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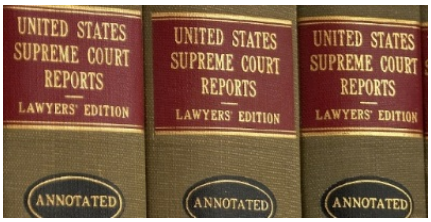

CONSTRUCTION AND REFORMATION OF WILLS AND TRUSTS IN SURROGATE'S COURT

FACULTY

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June 16, 2021
Suffolk County Bar Association, New York

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About Robert

Robert M. Harper concentrates in trust and estate-related litigation in Surrogate's Court and Supreme Court. His practice includes probate contests, accounting proceedings, discovery and turnover proceedings, guardianship proceedings, and trust invalidation proceedings. He is also a frequent contributor to Farrell Fritz's New York Trusts & Estates Litigation blog.

In addition to his work at Farrell Fritz, Rob is a special professor of law at Hofstra University School of Law. He also coaches several of Hofstra's moot court teams, including the National Moot Court Competition team.

Experience

- Co-authored amicus curiae brief, and served as counsel of record, for the New York State Bar Association in the Supreme Court of the United States matter of North Carolina Department of Revenue v. The Kimberly Rice Kaestner 1992 Family Trust.
- Co-authored a proposal to amend Rule 4503(b) of the New York Civil Practice Law and Rules to extend to revocable trust contests an exception to the attorney-client privilege, which Governor Cuomo signed into law on August 19, 2016.
- Authored a proposal to amend Mental Hygiene Law section 81.21, which the Governor signed into law in 2015.
- Instrumental in ensuring that proposals to amend Estates, Powers and Trusts Law sections 11-1.5 and 11-A-2.1 and Surrogate's Court Procedure Act section 1724 passed the New York Legislature and were signed into law by Governor Cuomo in 2014.

Credentials

EDUCATION

- Boston College
- Chaminade High School
- Hofstra University School of Law

BAR ADMISSIONS

- New York
- New Jersey

COURT ADMISSIONS

- U.S.D.C., Eastern District of New York

Affiliations & Appointments

- New York State Bar Association, Trusts & Estates Law Section, Chair, Former Chair-Elect, Former Treasurer and Secretary, Past Governmental Relations and Legislation Co-Chair and Past Delegate to the House of Delegates

- Suffolk County Bar Association, Board of Directors
- New York Bar Foundation, Fellow
- Suffolk County Bar Association
- Surrogate's Court Committee, Past Co-Chair
- Suffolk Academy of Law, Past Officer
- Nassau County Bar Association
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The Construction and Reformation of Wills and Trusts in Surrogate's Court

Suffolk Academy of Law

Presented By:
Robert M. Harper

June 16, 2021

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The Construction and Reformation of Wills and Trust Instruments

- Parties often seek construction and/or reformation of wills and trust instruments in order to resolve disputes as to the meaning thereof, and mistakes contained in the instruments (*Matter of Stahle*, N.Y.L.J., Jan. 23, 2002, at 32 [Sur. Ct., Onondaga County]).
- A "fundamental distinction" exists between construction and reformation (*id.*).
  - "Construction means [that the Surrogate's Court] must determine the meaning of words in a will [or a trust instrument]" (*id.*).
  - In reformation, the Surrogate's Court "changes the language of the will [or trust instrument] itself by the addition or deletion of words in an attempt to conform to the decedent's intent" (*id.*).

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The Construction and Reformation of Wills and Trust Instruments

- "It is within the power of the [Surrogate's Court] to construe and reform a will [or trust instrument] to effectuate the [testator or grantor's] intention" (*Matter of Scheuerer*, Decision and Order, dated June 29, 2018, File No. 2016-4656/C [Sur. Ct., Suffolk County]).
- The "paramount objective" in doing so is to give effect to the testator or grantor's intent (*id.*).

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The Construction and Reformation of Wills and Trust Instruments

- The Surrogate's Court's authority to determine the validity, construction, or effect of a will is derived from SCPA § 1420 (SCPA § 1420).
- Under SCPA § 209, the Surrogate's Court possesses the authority to "determine any and all matters relating to lifetime trusts" (SCPA § 209[6]).

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The Construction of Wills and Trusts

- The primary purpose of a construction is to ascertain a testator or grantor's intent as expressed in a will or trust instrument (*Matter of Cord*, 58 N.Y.2d 539 [1983]).
- A testator or grantor's "intent . . . must be gleaned not from a single word or phrase but from a sympathetic reading of the will [or trust instrument] as an [entirety] and in view of all the facts and circumstances under which the provisions of the [instrument] were framed" (*Matter of Fabbri*, 2 N.Y.2d 236 [1957]).

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The Construction of Wills and Trusts

- Upon reading a will or trust instrument, if the court is able to discern a dominant purpose or testamentary scheme, "the individual parts of the will [or trust instrument] must be read in relation to that purpose and given effect accordingly" (*id.*).

- The Court of Appeals has directed as follows:

> If we can see that the inapt, or careless, use of language by the testator [or grantor] has created the difficulty in ascertaining his [or her] intention, but, nevertheless, feel certain as to what he [or she] meant, from reading the whole instrument in connection with the clause in question, we may subordinate the language to that meaning (*id.* [internal quotation mark omitted]).

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Reliance upon Extrinsic Evidence in Construing a Will or Trust Instrument

- Where an ambiguity exists in a will or trust instrument, a court need not resort to considering extrinsic evidence where the testator or grantor's intent can be discerned from the language of the will or trust instrument itself (*Matter of Anderson*, 2019 WL 1095547 [Sur. Ct., New York County Feb. 28, 2019], *aff'd*, 184 A.D.3d 429 [1st Dep't 2020], *leave denied*, 2021 N.Y. Slip. Op. 64026 [Apr. 1, 2021]).
- Where a will or trust instrument contains an ambiguity, but the testator or grantor's intent can "be gleaned from the four corners of the" instrument, the Surrogate's Court need not "grant discovery or receive extrinsic evidence" to resolve the ambiguity (*id.*).
- Thus, in *Matter of Anderson*, the Surrogate's Court properly declined the petitioner's request for discovery and an evidentiary hearing to resolve a construction issue, despite finding that the testator's will contained an ambiguity that warranted a construction (*id.*).

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Reliance upon Extrinsic Evidence in Construing a Will or Trust Instrument

- At times, extrinsic evidence can "be considered in ascertaining [a testator or grantor's] intentions" when the testator's will or the grantor's trust instrument contains an ambiguity (*Matter of Gedbaw*, N.Y.L.J., Aug. 19, 1991, at 29 [Sur. Ct., Nassau County]).
- Examples of extrinsic evidence that may be considered, where appropriate, include –
  - The attorney-draftsperson's testimony;
  - The attorney-draftsperson's notes;
  - Statements that the testator or grantor made concerning his or her intentions (*Scheuerer*, *supra*).

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Reliance upon Extrinsic Evidence in Construing a Will or Trust Instrument

- It is not necessarily true that the Surrogate's Court's consideration of extrinsic evidence will necessitate a hearing to resolve an ambiguity in a will or trust instrument.
- In *Matter of Sawyer*, the Fourth Department affirmed the Surrogate's Court's grant of summary judgment concerning a construction issue (*Matter of Sawyer*, 4 A.D.3d 800 [4th Dep't 2004]).
  - A party submitted an affidavit from the attorney-draftsperson of an instrument in order to resolve an ambiguity in the instrument (*id.*).
  - The affidavit was "not used to 'vary, contradict or add to the terms of [the instrument] or to show an intention different than that disclosed by the language employed'" (*id.*).

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Choice of Law Considerations

- In general, "the law of [a] testator's domicile controls in the interpretation and construction of [the testator's] will" (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[1]).
- The underlying rationale is that a testator's "will should be interpreted in accordance with the law that the testator presumably had in mind at the time of the making of [the] will" (*id.*).
- Despite that, the provisions of a testator's will may be interpreted pursuant to the law of a state other than the testator's domicile when –
  - The testator owns property in another state and expresses his or her intent for the law of the state in which the property is located to govern the disposition of the property; or
  - The testator owns real property in another state (*id.*).

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Choice of Law Considerations

- New York law generally will govern the construction of an inter vivos trust instrument that a New York domiciliary executes, when the trust is to be administered in this state (106 *N.Y. Jur.* 2d Trusts § 23).
- Where a non-domiciliary grantor creates a trust, pursuant to a trust agreement that states that New York law will govern the trust's administration, and the trust consists of personal property that is located in this state, New York law shall apply to the construction of the trust instrument concerning such personal property (106 *N.Y. Jur.* 2d Trusts § 24).
- Where the trust instrument executed by a non-domiciliary grantor consists of personal property that is located in this state, but does not specify which state's law shall govern the trust, the "law of the jurisdiction having the most significant contacts with the trust" shall apply to the trust instrument's construction concerning the personal property in question (*Matter of Moore*, 129 Misc.2d 639 [Sur. Ct., New York County 1985]).

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Choice of Law Considerations

- In *Matter of Beanland*, the decedent executed a trust agreement providing that the instrument's construction would be governed by the law of the state in which the trust was being administered (*Matter of Beanland*, N.Y.L.J., Aug. 7, 2017, at 25 [Sur. Ct., Suffolk County]). At the time that the decedent did so, she was domiciled in California, and the trust consisted of real property located in California (*id.*). Years later, the decedent relocated to New York (*id.*). The trustee of the trust – who was a New York resident – started administering the trust in New York, and treating the trust as a New York resident for tax purposes (*id.*).
  - After a beneficiary contested the trust instrument's validity, a question arose as to whether the trust agreement's in terrorem clause should be construed under New York law or California law (*id.*).
  - The Surrogate's Court held that New York law would govern the trust agreement's construction (*id.*).
    - The Surrogate's Court reasoned that the trustee had established that she had administered the trust in New York (*id.*).
    - The fact that the trust's most valuable assets were parcels of real property in California was not dispositive (*id.*).

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Practical Considerations for Seeking a Construction of a Will or Trust Instrument

- "A fiduciary or a person interested in obtaining a determination as to the validity, construction or effect of any provision of a will" or trust instrument may petition the Surrogate's Court for a construction (SCPA § 1420).
- The petition must show the following –
  - The petitioner's interest;
  - The names and addresses of the other persons interested; and
  - The particular provision concerning which the petitioner seeks a construction and the necessity for the construction (*id.*).
- "If the application [is] entertained[,] process shall issue to all persons interested in the question to be presented to show cause why the determination should not be made" (*id.*).
- "On the return of process[, the Surrogate's Court] shall take such proof and shall make such decree as justice requires" (*id.*).

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Practical Considerations for Seeking a Construction of a Will or Trust Instrument

- A party may seek a construction of a will or trust instrument in an accounting proceeding (*id.*).
- The party seeking a construction in an accounting proceeding must establish that the "propriety of [a] debit or credit in the" accounting "involves the validity, construction or effect of [a] portion of the will [or trust instrument that] requires such construction" (*id.*).

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Practical Considerations for Seeking a Construction of a Will or Trust Instrument

- Virtual representation under SCPA § 315 is available when a party seeks a construction (*id.*).
- A decree construing or interpreting a will or trust instrument, unless reversed or modified on appeal, shall "be binding and conclusive . . . upon all parties to the proceeding and . . . their successors in interest as to all questions of construction . . . thereby determined" (*id.*).

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Practical Considerations for Seeking a Construction of a Will or Trust Instrument

- "As a general rule, a construction proceeding requires a determination on the merits and" cannot be settled (Marilyn G. Ordover & Charles F. Gibbs, "Correcting Mistakes in Wills and Trusts," N.Y.L.J., Aug. 6, 1998).
  - The underlying rationale is that interested parties should not be permitted, in a settlement agreement, to re-write the provisions of a will or trust instrument "so as to avoid the unambiguous direction" expressed by the testator or grantor (*Matter of Beckley*, 63 A.D.2d 855 [4th Dep't 1978]).
  - Although settlements typically are favored in other circumstances, they generally should not be used to defeat a testator or grantor's expressed intent (*Matter of Wadsworth*, 142 Misc. 717 [Sur. Ct., Jefferson County 1932], *aff'd*, 236 A.D. 712 [4th Dep't 1932]).
- Where "honest differences of opinion as to the intended meaning of [a] will [or trust instrument's provision]" exist, and where the interested parties enter into an agreement concerning the construction of the provision in question that is "as compatible with the intention of the testator" or grantor "as any other," the Surrogate's Court may approve of the settlement in order to avoid "further litigation and expense" (*Beckley*, *supra*).
  - In *Matter of Beckley*, the testator's will bequeathed the residue of the estate to the "Franciscan Fathers, Christ the King Seminary, St. Bonaventure University" (*id.*). However, two separate friaries (both of which were subdivisions of the Franciscan community) operated at St. Bonaventure University (*id.*). The two friaries agreed to jointly receive the residuary bequest, but the Surrogate's Court rejected that as an improper settlement of a construction issue (*id.*). The Appellate Division reversed (*id.*).

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Practical Considerations for Seeking a Construction of a Will or Trust Instrument

- "[N]o will [or trust instrument] has a twin brother" or sister (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[3]).
  - Other than "perhaps mutual wills executed by spouses," no two wills are "exactly the same" (*id.*).
  - The interpretation of one will or trust instrument generally does not govern the construction of another (*id.*).
- As a result, precedents have "[l]ittle [v]alue" in construing a will or trust instrument (*id.*).

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The Availability of Construction as a Remedy

- Where a will or trust instrument "clearly expresses" the testator or grantor's intent "without ambiguity," a court must "enforce the [instrument] according to its terms" (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[2]).
- A construction is not necessary (*id.*).
- In *Matter of Castagnozzi*, the grantor's trust instrument stated that the trust's assets would pass to a particular person, but only if that person survived until the time of distribution (*Matter of Castagnozzi*, 13 Misc.3d 1237[A] [Sur. Ct., Dutchess County 2006]). That person died before distribution occurred (*id.*).
  - Although the trustee of the trust requested a construction of the trust instrument, the Surrogate's Court declined to grant one (*id.*).
  - The Surrogate's Court reasoned that "no construction is required, as the language in the trust instrument is unambiguous" (*id.*).

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The Availability of Construction as a Remedy

- A Surrogate's Court "will not entertain construction questions that are academic or abstract" (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[2]).
- Thus, construction is not available when –
  - The petitioner is "not an interested party";
  - The question presented is "actually a tax question"; or
  - The Surrogate's Court is "asked to speculate as to future contingencies" (*id.*).

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The Availability of Construction as a Remedy

- A Surrogate's Court must admit a will to probate before construing the instrument.
- Where "a party asks for construction of a will in a pending probate proceeding," the Surrogate's Court "may determine the construction issue '[u]pon the entry of a decree *admitting the will to probate*'" (*Matter of Martin*, 17 A.D.3d 598 [2d Dep't 2005] [citing SCPA § 1420(3)]).
- The Second Department has recognized that "[n]o provision is made for construction of provisions of a will prior to probate" (*id.*).

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The Availability of Construction as a Remedy

In *Matter of Baugher*, parties to a probate proceeding asked the Surrogate's Court to determine whether actions that they took in SCPA § 1404 discovery would trigger the in terrorem clause contained in the propounded will (*Matter of Baugher*, 29 Misc.3d 700 [Sur. Ct., Nassau County 2010]).

- The Surrogate's Court declined to grant the requested construction, reasoning that it lacked the authority to construe the propounded will because it had yet to be admitted to probate (*id.*).
- The Surrogate's Court admonished the parties that they could proceed with the pre-objection discovery in question (depositions of the nominated successor executor and the drafter of the decedent's prior will, for which SCPA § 1404 did not provide) "at their own peril" (*id.*).

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The Construction Applied by Persons Interested in an Estate or Trust

- The provisions of a will or trust instrument "are first interpreted by the [fiduciary] named in [the instrument] and by the persons interested in the estate" or trust (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[2]).
- Where those parties agree "as to the construction of the will [or trust instrument] and are all of full age, the [fiduciary] may distribute the estate [or trust's assets] in accordance with their view of the [testator or grantor's] intention" (*id.*).
- Where "a dispute arises or there is some unresolved ambiguity or some reason to question the language in the will [or trust instrument,] a construction is brought about in the courts" (*id.*).

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The Construction Applied by Persons Interested in an Estate or Trust

- "The practical interpretation of a will [or trust instrument] made over time by the parties interested is entitled to weight" when a construction is sought (*id.*).
- This principle is predicated upon the notion of estoppel (*id.*).
- Where "the interested parties have acquiesced in the construction of the instrument in a certain manner and are all competent and of full age, they may be estopped from claiming an alternative construction" (*id.*).

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The Canons of Construction

- "The intention of the decedent as expressed in the will [or trust instrument] is to be given effect by the [Surrogate's Court], unless contrary to law, or public policy" (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[3]).
- "At common law, there have developed so-called canons of construction to aid in determining the decedent's intent in an otherwise ambiguous will [or trust instrument] provision" (*id.*).

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The Canons of Construction

- When a Surrogate's Court can ascertain a testator or grantor's intent from the language of the will or trust instrument, taken as a whole, the court need not apply any of the canons of construction in interpreting the will (*Matter of Clark*, 280 N.Y. 155, 160 [1939]).
- In other words, the canons of construction "do not come into play," if the testator or grantor's intent can be gleaned from the four corners of the testator's will or the grantor's trust instrument (*Matter of Rodrigues*, 33 A.D.3d 926 [2d Dep't 2006]; *Matter of Shannon*, 107 A.D.2d 1084 [4th Dep't 1985]).

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The Canons of Construction

- Although no court has "definitively listed all the various canons of construction," "there are certain rules that have always been regarded as canons" of construction (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[3]).
- They include –
  - "When a testator [or grantor] uses technical words, he [or she] is presumed to employ them in their narrow sense and words in general are to be taken in their ordinary and grammatical sense unless the context clearly indicates the contrary" (*id.*).
  - "A will [or trust instrument], if possible, will be construed in a manner to prevent a testator [or grantor] from dying intestate" (*id.*).
  - "When the words of a will [or trust instrument] clearly indicate an intention to make an absolute gift of property to a donee, such gift will not be restricted or cut down to any less estate by subsequent or ambiguous words" (*id.*).
  - "[P]rovisions in favor of a surviving spouse should be liberally construed" (*id.*).
  - "Where two or more interpretations of a will [or trust instrument] are possible, the one which favors those of the blood of the testator [or grantor] will be preferred over one that favors strangers" (*id.*).
  - "Where two or more interpretations of a will [or trust] provision are possible, and one of which would invalidate the will [or trust] provisions, the construction that will sustain the validity of the provisions will be favored" (*id.*).
  - "Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant" (*id.*).
  - "Equality of benefit will be favored when under one construction of the will [or trust instrument] the benefits to be conferred upon the natural objects of the [testator or grantor's] bounty will be equal, while under another interpretation they will be unequal" (*id.*).

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Statutes Affecting Construction Issues

- At times, "statutes affecting construction are enacted in order to change common law rules of construction" (11 *Warren's Heaton on Sur. Ct. Prac.* § 187.01[3]).
- EPTL § 3-3.1 – "Unless the will provides otherwise, a disposition by the testator of all his [or her] property passes all of the property he [or she] was entitled to dispose of at the time of his [or her] death" (EPTL § 3-3.1).
- EPTL § 3-3.3 – When a will contains a bequest to the testator's issue or siblings, the bequest will not lapse if the beneficiary dies during the testator's lifetime leaving issue surviving the testator, but instead will pass to the beneficiary's issue (EPTL § 3-3.3).
- EPTL § 3-3.4 – "Whenever a testamentary disposition of property to two or more residuary beneficiaries is ineffective in part, as of the date of the testator's death, and the provisions of 3-3.3 do not apply to such ineffective part of the residuary disposition nor has an alternative disposition thereof been made in the will, such ineffective part shall pass to and vest in the remaining residuary beneficiary or, if there are two or more remaining residuary beneficiaries, in such beneficiaries, ratably, in the proportions that their respective interests in the residuary estate bear to the aggregate of the interests of all remaining beneficiaries in such residuary estate" (EPTL § 3-3.4).

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Statutes Affecting Construction Issues

- EPTL § 1-2.10 – "Unless a contrary intention is" expressed, the use of the term "issue" in a will or trust instrument generally includes the "descendants in any degree from a common ancestor" (EPTL § 1-2.10).
  - The "terms 'issue' and 'descendants' . . . include adopted children" (*id.*).

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Statutes Affecting Construction Issues

- EPTL § 1-2.14 –
  - A per stirpes disposition is made to persons "who take as issue of a deceased ancestor" as follows – The property so passing is divided into as many equal shares as there are –
    - "surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue;" and
    - "deceased issue in the same generation who left surviving issue, if any" (EPTL § 1-2.14).
  - "Each surviving member in [the] nearest generation [to the deceased ancestor] is allocated one share" (*id.*).
  - "The share of a deceased issue in [the] nearest generation who left surviving issue shall be distributed in the same manner to such issue" (*id.*).

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Statutes Affecting Construction Issues

- EPTL § 1-2.16 – A disposition by representation is made "to persons who take as issue of a deceased ancestor" in the following manner –
  - "The property so passing is divided into as many equal shares as there are" –
    - "surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue"; and
    - "deceased issue in the same generation who left surviving issue, if any" (EPTL § 1-2.16).
  - "Each surviving member in [the] nearest generation is allocated one share" (*id.*).
  - "The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue" (*id.*).

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Statutes Affecting Construction Issues

- In *Matter of Scheuerer*, the grantor executed a revocable trust instrument, leaving $18,000.00 total to certain grandchildren and great grandchildren, and the residue to his "then living issue, in equal shares, per stirpes" (*Scheuerer*, *supra*).
- After the grantor died and his three children took the position that they should split the trust's residue in equal shares, a Guardian ad Litem argued that the residue should be split among all of the grantor's issue (not just his three children) (*id.*).
- A construction proceeding ensued, in which the Surrogate's Court (a) found that the trust instrument's residuary clause contained an ambiguity; and (b) relied upon extrinsic evidence to conclude that the residue should be split among the grantor's three children (*id.*).

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The Interpretation of Conditions on Bequests and Distributions

- When a fair reading of a will or trust instrument evidences the testator or grantor's intention to impose conditions on bequests or distributions, including a survivorship condition, the Surrogate's Court will defer to the conditions and limitations expressed by the testator or grantor (*Matter of Scova*, N.Y.L.J., Apr. 16, 2001, at 22 [Sur. Ct., Westchester County 2001] [finding that the anti-lapse statute was applicable to a bequest to the decedent's daughter without a survivorship condition]; *Matter of Bleakley*, N.Y.L.J., May 10, 1995, at 25 [Sur. Ct., Westchester County 1995] [holding that a bequest to the decedent's sister conditioned by her survival trumps the anti-lapse statute]).
- Survivorship language is not to be cast aside as superfluity or meaningless (*Matter of Camac*, 2004 N.Y.L.J. LEXIS 25 [Sur. Ct., Bronx County]).

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The Interpretation of Conditions on Bequests and Distributions

- To the extent that a will or trust instrument contains a limitation on a bequest or distribution in one section, but not in others, that evidences the testator or grantor's "ability to make a limited gift when she [or he has] that donative intent" (*Matter of Ledoux*, 161 A.D.3d 490 [1st Dep't 2018]).
- Thus, where a testator includes a survivorship condition in one section of a will, but not in others, that establishes the testator's intent to limit the application of the survivorship condition to certain bequests (*id.*).

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Construing Wills and Trust Instruments to Correct Scrivener's Efforts

- When called upon to construe a will or trust instrument that contains an ambiguity, the Surrogate's Court may "add, excise, modify, or transpose language or provisions of the document to carry out the [testator or grantor's] intent" (*Scheuerer*, *supra*).
- The Surrogate's Court may construe an instrument containing an ambiguity to correct a scrivener's error in the instrument (*Matter of Tepe*, Decision, dated Mar. 8, 2021, File No. 2020-1576/B).

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The Construction of In Terrorem Clauses

- "An in terrorem clause is designed to prevent a contest over a will or a lifetime trust" (15 *Warren's Heaton on Sur. Ct. Prac*. § 062010-1).

- It has been defined as a "provision in a document[,] such as a will [or a trust instrument], designed to frighten a beneficiary . . . into doing or not doing something" (*id.*).

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The Construction of In Terrorem Clauses

- "In terrorem clauses, while [generally] valid and enforceable, are not favored by . . . courts and will be strictly construed" (*Baugher*, *supra*).
- "A determination of whether an in terrorem clause has been triggered involves both a construction of [a will or trust instrument], as well as an examination of the conduct alleged to have triggered the clause" (*Matter of Rabinowitz*, Decision and Order, dated March 17, 2021, File No. 2018-485/B [Sur. Ct., Nassau County]).

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The Construction of In Terrorem Clauses

In *Matter of Sochurek*, the decedent's will bequeathed to his spouse a life estate (carrying with it "all the duties and responsibilities" of ownership) in the decedent's fifty percent interest in a business, with the business interest passing to the decedent's daughters from a prior marriage upon the spouse's death (*Matter of Sochurek*, 174 A.D.3d 908 [2d Dep't 2019]). The will bequeathed the estate's residue to the spouse, and nominated the spouse to serve as executor (*id.*). Notably, the will contained an in terrorem clause that "provided for the revocation of the interest of any beneficiary who 'institute[s] . . . any proceedings to set aside, interfere with, or make null any provision of [the will,] or [who] shall in any manner, directly or indirectly, contest the probate thereof" (*id.*). After the admission of the will to probate, the spouse entered into an agreement to sell the decedent's fifty percent interest in the business, and a dispute arose as to the daughters' interest in the proceeds derived therefrom (*id.*). The spouse and daughters entered into a "standstill agreement" concerning the proceeds, which resulted in Supreme Court litigation that the daughters commenced against the spouse (*id.*). The spouse commenced a Surrogate's Court construction proceeding, alleging that the daughters had violated the will's in terrorem clause by interfering with the administration of the estate (*id.*).

- Although the Surrogate's Court ruled in the spouse's favor and found that the daughters triggered the in terrorem clause, the Second Department reversed (*id.*).
- The Appellate Division found that the daughters did not contest the will's validity or otherwise interfere with the will's provisions (*id.*).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

- In order to balance the competing interests of testators to avoid challenges to their testamentary wishes and of beneficiaries to make informed decisions as to the merits of potential actions they might take, EPTL § 3-3.5 sets forth a non-exhaustive list of "safe harbor" provisions which shield beneficiaries from triggering in terrorem clauses contained in testamentary instruments (*Matter of Robbins*, 144 Misc.2d 510 [Sur. Ct., New York County 1989]).
- The list includes "[t]he institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof" (EPTL § 3-3.5).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

EPTL § 3-3.5 also provides safe harbor from in terrorem clauses to interested parties who engage in the following conduct –

- Contesting a will on the ground that the instrument "is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause;"
- Objecting to the jurisdiction of the Surrogate's Court in which a will is offered for probate;
- Disclosing to the Surrogate's Court or to the parties "any information relating to any document offered for probate as a last will, or relevant to the probate proceeding;"
- Refusing or failing to join in a petition for probate, or to sign a waiver of process; consent to probate; and
- Seeking pre-objection discovery under SCPA § 1404 (*id.*).

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- Does a party risk triggering a will's in terrorem clause by seeking pre-objection discovery for which SCPA § 1404 does not provide in a probate proceeding concerning the instrument's validity? Possibly.
- In *Matter of Singer*, the decedent's will contained two in terrorem clauses (*Matter of Singer*, 13 N.Y.3d 447 [2009]). An interested party took the pre-objection deposition of an attorney who did not draft the propounded will, but previously had rendered estate-planning services to the decedent (*id.*). The interested party did not object to the admission of the propounded will to probate (*id.*). Nevertheless, after the admission of the instrument to probate, the executor of the decedent's estate commenced a construction proceeding to determine whether the interested party had triggered the will's in terrorem clauses (*id.*).
  - The Surrogate's Court and the Appellate Division found that the interested party had triggered the in terrorem clauses, but the Court of Appeals reversed (*id.*).
  - The Court of Appeals reasoned that, "[u]nder these circumstances, and construing the clauses narrowly, the conduct of this deposition did not amount to an attempt to contest, object to or oppose the validity of the estate plan" (*id.*).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

- In a concurring opinion, Judge Graffeo explained: "Because we are required to construe the in terrorem clauses at issue here narrowly, we found it reasonable to conclude that the language of this will did not specifically impose forfeiture once [the interested party in question] deposed the attorney who drafted his father's prior wills" (*id.*).
- Judge Graffeo continued: "I believe, however, that an in terrorem clause can be properly drafted to explicitly prohibit this type of inquiry. A testator could, for example, draft an in terrorem clause that incorporates the statutorily-authorized preliminary examinations by explicitly stating that a beneficiary who makes or attempts to make inquiry about the will other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her bequest and extinguish any interest that the beneficiary's issue may have in the estate" (*id.*).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

In response to *Singer* and *Baugher*, the Legislature amended EPTL § 3-3.5 and SCPA § 1404 to provide that, "upon application to the court based upon special circumstances, the examination of 'any [other] person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will" containing an in terrorem clause (*Matter of Weintraub*, 40 Misc.3d 1207[A] [Sur. Ct., Nassau County 2013]).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

- Under EPTL § 3-3.5, "[a]n infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder" (*id.*).

- In *Matter of Shuster*, the petitioners offered for probate a will that contained an in terrorem clause (*Matter of Shuster*, 273 A.D.2d 397 [2d Dep't 2000]). They obtained a waiver and consent from an interested party, who subsequently withdrew the waiver (*id.*). The petitioners then alleged that the interested party who signed – and subsequently withdrew – the waiver was a "person under a disability" (*id.*). Thereafter, the interested party in question attempted to file probate objections and unsuccessfully commenced federal litigation concerning the in terrorem clause's validity (*id.*). The Surrogate's Court appointed a Guardian ad Litem for the subject interested party, and later admitted the will to probate (*id.*). The petitioners petitioned to construe the in terrorem clause, claiming that it had been triggered by the interested party's actions (*id.*).
  - The Surrogate's Court declined to construe the in terrorem clause as the petitioners requested, and the Second Department affirmed (*id.*).
  - In doing so, the Appellate Division explained: "[T]he Surrogate determined that the respondent was a person under a disability and appointed a . . . guardian ad litem to protect his interests. In view of the foregoing, the in terrorem clause cannot be enforced against him" (*id.*).

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In Terrorem Clauses and Statutory Safe Harbor Provisions

- If a party contests a New York trust instrument in a state where in terrorem clauses are void as against public policy (such as Florida), and that contest is dismissed on jurisdictional grounds, will EPTL § 3-3.5 provide cover to that party when a New York court construes the in terrorem clause to determine whether the out-of-state contest triggered it?
- According to *Matter of Shamash*, the answer is no (*Matter of Shamash*, N.Y.L.J., June 16, 2009, at 38 [Sur. Ct., New York County]).

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In Terrorem Clauses and Case-Based Safe Harbor Principles

- The statutory safe harbor provision providing that a party will not trigger an in terrorem clause in a will, by seeking a construction of the instrument, has been extended to lifetime trusts (*Matter of Santangelo*, Decision and Order, dated June 26, 2015, File No. 2012-32/F [Sur. Ct, Suffolk County]).
- "Any attempt by a testator" or grantor, based upon the inclusion of an in terrorem clause in a will or trust instrument, "to preclude a beneficiary from questioning the conduct of the fiduciaries, from demanding an accounting from said fiduciaries or from filing objections thereto will result in a finding that the pertinent language is void as contrary to public policy and the applicable statutes of the State of New York" (*Matter of Egerer*, 30 Misc.3d 1229[A] [Sur. Ct., Suffolk County 2006]; *Matter of Stralem*, 181 Misc.2d 715 [Sur. Ct., Nassau County 1999]).
- A fiduciary's threat of triggering an in terrorem clause cannot be used to insulate the fiduciary from removal for his or her misconduct (*Matter of Rimland*, 2003 WL 21302910 [Sur. Ct., Bronx County 2003] [emphasis added and internal citations omitted] ["It is disingenuous for the trustee to contend that the decedent intended that she serve as trustee even if she violated her obligations under the trust and her sacred duties of undivided loyalty to the trust. *Moreover, even if the decedent had such an intent, such a broad in terrorem clause would be void as against the public policy of this State*."]; *Matter of Aoki*, 2019 WL 1744522 [Sur. Ct., New York County Apr. 12, 2019]; *Matter of Levine*, Decision, dated Mar. 3, 2016, File No. 2011-363619/H [Sur. Ct., Nassau County]).

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In Terrorem Clauses and Case-Based Safe Harbor Principles

- While Surrogate's Courts have recognized that seeking a fiduciary's removal based upon the fiduciary's misconduct as a fiduciary generally will not trigger an in terrorem clause, will objecting to the fiduciary's appointment do so?
- In *Matter of Cohn*, the decedent's child petitioned for a construction of the decedent's will's in terrorem clause to determine whether the clause would be triggered by an application "to set aside the fiduciary nominations" for certain trusts created under the will (*Matter of Cohn*, N.Y.L.J., Mar. 11, 2009, at 32 [Sur. Ct., New York County], *aff'd*, 72 A.D.3d 616 [1st Dep't 2010]).
  - The Surrogate's Court and the First Department held that the in terrorem clause would be triggered by such an application (*id.*).
  - The courts reasoned that the application would not be predicated upon the fiduciaries' actions as fiduciaries, and, thus, constituted "an attack on the testator's nomination of fiduciaries" (*id.*).

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The Reformation of Wills and Trusts

- "Courts are hesitant to reform wills unless the reformation 'effectuates the testator's intent'" (*Matter of Brill*, N.Y.L.J., Aug. 17, 2017, at 23 [Sur. Ct., Bronx County]).
- At times, "[r]eformation is utilized to correct mistakes, not to change terms" (*id.*).
  - Some Surrogate's Courts have held that they "are without power to reform unambiguous wills even though there was a mistake of fact or law, whether in expression or inducement" (*Matter of Sheehan*, N.Y.L.J., Jan. 16, 2008, at 37 [Sur. Ct., Suffolk County] [denying a petition to reform a will that omitted a residuary clause as a result of a "clerical error"]).
    - Those courts have reasoned that reformation would result in a testamentary plan that "was not expressed in conformity with EPTL 3-2.1" (*id.*).
    - Other Surrogate's Courts have found that "[t]he existence of clear and unambiguous language" in a will "is not a bar to the reformation of a testamentary" instrument when the extrinsic evidence presented in support of reformation is compelling (*Matter of Longhine*, 15 Misc.3d 1106[A] [Sur. Ct., Wyoming County 2007] [reforming a will to ensure that the testamentary trust for which the instrument provides qualified as a supplemental needs trust]).

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The Reformation of Wills and Trusts

- A compelling reason for reformation may exist when supplemental needs planning is required to preserve a beneficiary's eligibility for governmental assistance, or where tax savings would result from the reformation (*id*.; *Matter of Stalp*, 79 Misc.2d 412 [Sur. Ct., Kings County 1974]).
- In order to justify reformation, however, the party requesting reformation must establish that it is consistent with the testator or grantor's intent (*Matter of Dousmanis*, 190 A.D.3d 548 [1st Dep't 2021]).
  - As such, in *Matter of Dousmanis*, the First Department rejected a request to reform a will to convert a testamentary trust into a supplemental needs trust (*id*.).
    - In doing so, the Appellate Division directed that, upon the death of the trust's lifetime beneficiary, the trust's assets would be used to satisfy a Medicaid lien against the beneficiary's assets, rather than paid to the trust's residuary beneficiary (*id*.).
    - The First Department reasoned that –
      - "[N]othing in [the] will indicated an intention to create a" supplemental needs trust; and
      - The residuary beneficiary – who was trustee of the testamentary trust – had failed to comply with a Supreme Court order "directing him to set up a special needs trust . . . pursuant to EPTL 7-1.12, in order to permit the trust assets to be used to enhance [the lifetime beneficiary's] quality of life without rendering him ineligible for public assistance" (*id*.).

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The Reformation of Wills and Trusts

- In *Matter of Snide*, a husband and wife signed each other's wills (but not their own wills), which mirrored each other (*Matter of Snide*, 52 N.Y.2d 193 [1981]). Each instrument left the testator's estate to his or her spouse (*id.*). The husband died, survived by his wife, who offered the husband's will for probate and requested that the Surrogate's Court reform the instrument to correct the mistaken references to each other (*id.*).
- The Surrogate's Court admitted the will to probate and reformed the instrument as requested, but the Appellate Division reversed (*id.*).
- In a 4-3 decision, the Court of Appeals reversed, finding that the propounded instrument could be admitted to probate and reformed (*id.*).
  - The Court of Appeals made clear that it did not intend to open the doors to widespread reformation of wills and trust instruments (*id.*).
  - Instead, as commentators have explained, *Snide* "can be interpreted as limiting the reformation of wills to its very special circumstance, where the extrinsic evidence demonstrating actual intent of the testator consists of two simultaneously signed instruments, both executed with the full formalities required by the Statute of Wills" (Ordover & Gibbs, *supra*).

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The Reformation of Wills and Trusts

- "In general, applications to reform donative instruments to satisfy technical tax code requirements and avoid unintended tax consequences are received sympathetically by the courts" (*Matter of Gottfried*, N.Y.L.J., Apr. 11, 1997, at 46 [Sur. Ct., New York County]).
  - Thus, "courts have on many occasions reformed wills to effect a testator's intention to take full advantage of available tax deductions and exemptions" (*Matter of Choate*, 141 Misc.2d 489 [Sur. Ct., New York County 1988]).
  - This is because, among other things, New York law "presumes that a testator intends to take full advantage of the deductions and exemptions authorized by law" (*id.*).
- In *Matter of Sukenik*, the Appellate Division reversed the Surrogate's Court's Decree, finding that reformation of a lifetime trust instrument and an I.R.A. beneficiary designation form was warranted to achieve income-tax savings (*Matter of Sukenik*, 162 A.D.3d 564 [1st Dep't 2018]).

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Proposed New York Trust Code Provisions Concerning Reformation of Lifetime Trusts

- In the next few years, the Legislature may enact a version of the New York Trust Code into law.
- If the New York Trust Code is enacted into law, EPTL §§ 7-A-4.10, 7-A-4.12, 7-A-4.14, 7-A-4.15, and 7-A-4.16 likely would address the modification and reformation of lifetime trusts (EPTL §§ 7-A-4.10, 7-A-4.12, 7-A-4.14, 7-A-4.15, and 7-A-4.16).
- They provide that modification may be sought for the following purposes –
  - Unanticipated circumstances;
  - Inability to administer the trust effectively;
  - Economic impracticability of the trust;
  - Need to correct mistakes in the trust;
  - Tax savings; or
  - Supplemental needs planning objectives (*id.*).

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Proposed New York Trust Code Provisions Concerning Reformation of Lifetime Trusts

- Under the New York Trust Code, a trustee or beneficiary of a lifetime trust could commence a proceeding to terminate, modify, or revoke a lifetime trust, on notice to the parties who are interested in the proceeding (EPTL § 7-A-4.10).
- The interested parties would include the trustee and any persons upon whom process would need to be served in a proceeding for judicial settlement of the trustee's accounting, taking into account SCPA § 315 (*id.*).
- To the extent that the grantor of the trust is alive, the party commencing a proceeding to terminate, modify, or revoke a lifetime trust instrument will need to notify the grantor in writing of the proceeding (*id.*).
- EPTL § 7-A-4.10 does prohibit the termination, modification, or reformation of a lifetime trust, if that relief would jeopardize certain tax deductions or exclusions, the qualification of a transfer as a direct skip under Internal Revenue Code § 2642(c), and/or a beneficiary's eligibility for governmental benefits (*id.*).

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Thank you.

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