory of the decedent.

To obtain the testator's medical or pharmacy records, counsel must obtain a HIPAA release signed by the preliminary executor and must serve it on the medical provider along with a subpoena.

In addition to the attorney-drafter's file and medical records, a challenger might request:

-Notes of health-care attendants and paraprofessionals who rendered medical care to the testator.

-Prescription drug information.

-Financial records and tax returns (including gift tax returns).

-Bank statements, cancelled checks, receipts for medical expenses.

-Powers of attorney, living wills, HCPs (executed and unexecuted).

-Insurance policies.

-Photos of the testator.

-Audio and videotapes of the testator.

-Appointment books, calendars, diaries, journals of the testator.

-All correspondence written by or received by the testator.

-The testator's address book (to identify potential witnesses)

-The funeral/memorial sign in book (to identify potential witnesses).

These are just a few examples of the documents to be sought by a potential objectant.

SCPA 1404 EXAMINATIONS

If information gleaned during document discovery hasn't ruled out a will contest, the next step in the process is examination of the attorney-drafter and the attesting witnesses. If the will has a no-contest clause, the nominated executor and proponent are also subject to examination. And if respondent believes that there are additional persons who possess critical information about the validity of the propounded will, an application can be made for a court order authorizing their pre-objection examinations as well. To obtain such an order, respondent must show that the proposed deponent possesses information "that is of substantial importance or relevance to a decision to file objections to the will." See SCPA 1404(4).

The potential objectant will want to be thorough in preparing for and conducting these examinations, as there is no second bite at the apple. Respondent's counsel will not be able to depose the witnesses a second time except upon court order after a showing of special circumstances (e.g., change of testimony, new evidence of fraud/undue influence, expert determination of forgery).

The scope of the examinations is any matter that may provide a basis for filing objections to the Will. Note, however, that the examinations are confined to events that occurred 3 years before execution of the propounded will and 2 years after unless the period is expanded due to special circumstances (i.e., allegations of fraud or a continuing course of wrongful conduct or undue influence). See Uniform Rule 207.27.

The information sought from the attorney-drafter and attesting witnesses should be designed to elicit information that will allow respondent's counsel to determine whether the instrument was properly executed, whether the testator had capacity, and whether the instrument was freely made and reflects his testamentary desires.

Practice Tip: Asking ultimate questions, such as "Was the testator competent to execute a will?" will almost certainly garner predictable answers supporting the propounded will. Instead, counsel will want to probe the factual bases for the witnesses' conclusions that the testator was competent and the propounded will represents his actual wishes.

Examples of relevant lines of inquiry are:

The Testator's Relationship with the Attorney-Drafter

-Did the testator have a longstanding relationship with the attorney-drafter?

-How long?

-How many times did the attorney-drafter see the testator over the 3-year period prior to execution?

-If no prior relationship, who referred the testator to the attorney?

-Did the attorney-drafter have a prior relationship with a primary beneficiary?

The purpose of this line of inquiry is to probe whether the attorney-drafter was working as the testator's agent or instead was an instrument of another person who may have unduly influenced the testator.

The Testator's Participation in Estate Planning

-Who set up meetings with the attorney-drafter?

-Who attended meetings?

-Who gave instructions regarding the terms of the will?

-E.g.: If the attorney-drafter says that he was first contacted by the testator's niece, who conveyed her aunt's desire to make a will leaving everything to the niece, appropriate follow-up questions would be:

-When and where did you first speak with the testator?

-Alone or with the niece?

-How many times did you meet with the testator prior to execution of the will?

-Did you confirm her desire to leave everything to the niece?

-Did you determine why she chose not to leave any portion of her estate to whomever?

-Did you send the testator a draft of the will for review?

The purpose of this line of inquiry is to assess the testator's involvement in the process. Did the attorney-drafter simply follow the lead of another person who may have been dictating the terms of the Will?

The Testator's Mental and Physical Condition

-Was the testator able to communicate? Was he talkative? Lucid? Strong-minded?

-What information did he provide about his family?

-What did he tell the attorney-drafter about his assets?

-Did he suffer from any mental defects?

-Did the testator have any medical issues? Diagnoses?

-Was he on any medications?

-Had he recently been hospitalized?

-What were his living arrangements?

-Was he able to take care of personal business?

-Was he working and/or managing his own financial affairs?

-Ability to conduct business/financial matters is strong evidence of capacity. E.g., Matter of Nofal, 35 A.D.3d 1132 (3d Dep't 2006).

The Testator's Relationships with Legatees/Distributees

-Does the propounded will's scheme match the testator's relationships at the time of execution?

-What reasons did he give for his testamentary plan?

-Was this will a significant deviation or sudden disinheritance or did it represent only an incremental change?

-If the will does not provide for those nearest and dearest, is there a reason other than undue influence why a beneficiary received a bequest?

Practice Tip: To successfully assert an undue influence objection, an objectant will be required to exclude other reasonable explanations for the testator's actions in providing for the alleged undue influencer.

The Testator's Dependency Upon Others

-Was there a confidential relationship between the testator and any beneficiary?

-Did any beneficiary control the testator's finances?

- Was any beneficiary acting under a power of attorney or health care proxy?

-Was the testator isolated from family members?

Particulars of Execution

-Where did execution take place?

-Did the attorney-drafter speak with the testator before execution?

-What did they speak about?

-Who else was present for that conversation?

-Did the attorney-drafter review the will with the testator?

-Did the testator have any questions or did he confirm that the will represented his testamentary wishes?

-When did the attesting witnesses come into the room?

-How were the witnesses related to the testator or to the attorney-drafter?

-Did the attorney-drafter follow a particular protocol for executing wills?

-What was it?

-Did s/he follow it here?

-Who signed the will first?

Practice Tip: Have the witness identify her signature and any other signatures she recognizes.

-Who filled in the date?

-Did the testator "publish" the will to the witnesses?

-If the testator did not declare the document to be his will, did the witnesses know they were signing a will?

-Was the attestation clause read aloud?

-Did the witnesses sign a self-proving affidavit? When?

-Was it customized as necessary if the testator could not read/write English or suffered from a defect in sight, hearing or speech?

-Did anyone leave the room during the execution process?

-What happened to the original will? What about copies?

The purpose of this line of inquiry is to ensure that the requirements of execution as set forth in EPTL 3-2.1 have been met.

If a Witness Does Not Recall the Testator or the Execution Process

Forgetful witnesses are a common problem. The attorney-drafter may have forgotten the testator if he was not a long-standing client or if the instrument is very old. Attesting witnesses are even more likely to have forgotten, as they often have only fleeting contact with a testator.

If only one of two attesting witnesses has been located and she does not have a specific recollection of the execution ceremony, that does not affect the validity of the will. (Matter of Leach, 3 AD3d 763 [3d Dept. 2004]).

If both attesting witnesses say they do not have a specific recollection of the testator or the execution ceremony, that does not affect the validity of the will. See SCPA 1405; Matter of Nelson, 2019 NYLJ LEXIS 503 (Sur. Ct., Richmond Co.); Matter of Finocchio, 270 A.D.2d 418 (2d Dep't 2000); Matter of Collins, 60 N.Y.2d 466 (1983).

If none of the attesting witnesses can be found or they cannot testify, the will can be admitted to probate upon proof of the testator's handwriting and the handwriting of at least one attesting witness and other proof sufficient to prove the will. See SCPA 1405.

If the Attorney-Drafter Does Not Recall the Testator or the Execution Process

If the attorney-drafter doesn't remember the testator or his will, proponent's counsel – charged with proving due execution – might ask:

-Does the attorney-drafter recognize his signature and those of the attesting witnesses on the will?

-Did he have a particular protocol for drafting a will?

-What was it?

-Did he always follow that protocol?

> -E.g.: Was it his practice to forward a draft to the client prior to execution? Was it his practice to review the will's provisions with the client immediately prior to execution? (This will help to establish that the testator understood the contents of the Will, as required for testamentary capacity.)

-Did he have a protocol for supervising the execution of a will?

-What was it?

> -E.g.: It may have been the drafter's practice to ask the testator to sign her will and then to ask: (1) What is this document you have just signed? (2) Do you want us to act as witnesses to your will? (3) Do you want us to sign the affidavit at the end stating you are competent to make a will today? And then to read the attestation clause aloud and have the witnesses sign.

-Did the attorney-drafter follow the protocol every time?

-Would the attorney-drafter have permitted the execution to go forward if he had any question as to the testator's capacity to make a will or whether it reflected the testator's true testamentary desires.

If the Attesting Witnesses Have Forgotten

If an attesting witness does not remember the execution process, proponent's counsel should nevertheless have her identify her signature on the will and the self-proving affidavit. Counsel might also ask:

-Does the witness recognize the signature of any other attesting witness?

-Has the witness signed other wills in execution ceremonies presided over by the attorney-drafter?

> -If the answer is yes, have the witness describe the usual execution process. (The attesting witness should, if possible, verify the attorney-drafter's recollection of his usual practice.)

-Would the witness have agreed to witness any will if he had concerns about the testator's capacity or freedom from restraint?

Relying on Presumptions in the Absence of Relevant Testimony

In the absence of relevant testimony, the proponent can rely on presumptions.

If the execution was supervised by an attorney, there is a presumption that the statutory requirements of execution were met and the will was properly executed. Matter of Falk, 47 A.D.3d 21 (1st Dept 2007); Matter of Moskoff, 41 A.D.3d 481 (2d Dept. 2007).

If the will has an attestation clause, there is also a presumption of compliance with the statutory requirements. Matter of Falk, 47 A.D.3d at 26; Matter of Moskoff, 41 A.D.3d at 482; Matter of Malan, 2008 WL 4816337 (2d Dep't 2008); Matter of Gold, 2018 NYLJ LEXIS 2656 (Sur. Ct., New York Co.).

If the witnesses have executed self-proving affidavits, there is a presumption of testamentary capacity and the affidavit constitutes prima facie evidence of the facts attested to therein. Matter of Clapper, 279 A.D.2d 730 (3d Dep't 2001); Matter of Friedman, 26 A.D.3d 723 (3d Dep't 2006).

These presumptions are not overcome merely because the attesting witnesses are unable to recall the details of the execution ceremony. E.g., Matter of Scaccia, 66 A.D.3d 1247 (3d Dep't 2009); Matter of Leach, 3 A.D.3d 763 (3d Dep't 2004); Matter of Finocchio, 270 A.D.2d 418 (2d Dep't 2000). This means that if there is no other evidence, legal presumptions alone can be used to establish testamentary capacity and due execution. In the appropriate case, proponents can and will rely on them in concluding that the testator had capacity and the will was properly executed.

WHETHER AND WHEN TO PROSECUTE OBJECTIONS

After document discovery and SCPA 1404 exams are complete, respondent will have to decide whether objections should be filed.

Under SCPA 1410, objections must be filed within 10 days after the examinations are complete or within the time frame fixed by the parties or the court.

In deciding whether to prosecute objections, respondent must look at the big picture. If there are ten prior testamentary instruments that have to be successfully challenged before respondent fares measurably better than under the propounded instrument, that must clearly factor into the decision.

Respondent must also keep in mind the odds of winning. Burdens of proof, the presumptions that apply, the rules of evidence,[2] and even the funding of the litigation stack the deck against objectants.

---

[2]One example of a rule of evidence that skews the odds is CPLR 4519 – the so-called Dead Man's Statute. Under that rule, any person who will gain or lose depending on the outcome of the will contest is precluded from testifying in his or her behalf as to personal transactions or communications with the decedent. The rule bars all testimony that the testator, if living, could contradict or explain. The statute does not apply if the witness is testifying against his or her own pecuniary interest or if the witness is being examined on behalf of the adverse party. Moreover, the statute applies only to testimony, not documentary evidence, and applies only at time of trial, not to pre-trial disclosure. Protection of the statute can be waived by the personal representative or by failure to object to testimony, by opening the door through questioning an adversary, etc.

Finally, respondent must consider the costs of a will contest. The proponent's fees are borne by the estate unless the will has not been offered in good faith. Objectants, in contrast, pay their own way.

PARTIAL PROBATE: ELIMINATING THE ATTORNEY-DRAFTER FROM THE WILL

See: NY Rules of Professional Conduct, Rule 1.8(c), Eff. April 1, 2009

Matter of Putnam, 257 N.Y. 140 (1931)

Lawyers are prohibited from soliciting bequests/gifts from clients. Lawyers are also prohibited from drafting instruments giving them or any related person a bequest unless the lawyer or related person is related to the client and a reasonable lawyer would conclude the transaction is fair and reasonable.

> "Related persons" include a spouse, descendants, ancestors, or other relatives or individuals with whom the lawyer or client maintains a close, familial relationship.

If the will gives a bequest to the attorney-drafter or his family, respondent – relying on Rule 1.8(C) – might argue for what is known as "partial probate," a means by which an improper gift is excised from the will as invalid.

The court may schedule a so-called "Putnam hearing" to determine whether the gift to the attorney-drafter resulted from undue influence.

The burden is on the attorney-drafter to show the bequest was freely made.

UNDUE INFLUENCE BY ATTORNEY DRAFTERS SEEKING APPOINTMENT

See: Matter of Weinstock, 40 N.Y.2d 1(1976)

If respondent has uncovered evidence to establish that the attorney-drafter has been appointed as executor through undue influence, misrepresentation, or other wrongful conduct, respondent may object on that limited ground and seek to have the attorney-drafter disqualified as executor.

Note, at any rate, that an attorney-drafter who is appointed as executor must comply with SCPA 2307-a. When an attorney prepares a will naming himself, his employee, or an affiliated

attorney as executor, they must sign an acknowledgment,[3] in the presence of a witness, that the testator was informed that:

-Any person is eligible to serve as executor.

-Absent contrary agreement, any person (including an attorney) who serves as executor is entitled to statutory commissions.

-If the attorney serves as executor and also renders legal services to the estate, he will receive both commissions and legal fees.

-If the acknowledgment is not signed, an attorney-executor will only receive ½ of the statutory commissions.[4]

The purpose of SCPA 2307-a is to assure that clients appointing their attorneys as fiduciaries understand the financial ramifications.

If the requirements of SCPA 2307-a are not met, the commissions of an attorney-executor (or his employee) are reduced to one-half.

A determination of whether there has been statutory compliance will be made by the court when the will is admitted to probate.

A.C.B.

---

[3] The acknowledgment must be in a document separate from the will. See SCPA 2307-a.

[4] This fourth prong, spelling out the consequences of not signing, was added by a subsequent amendment to the statute.