SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

SIGNATURE SERIES:
The Safekeeping of Wills

FACULTY:

Hon. John M. Czygier, Jr., (Retired)

Program Coordinator:
Amy H. Hsu, Esq., Law Clerk to Hon. Theresa Whelan, Surrogate

September 21, 2022
Suffolk County Bar Association, New York

Like us on:

"The opinions, beliefs and viewpoints expressed herein are those of the authors and do not necessarily reflect the official policy, position or opinion of the Suffolk County Bar Association, Suffolk Academy of Law, their i Board of Directors or any of their members"

There's a whole new way to obtain your CLE certificate! It's fast, easy and best of all you can see the history of courses that you've attended!

Within 10 days of the course you attended, your CLE Certificate will be ready to view or print. Follow the instructions below:

1. Go to SCBA.org
2. Member Log In (upper right corner)
3. If you **do not** know your username or password, click the area below and enter your email that is on file with SCBA. Follow the prompts to reset your username and password.
4. After you log in, hover over your name and you will see "Quick Links". Below that you will see:
   a. My SCBA
   b. My CLE History
   c. Update My Information
   d. Update My Committees
5. Click on **My CLE History**, you will see the courses you have attended. Off to the right side you will see the Icon for certificates. You are now able to download the certificate, print it or save it. You may go to your history and review the courses you have taken in any given year!
6. **CLE certificates will no longer be mailed or emailed**. Certificates will be available within 10 days after the course.

JOHN M. CZYGIER, JR.

John M. Czygier, Jr. was admitted to practice law in New York State in 1975. After serving as a prosecutor in the Suffolk County district Attorney's Office, he entered private practice and, for twenty-five years, concentrated in estate administration and estate litigation in the New York metropolitan area. He was awarded an "AV" rating by Martindale-Hubbell, the highest rating for practicing attorneys. He is a member of the Suffolk County Bar Association where he served as director, Chair of the Surrogate's Court Committee and Co-Chair of the Bench Bar Committee. He is also a member and former director of the Suffolk County Women's Bar Association. While in private practice, Surrogate Czygier served as a Mental Hygiene Law Article 81 Court Examiner for New York and Suffolk Counties, and was counsel to the Public Administrator of Suffolk County.

On April 26, 2001, Judge Czygier was appointed Judge of the Surrogate's Court of Suffolk County by Governor George Pataki and subsequently confirmed by the New York State Senate on May 8, 2001. In November 2001 he was elected to a ten-year term and was re-elected in November 2011; he was also a Judicial Fellow of the prestigious American College of Trust and Estate Counsel. Since his retirement from the bench on December 31, 2018, he continues as a Fellow of the American College of Trust and Estate Counsel.

In October 2000, Judge Czygier was elected to the Fellows of the New York Bar Foundation. He is a member of the Surrogate's Association of the State of New York, where he previously served as Secretary/Treasurer, Vice President and President. He is a member of the Trusts and Estates Law Section of the New York State Bar Association where he served on the Estate and Trust Administration Committee and was formerly a Vice-Chairman of the Estate Litigation Sub-Committee. He has also served on the Committee on Trusts, Estates and Surrogate's Court of the Association of the Bar of the City of New York.

In addition to his involvement in numerous professional associations, Surrogate Czygier has played an active role on various committees to improve the law, administration and practice in the Surrogate field. Judge Czygier has served as a member of the Surrogate's Court Advisory Committee to the Chief Administrative Judge of the Courts of the State of New York since his appointment in 1999 by the Hon. Jonathan Lippman, as well as a member of the EPTL-SCPA Legislative Advisory Committee. The mission of both committees is to review existing statutes and to draft legislation. In 2009 Judge Czygier was appointed to the Administrative Board for the Office of the Public Administrator where he served as Chair and he has served as Chairman of the Distinguished Alumni on the Bench at Hofstra Law School. He has also lectured on various aspects of Trust and Estate Law at numerous law schools and state and local bar associations and has trained newly elected Surrogate Judges at the New York Judicial Institute.

Judge Czygier has been a contributing author to *Warren's Heaton on Surrogates' Courts* (Matthew Bender) and to *Weinstein, Korn & Miller New York Civil Practice* (Matthew Bender), and has written for the *New York State Bar Association Trusts and Estates Newsletter*, the *New York Law Journal* and the *New York State Bar Association Journal*.

CONSEQUENCES OF KEEPING -- AND LOSING -- WILLS

Hon. John M. Czygier, Jr.
Former Judge of the Surrogate's Court
Suffolk County, New York

Suffolk County Bar Association
September 21, 2022

ATTORNEY RETENTION - Consequences of Keeping the Will:

I. IN GENERAL

An attorney has a duty to safeguard property held for a client, maintain a record of it and return it on the client's request. New York Rules of Professional Conduct (RPC) 1.15 (based upon ABA Model Rule 1.15: Safekeeping Property).

II. STATUTES, RULES & ETHICAL OPINIONS

(a) Penal Law § 190.30: Unlawfully concealing a will

"A person is guilty of unlawfully concealing a will when, with intent to defraud, he conceals, secretes, suppresses, mutilates or destroys a will, codicil or other testamentary instrument. Unlawfully concealing a will is a class E felony."

(b) SCPA § 1401: Proceeding to compel production of a will

"Whenever it shall appear to the court, sua sponte, or by the petition of a person authorized under the succeeding section of this act to present a petition for the probate of a will, that there is reasonable ground to believe that any person has knowledge of the whereabouts or destruction of a will of a decedent the court may make an order requiring the person or persons named therein to attend and be examined in the premises. Service of the order must be made by delivery of a certified copy thereof to the person or persons named therein either personally or in such manner as the court shall direct. The court may either in the order or otherwise in the proceeding require the production and filing in court of any will of the decedent which it finds is in the possession or under the control of the respondent. The court may impose the reasonable attorneys fees of the petitioner in such a proceeding against a respondent when the court determines the respondent did not have good cause to withhold production of such will or codicil."

(c) SCPA § 1403(1)(d)

In a probate proceeding, process must issue to:

"Any person designated as beneficiary, executor, trustee or guardian in any other will of the same testator filed in the surrogate's court of the county in which the propounded will is filed whose rights or interests are adversely affected by the instrument offered for probate."

(d) SCPA § 1407: Proof of Lost or Destroyed Will

A lost or destroyed will may be admitted to probate if:

"1. It is established that the will has not been revoked, and

2. Execution of the will is proved in the manner required for the probate of an existing will, and

3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete."

(e) SCPA § 2507: Permits filing of wills with Surrogate's Court for safekeeping. SCPA § 2402(9)(v) sets fee (*see Matter of the Wills of Dobbs et al.*, NYLJ 4/14/2009, 34 (col. 6)).

(f) Relevant Rules and Ethical Opinions:

(i) The *Rules of Professional Conduct*, effective April 1, 2009, do not specifically address the subject of safekeeping wills, but do address preserving record and property of client (RPC 1.15).

(ii) Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion No. 1999-5, based on the former EC 4-6; EC 6-1; DR 9-102(c), 9-102(F). (Recommends that a retiring attorney or dissolving firm communicate with the client to arrange for the return of an original will or consent to its disposal.)

(iii) NYSBA Committee on Professional Ethics, Opinion 521 4/29/80:
Lawyer may contact the designated executor and/or beneficiaries to advise them that he holds will of deceased client. Lawyer should make no suggestion that he be retained by executor and, if asked, should make it clear that the executor is entirely free to retain counsel of his choice.

(iv) NYSBA Committee on Professional Ethics, Opinion 775 5/4/04:
When a possibly incapacitated former client asks a lawyer to return the client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

(v) NYSBA Committee on Professional Ethics, Opinion 1002 3/31/14:
Lawyer appointed as executor to estate of deceased lawyer who had custody of client and non-client wills may access and disclose confidential information in the wills insofar as necessary to learn identity of testator, executor, or beneficiary/ies in order to dispose of wills properly.

(vi) NYSBA Committee on Professional Ethics, Opinion 1035 11/14/14:
A lawyer receiving an original will must take reasonable steps to locate and notify the testator or others with an interest in the will. The lawyer may review or disclose confidential information from the will as necessary for

its appropriate disposition and may file the original will with the local surrogate's court.

(vii) NYSBA Committee on Professional Ethics, Opinion 1182 01/23/20: A lawyer may not dispose of wills even when the testator's locations and/or circumstances are unknown. A lawyer must safeguard the wills indefinitely unless the law provides an alternative.

III. CASE LAW & CONTEMPT

(a) *Will of Slavin*, 2016 NY Misc LEXIS 277 (Sur Ct, New York County): rejecting respondent's argument that the court did not have jurisdiction over her and compelling her to produce will.

(b) *Estate of Margaret McArdle*, File No. 2015-2041 (Sur Ct, Suffolk County) [October 20, 2015 court proceedings]: *sua sponte* compelling counsel to produce a will despite counsel's argument that the proceeding lacked jurisdiction

(c) Criminal contempt generally requires wilfulness, while civil contempt does not. Civil contempt is generally designed to coerce behavior or provide a remedy to an aggrieved litigant. Criminal contempt, on the other hand, involves vindication of an offense against public justice and is utilized to protect the dignity of the judicial system and to compel respect for its mandates (*see King v. Barnes*, 113 NY 476).

IV. PROPOSALS

(a) Proposed Uniform Court Rule 1250.7 (22 NYCRR Part 1250), a/k/a the Uniform Court Rule on the Appointment of Caretaker Attorneys, was proposed by the New York State Bar Association through its Law Practice Continuity Committee. The proposed rule included authority for a caretaker attorney, appointed by the court, for an attorney who has disappeared or abandoned the practice of law, has retired, has died or has otherwise become unable to practice law temporarily or permanently, to take possession of such an attorney's files, including wills. It spelled out the obligations of a caretaker attorney, *vis-a-vis* said files. The Administrative Board declined to adopt the proposal.

(b) A January 14, 2008 proposal from the Committee on Trusts, Estates and Surrogate's Courts, Subcommittee on Disposition of Original Wills by Solo Practitioners proposed a central repository and database for wills maintained by the New York State Bar Association, through its Trusts and Estates Section. To support the costs of maintaining such a repository and database, a modest surcharge could be added to dues, and a one-time fee imposed on non-member lawyers (or others) making use of the services.

(c) Senate and Assembly Bill (S. 659, A. 1289), presented in 2007, would have required the Surrogate's Court in each county to establish and maintain a registry of wills and codicils.

(d) Legislation that would allow one holding a will executed more than forty years prior to destroy the instrument.

(e) Legislation that would permit attorneys to obtain a statement from clients regarding disposition of an original will if the client cannot be found later.

(f) There are also private companies that offer will registries and can be found by searching the internet.

(g) Other Approaches:

(i) Monroe County, NY has a lawyer succession registry: "It enables attorneys to plan for law practice contingencies by designating, in advance, another lawyer who is willing to assist in the transfer of client flies in the event of attorney disability, death or unavailability."

(ii) Erie County, NY has a vault for the safekeeping of wills upon the death of attorneys. Although there is no formal requirement regarding such, it is common practice in Erie County to deposit originals in the vault, which currently contains over 200,000 original wills.

(ii) Some states, such as New Jersey, have statutorily-created will registries. Under N.J.S.A. 3B:3-2.1, the Office of the Secretary of State maintains a registry. Registration is voluntary, and registry information is accessible after the testator's death.

(iii) Practices regarding an attorney's retention of the will vary across the country.

V. SPOLIATION

(a) Attorney draftsperson's failure to retain memoranda, notes, records, writings of meetings with testator, while not necessarily spoliation (the intentional or negligent destruction of specific evidence), can lead to an inference at trial concerning the nature of the consultation and condition of testator.

(b) Documents: Electronic discovery/Spoliation
Sanctions under CPLR 3126 may be imposed for spoliation which occurred even before a discovery order is issued. *See Rules of Professional Conduct* 3.4.

(c) *See also*, Judiciary Law § 487, Misconduct by attorneys:

An attorney or counselor who:

(1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or

(2) Willfully delays his client's suit with a view to his own gain; or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for; or,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

VI. PRIVITY & *SCHNEIDER V. FINMANN*

(a) Prior to 2010, NY adhered to the "strict privity" doctrine, i.e. in the absence of fraud, collusion or malice, the attorney who negligently prepared the decedent's will is liable only to his client, the testator, not the beneficiary. Widow has no privity to sue dead husband's estate planners for malpractice (*see Leff v. Fulbright & Jaworski*, NYLJ 7/10/2009 32, (col. 1) - Note, this decision was appealed).

(b) HOWEVER - In June of 2010, the Court of Appeals ruled that a personal representative of an estate may maintain a claim for malpractice against decedent's estate planning attorney. "Privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." Court of Appeals in *Schneider* relied on Texas Supreme Court case *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 SW3d 780. (*Estate of Schneider v. Finmann*, 15 NY3d 306, decided 6/17/10).

VII. LAW OF ATTORNEY MALPRACTICE

"In order to state a claim sounding in legal malpractice, the plaintiff must show that the defendants failed to exercise the skill commonly exercised by an ordinary member of the legal community" *(Raphael v. Clune, White & Nelson*, 201 AD2d 549; *Thaler & Thaler v. Gupta*, 208 AD2d 1130; *Marshall v. Nacht*, 172 AD2d 727). An action to recover damages for legal malpractice requires proof that: (1) the attorney was negligent; (2) the negligence was the proximate cause of the loss sustained; and (3) the plaintiff sustained actual damages as a result of the attorney's negligence (*Khadem v. Fischer & Kagan*, 215 AD2d 441; *Franklin v. Winard*, 199 AD2d 220). Plaintiff must prove, by a preponderance of the evidence, that defendant failed to meet the requisite standard of care. The burden of proof is generally met by proffering expert opinion evidence on the duty of care, or, plaintiff may rely on "ordinary experience of the fact finder [to] provide [] sufficient basis for judging the adequacy of the professional service" *(Estate of Nevelson v. Carro, Spanbock, et. al.*, 259 AD2d 282).

VIII. ISSUES RAISED BY *SCHNEIDER V. FINMANN*

(a) Who May Bring an Action:

Court of Appeals in *Schneider* referred specifically to the personal representative of the estate, however, under SCPA §§ 702 (8), (9), the court may issue limited letters of administration to someone other than the fiduciary. Should the Surrogates read *Schneider* to be that limits the cause of action to a personal representative, and thus deny a SCPA §§ 702(8) or (9) petition for limited letters? *See "Privity and the Role of Limited Letters in Legal Malpractice Actions,"* C. Raymond Radigan and Jennifer F. Hillman, NYLJ 11/22/2009 3, (col. 1).

In *Leff v. Fulbright & Jaworski, LLP*, (78 AD3d 531, *lv to appeal denied* 17 NY3d 705), the Appellate Division, First Department, ruled that decedent's spouse, who believed that she had engaged in joint estate planning, did not have a cause of action for malpractice against her deceased husband's attorneys.

(b) Statute of Limitations:

In New York, an action to recover damages for legal malpractice is deemed to accrue on the date the malpractice was committed, not when it was discovered (*Shumsky v. Eisensten*, 96 NY2d 164; *J & J, LLC v. Polizotto & Polizotto*, 69 AD3d 704). Under the doctrine of "continuous representation" however, the three-year statute of limitations for legal malpractice is tolled while the attorney continues to represent the client in the same matter in which the malpractice allegedly occurred, after the malpractice is committed (*id*.). The parties must have a "mutual understanding" that further representation is needed with respect to the matter underlying the malpractice claim" (*McCoy v. Feinman*, 99 NY2d 306).

In certain instances, such as a cause of action based upon fraud, the statute of limitations will accrue on the date that the fraud is discovered or could have been discovered with reasonable diligence, the so called "discovery rule" (CPLR 203(g), 213(8); *Oggioni v. Oggioni*, 46 AD3d 646). This exception is statutory and very limited.

NY County Supreme Court post *Schneider v. Finmann* ruling in *Allmen v. Fox Rothschild, LLP* (34 Misc3d 1224A), ***rejected*** the continuous representation theory and ruled that the statute of limitations did not toll, and that the suit was time barred. The court based its decision on various factors: 1) a separate retainer agreement between the executor and the firm which specified duties of representation, 2) objective proof that none of the parties had an understanding of continuous representation.

(c) NY State Bar Association, Committee on Professional Ethics, Opinion 865 (5/10/11):

Lawyer who prepared estate plan for decedent may represent executor despite recent change in law of legal malpractice in *Schneider* provided that lawyer does not perceive a colorable claim of legal malpractice arising out of the estate planning.

CLIENT RETENTION - Consequences of Losing a Will:

I. SCPA 1407

Provides that a lost or destroyed will may be admitted to probate only if

(1) It is established that the will has not been revoked, and

(2) Execution of the will is proved in the manner required for the probate of an existing will, and

(3) All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

II. PRACTICAL CONSIDERATIONS

(a) Consider possible administration.

(b) Wherefore clause of petition must specifically seek the admission to probate of a copy of the proposed will; waivers and consents/citations must also so indicate that it is a copy of a will that is being offered for probate.

(c) Court may require a hearing, in which the petitioner bears the burden of proof on each of the elements required of SCPA 1407 (*see In re Young's Will*, 82 Misc2d 871; *Matter of Staiger*, 243 NY 468)

III. PRESUMPTION OF REVOCATION

(a) If the original will was last known to be in the decedent's possession or if it is unknown in whose possession the will was last in, it is presumed that the decedent destroyed it (*see Matter of Passuello*, 169 AD2d 1007 [citing *Collyer v. Collyer*, 100 NY 481]); *Matter of McDonald*, 40 NY2d 995; *Matter of Hughson*, 97 Misc2d 427).

(b) Burden is on proponent by clear and convincing evidence (*see Matter of Staiger*, 243 NY 468; *In re Millen's Will*, 30 NYS2d 274).

(c) May use circumstantial evidence to rebut presumption of revocation (*see Matter of Engelken*, 103 Misc2d 772).

(d) Presumption does not attach when original in possession of a third party (*see, e.g., Matter of Kalenak*, 182 AD2d 1124).

IV. ROBYN LEWIS CASE

(a) The Facts:

(i) Decedent, Robyn Lewis, was married to James A. Simmons. The couple resided in Texas, but at some point during the marriage, they also purchased improved real property in Clayton, New York from the decedent's parents. Specifically, this property was a farm that had been owned by the decedent's family for generations. On July 15, 1996, the decedent executed a will which nominated her husband as executor, left all of her property to her husband, and provided that if her husband predeceased her, his father would be the alternate executor and alternate beneficiary. It is unclear whether decedent executed four originals of the will, or whether she executed one original with three copies.

(ii) In 2007, the couple divorced and decedent relocated to the Clayton property.

(iii) Upon the decedent's death, her parents searched her home and did not find a will. As such, they commenced an administration proceeding. After letters of administration were issued, the decedent's former father-in-law, James R. Simmons, offered the 1996 will for probate.

(iv) Decedent's parents and siblings objected to probate of the 1996 will.

(v) The ex-husband testified that the couple executed four originals of their estate planning documents–one for the Texas house, one for the Clayton house, one for his parents, and one for a safe deposit box.

(vi) Marilew Barnes, decedent's friend and former neighbor, testified that, at some point after the divorce, decedent asked Ms. Barnes to retain a manila envelope. According to Ms. Barnes, the envelope contained an executed will which revoked all prior wills and left the Clayton home to decedent's brothers. When Ms. Barnes moved, she returned the will to decedent.

(b) May 18, 2012 Decision of Surrogate's Court, Jefferson County (Hon. Peter A. Schwerzmann):

(i) Objections:

- Under Texas law, a divorce revokes a gift to a former spouse and all relatives of the former spouse who are not also relatives of the testator.

- Under the divorce decree, decedent's ex-husband was to return any "paperwork associated with any item of the decree." The ex-husband did not return the 1996 will to decedent.

- The 1996 will was revoked by a later, lost will.

(ii) Holdings:

- Evidence did not establish due execution of the lost will. Therefore, revocatory language in the alleged second will was of no force and effect.

- NY law applied.

- 1996 will admitted to probate.

- The Court further noted: "[i]t is not clear from the testimony of the witnesses if the decedent and Mr. Simmons left the attorney's office with four original instruments or one original and three copies."

(c) January 2, 2014 Decision of the Appellate Division, Fourth Department, 114 A.D.3d 203

(i) On appeal, objectants also argued that the decedent's father-in-law failed to account for all four originals of the 1996 will and therefore could not rebut the presumption of revocation by destruction.

(ii) Holdings:

- Surrogate's Court decision affirmed.

- NY law applies.

- Given that decedent did not make a demand for return of the will, neither the ex-husband nor his parents had an obligation to return it.

- There was no proof that the later will was duly executed.

- As to the objection that petitioner failed to account for all four of the originals of the 1996 will, the objectants could not raise a new ground on appeal.

(d) June 4, 2015 Decision of the Court of Appeals, 25 N.Y.3d 456, 2015 N.Y. LEXIS 1292:

(i) Lower courts properly refused to give revocatory effect to the lost will as it was not established that the lost will was duly executed.

(ii) "[T]he evidence before the Surrogate raised a most serious, and unresolved, question as to whether the 1996 will had been otherwise revoked, and while that question persisted the will should not have been admitted to probate."

(iii) The evidence supported the inference that the will was executed in quadruplicate, raising a presumption of revocation when the original kept at the Clayton residence could not be found.

(iv) "Here, it is manifest that the Surrogate's attention was drawn to the existence of will duplicates, but the consequently arising issues as to the will's validity were not resolved . . . ."

(v) Remanded.

(e) September 6, 2016 Decision of Surrogate's Court, Jefferson County (Hon. Peter A. Schwerzmann), Decision Not Published:

(i) The Surrogate determined that there was only one original will of Ms. Lewis, dated July 15, 1996, which was properly admitted to probate on May 22, 2012.

(ii) On remittitur, the court held a hearing. The only testimony was from decedent's ex-husband who, of course, testified that he and the decedent signed only one will. Although the court noted that the ex-husband indirectly benefitted from such testimony, it also stated that there was nothing about his demeanor "that suggested that he was untruthful, and the fact pattern is so peculiar that it has the air of truthfulness."

(iii) The court recognized the inequity, but essentially concluded that there was not much that it could do. "[T]he Simmons' [sic] have the right to bring a distasteful petition and the Court cannot render a decision based upon its own particular notion of fairness or the likeability of the litigants. The goal of a unified court system is to provide fair and predictable results. We cannot, or at least should not, rewrite the law based upon the facts of one case. While the legislature may be considering changing the law in New York as a result of outcomes like this, the Court must deal with the circumstances and the law as it exists at the relevant time."

(f) February 9, 2018 Decision on Appeal of the Appellate Division, Fourth Department, 158 AD3d 1247

(i) Decree affirmed.

(ii) Decedent's parents argued on appeal that the Surrogate erred in failing to draw an adverse inference against petitioner based upon his failure to call the attorney as a witness at the hearing upon remittal. The Appellate Division held that the parties did not make their request for an adverse inference in a timely manner.

(iii) Leave to appeal denied, 2018 NY LEXIS 1417 (NY Court of Appeals, June 12, 2018).

(g) Why *Robyn Lewis* turned out as it did. EPTL 5-1.4:

(i) Revokes will bequests, appointment as an agent under power of attorney or health care proxy; beneficiary designation on transfer of death, life insurance policies, and certain retirement assets. Note that it does not revoke dispositions or appointments under irrevocable trusts.

(ii) Exceptions within the statute:

- If the governing instrument provides otherwise

- 5-1.4(b)(2): "A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse."

(iii) Adopted 2-804 of the 1990 Uniform Probate Code, but did not adopt the provision that expanded the revocatory effect of the divorce beyond the divorced spouse of the decedent to include the "relatives" of the divorced spouse.

(iv) Prior to its enactment in 1966, the Decedent Estate Law provided that a testamentary instrument could only be revoked as follows: "by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same."

(v) Initially provided for the revocation of dispositions to and appointments of a testator's former spouse in a testamentary instrument upon the testator's divorce from a former spouse or the annulment of their marriage.

(vi) In 2005, the legislature amended the statute to bring transfer-on-death accounts within its scope.

(vii) In 2008, the legislature repealed the then-existing version of 5-1.4 and enacted a new statute. The new statute extended the revocatory effect that a divorce or annulment of a marriage would have on a former spouse's status as a beneficiary of Totten Trust accounts, life insurance policies, revocable trusts, and joint tenancies with right of survivorship.

(g) Possibilities & Proposals

(i) Adopt a law like Texas, which would exclude all relatives of the ex-spouse who are not also relatives of the decedent. (Problem: What if the testator is very close to stepchildren or ex's family?)

(ii) Exclude only some relatives of the ex-spouse.

(iii) Exclude relatives only in cases of gifts contingent on ex's death.

(iv) Rebuttable presumption that relatives of the ex are excluded.

- Could allow CPLR 4519 evidence
- Rebuttable by substantial evidence
- Should dead man's statute apply?
- Proposal:

"The revocatory effect of paragraph (a) shall be presumed to apply to a person in any relationship to the divorced individual that was based upon said marriage, including but not limited to step children, step grandchildren and parents in law, unless there is substantial evidence of the divorced individual's contrary intention at the time of his or her death or when the disposition, appointment, provision or nomination at issue would take effect. Testimony with regard to such intention shall not be disqualified under CPLR 4519 provided that such testimony is supported by other evidence."

V. GENERAL PRINCIPLES FROM *ROBYN LEWIS* CASE

(a) *Crossman v. Crossman*, 95 N.Y. 145 (1884)

(i) Decedent had executed duplicate wills, one of which was admitted to probate.

(ii) The Court held that the proponents of the will were not required to offer both duplicates for probate and that it was not essential that the petition describe the will as executed in duplicates.

(iii) However, the Court also noted, "[a]s soon as it is brought to the attention of the surrogate that there are duplicates of a will presented to him for probate, it is proper that he should require both duplicates to be presented, not for the purpose of admitting both as separate instruments to probate, but that he may be assured whether the will has been revoked, and whether each completely contains the will of the testator."

(b) *Matter of Robinson*, 257 A.D. 405, 13 N.Y.S.2d 324 (4th Dept 1939):

(i) The testator executed two wills, one of which was printed in carbon and one of which was printed from a typewriter. After decedent's death, the court refused to probate the will retained at the attorney's office without accounting for the will that was retained by the decedent.

(c) *Matter of Blackstone*, 172 Misc. 479, 15 N.Y.S.2d 597 (Sur Ct, New York County 1939):

(i) Testator retained the original and a copy of her will. After her death, only the copy could be located. Despite petitioner's argument that the testator had taken great care to preserve the copy, the court found that the presumption of revocation applied, and that the presumption had not been rebutted.

(d) *Scholen v. Guaranty Trust Co.*, 288 N.Y. 249, 43 N.E.2d 28 (1942):

(i) Cited by the Fourth Department in *Lewis* for the proposition that one who accepts custody of the original will is bound to return it on demand.

(ii) Here, the decedent named the Guaranty Trust Company as the executor and trustee. After execution, he left the will with Guaranty. Decedent died in 1933 and the Richmond County Surrogate's Court issued letters of administration. Guaranty did not learn of decedent's death until 1937.

(iii) "The defendant . . . received the will 'for safekeeping.' It accepted the custody thereof. It was bound to return the instrument to its maker upon demand and perhaps after the death of the testator and upon notice of such death, it was bound to produce the will so that it might be probated."

(e) A subsequent will, which has been proven to be duly executed, can revoke a prior will even if it otherwise cannot be admitted to probate.

(i) *Matter of Wear*, 131 A.D. 875, 116 N.Y.S. 304 (2d Dep't 1909) (Subsequent will, which was proven to have been duly executed, was sufficient to revoke a prior will, even though the subsequent will had been lost).

(ii) *See also Matter of Walsh*, 5 Misc.2d 801, 161 N.Y.S.2d 272 (Sur Ct, Suffolk County 1957); *Matter of Shinn*, 7 Misc.2d 623, 158 N.Y.S.2d 921 (Sur Ct, Westchester County 1956); *Matter of Henesey*, 1 Misc.2d 864, 149 N.Y.S.2d 68 (Sur Ct, New York County 1956).

(f) If the subsequent will has not been duly executed and attested, however, it is insufficient to establish that the earlier will has been revoked.

(i) *Matter of Logasa*, 161 Misc. 774, 293 N.Y.S. 116 (Sur Ct, New York County 1937) (subsequent will was handwritten and executed in accordance with French law)

(ii) *Matter of Andrews*, 195 Misc. 421, 88 N.Y.S.2d 32 (1949) (subsequent will was lost, no copy could be found, and witnesses could not remember the contents of the will at all)

(iii) *Matter of Katz*, 78 Misc.2d 790, 358 N.Y.S.2d 616 (Sur Ct, Schoharie County 1974) (contents of purported second will were not known and there was no proof that it was duly executed).

(iv) *Matter of Goldsticker*, 192 N.Y. 35, 84 N.E. 581 (1908) (decedent lacked testamentary capacity to execute the subsequent will, and therefore it did not revoke the previous will).

SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend resources. All calls are private and confidentiality is protected under Judiciary Law Section 499. (Lawyer Assistance Committee)

Feel Free to Join Us at Our Weekly Recovery Meeting