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TRUSTS AND ESTATES

No Signature Required: N.J. Leads the Way With Writings Intended as Wills

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Faced with everything from DVDs to Post-it notes, New Jersey courts are admitting to probate nontraditional "documents" as writings intended as wills. A recent New Jersey Appellate Division decision, *In re Estate of Ehrlich,* is the latest example of the movement away from strict compliance with will formalities.

Erosion of Formalities

The national trend away from strict formalities has developed in large part since the adoption of § 2-503 of the Uniform Probate Code (UPC) in 1990. In adopting the UPC, New Jersey codified the formal requirements for a traditional will. These basic requirements are delineated in N.J.S.A. §§ 3B:3-1 and 3B:3-2.

With the adoption of the UPC, New Jersey also adopted the harmless error doctrine (UPC § 2-503), allowing documents that lack the traditional requirements for a valid will to be probated. N.J.S.A. § 3B:3-3 states:

> [A] document or writing is treated as if it had been executed in compliance with N.J.S.A. 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 [a] formerly revoked will or formerly revoked portion of the will.

The doctrine of harmless error ignores the traditional statutory elements and focuses directly on whether the testator intended the document to be effective as his last will and testament.

The majority of states has rejected the UPC § 2-503 harmless error doctrine in favor of strict compliance with the statutory requirements to create a valid will. Only Hawaii, Michigan, Montana, South Dakota and Utah have joined New Jersey in adopting the UPC's harmless error doctrine in full. California, Colorado, Ohio and Virginia have adopted a variation of the doctrine.

The *Ehrlich* Case

The New Jersey Appellate Division upheld the probate of a copy of an unsigned document in *In re Estate of Ehrlich*, 427 N.J. Super. 64 (App. Div. 2012), *appeal dismissed,* 2013 WL 1798027 (N.J. 2013) (the Appellate Division decision was appealed to New Jersey Supreme Court as of right based on dissent, but was dismissed by stipulation of the parties on April 26, 2013).

Decedent Richard Ehrlich was a trust and estate attorney who practiced in Burlington County for over 50 years. At his death, his only heirs or next of kin were his deceased brother's three adult children — Todd and Jonathan Ehrlich, and Pamela Venuto.

The material facts were undisputed. The decedent had not seen or had any contact with Todd or Pamela in over 20 years, but he did maintain a relationship with Jonathan. In fact, the decedent told his closest friends that Jonathan was the person to contact if he became ill or died, and that Jonathan was the person to whom the decedent would leave his estate.

Jonathan learned of his uncle's death nearly two months after the pass-

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ing. He then located a copy of a purported will in a drawer near the rear entrance of the decedent's home. He filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, objected.

The document proffered by Jonathan was described by the Appellate Division as a copy of a detailed 14-page document entitled "Last Will and Testament," typed on legal paper with Ehrlich's name and law office address in the margin of each page. Further, although the document did not contain the decedent's signature or any witnesses' signatures:

> It [did], however, include, in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H.W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.

Ehrlich, 427 N.J. Super. at 68.

The purported will provided $50,000 to Pamela; $75,000 to Todd; 25 percent of the residue to a trust for the benefit of a friend, Kathryn Harris; and 75 percent of the residue to Jonathan.

It was "undisputed that the document was prepared by the decedent and just before he was to undergo life-threatening surgery." On the same date as the proffered will — May 20, 2000 — the decedent also executed a power of attorney and living will, which were both witnessed by the same individual, the Burlington County surrogate, who later predeceased the decedent. As with the purported will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page.

The evidence established that, years after drafting these documents, the decedent acknowledged to others that he had a will and wished to delete the bequest to his former friend, Kathryn Harris. Nevertheless, no later will was ever found.

After discovery, the parties cross-moved for summary judgment. The trial court granted Jonathan's motion and admitted the document to probate. The court reasoned:

> First, since Mr. [Richard] Ehrlich prepared the document, there can be no doubt that he viewed it. Secondly, while he did not formally execute the copy, his hand written notations at the top of the first page, effectively demonstrating that the original was mailed to his executor on the same day that he executed his power of attorney and his health directive is clear and convincing evidence of his "final assent" that he intended the original document to constitute his last will and testament as required both by N.J.S.A. 3B:3-3 and [*In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 310 (App. Div. 2010)].

Ehrlich, 427 N.J. Super. at 69.

On appeal, the Appellate Division articulated the issue as "whether the unexecuted copy of a purportedly executed original document sufficiently represent[ed] decedent's final testamentary intent to be admitted into probate."

Citing to the legislative history of N.J.S.A. § 3B:3-3 and *Macool*, at 311, the Appellate Division continued:

> Thus, N.J.S.A. 3B:3-3, in addressing a form of testamentary document not executed in compliance with N.J.S.A. 3B:3-2, represents a relaxation of the rules regarding formal execution of Wills so as to effectuate the intent of the testator. This legislative leeway happens to be consonant with "a court's duty in probate matters ... 'to ascertain and give effect to the probable intention of the testator.'" As such, Section 3 dispenses with the requirement that the proposed document be executed or otherwise signed in some fashion by the testator.

Ehrlich, 427 N.J. Super. at 72 (citations omitted).

The court explained that N.J.S.A. § 3B:3-3 "places on the proponent of the defective instrument the burden of proving by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent, and was thereafter assented to by the testator."

The Appellate Division then noted that the decedent undeniably prepared and reviewed the challenged document. In disposing of his entire estate and making specific bequests, the purported will contained both a level of formality and expressed sufficient testamentary intent. As the motion judge noted, in its form, the document "[was] clearly a professionally prepared will and complete in every respect except for a date and its execution." Moreover, as the only living relative with whom the decedent had any meaningful relationship, Jonathan, who was to receive the bulk of his uncle's estate under the purported will, was the natural object of the decedent's bounty.

The court then turned to whether the decedent "gave his final assent" to the document:

> Clearly, decedent's handwritten notation on its cover page evidencing that the original was sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates — the "Last Will and Testament" of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, "[e]ven if the original for some reason was not signed by him, through some oversight or neg-

> ligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament."

Ehrlich, 427 N.J. Super. at 74.

The appellate court also noted that, as late as 2008, the decedent "repeatedly orally acknowledged and confirmed the dispositionary contents therein to those closest to him in life."

The court further concluded that the fact that the document was only a copy of the original sent to the decedent's executor was not dispositive, since N.J.S.A. § 3B:3-3 does not require that the document be an original. The court determined that the evidence was compelling as to the testamentary sufficiency of the document, so as to rebut any presumption of revocation or destruction due to the absence of the original.

The holding in *Ehrlich* demonstrates that the erosion of the requirements of testamentary formalities is well underway. After all, who would have foreseen that an *unsigned copy* of a will could be admitted to probate?■