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UNION COUNTY BAR ASSOCIATION
ELDER LAW COMMITTEE
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THE INCREDIBLE SHRINKING REQUIREMENTS OF WILL FORMALITIES

TRADITIONAL STATUTORY STANDARDS

3B:3-2. Requirements for Will; Handwritten Will; Evidence establishing intent.

- a. Except as provided in subsection (b) and in N.J.S. 3B:3-3, a will shall be:
 - (1) In writing;
 - (2) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and
 - (3) Signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.
- b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
- c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as

wills, portions of the document that are not in the testator's handwriting.

- 3B:3-2a. contains the traditional will execution requirements that we all (hopefully) employ in our offices.
- 3B:3-2b. is the "holographic will" statutory standard.

SUBSTANTIAL COMPLIANCE DOCTRINE

Through the years the doctrine of substantial compliance developed to address circumstances where formalities of the aforementioned statute (particularly N.J.S. 3B:3-2a.) were not satisfied. Generally, if the document reflects the testator's intent, a technical defect in the formal execution of same will not invalidate it. In re: Ranney, 124 N.J. 1 (1991). (A signature by witnesses on only self-proving affidavit was sufficient); In re: Peters, 107 N.J. 263 (1987). (The signing of a will after the death of the testator may be sufficient if the witnesses are precluded from signing before the testator's death); See also, In re: Estate of Gerhardt, 336 N.J. Super. 157 (Ch. Div. 2000). (Notary public may sign as witness if that is the intent of the testator and the notary public.)

The doctrine of substantial compliance has been codified as outlined below:

3B:3-3. Noncompliant execution; Clear and convincing evidence of intent.

Although a document or writing added upon a document was not executed in compliance with N.J.S. 3B:3-2, the document or writing is treated as if it had been executed in accordance with N.J.S. 3B:3-2 if the proponent of the document or writing establishes clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will; (2) a partial or complete revocation of the will; (3) an addition to or an alteration of the will; or (4) partial or complete revival of the formerly revoked will or of a formerly revoked portion of the will.

IN THE MATTER OF THE PROBATE OF THE ALLEGED WILL AND CODICIL OF MACOOL, DECEASED. 416 N.J. Super. 298 (App. Div. 2010)

The Macool case is the first published Appellate Division decision analyzing N.J.S. 3B:3-3.

In Macool, Louise and Elmer Macool were married for 40 years in what was for both of them a second marriage. They had no biological children. Louise raised Elmer's seven children from his first marriage as if they were her own. Louise's first will named her husband as her sole beneficiary and her seven stepchildren as contingent beneficiaries. After Elmer died, Louise went to her attorney's office with the intent of

changing her will. She gave a note to her attorney that added two of her nieces as primary beneficiaries along with her seven stepchildren.

Louise met with her attorney and left him her handwritten notes. The attorney testified that he dictated the entire will while Louise was in the office. A draft will was prepared by attorney's secretary in which Louise's two nieces and seven stepchildren were named as primary beneficiaries.

Louise left her attorney's office and died one hour later. She never reviewed the draft will. Louise never signed the handwritten notes given to her attorney.

Plaintiff niece argued that the draft will should be admitted to probate under N.J.S. 3B:3-3 since there was clear and convincing evidence that the decedent intended this document to constitute her will or, alternatively, a partial revocation of her prior will. The Appellate Division in addressing this argument distinguished between evidence showing the decedent's general disposition to alter her testamentary plans (which was apparent) and evidence establishing, by clear and convincing evidence, that decedent intended the draft will prepared by her attorney to constitute her binding and final will.

The Appellate Division agreed with the trial court that the record clearly and convincingly showed that decedent intended to alter her testamentary plans to include her two nieces when she met with her attorney. The decedent's handwritten note and her attorney's testimony and the draft will itself all supported that finding. **However**, the Appellate Division found that plaintiff failed to establish by clear and convincing evidence that decedent intended the "draft" document prepared by her attorney to be her will.

The court also noted that decedent's untimely demise prevented her from: (1) reading the draft will prepared by her attorney; and (2) conferring with her counsel after reviewing the draft document to clear up any ambiguities, modify any provision or express her final assent to the rough draft.

In clarifying N.J.S. 3B:3-3, Appellate Division held that before a writing is deemed to be a will, the proponent of the writing must prove by clear and convincing evidence, that:

- (1) the decedent actually reviewed the document in question,
and**
- (2) thereafter gave his or her final assent to it.**

Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes. The Appellate Division also reversed the trial court's ruling which required that a writing offered under N.J.S. 3B:3-3 be signed by the testator. The Appellate Division reasoned

that the only conceivable relief offered by N.J.S. 3B:3-3 is to, when circumstances permit, admit a writing to probate that has not been signed by a testator.

**IN THE MATTER OF THE ESTATE OF LEIGH CAMERON
RANDALL (Chancery Division, Probate Part, Essex County,
Docket No. ESX-CP-0199-10)(Walter Koprowski, Jr., J.S.C.,
decided February 1, 2011, Unpublished)**

Decedent died with six first cousins as his sole intestate heirs. Plaintiff, one of the six cousins, sought to probate a letter allegedly written by the decedent eight years before his death as a writing intended as a will. The letter did not have the decedent's signature on the pages offered for probate.

Plaintiff lost his copy of the letter but found an amended portion of same in a drawer of decedent's home. The amendment contained a handwritten note in the margin of the letter (which was a copy of the letter sent to plaintiff) which devised most of decedent's estate to plaintiff in appreciation for his help throughout the years. Decedent wrote VOID next to the parts of the letter which devised the estate to his remaining cousins and others.

The photocopy of the letter containing the original notation in the margin was admitted to probate under N.J.S. 3B:3-3. The trial court accepted plaintiff's testimony that the handwriting was that of the decedent and believed the decedent considered this letter as important since she kept a photocopy of it in her bureau for eight years. No other correspondence was noted in this location after her death.

The court also seemed to be persuaded by the fact that, as plaintiff testified, he and his father had a close relationship with the decedent and spoke to her about once a month by telephone when she lived in Arizona. In addition, the plaintiff received numerous letters from the decedent throughout his life. Plaintiff also testified that decedent kept important financial documents for safekeeping at home as she distrusted financial institutions and was concerned about attorney's fees in connection with preparation of a formal last will and testament.

**IN THE MATTER OF THE ESTATE OF WILLIAM
W. WALB, JR. DECEASED (Appellate Division—Docket No.
A-1368-09 P2 (Decided March 3, 2011, Unpublished Opinion)**

Decedent executed a will bequeathing certain personal property and percentages of his net estate to friends and his alma mater Albright College. The will contained a clause indicating that decedent would prepare a list disposing of personal property.

The decedent did execute an addendum disposing of personal property. However, he also included a bequest for his home and his residuary estate. This essentially changed the document from one governed by N.J.S. 3B:3-11 (identifying a

devise of tangible personal property by a separate writing) to that (possibly) of a writing intended as a will pursuant to N.J.S. 3B:3-3 since it attempted to devise non-personality items.

Once the executor discovered the addendum, an order to show cause was filed seeking to admit same to probate as a writing intended as a will. Albright College objected to the addendum alleging that it lacked testamentary capacity and that another beneficiary unduly influenced the decedent.

At oral argument, the parties discussed the need for a plenary hearing to determine decedent's intent in executing the addendum, however, the judge refused ruling the addendum was not a codicil but rather an addendum governed by N.J.S. 3B:3-11 which could only dispose of the tangible property listed therein.

The lesson of this case is that if you believe you have a case which requires a hearing, particularly as to issues of testamentary intent, the court should hold a hearing if not on the return date of an order to show cause then at another time in the future after a period is allowed for discovery.

QUESTIONS RAISED BY CONTINUED LOOSENING OF WILL FORMALITY REQUIREMENTS

- How do we protect ourselves against a Macool situation? Should we include with the transmittal of draft documents to the client a mechanism by which the client can confirm that they have reviewed the document and agreed to its terms while it is still in their possession? Many clients don't return to our offices for months to execute documents that reflect their testamentary intent.
- Would it be a better post-Macool practice to transmit all drafts by way of email (with client consent) so that they may acknowledge in a reply email that they have reviewed the documents and same meet with their approval? Could such a methodology actually become a Best Practice in a post-Macool legal world, especially if there are additional loosening of the strict execution requirements?
- Is the relaxation of will formality requirements a good thing for clients?
- Does the potential benefit of effectuating testamentary intent of some writings intended as wills outweigh the possible detriment for more mischief (such as undue influence) that could accompany such a loosening of execution standards (forged handwriting of a testator, reply emails by the son or daughter who live with the testator when other siblings are out of state)?
- What if a testator is too weak to create a writing? Can he be permitted to dictate his testamentary intent on a tape recorder and state he has reviewed the tape in detail and assents to its contents? Why shouldn't this be admissible as a recording intended as a will under a future expansion of Macool?