

# Estate Litigation: Deposing the Objectant in a Contested Will Proceeding

Defending the propriety of a will often involves thwarting off a variety of attacks.



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Although the primary objective is to defend the propriety of the subject will, contested will proceedings are frequently won or lost during the deposition of the objectant. This article will provide a roadmap to effectively deposing an objectant when representing a proponent in a contested will proceeding.

## Preparation

Before deposing the objectant, it is essential to first obtain and review relevant documents from the proponent, the objectant (by way of Notice for Discovery and Inspection), and

non-parties (by way of subpoena). Documents intended to be used as exhibits during the objectant's deposition should be placed in the

order in which they will be presented to the objectant at deposition; and highlighted to streamline the line of questioning. This should assuage the need to awkwardly shuffle through documents to search for relevant passages during a line of questioning. Three copies of all exhibits are required at the deposition.

It is also important to conduct an internet search (i.e., via Google, court filings, social media, and the decedent's emails and text accounts) for the objectant and any witness(es) that may testify in the objectant's favor. One should also speak to the proponent about who the objectant is and the objectant's relationship with the decedent.

With the necessary ammunition in hand, the next step is to prepare a line of questioning, keeping in mind the so-called "three-two" rule. Unlike depositions in other civil matters, disclosure in a contested will proceeding is limited to a "three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period."<sup>1</sup> However, where a party is able to show "special circumstances" (i.e., allegations, supported with facts, of a scheme of fraud or a continuing course of conduct of undue influence), the stated time period for disclosure under the so-called "three year-two year" rule is subject to extension.<sup>2</sup>

## Questioning the Objectant

An understanding of the burdens required of each party to the contested will proceed-

ings is crucial for the development of a line of questioning. The vast majority of will contests require the proponent to defend claims of lack of testamentary capacity and undue influence.

With respect to testamentary capacity, the proponent has the burden of proving, by a preponderance of the evidence, that at the time of execution, the decedent understood in a general way the:

- nature and extent of her property,
- natural objects of her bounty, and
- provisions of the instrument.<sup>3</sup>

The capacity to execute a will is minimal, and lower than that required to execute most other legal documents or contracts.<sup>4</sup> The testator's competence must be determined at the time the will was executed.<sup>5</sup> Self-executing affidavits of the subscribing witnesses who attest to testator's sound mind, memory and understanding when she signed the will creates "a presumption of testamentary capacity and prima facie evidence of the facts attested to."<sup>6</sup> With respect to undue influence, it is the burden of the objectant to show:

- the existence and exertion of an influence;
- the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and
- that, but for undue influence, the will would not have been executed.<sup>7</sup>

Undue influence can be shown through a consideration of all surrounding facts and cir-

cumstances, including, among other things, the nature of the will, deviation from a prior testamentary plan,<sup>8</sup> deliberate isolation from family members,<sup>9</sup> the decedent's physical and mental health, and whether the alleged influencer directed the testator to the person who drafted the will,<sup>10</sup> or was involved in the drafting of its terms.<sup>11</sup> Undue influence is seldom practiced openly, but is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence.<sup>12</sup> Mere speculation that opportunity and motive to exert such influence existed is insufficient to demonstrate the existence of undue influence.<sup>13</sup>

## Begin Questioning with Family History

With these burdens in mind, it is time to plan a line of questioning. It is advantageous to begin questioning by inquiring into family history. Many will contests stem from long-standing family disputes which, upon questioning, may result in the objectant providing defensive, angry, sad or otherwise emotional responses. An emotional deponent can be the questioning attorney's best friend. Inquiring into family history also provides insight into the role of each player – including which family member was in charge of healthcare and/or finances for the decedent. Finally, this line of questioning may also shed light on the relationships amongst the

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**WILL...**

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parties, explaining why the will benefited some to the detriment of others.

**Focus on Objectant's Relationship with Decedent**

Next, the line of questioning should focus on the objectant's relationship with the decedent. These questions often lead to the objectant posturing as to how close (s)he and the decedent were, and how shocking it was to not be included as a beneficiary of the decedent's estate.

With objectant now on record stating how familiar (s)he was with the decedent, the next line of questioning should focus on general questions about the decedent that someone familiar with the decedent would know, e.g., Was Aunt Bee married? When did she get married? What was her maiden name? Did she go to college? What did she do for a living?

**Frequency of Contact**

This line of questioning should be immediately followed by questions concerning the frequency with which the objectant was in contact with the decedent. These questions generally reveal whether the objectant had knowledge of the decedent's mental health, cognitive abilities, physical health, circle of friends and/or caretakers – information critical to support lack of capacity and undue influence claims:

- How many times did you (visit/talk with) Aunt Bee in the (month/six months/year) prior to her death?
- Describe her dress during that visit? Describe her physical appearance. Was she showered? Was her hair combed? Was she unkempt in any way?
- Was she acting odd in any way? Repeating herself? Falling asleep?
- Were you concerned? What, if anything, did you do in response to being concerned?
- Did you ever speak with Aunt Bee's caretakers in the year prior to her death?
- Did you send Aunt Bee a (present/card) on her last birthday?

- Did Aunt Bee ever mention Maybury Church to you? Did she attend Maybury Church?
- Did she donate money to Maybury Church?
- Did you attend Aunt Bee's (funeral/wake)? Did you send a (flower/card)?

**Testamentary Incapacity and Undue Influence**

Having established that the objectant was unfamiliar with certain aspects of the decedent's life, it is now time to inquire into important areas relating to testamentary capacity and undue influence (i.e., medical care, mental acuity, and the relationship between the decedent and the alleged influencer). This line of questioning often reveals that the objectant's source of information is either second hand or speculative:

- Who was in charge of Aunt Bee's finances in the year prior to her death?
- Did she pay her bills on her own in the year the will was executed?
- Did Aunt Bee do her own banking in the year (prior to her death/the will was executed)?
- How did you learn of this?

**Objectant's Knowledge of Alleged Incapacity and Undue Influence**

Another area worth exploring is the timing of the objectant's knowledge of certain events that took place during the decedent's lifetime and the actions taken or omissions made by the objectant upon learning of these events:

- When did you first learn the Aunt Bee was suffering from dementia?
- How did you learn of this?
- What was being done to help Aunt Bee?
- When did you first learn the Aunt Bee was being controlled by Opie?
- How did you learn of this?
- Were you concerned?
- What, if anything, did you do in response to being so concerned?
- Is there a reason that you did nothing in response to being concerned?

**Signature Identification**

Another important area, especially in con-

nection with lack of capacity cases, is signature identification. If possible, inquire into the objectant's familiarity with the decedent's signature prior to the alleged incapacity, and follow-up with questions concerning the decedent's signature on the subject will. This line of questioning will expose the objectant's position regarding alleged changes in the decedent's signature as a result of some physical or mental condition.

- Are you familiar with Aunt Bee's signature as it existed prior to her alleged incapacity? How did you become familiar?
- Please take a look at page 12 of the document marked as Petitioner's Exhibit "1" (the proposed will).
- Do you recognize the signature on page 12? Whose signature is that?
- Does the signature on page 12 of Petitioner's 1 differ, in any way, from Aunt Bee's signature as it existed prior to her alleged incapacity?

**Contact with Decedent at Time of Will Execution**

Next, address the objectant's contact with the decedent on and around the day of the will execution. Given that the moment of execution is determinative, the objectant's contact with the decedent on or around the day of execution is crucial.

- Did you see Aunt Bee on (execution day)? Who was there?
- Describe Aunt Bee's actions, demeanor, appearance, etc. on (execution day).
- When was the last time prior to (execution day) you saw Aunt Bee?
- Describe her actions, appearance, demeanor etc.
- To your knowledge, was Aunt Bee suffering from any mental condition as of (execution day) which you believed affected her ability to:
  - Understand the nature and consequences of executing a will?
  - Understand the nature and extent of her property and assets?
  - Understand who she wanted to pass her property and assets to upon her death?

As previously stated, it is crucial to keep in mind the burden of proof when engaging in these lines of questioning. Thus, whenever possible, follow-up with questions probing into: the nature of the relationship between the alleged influencer and the decedent; the decedent's isolation from family members; deviation from a prior testamentary plan; and whether the alleged influencer directed the decedent to the person who drafted the will, or was involved in the drafting of its terms.

The objectant's deposition can be a turning point in any will contest proceeding. Although there may be hundreds of other topics worthy of inquiry during the Objectant's examination, keeping the above areas of inquiry in mind while preparing will allow the practitioner to achieve a fruitful and, hopefully, advantageous deposition of the objectant.

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1. 22 NYCRR § 207.27.
2. 22 NYCRR § 207.27; *Matter of Chambers*, NYLJ, Nov. 2, 2001, at 21.
3. *Matter of Kumstar*, 66 N.Y.2d 691, 692 (1985).
4. *Matter of Codrington*, 281 A.D. 143, 146 (3d Dept. 1952), *aff'd*, 307 NY 181 (1954); *Matter of Safer*, 19 A.D.2d 725, 726 (2d Dept. 1963); see, e.g., *Matter of Rotkamp*, 95 A.D.3d 1338, 1339 (2d Dept. 2012); *Matter of Bellasmo*, 54 Misc.3d 1216(A) (Sur. Ct., Queens County 2017).
5. *Matter of Donovan*, 47 A.D.2d 923, 924 (2d Dept. 1975); see *Matter of McCloskey*, 307 A.D.2d 737, 738 (4th Dept. 2003).
6. *Matter of Walker*, 80 A.D.3d 865, 866, 914 N.Y.S.2d 379 (2011), *in denied*, 16 N.Y.3d 711 (2011); see *Matter of Prevattil*, 121 A.D.3d 137, 141 (3d Dept. 1965); *Matter of Kruselnicki*, 23 A.D.2d 622 (4th Dept. 1965); *Matter of Jacobs*, 2015 NY Slip Op. 31301(U), at \*9 (Sur. Court, Nassau County 2015).
7. See *Matter of Walther*, 6 N.Y.2d 49, 53-54 (1959).
8. See e.g., *Matter of Kruselnicki*, 23 A.D.2d 622 (4th Dept. 1965); *Matter of Jacobs*, 2015 NY Slip Op. 31301(U), at \*9 (Sur. Court, Nassau County 2015).
9. See, e.g., *Matter of Zirinsky*, 10 Misc.3d 1052(A), at \*10-11 (Sur. Ct., Nassau County 2005).
10. See generally, e.g., *Matter of Elmore*, 42 A.D.2d 240, 241 (3d Dept. 1973); *Matter of Jacobson*, 2013 NYLJ LEXIS 4543 (Sur. Ct., Suffolk County 2013).
11. *Matter of Testa*, 43 Misc.3d 1217(A), at \*3 (Sur. Ct., Nassau County 2014)(citing 2 Pattern Jury Instr., Civil, § 7:55).
12. *Matter of Burke*, 82 A.D.2d 260, 269 (2d Dept. 1981).
13. See *Matter of Chirazzi*, 296 A.D.2d 406, 407 (2d Dept. 2002); *Matter of Herman*, 289 A.D.2d 239, 240 (2d Dept. 2001).

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