

March 28, 2001

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PARTIAL PROBATE

To every attorney who has probated a Will, the words “probate is complete” have a lovely sound. Limitations which may have been imposed by a grant of Preliminary Letters, no longer need to be considered. The full panoply of the executor’s powers is now available. The administration of the decedent’s estate can commence in earnest; debts may have been paid or disputed and taxes determined, but now assets may be distributed in accordance with the Last Will and Testament.

On occasion, however, what appears at first blush to be an anomaly, prevails: partial probate. Upon reflection, the concept of partial probate is less unfamiliar than one might think. We have all seen those cases where decedent’s Will was admitted to probate, while a Codicil for whatever reason, was denied probate. Logically, the Codicil is then regarded as a separate instrument. In fact, however, the Codicil and Will are an integrated instrument, part of a whole. EPTL §1-2.19 (b) provides that, “unless the context otherwise requires, the term ‘Will’ includes a Codicil.”

Nevertheless, in many instances, the provisions of a Codicil may be easily severed from those of a Will, an important condition for a grant of partial probate. Furthermore, other severable portions of a Will may be probated while disputed portions are denied probate, as our brief discussion will illustrate.

THE PARAMETERS

Where partial probate is granted, a part of the Will is admitted to probate while another part, the

validity of which is questioned, or which may then or later be deemed invalid, is denied probate upon certain grounds.

The provision to be denied probate must be challenged on the customary, substantive grounds, such as fraud, mistake, undue influence or lack of due execution, although this finding need not be made contemporaneously. Grounds may not consist of a claim that the offending provision is scandalous, atrocious or libelous, as in such case the Surrogate will not deny probate to the disputed portion.¹

Limited Letters are issued to the executor to implement those provisions of the Will admitted to probate.² The valid portion admitted to probate must be clearly severable from the remaining provision(s).³

It is an uncommon remedy which is granted only upon the consent of all parties and only where objections are limited to a specific disposition. Distribution of the remainder of the estate must be certain.⁴

The term “partial probate” should not confuse. Where a Will is genuine, the testator was of sound mind and not under restraint and the Will was executed in accordance with the requirements of the Statute, the Will must be admitted to probate even if one or more of its provisions may be invalid.⁵

THE PROCEDURAL POSTURE

The probate petition should be seen as an initial pleading, with built-in allegations that the Will is duly executed in accordance with statutory requirements; that the decedent had testamentary capacity; was not under restraint, and so on. These, unspoken, allegations customarily are not denied, but if challenged, they may be disputed as affirmative defenses in the form of objections.⁶

SCPA §1410 provides that any person whose interest in property or in the estate of a testator would be adversely affected by the admission of the Will to probate may file objections to the probate of the Will or of any portion thereof. The statute has been construed to read that objections may be filed by

any person whose interests may be adversely affected by the admission to probate of the Will or to probate of any portion of the Will addressed by the objections.⁷

If the probate petition is thus properly viewed as the initial pleading, there is no reason why the issue of partial probate may not be raised prior to determination of the objections. In Will of Edythe Atlas, 101 Misc. 2d 677, (Surr. Ct., Nassau Cty., 1979) *supra*, all parties agreed that partial probate was appropriate, permitting the funding of a trust for the benefit of decedent's mother, where objections dealt primarily with allegations of undue influence concerning the residuary clause in decedent's Will. The Surrogate issued limited letters to the fiduciary pursuant to the petition for partial probate.

A request for a decree of partial probate prior to the filing of objections will be denied, however, where provisions of the propounded Will and its eleven Codicils are so intertwined as to make it impossible to properly sever those portions amenable to probate from those which must be denied probate.⁸

The Court in Matter of Okin, 100 Misc. 2d 1020 (Surr. Ct., Westchester Cty., 1979) denied partial probate, however, where objections were filed to the probate of the decedent's Codicil, and not the Will, although it appeared that the undisputed portions in the Will could have been carried out. The case indicates that the proponents failed to present the Court with precedent, never a good idea when one ventures into rarely traversed territory.

Similarly, at this stage of the proceeding, partial probate will be denied where all the parties do not consent. In Matter of Helen Geraci, NYLJ 2/22/2000 p. 28, col. 5, (Surr. Ct., Kings Cty.) *supra*, where provisions of a Codicil were at issue, no one apparently objected to admission of the Will to probate. Nevertheless, the preliminary executrix objected to partial probate on the grounds that an early distribution of funds bequeathed in paragraph "sixth" of the Will would be inopportune due to uncertain tax liabilities

of the estate. Her failure to consent resulted in a denial of partial probate.

There appears to be some reluctance to grant partial probate prior to the trial of objections. We can see this, as well, in Matter of Emil Kortchmar, NYLJ 7/2/93, p. 27, col. 6, (Surr. Ct., Westchester Cty.) where partial probate was not granted after a motion for summary judgment was denied in part.

After the decree granting partial probate is in place, the objections to the remaining portion may be tried, or, as is so often the case in contested probate, the matter is settled and a supplemental decree will be issued.⁹

THE MERITS

A part of the Will may be denied probate upon any ground which is objectionable, except, it would seem, testamentary capacity, which must require the denial of probate of the entire instrument. A Surrogate may refuse to probate part of the Will on the grounds of mistake;¹⁰ inadvertence, where a sheet not intended to be fastened with the Will was erroneously included and stapled to the Will by the attorney-draftsman;¹¹ destruction, where the Surrogate was satisfied that the decedent never intended to destroy her will, because the Will was found together with other partially decomposed documents in a box in decedent's attic;¹² undue execution, where testatrix' attorney filled in certain blanks in the testimonium clause after the testatrix had affixed her mark which served as her signature.¹³

The issue of fraud and undue influence presents an interesting question.¹⁴ Does this unsavory force affect the entire act of testation such that the testator is left unable to exert his own will?

In a thoughtful discussion in In re McCaffrey's Will, 173 NYS 392 (Surr. Ct., Kings Cty., 1918), the Court held that since it may refuse probate of any separate portion of a Will for any cause, there is no

reason not to apply the same procedure where it can be shown that a certain, severable, portion was procured by fraud and undue influence, while the testator intelligently approved and adopted other portions of the Will.¹⁵

Matter of Lawson, 75 AD2d 20 (4th Dept. 1980) points up the importance of counsel's role in presenting the issue to the Court at the appropriate time. There, after a jury trial of objections on the basis of, inter alia, fraud and undue influence, the probate petition was dismissed on the grounds that the attorney-draftsman had procured a \$20,000.00 bequest to him by fraud and undue influence. On appeal, counsel for the other beneficiaries argued that the portion of the Will procured by fraud should have been denied probate and the remaining part of the Will admitted. The Court found that the Surrogate, had he been the trier of fact himself, rather than the jury, could, in his discretion and depending upon his analysis of the proofs, have admitted the Will to probate without the bequest to the attorney-draftsman. "We have here a jury trial in which no intimation was made by the Court or counsel that the finding of undue influence would have any result other than invalidation of the Will in its entirety... the single unambiguous question submitted to the jury was whether the execution of the *paper* by Nellie E. Lawson was caused or procured by undue influence of George A. Shaffer." (75 AD 20 at 29) The matter was remitted to the Surrogate's Court for consideration of whether the undue influence of the attorney-draftsman should have invalidated only the bequest to him or the entire Will.

The Court in Matter of Emil Korchmar, NYLJ 7/2/93, p. 27, col. 6 (Surr. Ct., Westchester Cty.) *supra*, citing, Matter of Lawson, 75 AD2d 20 (4th Dept. 1980) *supra*, decided that the decision of whether fraud and undue influence vitiate the entire Will or just a portion could be more appropriately decided after evidence has been presented. Proponents' motion for partial probate was denied.¹⁶

While there is no question that partial probate may be granted to portions of a Will deemed unaffected by fraud and undue influence, it would seem that Courts may be more amenable to do so after objections are tried and evidence is presented. There appears to be no basis in fact for this reluctance. Once a motion for summary judgment dismissing objections is granted in part, leaving the issue of fraud and undue influence as to some part of the Will open, partial probate should be available as to the unaffected portion of the Will.

CONCLUSION

Partial probate while uncommon, is a viable option under appropriate circumstances. The proponent who has legitimate and well founded concerns about the legitimacy of some part of the instrument propounded, may petition for admission of the untainted portion.¹⁷ The objectant who wishes to zero in on the point in controversy need not file objections based on every conceivable ground, risking a loss of the integrity of his case.

Since the procedure is somewhat unusual, counsel's well reasoned argument, supported by case law and made at the appropriate time, will be most helpful.

1. In Re Meyer, 72 Misc. 566 (Surr. Ct, NY Cty, 1911); but see In re Draske's Will, 160 Misc. 587 (Surr. Ct., Kings Cty., 1936)

2. Will of Edythe Atlas, 101 Misc. 2d 677 (Surr. Ct., Nassau Cty., 1979)

3. In Re Lyons Will, 75 NYS 2d 237 (Surr. Ct., Broome Cty., 1974); In re Foley's Will, 76 Misc. 168 (Surr. Ct., NY Cty., 1912)

4. Estate of Alice Tully, NYLJ, 12/6/94 p. 27, Col. 4 (Surr. Ct., NY Cty., 1994) [c.f. 227 AD2d 288 (1st Dept. 1996)]; Matter of Helen Geraci, NYLJ 2/22/2000, p. 28 Col 5. (Surr. Ct., Kings Cty.)

5. In Re Lawler's Estate, 123 Misc. 72, aff. 215 AD 506 (1st Dept. 1926)
6. In re Dixon's Will, 7 Misc. 2d 812, aff. 2 AD2d 98, app. den. 3AD2d 672 (2d Dept., 1957)
7. Matter of Wharton, 114 Misc. 2d 1017 (Surr. Ct., Westchester Cty., 1982) "To achieve legislative intent, SCPA § 1410 should be read as if the words 'or any portion thereof' were twice inserted...", 114 Misc. 2d at 1019.
8. Estate of Alice Tully, NYLJ, 12/6/94, p. 27 col. 4 (Surr. Ct., NY Cty., 1994), supra.
9. Estate of Doreen L. Wedeking, NYLJ 8/8/2000, p. 28 col. 5, (Surr. Ct., Nassau Cty.)
10. In re Schwartz' Will, 79 Misc. 388 (Surr. Ct., NY Cty., 1913)
11. Matter of Kratina, 151 NYS2d 714 (Surr. Ct., NY Cty., 1956)
12. In re Christensen's Will, 197 Misc. 152 (Surr. Ct., Richmond Cty., 1950)
13. In re Foley's Will, 76 Misc. 168 (Surr. Ct., NY Cty., 1912)
14. We should note at the outset, that although fraud and undue influence are usually lumped together, they are conceptually different. The distinction, however, is not consequential here. For an excellent exposition, see Estate of Julius Weinstock, 78 Misc. 2d 182 (Surr. Ct., Nassau Cty., 1974).
15. Accord Matter of Wharton, 114 Misc.2d 1017 (Surr. Ct., Westchester Cty., 1982); supra; Matter of Delia Roosa Thorn, 153 Misc. 28 (Surr. Ct., Oneida Cty., 1934)
16. See e.g. Estate of Margaret Eckert, 93 Misc. 2d 677 (Surr. Ct., NY Cty., 1978);
17. The proponents in In re Schwartz' Will, 79 Misc. 388 (Surr. Ct., NY Cty., 1913), supra, could have taken this posture.