Law Offices of
Daniel Timins

Daniel A. Timins, Esq., CFP®
Licensed in New York
Wills, Estate Planning, Estate Litigation, Elder Law

OF COUNSEL

Brian J. Zimmet
Licensed in New York
and New Jersey

www.TiminsLaw.com
dan@timinslaw.com

Tel: (212) 683-3560
477 Madison Avenue – Suite 240
New York, NY 10022

Getting Your Will Probated in New York: It's About Your Family, Not Your Beneficiaries

The earliest known Will was executed by an Ancient Egyptian named Uah in the year 2548 B.C. Since that time Wills have always represented one concept: Who gets which of my things when I pass away. While this seems easy enough in theory, people over time have by necessity created procedures to validate the authenticity of a Will, and created systematized steps to ensure their instructions are properly carried out.

Our modern system of Probating a Will goes back to law promulgated in England prior to the exploration of North America. In those days there were no life insurance policies or retirement plans that transferred outside of Probate: An original document was signed by the Testator and sworn to by two disinterested witnesses. And while the procedures of both creating and Probating Wills has changed over time, the very basis of those changes are still rooted in Anglo-American jurisprudence going back hundreds of years.

Wills are state-based, meaning that the execution requirements for a Will in California or Connecticut may be different than those in New York or Florida, but as long as the document was properly executed under that state's law it should be valid in every state of the country. In addition, many foreign Wills are recognized in the United States and vice-versa. But the procedures for administering to a deceased person's estate differ vastly between international boarders, state lines, and sometimes even differ from county to neighboring county.

When you pass away the first issue is which state and county the Will should be Probated in. The answer is typically based on where you were domiciled, but may instead be determined based on where you owned real estate, or your citizenship. If you have real estate in several states or countries you will usually need to do one Probate proceeding in each jurisdiction (unless the property is owned by a Trust, jointly, or reserved by a remainder tenancy). Lastly, if your estate is worth negative money you should typically not be Probateit, since there will be no property to distribute anyway (which is the primary purpose of Probating a Will).

What follows is a general discussion as to the legal procedures and potential challenges that apply to Wills that are submitted to the Surrogate's Court for Probate.

Be mindful that Will ONLY transfers property that are a part of your Probate Estate, meaning funds that we can't ascertain the beneficiary after your death without the Will. For example, if

you die owning a joint account, the joint account holder receives all funds in the account; because we know who receives these funds upon your passing they are NOT a part of your estate. Your life insurance and retirement plans typically name a beneficiary who receives them upon your death; even if your Will leaves these funds to other people, they are transferred by the beneficiary designation form to the named beneficiary so your Probate Estate never owns these funds and the Will's instructions regarding the policy or retirement plan is invalid. Any account that is Transfer On Death ["TOD'], In Trust For ["ITF'], or names a beneficiary at your passing pass to the designated individual, so these accounts also avoid Probate. Lastly, any property or account specifically owned or going to a Trust avoids Probate, since the Trust has its own distributive terms. It is crucial you speak to an attorney about these "Testamentary Substitutes" that avoid passing through Probate under your Last Will and Testament, as their distribution is much simpler than assets passing under your Will.

Simply stated: The burden of proof on invalidating a transfer outside of Probate is on the opponent (non-beneficiary), while the burden of proof validating a Will is on the proponent (the person who wants the Will to be probated).

1. Original Will, Death Certificate & Proponent Necessary

First, be mindful that your Will is a contract that is not even considered valid until several weeks after the time of your death: Instructions such as disposition of bodily remains are not in force at this time. In order to begin the Probate process your estate must produce the original Will. If it cannot be found a signed copy of your Will may be valid under a Lost Will Proceeding, but this is not the preferable route to achieve a successful Probate.

Next, the person who is willing to serve as Executor who you have also named in your Will (whom we shall also refer to as the Will's "Proponent") needs to bring the Will and an original Death Certificate to an attorney so he can prepare a Petition that puts the court on notice of your passing, and the Proponent's desire to help manage your post-mortem affairs under the terms of the Will. The Proponent will also need to provide an initial retainer for legal counsel and a filing fee to the court (the latter is capped at a maximum of $1,250). Your estate's funds cannot be used for these expenses at this time – no one has authorization to touch your estate's assets - so leaving a small account as Transfer On Death ["TOD"] to your proposed Executor to commence Probate is often a good idea.

2. Requirements of the Petition

The Petition states the date of your Will, the names of the witnesses to the Will, the proposed Executor's name and address, and the names, addresses and relationships of your closest family members (your "**Distributees**", sometimes referred to as your Next of Kin), and the names and addresses of your beneficiaries. Your proposed Executor will also sign an Oath stating he or she

will live up to his or her fiduciary responsibilities in administering to your estate, as well as submitting other Court paperwork.

Identifying your Distributees is the first step. Your Next of Kin is determined by who is most closely related to you:

1. Your spouse
2. Your children (or, in their absence, their children)
3. Your parents
4. Your siblings (or, in their absence, their children)
5. Your grandparents
6. Your aunts and uncles
7. Your cousins

Step-Children, Life Partners, Friends, Charities, the family dog any anyone not listed above are not and never can be Distributees, since they are not related to you. They have no right to your estate unless you name them as a beneficiary under your Will, and have limited abilities to dispute any gift you give them.

Some estates only have one Distributee (such as a surviving spouse when you have had no children, or a single child if your spouse has predeceased you), while other estates may have many distributees (such as if you are unmarried with no children and you outlive your parents, but you have a few siblings who are alive and some who predeceased you but have children of their own). These parties must all be entered into the Probate Petition.

Once the Proponent / desired Executor of your Will has identified your estates' Distributees, he must then put them all on notice of your passing and provide them a copy of the Will. **Notifying EVERY DISTRIBUTEE is MANDATORY, even if you have left them NOTHING**, because without them being placed on notice of your demise and the contents of your Will, the Will cannot be validated and therefore Probated. This notice is procured in one of two ways:

1. You send a copy of the Will to these distributees and send a Waiver which they sign in front of a notary, thereby consenting to the contents of the Will.

2. You send a copy of the Will with a Citation provided by the Surrogate's Court telling the Distributee the address, date and time that they may begin a Will Dispute (known as a "Return Date").

3. Submission of Paperwork (Or Setting Up a Return Date) With the Surrogate's Court

If every Distributee signs and sends in a Waiver to the Proponent, which is then filed with all remaining paperwork with the Surrogate's Court, then the matter moves quickly through

Probate, and the Surrogate (the judge of the Surrogate's Court) issues a Judicial Order granting Probate. However, as long as even one distributee does not sign a Waiver, the Will cannot be validated. If a party's whereabouts are unknown, the Surrogate's Court will often appoint a "Guardian Ad Litem", typically an experienced attorney the Surrogate trusts, to represent the Distributee in his absence; this "GAL" gets paid from your estate.

If a person is initially expected to not sign the Waiver, he is delivered a Citation stating the Return Date that he may dispute the contents of the Will. This is typically a right only permitted to the Distributees, as is the case with most legal disputes for the purposes of this discussion. Usually the Distributee's attorney shows up at the Court – the Distributee usually does not unless he is not represented by legal counsel. The disputes can be broken down into two aspects: Pre-Discovery Proceedings, and Discovery Proceedings.

4, Pre-Discovery / "1404" Proceedings

Every contesting Distributee is permitted the right to (1) review the deceased individual's legal file held by the drafting attorney, (2) depose the witnesses to the Will, and (3) depose the drafting attorney. This is called a "1404 Proceeding" which is used to authenticate the validity of a Will. During this time any "No Contest / In Terrorem" clause in the Will is INVALID: The 1404 Examinations have to do with whether or not a Will is even a valid document, and are a right every Distributee has.

In addition, when a Will has a No Contest Clause, the named Executors in your Will may be deposed as well.

Most witnesses tend to not remember much about the execution of the Will: They are typically asked questions by opposing counsel about things they would not tend to remember, since many witnesses usually have not met the Testator for more than a few minutes. However, a client's legal file will contain many details that may be useful to both the proponent of the Will and the contesting Distributee (now a "Contestant" or "Respondent"). In addition, questioning the drafting attorney is meant to give a more clear picture of the relationship between the client and the attorney, the communications which took place between them, the desires of the Testator, what the contents of the Will and file are meant to represent, and the like. While the questioning of the drafting attorney is not meant to be confrontational, many opposing counsels incorrectly use this as an opportunity to lambast or disparage the drafting attorney, when they should instead by fact finding.

If after this point the Respondent does want to proceed further he risks invoking a No Contest Clause, and the stakes increase drastically.

5. Discovery / Trial

At this point the Respondent has opted to challenge the validity of the Will or the mental state of the Testator: They are "All In." Their arguments are usually based on the following legal theories:

- **Mental Capacity** (Proponent must prove): The Testator did not know what they were doing or what they were signing at the time the Will was executed, or did not know the nature of their assets, who their nearest family members were, or could not comprehend the contents of the Will.

- **Undue Influence / Fraud / Coercion** (Respondent must prove): The Testator was being bullied into signing the Will.

- **Mistake:** Either the Will is wrong and does not contain what the Testator wanted, or the Ceremony was done incorrectly and an execution requirement is missing or invalid.

Depending on the nature of the facts, and usually at the Court's request, disputing parties will often come up with a settlement instead of going to trial: Surrogate's Court trials are relatively rare, often time consuming, and expensive to both the parties and the Court alike. In addition, during this time the opposing parties are paying legal fees out of their own pockets, and feel the financial pains every time they delay a settlement. However, well-funded parties may be tempted to continue their claim, leaving the less-wealthy party in a position of stalling until either trial occurs or the Court forces a resolution.

As a final reminder, much of this can be avoided by having your estate pass outside of Probate. Utilizing trusts, naming beneficiaries on accounts, and gifting prior to your passing will make it very difficult for your vexatious Distributees to dispute the transfers: Your Distributees have rights to your estate, so leaving your estate with no assets will greatly diminish their ability to exert their own rights.