What Writings Are Adequate to Qualify for Probate?

By ROBERT I. AUFSEESER

Robert I. Aufseeser

Attorney Robert I. Aufseeser discusses what writings are adequate to qualify for probate in *Estate Planning* magazine. While various formalities are associated with drafting and executing wills, he writes, sometimes a decedent's unsigned note is offered for probate.

In the U.S., laws allow great latitude in how wealth is accumulated and how that wealth is distributed at the owner's death. The modern law of wills allows for the orderly creation of legal documents (e.g., wills and trusts) to effect a testator's testamentary intent. This law has been under attack in recent years, however, and advances in technology—particularly tablet computers and other electronic devices—have begun to question traditional notions of what it means to write a will.

The law of wills and intestacy

Laws governing the creation of wills are similar throughout the country. Generally, a will must be in writing, signed by the testator, and witnessed by at least two individuals.[1]

Historically, documents failing to meet these basic criteria were deemed invalid. When a will is invalidated, the decedent's property passes as governed by the laws of intestate succession. For example, if a testator is unmarried and has no children, and the testator wants his or her estate to go to charity, the testator's intent would be legally enforceable only if he or she writes a valid will. If the testator does not write a valid will, the estate would generally pass to distant relatives and not to those charities he or she had wished to benefit.

What if the charitably inclined testator, with no knowledge of how to draft a will properly, writes a letter to those concerned expressing his or her wishes? What should a court do with such a letter that does not meet the statutory requirements for a will?

Gauging the decedent's intent

In an attempt to answer the question, the authors of the Uniform Probate Code (UPC) proposed the "harmless error doctrine" found in section 2-503.[2] Under the UPC, "the document or writing is treated as if it had been executed in compliance [with the law] if the proponent of the document or writingestablishes by clear and convincing evidence that the decedent intended the document or writing to constitute […] the decedent's will." (Emphasis added.)

Since section 2-503 was proposed, about nine state legislatures have adopted some form of the UPC granting courts legal authority to dispense with the absolute requirements for the execution of a will.3 In essence, these new statutes have substituted the requirement of proper execution for proof of the testator's intent. In other words, a document that fails the strict statutory test for a will may nevertheless be admitted to probate if sufficient proofs are presented to the court that the

document in question was intended by the decedent to be the decedent's last will and testament.

For example, what if the charitably inclined testator noted above sends a letter to his or her attorney asking the attorney to prepare a will benefiting favorite charities? What if the testator dies after sending the letter but before his or her will can be drafted? Can the charities seek to probate the letter as the testator's will even though it was not signed and witnessed in accordance with the law?

The answer might be … it depends. In 2010, in a matter of first impression, a similar case was presented to the New Jersey courts for interpretation. The case was In *re Probate of Will and Codicil of Macool.*[4] In *Macool,* the decedent hired an attorney to prepare her will. The attorney drafted the will in accordance with the decedent's instructions. Unfortunately, she died before the will could be executed. The residuary beneficiaries sought to probate the unsigned will claiming that it reflected the decedent's testamentary intent.

Under N.J.S.A. 3B:3-3, the proponent of a document or writing must establish "by clear and convincing evidence that the decedent intended the document or writing to constitute … the decedent's will." (Emphasis added.) The court in Macool established a two-part test for determining whether an unsigned document could be admitted to probate under the statute:

- First, the court held that the proponent must prove by clear and convincing evidence that the decedent actually reviewed the document in question.

- Second, if such was the case, the proponent must then prove, also by clear and convincing evidence, that the decedent gave her final assent to it.

In *Macool*, the court found that the decedent had not reviewed the final draft of the will prepared by her attorney and that she had not given her final assent. As such, the unsigned document was not admitted to probate.

In contrast to *Macool*, in 2012 the New Jersey Appellate Division, in *In re Estate of Ehrlich*,[5] held that an unsigned photocopy of the decedent's will could be admitted to probate.

The matter of the estate of Richard Ehrlich was as follows: The decedent, who was an attorney, drafted his own will. He then mailed the original will to his friend who he named as his executor. He retained a photocopy and at the top, he handwrote: "Original mailed to H.W. Van Sciver, 5/20/2000." At his death, the original will could not be located. The photocopy was offered for probate. In distinguishing the facts from *Macool*, the court in *Ehrlich* held that the handwritten notation was proof that the decedent actually reviewed the document in question and that he gave his final assent to it. The court admitted an unsigned document to probate based on proofs that the document itself was intended to be the decedent's will.

Attorneys' fees and increased litigation

This author has been involved in several cases over the years involving the probate of unsigned notes. In at least one case, the author was able to successfully defend the beneficiaries against the probate of such a note by showing that the decedent had prepared several wills in her life time in accordance with applicable law, and that she knew the difference between a formal will and an informal note to her attorney. Despite winning the case, the proponent of the note was able to successfully petition for attorney's fees out of the estate. The award of attorney's fees is what drives litigation in this arena. If fees are liberally granted, attorneys are emboldened to offer for probate any such note that might purport a testamentary intent. In this author's opinion, such litigation goes too far and is not what was intended by the legislature when the formalities to prepare a will were relaxed.

Unsigned notes in the digital age

Expect more litigation in the digital age. Given the prevalence of smartphones and tablet computers, it is inevitable that more testators will use these tools to express their final wishes.

For example, in 2013, in what was a matter of first impression, an Ohio court admitted a will to probate that had been prepared on a Samsung Galaxy tablet.[6] The facts in the matter of the Estate of Javier Castro are as follows: The will was typed on the device while the decedent lay in a hospital bed. The decedent used the tablet's stylus to "sign" his name. After his death, this "document" was printed and presented for probate. The court found that that the electronic signature was valid, and that the document, although prepared on a tablet computer, was otherwise valid as the decedent's will. The court went on

to find that the proponents of the will had proven byclear and convincing evidence that the document was intended by the decedent to be his will.

Electronic wills

Only Nevada has a statute governing electronic wills.[7] Although legislation has been proposed in other jurisdictions, problems exist in how to authenticate an electronic will where fraud is suspected. In *Castro*, all parties agreed that the electronic document was the decedent's will.

What would the result have been if someone had objected? The purpose of statutory requirements for the making of a will is to avoid fraud on the part of disgruntled beneficiaries. Ostensibly it is harder to forge a handwritten signature than an electronic one. Avoiding fraud and giving courts a reasonable method for determining the authenticity of an electronic signature is what jurisdictions are now grappling with.

Unsigned notes are presented for probate all the time. Whether those notes are intended to be wills is a matter for the courts to determine. Whether an individual is a proponent of the note or is defending against its probate, understanding the laws concerning the testamentary nature of these documents is the first step in

ROBERT I. AUFSEESER, J.D., LL.M., is an attorney in Ansell Grimm & Aaron's Wills, Trusts, and Estates practice, as well as the firm's real estate and corporate law practices, in New Jersey. He can be reached at ria@ansellgrimm.com.