When Moving From New York to Florida, Consider Estate Planning Differences
August 31, 2015

By Jay D. Waxenberg, David Pratt and Jonathan Galler

It is no secret that many New Yorkers contemplate moving to Florida in their golden years. From an estate and tax planning perspective, there may be substantial advantages to changing one's domicile to Florida.

Those advantages—along with the allure of gated communities and early bird specials (Del Boca Vista, anyone?)—are often the focus of discussions between these clients and their estate planning lawyers.

But for clients who anticipate the possibility of postmortem litigation over their estates, discussions with estate planning lawyers ought to include another topic: the distinctions in how New York and Florida handle those types of disputes.

These cases are especially fact-specific, and given the emotional components, they are overwhelmingly personality-specific as well. There are no "one size fits all" answers. Nevertheless, clients who are contemplating a move from New York to Florida, and who anticipate postmortem disputes, should at least be made aware that changing domicile may very well have a substantive impact on any will or trust contest.

Jurisdiction Over Estate

New York and Florida each have procedures for probating the will of a decedent who is domiciled outside that state.1 However, absent an intentional multi-state race to the courthouse, clients can generally expect their wills to be probated, and their estates to be administered, in the jurisdiction in which they were domiciled at the time of death. Thus, the will of a Florida domiciliary is likely to be probated in a Florida court. Similarly, any challenges to its validity, as well as the administration of the estate, will generally be governed by Florida law.

It should be noted that, pursuant to EPTL 3-5.1(h), a non-domiciliary with property in New York may elect to have his or her will governed by New York law with respect to that property. That and other exceptions to the general choice-of-law rules are beyond the scope of this article. But the fact that such options may be available further underscores the need to be aware of how different jurisdictions address contested probate proceedings.

The issues of jurisdiction and venue, in and of themselves, can affect a will contest. Petitioning for administration in Florida automatically subjects the executor (Florida uses the term "personal representative") to the jurisdiction of the Florida court, regardless of his or her residency.2 Even non-Florida beneficiaries are subject to jurisdiction in Florida to the extent of their interests in the estate.3 This means that any challenge to the validity of a will that is probated in a Florida court will take place in Florida.4

Logistical factors such as the locations and availability of witnesses, medical professionals, and family members—many of whom may still be in New York—can substantially impact the prosecution and defense of any such will contest. For example, will the contesting party be deterred by having to pay for a Florida attorney to meet with and depose New York witnesses? What about a decedent's adult child who is serving as the fiduciary but lives in New York? Will he or she be willing and equipped to travel to Florida for depositions and trial to uphold the validity of the will?

Understandably, given the proliferation of revocable trusts, the site of an anticipated trust contest might be of greater financial significance than the site of a will contest. But under Florida's long-arm statute, the

court in which a decedent's estate is being administered often can obtain jurisdiction over the trustee and beneficiaries of the decedent's revocable trust as well, even if that trust is governed by the law of another state.5 Thus, it would be a mistake for New York clients to assume that even if they move to Florida, any postmortem litigation over their New York trusts will necessarily be confined to the New York courts.

Timing of Will Contests

Clients who anticipate postmortem litigation may also wish to consider the differences in the timing of a will contest in New York and Florida and the potential financial impact on their nominated fiduciary.

In New York, petitions for probate are filed with notice to interested persons to allow them the opportunity to object before the will is admitted to probate.6 In Florida, however, these petitions are typically filed and granted ex parte; interested persons receive notice after letters of administration have been issued and then have three months to object.7

This procedural difference can amount to a significant practical difference for the nominated fiduciary. Not surprisingly, fiduciaries might be reluctant to engage in protracted litigation to uphold the validity of the will if they have to pay for attorney fees personally during the pendency of the litigation. In Florida, fiduciaries will generally be appointed prior to any will contest; thus, they will have access to estate assets to fund the defense of the litigation. Not so in New York. For that reason, the nominated executor may petition for preliminary letters testamentary after a will contest has been filed (which would provide access to estate assets), but the court may deny that petition if it is concerned about a claim that the nominated fiduciary unduly influenced the testator.8

Selection of a Fiduciary

New York clients who anticipate litigation over their estates may be inclined to designate a neutral fiduciary, such as an accountant or lawyer, rather than a spouse or children. If these clients are planning a move to Florida, they should be aware that the fiduciary of a Florida estate must be domiciled in Florida or must be a family member of the decedent.9

In Terrorem Enforceability

New York clients who anticipate postmortem litigation over their estates are likely to include a no-contest, or "in terrorem," clause in their will. New York courts will enforce such provisions,10 and they may serve as a powerful deterrent to will contests.

But New Yorkers who are contemplating a move to Florida should be made aware that Florida courts, as a matter of statute and public policy, will not enforce in terrorem provisions.11 Instead, in Florida, a will or trust contestant is merely obligated to make a conditional renunciation of any beneficial interest in the document being challenged. If the contestant does not prevail, the renunciation is deemed null and void, and the contestant returns to his or her original position.12 Thus, the primary deterrent to commencing a will contest in Florida is attorney fees rather than disinheritance. If the stakes are high enough, that may not be a sufficient deterrent. Moreover, many lawyers will take these cases on a contingency basis. As discussed below, however, an unsuccessful contestant might be ordered to pay the attorney fees of the will proponent.

Undue Influence Claims

Circumstantial Evidence: A will may be contested on various grounds such as failure to comply with the formalities of execution, lack of testamentary capacity, fraud or undue influence.

Undue influence claims often present unique issues. For example, both New York and Florida recognize that undue influence claims, by the very nature of the alleged conduct, are difficult to establish through direct evidence. These cases often turn on circumstantial evidence.13

For that reason, New York clients may wish to consider the fact that will contests in New York can be tried before a jury,14 whereas will contests in Florida are tried exclusively by a judge.15 Depending on the fact pattern, this distinction alone may be outcome-determinative in an undue influence claim.

One can envision a will contest brought by an adult child who has been replaced in the decedent's estate plan in favor of a new spouse or even a caregiver. The adult child, who is the natural object of the decedent's bounty, may find a jury more sympathetic than a judge, and more disapproving of the settlor's "unnatural" changes. If so, the jury may also be more easily persuaded by circumstantial evidence of undue influence.

Burden of Proof: Clients may also want to understand who will have to prove what in an undue influence claim. In both New York and Florida, the contestant has the burden of proof to demonstrate undue influence by a preponderance of the evidence.16 Similarly, in both states an inference or presumption of undue influence can be triggered by certain types of evidence, and the burden may then shift to the will proponent. There are, however, some interesting differences.

In New York, if the contestant establishes that the alleged influencer is a beneficiary and shared a confidential relationship with the testator, an inference of undue influence may arise.17 The proponent of the will can overcome the inference with an alternative explanation for the bequest,18 and the inference alone does not shift the burden of proof.19 If the contestant offers additional evidence of influence, some courts have held, under a theory of constructive fraud, that the burden shifts to the proponent to prove by clear and convincing evidence that the bequest is free of undue influence.20

In Florida, if the contestant establishes that a beneficiary shared a confidential relationship with the testator and participated in procuring the bequest, a presumption of undue influence arises.21 By statute, the burden then shifts to the proponent of the will to prove by a preponderance of the evidence that there was no undue influence.22

To determine if there has been influence or active procurement, both states will consider a series of non-exclusive factors, including, inter alia, whether the alleged influencer was involved in hiring the drafting attorney, knew of the intended estate plan before the will was executed, was present for the execution of the document, or retained possession of the executed document.23

The challenges of proving a negative—i.e., that there was no undue influence—can be substantial. And the difference between a clear and convincing standard versus a preponderance of the evidence can be meaningful when relying on circumstantial evidence.

Interference With Inheritance

A New York client who anticipates a challenge to his or her testamentary intent should also be aware that Florida recognizes a more unusual cause of action known as tortious interference with an inheritance.24 New York, by contrast, has expressly declined to recognize this cause of action.25

The action is available in Florida only when the traditional probate remedy of a will contest is unavailable. For example, imagine a testator who prepares a new will in favor of his neighbor, but the will is never executed due to tortious interference by the testator's child. In such a scenario, the neighbor would have no standing, and thus no remedy available, in the probate process because he or she is not the beneficiary of any prior testamentary instrument.

The key difference between a will contest and a tortious interference claim is that the former seeks to invalidate the will in favor of a prior instrument, whereas the latter seeks damages directly from the alleged tortfeasor. Thus, the client should be aware that certain types of will contestants may have more litigation options available in Florida than in New York.

Assessing Attorney Fees

As discussed above, in light of the fact that in terrorem clauses will not be enforced in Florida, the primary deterrent to a will contest in Florida is attorney fees.

But it is not just his or her own attorney fees that the contesting party may have to pay. In both New York and Florida, courts have the authority to assess against a will contestant the fees incurred by the fiduciary in defending against the will contest. In New York, the fiduciary must establish that the will contest was brought in bad faith or was frivolous.26 In Florida, however, no such finding is required; instead, the statute provides the court with a non-exclusive list of factors to consider.27 Thus, it may be more difficult to have these fees assessed in New York than in Florida.

Conclusion

The questions that arise from these jurisdictional distinctions may not always have ready answers, particularly because the emotions that tend to run so high in these litigations after the settlor's death are often tempered while the settlor is still alive. That makes it difficult to predict how the different aspects of a will contest will be perceived by prospective will contestants or by those who will seek to defend the validity of the document. However, those New York clients who are aware enough of their particular circumstances that they anticipate such postmortem litigation, may be in a position to evaluate at least some of these issues when considering changing their domiciles to Florida.

Endnotes:

1. SCPA §1605; Fla. Stat. §733.101.
2. Payette v. Clark, 559 So. 2d 630 (Fla. 2d DCA 1990).
3. Fla. Stat. §733.301.
4. Fla. Stat. §733.109.
5. Fla. Stat. §736.0202.
6. SCPA §§306; 1403; 1410.
7. Fla. Stat. §733.212. Note that petitioners can voluntarily provide notice and, in some instances, can even be compelled to do so. Fla. Stat. §§733.2123; Fla. Prob. R. 5.260.
8. SCPA §1412; Estate of Scamardella, 169 Misc. 2d 55 (Sur. Ct. 1996).
9. Fla. Stat. §733.304.
10. EPTL §3-3.5(b).
11. Fla. Stat. §§732.517; 736.1108.
12. Carman v. Gilbert, 641 So. 2d 1323 (Fla. 1994); Fintak v. Fintak, 120 So. 3d 177 (Fla. 2d DCA 2013).
13. Matter of Estate of Bacon, 169 Misc. 2d 858 (Sur. Ct. 1996); Blinn v. Carlman, 159 So. 3d 390 (Fla. 4th DCA 2015).
14. SCPA §502.
15. Allen v. Dutton's Estate, 394 So. 2d 132 (Fla. 5th DCA 1980).
16. Matter of Panek, 237 A.D.2d 82 (4th Dep't 1997).
17. In re Kruszelnicki's Will, 23 A.D.2d 622 (4th Dep't 1961).
18. Matter of Estate of Collins, 124 A.D.2d 48 (4th Dep't 1987).
19. In re Neenan, 35 A.D.3d 475 (2d Dep't 2006).
20. In re Estate of Nealon, 104 A.D.3d 1088 (3d Dep't 2013); In re Will of Ehrensberger, 47 Misc. 3d 1218(A) (Sur. Ct. 2015).
21. Estate of Madrigal v. Madrigal, 22 So. 3d 828 (Fla. 3d DCA 2009).
22. Fla. Stat. §733.107; Diaz v. Ashworth, 963 So. 2d 731 (Fla. 3d DCA 2007).
23. In re Carpenter's Estate, 253 So. 2d 697 (Fla. 1971).
24. Martin v. Martin, 687 So. 2d 903 (Fla. 4th DCA 1997).
25. Vogt v. Witmeyer, 87 N.Y.2d 998 (1996).
26. SCPA §2302.
27. Fla. Stat. §733.106.

Jay D. Waxenberg is a partner at Proskauer Rose in New York and a member of the executive committee. David Pratt is managing partner of the firm's Boca Raton office, where Jonathan Galler is a senior counsel.