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The Fine Art of Disinheritance: Drafting in Contemplation of Probate Contests

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"Happy families are all alike; every unhappy family is unhappy in its own way."

— The opening lines of Tolstoy's *Anna Karenina*

I. Introduction

Many practitioners have come to believe that estate planning is merely a branch of tax law. Of course, taxes are a major, if not predominant, concern in this day and age, especially for sizable estates. However, the lawyer who drafts a sophisticated and tax-efficient estate plan for a client but neglects to consider non-financial considerations, such as family dynamics and the possibility of litigation, is not rendering a complete service to a client. I call this aspect of estate planning “defensive planning.” One aspect of such defensive planning is the considerations that must be made when a client seeks to disinherit a family member who may later object to the will. The failure to exercise reasonable care in drafting for disinheritance may promote litigation by the disinherited next-of-kin (or other parties with similar standing). Whatever savings that might have been realized on the tax side may well be wasted with the prospect of protracted and expensive litigation.

The art of disinheritance refers to some techniques that may be used to avoid the costs and expenses of protracted probate litigation. The practitioner is always to be wary of the possibility of such contests, especially

with the limited possibility of liability surviving the death of the testator/client.

I refer to the 'art' of disinheritance because there is no set formula to accomplish the task of avoiding a probate contest. The practitioner must not feel secure in the simple reliance on an *in terrorem* clause in a Will. A few minutes research time will disclose that many states will not enforce such clauses as being against public policy and that New York law views them with suspicion. Although *in terrorem* clauses are enforceable in New York under EPTL 3-3.5, they are viewed with disfavor by the courts and are strictly construed (*Matter of Robbins*, 144 Misc.2d 510).

The following outline will consider some practical suggestions for accomplishing what your client, as a testator, has clearly expressed to you - the desire to disinherit a person who otherwise would be a natural object of his or her bounty. For your ready reference, I include as part of this outline a summary of the law of intestacy in New York so as to allow you to determine just who the laws define as those "natural objects of one's bounty." It is also designed to highlight the importance of understanding the family dynamics and the reasons for your client's intent to disinherit a distributee.

The practitioner should not conclude that this is an exercise in futility because a distributee is free to make objections even in the presence of an *in terrorem* clause, hoping that the person seeking the probate of the testamentary instrument will settle the litigation for an acceptable amount. The attorney may still believe that the Surrogate's Court never grants motions for summary judgment and that frivolous litigation will be encouraged, if only by neglect. Moreover, it is clear that judicial philosophy of late favors an expansive reading of SCPA 1404(4), as limited by EPTL 3-3.5(b), in order to reduce contests and their attendant delays (Gibbs and Reddy, Law of *In Terrorem* Conditions Is on the March, NYLJ, February 20, 2008, at 3; Valente and Palumbo, '*In Terrorem*, or No Contest,' Clauses, NYLJ, April 29, 1999, at 3). Regarding summary judgment, the practitioner need only read two cases that came out of Nassau County Surrogate's Court to see the Appellate Divisions' recently discovered enthusiasm for the summary disposition of meritless objections to the probate of a Will (see, e.g., *Matter of Zirinsky*, 43 A.D.3d 946, 841 N.Y.S.2d 637 [2d Dep't 2007]; *Matter of Bustanoby*, 262 A.D.2d 407, 691 N.Y.S.2d 179 [2d Dep't 1999]).

II. Planning Techniques and Warning Signs

1. *The In Terrorem Clause*

As we have seen above, this old warhorse of disinheritance is a tool to be used with a great deal of care because they are not favored by the courts. New York provides, at EPTL 3-3.5, for *in terrorem* clauses and a copy of the statute is attached to this outline. Some points to keep in mind when contemplating such a clause:

- create a substantial risk. It is very frustrating to see an *in terrorem* clause drafted that is supported by a minimal bequest to the disinherited distributee. After all, the logic behind the use of such a clause is the risk-reward calculation that such a clause induces in the affected party.
- describe the triggering event. I would argue that while the statute describes the situation which will trigger the clause, there is no harm and possibly much benefit to detailing the acts that will trigger the clause in the Will itself. Moreover, every effort should be taken to make sure said clause will not be construed narrowly. Here is a sample clause from *Matter of Ellis* (252 AD2d 118 (2d Dep't 1998) that may be useful as a guide:

If any beneficiary under this Will in any manner, directly or indirectly, contests this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary, or to the beneficiary's issue, under this will is revoked.

The practitioner might even want to consider the author's additions to this language (in bold):

If any beneficiary under this Will, ***or any codicil to it****, in any manner, directly or indirectly, contests this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary, or to the beneficiary's issue, under this Will is revoked.* ***In this context, the word "contests" includes any and all conduct that it is not expressly exempted by SCPA 1404.***

- The testator may want to designate the recipient of the property that will be forfeited by the *in terrorem* clause. This may provide an additional party with a strong interest in upholding the Will and its forfeiture provision.

2. *Matter of Singer*

The practitioner should know that there is much recent change in the law relating to *in terrorem* clauses. What had been perceived as a trend toward strict enforcement of such clauses (See, e.g., *Matter of Ellis*, 252 AD2d 118 (2d Dep't 1998), *Matter of Singer*, 17 Misc. 3d 365 [Surr.Ct. Kings Co. 2007 [Lopez-Torres], aff'd 52 AD3d 612, 859 NYS2d 727 [2d Dep't, 2008]) was suddenly reversed by the Court of Appeals in *Matter of Singer*, 13 N.Y.3d 447, 920 N.E.2d 943, 892 N.Y.S.2d 836 (2009). The Court of Appeals ruled that although SCPA 1404 and EPTL 3-3.5 include only a few particular types of acceptable litigation while still preserving the *in terrorism*, circumstances may exist that would make it permissible to depose persons outside the statutory parameters without suffering forfeiture.

In response to *Matter of Singer,* EPTL 3-3.5(b)(3)(D) was amended as follows (the added provision is underlined and in bold):

(D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding **and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will.**

SCPA 1404 was amended in a similar fashion. These legislative changes will increase the costs of probating a will that seeks to disinherit a distributee and the time as well, as applications will be made in the Surrogate's Court on a case-by-case basis testing the limits of the *in terrorem* clause. It is respectfully submitted that it is increasingly important to consider the other means by which a distributee may be successfully disinherited, including the all too frequently overlooked strategy of "stacking" wills (see below).

3. *Explanation of Reasons for Disinheritance*

This is a controversial suggestion and many estate planners eschew its use for good reasons. If the testamentary instrument contains such explanatory language, it then gives another opportunity for an attack in the probate contest. If a testator states in his or her Will that a reason for disinheriting a son is that the son never called or visited the parent, then this will introduce a new issue for the trial, possibly leading to the conclusion by the jury that the testator was unduly influenced by another sibling or that he or she lacked testamentary capacity.

These considerations notwithstanding, there may very well be incidents that dictate in favor of such language. It should also be noted that if the practitioner should advise the testator that explanatory language is proper, that bitter and accusatory language may expose the estate, at least in some states, to the tort of "testamentary libel."

4. *Extraneous Supporting Documentation*

The single most important suggestion when representing a client in this matter is the care and attention to detail given the drafting process by the attorney. The use of notes and drafts of Wills is vitally important to document each stage of the planning process. These documents will be very useful during a probate contest (see, e.g., *Matter of Zirinsky*, 43 A.D.3d 946, 841 N.Y.S.2d 637 [2d Dep't 2007]).

Just as the careful practitioner gets a family tree and affidavit from a client, so too the attorney might consider the use of affidavits from friends and neighbors that give some background to the decision of the testator to disinherit a distributee. At the very least, the attorney might want to get a list of the names and addresses of such people who are otherwise disinterested in the estate but could provide some information supporting the disinheritance.

5. *Preserving Prior Wills*

What is the legal status of prior wills executed by a testator when he or she executes and then revokes a subsequent will? There are risks of running afoul of *Matter of Huang*, 11 Misc. 3d 325, 811 N.Y.S.2d 885 (Sur.Ct. NY County 2005), which held that a presumed act of revocation by destruction may not similarly operate to revive prior wills. *Huang* ruled that EPTL 3-4.6 may be an obstacle to admitting an earlier Will to probate if a later Will, even though incapable of being probated, was sufficiently executed so as to preclude the revival of the earlier instrument.[1] However, that being said, if a Will is denied probate after trial, there may be no obstacle to offering a previous instrument for probate and avoiding intestacy, especially if the jury's verdict was based on lack of testamentary capacity. After all, if the instrument is defective as an expression of the testator's wishes due to the lack of testamentary capacity, that taint of incapacity should also extend to the supposed revocatory act. Therefore, a useful estate planning technique may still be to have the testator execute several Wills over the course of a reasonable period of time so that each one stands as a separate obstacle to intestacy that would benefit the disinherited distributee.

6. *Stacking Wills*

Implicit in the foregoing discussion is the technique of deliberately having the client execute a series of Wills so as to present the object with the prospect of having to overcome several instruments. Every estate plan merits review on a periodic basis, now more than ever with the dizzying changes in the estate, gift, and generation-skipping transfer tax laws. Therefore, if a client advises the attorney that he or she is certain the disinherited child will contest the will, then it is imperative to consider the various tools available to the planner but far too infrequently utilized. One of those tools is "stacking wills." If EPTL 3-4.6 does not operate, then the series of will present the objectant with a task that may be an impossible one, i.e., sustaining litigation that would be protracted and ruinously expensive. The use of multiple wills, along with carefully crafted *in terrorem* clauses, must be considered.

7. *Inter Vivos Gifts to the Disinherited*

This is a cousin to the *in terrorem* clause. Here, the practitioner may suggest to the testator when the Will is executed to make a contemporaneous gift to the disinherited person. Of course, the testator has to overcome the aversion to doing that, but after you have convinced him or her of the value of an in terrorem clause, it should not be difficult to have him or she takes some of that legacy and give it to the distributee at that time. Why? Well, if the distributee is going to object to the Will, then he or she will be put in the uncomfortable position of objecting to the Will but defending the contemporaneous gift. What's more, if the Will contest should be successful, then the gift can be compelled to be returned to the estate in a discovery proceeding.

8. *Transparency during life*

Informing the distributee of a testamentary scheme has been suggested by some estate planners but is rarely utilized because the testator is desirous of maintaining whatever good relationship may exist. Nevertheless, this is one method that can be utilized.

EPTL 3-3.5. Conditions qualifying dispositions; conditions against contest; limitations thereon.

a. A condition qualifying disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.

b. A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:

1. Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will provide that such contest is based on probable cause.

2. An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.

3. The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

A. The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.

B. The disclosure to any of the parties or to the court of any information relating to any document offered for probate as the last will, or relevant to the probate proceeding.

C. A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.

D. The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, nominated executors and the proponents in a probate proceeding and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will.

E. The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

III. Intestacy primer

See the following for a graphic description of the rules of intestacy in New York.

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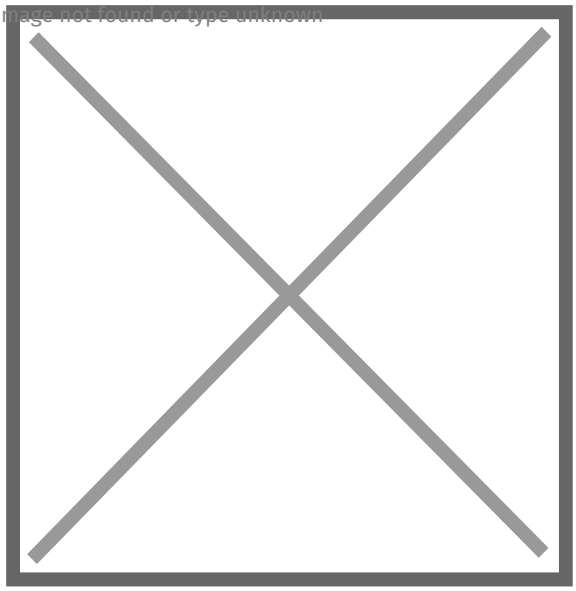

D is the decedent
1 is decedent's spouse
2 and 3 are decedent's children
4 and 5 are decedent's grandchildren
7 is decedent's father
6 is decedent's mother
8 is decedent's sibling
9 and 10 are decedent's nieces or nephews
11 and 12 are decedent's grandnephews or grandnieces
15 and 16 are decedent's paternal aunts and uncles
17 is the decedent's paternal first cousin

18 is the decedent's paternal first cousin once removed
21 and 22 are decedent's maternal aunts and uncles
23 is the decedent's maternal first cousin
24 is the decedent's maternal first cousin once removed
13 and 14 are the decedent's paternal grandparents
19 and 20 are the decedent's maternal grandparents

EPTL 4-1.1 provides that if the property of a decedent is not disposed of by Will, it shall be distributed as follows to the next of kin (distributees):

4-1.1(a). If a decedent is survived by:

1. A spouse *[1]* and issue *[children, grandchildren, etc.(2,3,4, and 5)]*, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.
2. A spouse *[1]* and no issue *[children, grandchildren, etc. (2,3,4, and 5]*, the whole to the spouse.
3. Issue *[children, grandchildren, etc. (2,3,4, and 5)]* and no spouse, the whole to the issue *[children, grandchildren, etc.(2,3,4, and 5)]*, by representation.
4. One or both parents *[6 and 7]*, and no spouse *[1]* and no issue *[children, grandchildren, etc.(2,3,4, and 5)]*, the whole to the surviving parent or parents *[6 and 7]*.
5. Issue of parents [*siblings, nephews, nieces, grandnephews and grandnieces (8,9,10,11, and 12)]*, and no spouse *[1]*, issue *[children, grandchildren, etc. (2,3,4, and 5)]* or parent *[6 and 7]*, the whole to the issue of the parents *[siblings, nephews, nieces, grandnephews and grandnieces (8,9,10,11, and 12)]* by representation.
6. One or more grandparents *[13, 14, 19, and 20]* or the issue of grandparents (as hereinafter defined) *[aunts, uncles, first cousins (15, 16, 17, 21, 22, and 23)]*, and no spouse *[1]*, issue *[children, grandchildren, etc. (2,3,4, and 5)]*, parent *[6 and 7]* or issue of parents *[siblings, nephews, nieces, grandnephews and grandnieces (8,9,10,11, and 12)*, one-half to the surviving paternal grandparent or grandparents *[13 and 14]*, or if neither of them survives the decedent, to their issue *[aunts, uncles, first cousins (15, 16, 17)]*, by representation, and the other one-half to the surviving maternal grandparent or grandparents *[19 and 20]*, or if neither of them survives the decedent, to their issue *[aunts, uncles, first cousins (21, 22, and 23)]*, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents *[aunts, uncles, first cousins]*, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue *[aunts, uncles, first cousins]*, by representation, in the same manner as the one-half. For the purposes of this subparagraph, the issue of grandparents shall not include issue more remote than grandchildren of such grandparents *[first cousins]*.

N.B. This means that if the decedent is most closely survived by first cousins on one side and first cousins once removed [18 and 24] on the other side, then all to the first cousins [17 and 23].

7. Great-grandchildren of grandparents [first cousins once removed (18 and 24)], and no spouse, issue [children, grandchildren, etc.], parent, issue of parents [siblings, nephews, nieces, grandnephews and grandnieces] , grandparent, children of grandparents [aunts, uncles] or grandchildren of grandparents [first cousins], one-half to the great-grandchildren of the paternal grandparents [first cousins once removed], per capita, and the other one-half to the great-grandchildren of the maternal grandparents [first cousins once removed], per capita; provided that if the decedent was not survived by great-grandchildren of grandparents [first cousins once removed]

on one side, the whole to the great-grandchildren of the grandparents on the other side [first cousins once removed], in the same manner as the one-half.

N.B. This means that intestacy does not extend beyond first cousins once removed [18 and 24].

IV. Matter of Huang and EPTL 3-4.6

(11 Misc. 3d 325, 811 N.Y.S.2d 885 [Sur.Ct. NY County 2005])
Surrogate's Court, New York County, New York.

In the Matter of the ESTATE OF Paul K.P. HUANG, Deceased.
No. 3702/2004. NYLJ, Jan. 9, 2005, p.33, col. 3
Dec. 29, 2005.

EVE PREMINGER, J.

*1 Paul K.P. Huang died August 19, 2004, leaving an instrument dated October 7, 1998, which is being offered for probate. Petitioner, in his second amended petition, asks the Court to deny probate to seven other writings, each of which is later in date than the proffered instrument. The first six, being unattested, are inadmissible to probate (see EPTL 3-2.1). The seventh, dated April 29, 2004, is a photocopy of an instrument which was executed under the supervision of an attorney; its due execution, therefore, is presumed (Matter of Rosen, 291 A.D.2d 562). Moreover, the attached affidavit of attesting witnesses satisfies the requirements of SCPA 1406(1). The original, however, cannot be located. The supervising attorney avers that after the execution of the document which he believes decedent drafted himself in decedent's home, decedent retained possession of the original. The strong presumption, therefore, is decedent revoked the will by destruction (Matter of Fox, 9 N.Y.2d 400, 407). Accordingly, the photocopy of the April 29, 2004 instrument is inadmissible (Matter of Passuello, 169 A.D.2d 1007).

EPTL 3-4.6(a) provides:

> If after executing a will a testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof.

Decedent's clear intent to revoke all prior wills by means of the April 29, 2004 instrument is both explicit: "I, Paul K.P. Huang, being of sound mind, publish and declare this to be my last Will and Testament, revoking all former wills," and implicit: the complete disposition of decedent's estate (see Matter of Lautz, 55 Misc.2d 412, 413). There is no evidence the October 7, 1998 instrument, or any other prior instrument, was revived (see EPTL 3-4.6 [b]); accordingly, the decedent died intestate (see Matter of Mangan, NYLJ, Oct. 28, 1994, at 34, col 2) Probate of the proffered instrument is denied;

preliminary letters testamentary heretofore issued to petitioner are revoked. This decision constitutes the order of the Court.

§ 3-4.6. Revocation or alteration of later will not revive prior will or any provisions thereof

a. If after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will do not, of itself, revive the prior will or any provision thereof.

b. A revival of a prior will or one or more of its provisions may be affected by:

1. The execution of a codicil which in terms incorporates by reference such prior will or one or more of its provisions.
2. A writing declaring the revival of such prior will or of one or more of its provisions, which is executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.
3. A republication of such prior will, whether to the original witnesses or to new witnesses, which shall require a re-execution and re-attestation of the prior will in accordance with the formalities prescribed by 3-2.1.

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