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– Part One**

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Focus on Forgery – Part One

By Amy F. Altman

An allegation of forgery in a probate contest is inherently more difficult to prove than other potential objections. Indeed, a forged will often implicates multiple actors who have conspired to commit both forgery and perjury,¹ and finders of fact may be reluctant to conclude that the attesting witnesses have willingly participated in a crime.² In cases where no attorney-draftsperson is known to have been present at the time of execution – and therefore lack a presumption of due execution³ – allegations of wrongdoing abound. Nevertheless, mere allegations of forgery without evidence that rises to the standard of clear and convincing evidence will be a fruitless endeavor.

To prevail, the proponent of the will (the “proponent”) must understand their burden of proving due execution. Both the proponent and any objectant to the will (an “objectant”) must be mindful of authentication standards for documents containing decedent’s signature, which will aid handwriting experts⁴ and lay witnesses alike. This article, which is the first in a Focus on Forgery series, will concentrate on important considerations for practitioners preparing for a trial on the issue of forgery.

Fraud Versus Forgery

Although forgery and fraud are often used synonymously, a formal objection of fraud in a will contest is materially different from a claim that the propounded will has been forged. To prove fraud, an objectant must show that a false statement

or knowing misrepresentation was made to the decedent, thereby inducing her to execute a will that disposes of her property differently than she otherwise would have.⁵ This article will focus exclusively on the act of forgery, defined as the false making of an instrument – the propounded will – which purports on its face to be good and valid for the purpose for which it was created, with an intention to defraud.⁶

A Shifting Burden

Widely recognized among practitioners is the proponent’s burden of proving due execution of the will by a preponderance of the credible evidence.⁷ Lesser recognized by practitioners is the fact is that once due execution has been established, the burden shifts to the objectant, who will have to prove by clear and convincing evidence that the will was not duly executed, but rather a product of forgery.⁸ While the term “burden of proof” applies to the party bearing responsibility for proving an allegation, the term “quantum of proof” seeks to measure the degree to which the truth has been established. An objectant in a forgery trial must present evidence that makes it highly probable that a forgery actually occurred.⁹

The proponent’s statement of issues¹⁰ prepared shortly before trial should clearly outline the burden of proof, the fact that there is a shifting burden in the case of a forgery allegation, and the quantum of proof.¹¹ A sample statement of issues in a forgery trial may look similar to the following:

Issue #1(a)

Was the propounded Last Will and Testament of John Doe, dated January 1, 2026, duly executed in accordance with N.Y. Estates, Powers & Trusts Law 3-2.1 (EPTL)?

Burden of Proof: Proponent

Quantum of Proof: Preponderance of the credible evidence

Issue #1(b)

If the proponent has met their burden of demonstrating that the propounded instrument was duly executed, has objectant established that the signature appearing on the propounded instrument is forgery?

Burden of Proof: Objectant

Quantum of Proof: Clear and convincing evidence

With a shifting burden and high quantum of proof, an objectant should carefully consider whether the evidence collected during discovery, including their handwriting expert's reports and prospective testimony, will meet the high standard of clear and convincing evidence at trial. Similarly, the proponent should be well prepared to prove their initial burden of due execution and to address the objectant's "proof" of forgery during cross-examination.

Establishing Due Execution

The proponent must establish that the propounded will was duly executed.¹² Testimony by disinterested witnesses who attended the will execution (such as the attorney-draftsperson, attesting witnesses, or notary) should be used to establish that the will was signed by the testator in their presence; that the decedent declared the instrument to be their last will and testament and asked the attesting witnesses to sign the instrument; and that the attesting witnesses thereafter signed their names at the end thereof. A curated set of questions should be prepared by the proponent's counsel for each attesting witness, with the goal of crafting a seamless narrative establishing that the elements of EPTL 3-2.1 have been met by a preponderance of the evidence. Note that an attestation clause and self-proving affidavit give rise to a *presumption* of compliance with the statutory requirements for due execution.¹³

A successful direct examination will not only establish the elements of due execution but will also paint a genuine and consistent picture of the circumstances surrounding the testator's intent. Topics that may assist in creating a winning narrative include: the setting in which the execution took place; the events leading up to each witness's participation in the will's

execution; the relationship between the testator and each of the witnesses; and any conversations that took place before and/or after the will's execution. In preparing for trial, the witnesses should review their attesting witness affidavits and their prior deposition testimony. Refreshing the witnesses' memories will assist in warding off any attempt to impeach their credibility on cross-examination.

Ideally, the proponent's witnesses will provide wholly consistent testimony. However, due execution is often established even when there are discrepancies in the witnesses' testimony about the execution process.¹⁴ In *In re Marin*, for example, the testimony of a notary who witnessed the execution ceremony was relied upon to create a prima facie case of due execution even though one of the attesting witnesses did not recall seeing the decedent sign the instrument.¹⁵ In *In re Collins*, the Court of Appeals held that a will could be admitted to probate even where neither witness recalled the events surrounding the execution process, so long as the presiding court is otherwise satisfied that the will was properly executed.¹⁶ The *Collins* court observed that "testimony of the attesting witnesses is entitled to great weight."¹⁷ Their failure to recollect the event may be significant in determining whether the formalities of execution were followed.¹⁸ A failure of their recollection intensifies the care and vigilance that must be exercised in examining the remaining evidence."¹⁹

While courts have often forgiven lapses in the witnesses' memories, the proponent must focus on the circumstances surrounding the execution of the will in order to meet the standard of preponderance of the evidence. A finding that the proponent established a prima facie case of due execution will allow the burden to shift to the objectant to prove forgery by clear and convincing evidence.

Considerations for the Objectant

In the event an objectant's case is composed of nothing more than self-serving allegations of forgery, such allegations will not survive a motion for summary judgment, much less the objectant's high quantum of proof at trial.²⁰ In *Matter of Newbald*, the court granted a motion for summary judgment where the expert's report was unsworn and failed to identify the questioned documents or the relied-upon exemplars.²¹ However, a carefully crafted handwriting expert's report that relies on proper exemplars and definitively concludes that the signature on the propounded instrument is a product of forgery will likely be enough to stave off summary judgment and may even meet the quantum of proof at trial.²² Handwriting experts will be best served by many good exemplars that showcase deviations in decedent's handwriting in order to create a pattern that can be relied upon drafting their report. In *In re Estate of Sylvestri*, the Court of Appeals found that a jury could rely solely on the testimony of a handwriting expert to reject a will



for lack of due execution, notwithstanding the testimony of three attesting witnesses whom the jury did not find credible.²³

Notwithstanding the ruling in *Sylvestri*, an objectant should not place her entire quantum of proof in one proverbial basket. The ruling in *In re Taylor* granting summary judgment is instructive for future objectants. The *Taylor* court based its ruling on the fact that “the objectant ha[d] not even presented a theory with regard to either the identity of the alleged forger or a motive that would cause the two attorneys and two attesting witnesses to misrepresent the genuineness of the instrument.”²⁴

The presentation by the objectant of a compelling narrative regarding the whereabouts of the decedent and/or the motive of the attesting witnesses could place all of the proponent’s evidence into question. While a handwriting expert’s testimony may be found credible by the court, case law demonstrates that expert testimony alone may – or may not – be enough to obtain a ruling of forgery by clear and convincing evidence.²⁵

Authentication of Exhibits

In addition to consistent testimony by witnesses, each side is well advised to gather as many documents bearing decedent’s signature (known as “exemplars”) as possible. These exemplars, unless self-authenticating, will be admitted into evidence through witness testimony. Compiling the documents and determining how to obtain original and/or certified copies of decedent’s signatures is essential, but getting the documents admitted into evidence will require a separate analysis. A writing may be deemed hearsay and thus inadmissible unless it falls within an exception to the hearsay rule.²⁶

Documents can be admitted into evidence if they were kept in government offices and are original, or are certified copies, pursuant to N.Y. Civil Practice Law & Rules 4540 (CPLR) (note that Article 45 of the CPLR contains numerous provisions for the introduction of documentary evidence that should be reviewed in light of the documents amassed by counsel).²⁷ Generally, self-authenticating documents are non-controversial and may include, but are not limited to, the decedent’s passport, driver’s license, marriage license, and/or naturalization papers.²⁸ Either the proponent or objectant should seek to pre-mark these exhibits and have them entered

into evidence upon the agreement of all parties prior to trial.²⁹ Assuming the proponent or objectant has engaged a handwriting expert or has identified witnesses familiar with decedent’s handwriting, they will use the exhibits admitted into evidence to compare against the disputed signature on the propounded instrument.³⁰

Counsel should also consider the creation of a demonstrative exhibit showcasing copies of the signatures on the exemplars alongside decedent’s signature on the will. While this technique may effectively point out similarities in the signatures, the proponent’s counsel should be mindful that opposing counsel may use it to their own advantage by employing the objectant’s expert to point out glaring differences.

Demonstrative evidence, while probative, is not necessarily admitted for its truth but rather as an aid used to explain or illustrate a witness’s testimony or the presentation of the proponent’s case.³¹ Acceptance or rejection into evidence of demonstrative evidence rests in the court’s discretion, and admission is based upon a number of factors, including relevancy, authentication, foundation, and prejudice.³²

Review the Instrument (in More Ways Than One)

A review of the propounded instrument requires both a careful forensic review of the physical document by the expert and a review of the dispositive terms. If the physical instrument contains irregularities (such as differing ink, paper or printed tracings), the instrument itself may prove to be the most essential exhibit relied upon by an objectant’s expert (more to follow on handwriting experts in part two of this series). In the months leading up to trial, an examination of the original instrument at the courthouse under magnification and using other specialized equipment furnished by the handwriting expert is critical. The expert’s findings may become the foundation of their report.

Additionally, the nature of the dispositive provisions in the instrument will be a critical fact to consider. If the provisions of the will are natural – for example, they leave everything to a surviving spouse or the decedent’s next of kin – and the identities of the subscribing witnesses are easily explained,³³ it will be much harder to prove a conspiracy. If,

instead, the terms of the will represent a drastic deviation from the testator's known desires or prior testamentary plans or the witnesses appear to have been selected by the alleged forger, these facts will serve to buttress a claim of forgery.³⁴

In the months leading up to a potential trial on the issue of forgery, proponent's counsel would be well served by focusing on how the evidence adduced may be used to support each side's narrative, as well as on how to address at trial those facts that have persuaded the court to deny any motion for summary judgment. Equally important is a document authentication analysis that focuses on getting exemplars admitted into evidence under the evidentiary rules, and the development of witness examination outlines that bolster or undermine, as necessary, critical witness testimony. Finally, given the importance of expert testimony in a forgery trial, significant time will be devoted to ensuring that trial counsel understands the basis of the expert's conclusions and is able on direct examination to assist the expert in an orderly presentation of the evidence or, conversely, is able on cross-examination to exploit any weaknesses or inconsistencies in the expert's presentation.



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Endnotes

1. *In re Liquori*, N.Y.L.J., Mar. 1, 2001, p. 22, col. 4 (Sur. Ct., Kings Co.).
2. *Id.*
3. *In re Walker's Will*, 124 N.Y.S. 615 (Sur. Ct., Rockland Co. 1910); see also *In re Kiefer's Will*, 356 N.Y.S.2d 520 (Sur. Ct., Yates Co. 1974); 3 Warren's Heaton on Surrogate's Court Practice § 41.10.
4. Retaining a handwriting expert is not mandatory; however, it may be the only evidence the objectant is able to provide. The next article in this series will focus on handwriting expertise in the context of a forgery trial.
5. *In re Will of Coniglio*, 663 N.Y.S.2d 456 (App. Div. 4th Dep't 1997).
6. *Piedra v. Vanover*, 579 N.Y.S.2d 675 (App. Div. 2d Dep't 1992).
7. *Estate of Frank Martello*, N.Y.L.J., July 31, 2014, p. 27, col. 6 (Sur. Ct., Suffolk Co.).
8. *Bryant v. Bryant*, 856 N.Y.S.2d 22 (Table) (Sur. Ct., Bronx Co. 2007); *Albany County Sav. Bank v. McCarty*, 149 N.Y. 71 (1896); see also *Paciello v. Graffeo*, 819 N.Y.S.2d 480 (Mem) (App. Div. 2d Dep't 2006).
9. *Home Ins. Co. of Indiana v. Karantonis*, 550 N.Y.S.2d 77 (App. Div. 3d Dep't 1989).
10. N.Y. Comp. Codes R. & Regs. tit. 22, § 207.30 (N.Y.C.R.R.).
11. *Martello*, N.Y.L.J., July 31, 2014, p. 27, col. 6; see also 9 Warren's Heaton, Surrogate's Court Practice § 117.02(1)(c).
12. EPTL 3-2.1.
13. *In re Mooney*, 903 N.Y.S.2d 490 (App. Div. 2d Dep't 2010) (citing *In re Estate of Collins*, 60 N.Y.2d 466 (1983)); *In re Malan*, 866 N.Y.S.2d 774 (App. Div. 2d Dep't 2008); *In re Moskoff*, 836 N.Y.S.2d 708 (App. Div. 2d Dep't 2007)).
14. *Collins*, 60 N.Y.2d 466; *In re Liquori*, N.Y.L.J., Mar. 1, 2001, p. 22, col. 4 (Sur. Ct., Kings Co.); see also *In re Marin*, 918 N.Y.S.2d 591 (App. Div. 2d Dep't 2011).
15. *Marin*, 918 N.Y.S.2d 591.
16. *Collins*, 60 N.Y.2d 466.
17. *Id.* at 473 (citing *Orser v. Orser*, 24 N.Y. 51, 52 (1861)).
18. *Collins*, 60 N.Y.2d at 473 (citing *Woolley v. Woolley*, 95 N.Y. 231 (1884)).
19. *Collins*, 60 N.Y.2d at 473 (citing *In re Kellum*, 52 N.Y. 517, 519 (1873)).
20. *In re Estate of Taylor*, 936 N.Y.S.2d 61 (Table) (Sur. Ct., Bronx Co. 2011); see also *Estate of Newbold*, N.Y.L.J. Oct. 31, 2013, p. 32 (Sur. Ct., Kings Co.).
21. *Newbold*, N.Y.L.J., Oct. 31, 2013, p. 32.
22. *In re Estate of Sylvestri*, 44 N.Y.2d 260 (1978).
23. *Id.* at 267.
24. *Taylor*, 936 N.Y.S.2d 61 (Table).
25. *In re Liquori*, N.Y.L.J., Mar. 1, 2001, p. 22, col. 4 (Sur. Ct., Kings Co.); *In re Lowinger*, 246 N.Y.S.3d 380 (App. Div. 2d Dep't 2025).
26. 1 N.Y. Evidence Proof of Cases 3d § 8:2 (2025).
27. CPLR 4540 provides that a copy of an official record held by any government office in the United States "is prima facie evidence of such record."
28. The authentication of all other types of documents, such as business records (CPLR 4518), can be found throughout the various subsections of Section 4500 of the CPLR.
29. 22 N.Y.C.R.R. § 202.34, entitled "Pre-Marking of Exhibits," states that both sides should confer in good faith to agree upon which exhibits will be admitted into evidence without objection.
30. CPLR 4536.
31. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 645-47 (2006).
32. Davidowitz & Dreher, *Foundation Evidence, Questions and Courtroom Protocols* § 6.3 at 59 (4th ed. 2012).
33. *In re Shaver's Estate*, 231 N.Y.S. 596, 602 (Sur. Ct., Oneida Co. 1928), *aff'd sub nom. In re Will of Shaver*, 235 N.Y.S. 882 (Mem) (App. Div. 4th Dep't 1929).
34. *In re Walther's Will*, 6 N.Y. 2d 49, 55 (1959) (citing *Tyler v. Gardiner*, 35 N.Y. 559 (1866); *Eckert v. Page*, 146 N.Y.S. 513, 515 (App. Div. 1st Dep't 1914)).