WRITINGS INTENDED AS WILLS: UNEXECUTED COPY OF A WILL

The appellate court in New Jersey recently continued the interesting evolution of the concept of writings intended as wills in New Jersey. Modeled after UPC 2-503 ("Harmless Error"), *N.J.SA.* §3B:3-2c permits the use of extrinsic evidence to establish that a document that does not comply with testamentary formalities can still constitute a valid will, including writings intended as wills and portions of the document that are not in the testator's handwriting.

In the case of *Estate of Richard D. Ehrlich*, 427 N.J. Super. 64, 47 A.3d 12 (App. Div. 2012), the Appellate Division upheld the probate of a copy of an unsigned document as a valid writing intended as a will.

Facts

Decedent Richard Ehrlich was a trust and estate attorney for over 50 years. He died on September 21, 2009. His only next of kin (his heirs) were his deceased brother's three 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 passing. Jonathan then located a copy of a purported will in a drawer near the rear entrance of the decedent's home.

Jonathan 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 follows:
>
> [It] is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, 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.

Id. at 68.

The purported will provided: $50,000 to Pamela; $75,000 to Todd; 25% of the residue to a trust for the benefit of a friend, Kathryn Harris; and 75% 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." *Id*. at 68. On the same date as the proffered will -- May 20, 2000 – the decedent also executed a Power of Attorney and living will, "both witnessed by the same individual, who was the Burlington County Surrogate. 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." *Id*. at 69.

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.

Analysis

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)].

Id. at 69.

The Appellate Division articulated the issue as "whether the unexecuted copy of a purportedly executed original document sufficiently represents decedent's final testamentary intent to be admitted into probate under" *N.J.S.A.* § 3B:3-3. *Id*. at 69-70.

Citing to the legislative history of that statute, and *In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 311 (App. Div. 2010), 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.’” *Macool*, *supra*, 416 *N.J. Super.* at 307 (quoting *Fidelity Union Trust v. Robert*, 36 N.J. 561, 564 (1962)) (internal citations and quotation marks omitted in original). As such, Section 3 dispenses with the requirement that the proposed document be executed or otherwise signed in some fashion by the testator. *Macool*, *supra*, 416 *N.J. Super.* at 311.

The court explained *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.” *Id*. at 74.

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 both contains a level of formality and expresses sufficient testamentary intent. As the motion judge noted, in its form, the document "is 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 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 decedent's bounty. *Id*. at 74.

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 negligence 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."

Id. 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.” *Id.* at 74-75.

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. *Id*. at 76.

One of the most intriguing aspects of the *Ehrlich* decision is the dissent by the Honorable Stephen Skillman, J.A.D. (retired and temporarily assigned on recall). He concluded, "I do not believe that N.J.S.A. § 3B:3-3 can be reasonably construed to authorize the admission to probate of an unexecuted will." *Id*. at 78. In other words, Judge Skillman found that the statute authorized the admission to probate of a defectively executed will, and not an *unexecuted* will. However, Judge Skillman was also on the three-judge panel that decided the appeal in *Macool* – and reached a different conclusion in *dicta*.

In *Ehrlich*, Judge Skillman relied on the legislative history of *N.J.S.A.* § 3B:3-3 and national standards under the Uniform Probate Code. He explained, "Although I was on the panel that decided *Macool*, upon further reflection I have concluded that that opinion gives too expansive an interpretation to *N.J.S.A.* § 3B:3-3; specifically, I disagree with the dictum that seems to indicate a draft will that has not been either signed by the decedent or attested to by any witnesses can be admitted to probate, provided the putative testator gave his or her 'final assent' to the proposed will."

Judge Skillman stated that the proper standards for the case at bar were those dealing with lost wills. He would have remanded the matter for proceedings under those standards. *Id*. at 83-84.

Meanwhile, the majority opinion addressed Judge Skillman's dissent as follows:

> Our dissenting colleague, who participated in *Macool*, retreats from its holding and now discerns a specific requirement in Section 3 that the document be signed and acknowledged before a court may even move to the next step and decide whether there is clear and convincing evidence that the decedent intended the document to be his Will, and therefore excuse any deficiencies therein. We find no basis for such a constrictive construction in the plain language of the provision, which in clear contrast to Section 2, expressly contemplates an unexecuted Will within its scope. Otherwise what is the point of the exception?

Id. at 72.

The holding in *Ehrlich* demonstrates that the erosion of the requirements of testamentary formalities continues, and even *unsigned* wills may be probated. The concept of writings intended as wills can be expected to continue to evolve – and provide fertile ground for estate litigation – in those cases involving non-traditional testamentary "documents."