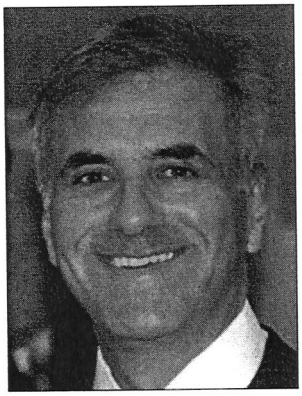
Bequests to Will Witnesses—A Trap for the Unwary?

By Lee A. Snow



Most trusts and estates practitioners are aware of the numerous problems that may arise when persons who have no experience drafting Wills attempt to prepare or in fact prepare their own Wills. A case decided last year illustrates some of the less recognized dangers that may be created as a result of a do-it-yourself Will execution.

In *Estate of Cynthia R. Wu*,[1] the New York County Surrogate's Court held that the estate tax apportionment clause in the decedent's Will was ineffective to absolve the decedent's brother from paying a portion of the estate taxes where the brother, who was the beneficiary of two life insurance policies on the decedent's life but not a beneficiary under the Will, was one of the two attesting witnesses to the Will. By strictly applying the New York statute that voids dispositions made to attesting witnesses, the Court followed the letter of the law, but, in this particular case, by doing so, the Court may also have defeated or diminished the testatrix's intention to benefit her brother.

EPTL § 3-3.2[2]

The statute in question, New York Estates, Powers and Trusts Law § 3-3.2(a), provides that a beneficial disposition or appointment of property made to an attesting witness under a Will is void if such witness's testimony is necessary to prove the Will. The statute offers two leniencies to this rule, however. EPTL § 3-3.2(a)(2) provides that a beneficial disposition to an attesting witness will not be void where the Will can be proved without the testimony of such witness, for example, where there are at least two other attesting witnesses who have received no beneficial disposition or appointment under the Will. EPTL § 3-3.2(a)(3) provides further that if an attesting witness is also a distributee of the decedent, then even if such witness's testimony is necessary to prove the Will, such witness will be entitled to receive the lesser of her intestate share or the value of the disposition made to her under the Will. If the void disposition to the distributee/witness becomes part of the residuary estate, the witness receives her share from the residuary estate. If the void disposition passes in intestacy (which could occur, for example, if the witness were the sole residuary beneficiary), then the witness receives her share ratably from the distributees who succeed to such interest.[3]

EPTL § 3-3.2 is derived from the predecessor statute, Decedent Estate Law § 27,[4] which provided the same general rule as EPTL § 3-3.2 and the same two leniencies described immediately above, albeit with a slightly different focus and in more antiquated language.

A Few Background Cases

The courts have held that where beneficial dispositions were made in a Will to all of the Will's attesting witnesses, the Will could still be admitted to probate, but the dispositions to the witness beneficiaries would be void.[5] In *Estate of Fracht*,[6] the decedent's nephew, an attorney who was obviously unfamiliar with estate law, prepared the decedent's Will. 50% of the residuary estate was left to the decedent's wife, the other 50% to the nephew, and the decedent's sister was a contingent beneficiary of the residuary estate. The wife, nephew and sister acted as witnesses. The court held that the wife, who was one of the decedent's distributees, could receive an amount equal to the lesser of her intestate share or the testamentary disposition made to her. The court also ruled that the entire 50% residuary interest left to the nephew and the contingent residuary bequest left to the decedent's sister (neither of whom were distributees) were void. Therefore, the voided portion of the wife's inheritance and the nephew's entire beneficial interest both passed to the contingent residuary beneficiaries of the Will (other than the sister).

In *In re Hens' Will*,[7] an older case decided under the DEL, the Surrogate's Court of Nassau County held that a residuary disposition under the Will to two beneficiaries would be effective even though the beneficiaries were witnesses to a Codicil to the Will. In this case, the two residuary beneficiaries under the Will were not witnesses to the Will, but were necessary witnesses to a Codicil to the Will that reduced the amount of a cash legacy made under the Will and thereby increased the value of the residuary estate. The court held that the original disposition of the residuary estate to these two witness beneficiaries was effective (because they were not witnesses to the Will) but the increase in the residuary estate made by the Codicil was void with respect to the witness beneficiaries. Because there was no alternative disposition of such amount, such amount passed in intestacy.

In *In re King's Estate*,[8] the court held that the determination of whether the attesting witness receives a beneficial disposition under the Will is made at the time of execution and attestation and that the disinterest of the witness must exist at the time of execution.

In this case, the Will left the entire residuary estate to the attorney-draftsman. There were three witnesses to the Will: the attorney-draftsman, the decedent's cousin (who received a $500 legacy) and a third person who had no interest in the Will. Before the Will was admitted to probate, the decedent's cousin signed a deposition stating that he was aware that by virtue of his testifying in favor of the Will's being admitted to probate, he would forfeit his $500 legacy. The attorney-draftsman argued that, as a result of the cousin's forfeiture, there were two disinterested witnesses, the attorney-draftsman was therefore not a necessary witness and thus he could receive his residuary legacy. The Court rejected this argument, holding that the disinterest of the witnesses must exist at the time of execution, not at the time of probate; the Court concluded that the attorney-draftsman must forfeit his residuary legacy.

With respect to the not infrequent practice of having a nominated executor act as one of a Will's witnesses, the courts have long held that the nomination of an attesting witness as an executor is not deemed a beneficial disposition to such witness. The courts' rationale for reaching this conclusion is that any payments made to the executor are compensation for services to be rendered rather than a beneficial disposition.[9]

The *Wu* Case

The *Wu* case is about extending the application of EPTL § 3-3.2(a)(1) to the tax apportionment clause of a Will. In *Wu*, the decedent, Cynthia Wu, executed a Will providing that all estate taxes payable by reason of her death with respect to property passing both under the Will and outside the Will were to be paid out of her estate without apportionment. Wu's brother, who was the beneficiary of two insurance policies on her life valued at approximately $3.3 million, was one of two attesting witnesses to the Will. Therefore, his testimony was necessary for its probate.[10]

In *Wu*, a case of apparent first impression, the New York County Surrogate's Court was presented with the question whether the tax apportionment clause of the Will was effective to absolve the brother from his share of estate taxes in light of EPTL § 3-3.2(a)(1). The Court couched its decision as hinged on whether the Will's estate tax non-apportionment clause was tantamount to a beneficial disposition to the witness brother.

The Court began its analysis by noting that the policy underlying EPTL § 3-3.2 and its predecessor DEL § 27 is to impose safeguards against fraud and undue influence by preventing a witness to a Will from benefiting under the Will if probate is dependent upon the witness's testimony. The brother argued that in this case there was no fraud or undue influence because, when he acted as a witness to the Will, he was unaware of his designation as beneficiary of the decedent's life insurance policies. The Court stated that even if the brother's assertion were true, his knowledge of the life insurance policy beneficiary designation was irrelevant. The Court held that "the application of EPTL 3-3.2(a)(1) to a non-distributee is absolute." While, the Court explicitly recognized that its strict application of the statute may lead to an unduly harsh result in certain circumstances, it opined that applying the statute rigidly was necessary due to the language of the statute and the public policy that it carries out.

Conclusion

The arguably unsettling significance of the holding in *Wu* is that the brother, who was not mentioned in the Will and, according to his testimony, was unaware that he was named as a beneficiary of a non-probate but estate-taxable asset, nevertheless was deemed to receive a beneficial disposition under the Will because of the Will's estate tax non-apportionment clause.

The *Wu* case clearly illustrates the dangers of having a do-it-yourself Will execution ceremony. Where the decedent may gather her family members and friends as witnesses, she is not likely to recognize that such an informal execution ceremony could defeat her intentions to benefit the same family members or friends under her Will. Even attorneys who are not knowledgeable in trusts and estates law may be unaware of the statute or its pitfalls. Furthermore, attorneys who do not concentrate in trust and estate practice and who are aware of the statute may not have the experience to know that only reviewing the terms of the Will to determine who may or may not serve as witnesses is not always sufficient. In order to ensure that the decedent's wishes are carried out, it often necessary and always advisable to gather complete information about the decedent's non-probate assets.

In light of the above, experienced trusts and estates law practitioners should continue to provide and adhere to the time-tested practice that Wills should be executed most often in an attorney's office, with attorneys or employees of the attorney acting as quasi-professional witnesses. Following such a procedure should in most cases ensure that the Will execution formalities are complied with and, equally importantly, ensure that the witnesses to the Will are truly disinterested. Because of the Court's decision in the *Wu* case, doing so is more important than ever before.

Endnotes

1. 24 Misc.3d 688, 877 N.Y.S.2d 886 (Surr. Ct., N.Y. Co. 2009) (hereinafter "Wu" or the "Wu case").
2. N.Y. Estates Powers and Trusts Law (EPTL) § 3-3.2 provides as follows:

   > Competence of attesting witness who is beneficiary; application to nuncupative will

(a) An attesting witness to a will to whom a beneficial disposition or appointment of property is made is a competent witness and compellable to testify respecting the execution of such will as if no such disposition or appointment had been made, subject to the following:

(1) Any such disposition or appointment made to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition or appointment thereunder.

(2) Subject to subparagraph (1), any such disposition or appointment to an attesting witness is effective unless the will cannot be proved without the testimony of such witness, in which case the disposition or appointment is void.

(3) Any attesting witness whose disposition is void hereunder, who would be a distributee if the will were not established, is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will, such share to be recovered as follows:

(A) In case the void disposition becomes part of the residuary disposition, from the residuary disposition only.

(B) In case the void disposition passes in intestacy, ratably from the distributees who succeed to such interest. For this purpose, the void disposition shall be distributed under 4-1.1 as though the attesting witness were not a distributee.

(b) The provisions of this section apply to witnesses to a nuncupative will authorized by 3-2.2.

3. *Id.* at § 3-3.2(a)(3)(A)&(B).

4. N.Y. Decedent Estate Law (DEL) § 27 provided as follows:

Devise or bequest to subscribing witness

If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

Except as hereinafter provided in this section no subscribing witness to a will shall be entitled to receive any beneficial devise, legacy, interest or appointment of any real or personal estate thereunder unless there are two other subscribing witnesses to the will who are not beneficiaries thereunder.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

5. *Estate of Fracht*, 94 Misc.2d 664, 405 N.Y.S.2d 222 (Surr. Ct. Bx. Co. 1978).

6. *Id.*

7. *In re Hens' Will*, 39 Misc.2d 78, 239 N.Y.S.2d 1007 (Surr. Ct. Nassau Co. 1963).

8. *In re King's Estate*, 68 Misc.2d 716, 328 N.Y.S.2d 216 (Surr. Ct. N.Y. Co. 1972).

9. *Fracht, supra; see Pruyn v. Brinkerhoff*, 7 Abb.Pr.N.S. 400 (Sup. Ct. 3rd Dist. 1867).

10. *Wu, supra; see* N.Y. Surrogate's Court Procedure Act (SCPA) § 1404 (1).

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