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Are Unsigned Wills a Sign of the Times?

New Jersey appellate court confirms that a writing intended as a will need not be executed

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The Appellate Division recently clarified the requirements for a valid writing intended as a will under N.J.S.A. § 3B:3-3, in the case of *In the Matter of the Probate of the Alleged Will and Codicil of Macool, Deceased*, 416 N.J. Super. 298 (App. Div. 2010).

In *Macool*, the Appellate Division affirmed the trial court's judgment declining to admit to probate a will which the decedent had not reviewed or signed before her death. However, while probate of the unsigned will was refused, the Appellate Division held that § 3B:3-3 does not require a testator's signature as a prerequisite for admission to probate. The *Macool* decision marks the continuing evolution of New Jersey's acceptance of a lack of formality when evidence of a testator's intent is clear and convincing.

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Historical Context

New Jersey statutes describe the requirements for two types of wills: the traditional, formal will (N.J.S.A. § 3B:3-2a); and the will done in the testator's handwriting, commonly referred to as a holographic will (N.J.S.A. § 3B:3-2b).

New Jersey has adopted the "surplusage standard" when dealing with holographic wills that contain portions not in the testator's handwriting. This standard requires that only the testator's handwritten words be considered, that those words must be intelligible without reference to words not in the testator's handwriting, and that other provisions, whether preprinted, typed, or written by others, are considered surplusage and must be ignored. *In re Will of Ferree*, 369 N.J. Super. 136 (Ch. Div. 2003), *aff'd*, 369 N.J. Super. 1 (App. Div. 2004). A testator does not create a valid holographic will when he fills out a preprinted form witnessed by only one person, where the elimination of the preprinted words renders the document meaningless.

Effective Feb. 27, 2005, the amendments to the New Jersey Probate Code retained the same basic requirements for holographic wills, although the statute does not refer specifically to a holographic will. *See N.J.S.A.* § 3B:3-2b. The key test in these cases remains whether "the signature and material portions of the document are in the testator's handwriting." The proponent of a holographic will bears the burden of proof to establish testamentary intent by a preponderance of the evidence. *See Matter of Will of Smith*, 108 N.J. 257 (1987).

Writings Intended as Wills

N.J.S.A. § 3B:3-2c permits the use of extrinsic evidence to establish that a document constitutes the testator's will, including writings intended as wills and portions of the document that are not in the testator's handwriting.

Based on § 2-503 of the Uniform Probate Code, N.J.S.A. § 3B:3-3 recognizes writings intended as wills:

> Although a document or writing added upon a document was not executed in compliance with *N.J.S.A.* 3B:3-2, the 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 his formerly revoked will or formerly revoked portion of the will.

Indeed, this statute has created a wide opening beyond holographic wills. For example, under this statute, a will prepared by the testator himself on his computer and signed by him would be valid. This document would not be a holographic will because the material provisions are not in his handwriting.

Macool

Louise Macool had been married to her husband, Elmer, for 40 years. It was the second marriage for both of them. Although they did not have biological children together, Louise raised Elmer's seven children from his prior marriage as if they were her own. In addition to her seven step-children, Louise also had a very close relationship with her niece, the plaintiff in this action.

Attorney Calloway drafted a 1995 will and later a 2007 codicil for Louise. Elmer died in April 2008. Less than a month later, Louise went to attorney Calloway's law office with the intent of changing her will. Toward that end, she gave attorney Calloway a handwritten note that contained the names and addresses of beneficiaries and certain bequests. Significantly, Louise did not sign her notes. According to Calloway, after discussing the matter with Louise and using her handwritten notes as a guide, he "dictated the entire will while she was there." Either later that afternoon or the next morning, Calloway's secretary typed a draft version of Louise's will, with the word "Rough" handwritten on the top left corner of the document.

Louise left Calloway's office with the intention of having lunch nearby. Calloway expected her to make an appointment to review the draft will sometime after he had reviewed it. However, Louise died about one hour after her meeting with Calloway, and thus never had the opportunity to see the draft will.

The niece filed an action seeking to invalidate Louise's 1995 will and 2007 codicil, and admit to probate the 2008 draft will which the decedent neither read nor signed before her death. The case was tried in one day, and included testimony from attorney Calloway as to his history of service to the Macool family, his preparation of both the 1995 will and the 2007 codicil, and his meeting with the decedent in May 2008.

Plaintiff's principal argument was based on the writings intended as wills statute, N.J.S.A. § 3B:3-3. The trial court rejected plaintiff's argument that the 2008 draft will met the requirements of N.J.S.A. § 3B:3-3. Specifically, the court found insufficient evidence from which to conclude that the decedent intended the particular draft document that Calloway prepared to be her will.

Although this ruling conclusively disposed of plaintiff's claims, the trial court nevertheless construed N.J.S.A. § 3B:3-3 to require that any document to be treated as a valid writing intended as a will had to have been executed or signed in some fashion by the testator.

The Appellate Division agreed with the trial court that the record clearly and convincingly showed that the decedent intended to alter her testamentary plan when she met with Calloway in 2008. The decedent's handwritten notes, Calloway's testimony, and the draft will itself all supported this finding. The Appellate Division also agreed that plaintiff had failed to establish by clear and convincing evidence that the decedent intended the document identified by Calloway as a "rough" draft to be her last and binding will.

The decedent's untimely demise prevented her from reading the draft will prepared by her attorney. She never had the opportunity to confer with counsel after reviewing the document to clear up any ambiguity, modify any provision, or express her final assent to the "rough" draft. The Appellate Division viewed the document as "a work in progress, subject to reasonable revisions and fine tuning."

The Appellate Division held that for a writing intended as a will to be admitted to probate under N.J.S.A. § 3B:3-3, the proponent of the writing must prove by clear and convincing evidence that (1) the decedent actually reviewed the document in question, and (2) thereafter gave his or her final assent to it. The Appellate Division reasoned that absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes.

The Appellate Division further held that a writing offered under N.J.S.A. § 3B:3-3 need not be signed by the testator in order to be admitted to probate. Because the essence of a holographic will is that it must be in the testator's handwriting (N.J.S.A. § 3B:3-2b), the only conceivable relief offered by N.J.S.A. § 3B:3-3 to this form of will must be that it need not be signed by the testator.

Practice Point

Louise Macool's death about an hour after visiting with her attorney may present extreme facts. It is more commonplace for a scrivener to send draft estate documents to a client, only to learn that the client has died prior to meeting with the scrivener to sign them. For estate practitioners, the lesson to be learned from *Macool* is clear: While it may be impossible to eliminate completely those situations where the client dies prior to execution of the will, steps can be incorporated into a law firm's standard practice to reduce that risk and better protect the scrivener's handiwork.

As *Macool* illustrates, the threshold that must be met is that the decedent actually reviewed the document at issue and thereafter gave final assent to it. Scriveners would be well-advised to include with their draft documents a manner in which the client can confirm these two elements in anticipation of the execution meeting. This can be accomplished by soliciting a reply e-mail which confirms review and assent, or a slip of paper which the client sends back to the law firm which confirms the upcoming meeting, as well as the review and assent of the revised estate plan. ■