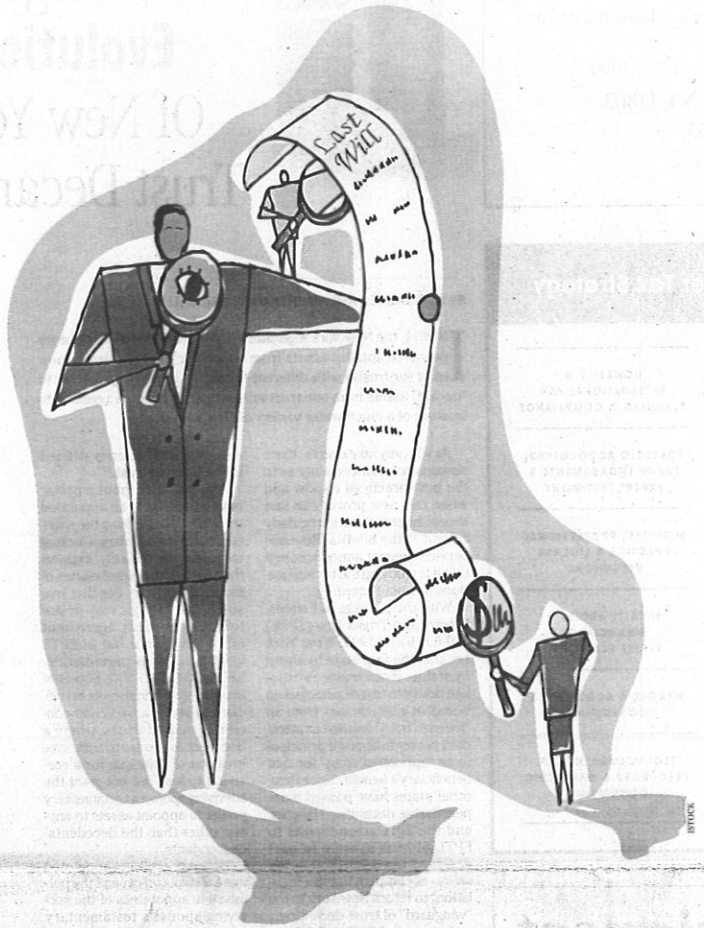
Trusts&Estates

Draft Once, Proofread Twice

Take extreme care in formulating personal property bequests.

BY MARY E. MONGIOI
AND STEPHANIE M. ALBERTS



ISTOCK

"MEASURE TWICE, CUT ONCE." It literally refers to the craft of carpentry and the need to double-check one's measurements for accuracy before cutting a piece of wood so as to not waste time and material. Figuratively, it is a phrase that bears repeating in every law office each time a pen is put to paper, especially when even the most skilled attorney has the task of drafting a last will and testament that must clearly state the intentions of the testator.

Stock phrases and clauses may be a good place to start, and certainly every attorney has a form with which they may be comfortable, but a "fill in the blanks" approach where one neglects to read and edit that form in the context of a specific client can lead to the unintended consequence of a will construction proceeding. That proceeding will impose great cost upon both the estate and the objectants, delay the distribution of assets to intended distributees and may create tension and ill will among those distributees, none of which was intended by the testator and all of which could have been avoided with careful and thorough drafting and editing by the attorney-draftsperson at the time the will was made.

A Case to Consider

While it isn't often that an old proverb rings true in a new way (and probably never in the case of will drafting), this one is particularly instructive after reading the recent case of *Matter of Gourary*,[1] a case decided by the Surrogate's Court of New York County by Judge Kristin Booth Glen on Nov. 1, 2011. The decision includes an exhaustive review of the present state of the law of New York with respect to will construction and provides attorneys a wealth of information with respect to interpretation of language, as well as great insight into the manner in which the surrogate judge reasoned her way to the decision she rendered.

Matter of Gourary involved the estate of the late Paul Gourary, who died leaving an estate worth approximately $17 million.[2] Included in the decedent's estate was a rare book collection valued on the decedent's estate tax return at $5.2 million.[3] Two seemingly disparate clauses, each at first glance clear on its face, gave rise to the will contest.

Article Second of the decedent's last will and testament contained a bequest of the decedent's tangible personal property and read, in part, as follows:

> All household furniture and furnishings, *books*, pictures, jewelry and other articles of personal or household use..., I bequeath to my wife, MARIANNE C. GOURARY, if she survives me.[4]

When a court must construe a will due to ambiguity, its "foremost objective is ascertainment of the decedent's intent." The court may utilize rules of construction and evaluate the technical meaning of individual terms in the will.

Article Third of the decedent's last will and testament then bequeathed the decedent's residuary estate two-thirds to his wife and one-third to his son.[5]

The decedent's wife (his second, and not the mother of the son to whom the bequest of one-third of the residuary estate was made), claimed that the rare book collection was included in the bequest of tangible personal property, that it constituted the "books" as set forth in Article Second of the last will and testament, and that thus the book collection was her sole property.[6]

This claim was challenged by the decedent's son, who argued that said book collection was part of the residuary estate and was not part of the tangible personal property "books" delineated in Article Second, and thus, belonged one-third to him.[7]

The surrogate recognized the latent ambiguity in the terms of the decedent's last will and testament and directed a hearing on this issue to determine whether the term "books" in Article Second was meant to include this rare book collection,[8] which brings us to the question: When is a book no longer a book?

The Controlling Law

When a court must construe a will due to ambiguity, its "foremost objective is ascertainment of the decedent's intent."[9] To achieve this task, the court may utilize rules of construction and evaluate the technical meaning of individual terms in the last will and testament.[10] Although rules of construction may be used, "their application should not be arbitrary" and all canons of construction are subordinate to the intent of the testator.[11] Most importantly, the court must read the decedent's last will and testament as a whole in light of all of the evidence presented to determine the decedent's intent and ultimate testamentary plan.[12] If a reading of the last will and testament as a whole reveals that the decedent did, in fact, have a testamentary plan, the individual terms of said last will and testament must be

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MARY E. MONGIOI *is counsel and* STEPHANIE M. ALBERTS *is an associate in the tax, trusts and estates department of Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana.* DANIELLE E. TRICOLLA, *a law clerk awaiting admission, assisted in the preparation of this article.*

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construed and given effect so as to effectuate this plan.[13]

The court's task in a construction proceeding is made more complicated by the fact that there is no clear burden of proof.[14] Appellate case law provides nothing but general statements indicating that there appears to be an equal burden on both parties, and the Restatement merely indicates that a fiduciary's construction is not afforded a presumption of accuracy.[15]

'Gourary' analogized ambiguity in a will to child custody cases that employ a "best interests" standard, and concluded that the applicable standard would be the court's best assessment of the decedent's intent when executing the will in light of all evidence presented.

In the *Matter of Gourary*, the court analogized the situation of ambiguity in a last will and testament to child custody cases in which the court applies a standard of "best interests" and concluded that the standard to be applied would be the court's best assessment of the decedent's intent when executing the subject last will and testament in light of all evidence presented.[16]

The Outcome

If one carefully examines the last will and testament, it would seem that the testator intended to leave his books to his wife, and yet a will construction proceeding ensued. The language in question was parsed down to the placement of commas, extrinsic written evidence considered, and testimony had from six witnesses, including two experts on prints, drawing and photographs, as well as a former law partner of the now deceased draftsperson.[17]

After reviewing all of the testimony and evidence presented by both parties (some of which had to be barred as double hearsay despite the fact that it may well have been dispositive), the surrogate resolved the ambiguity of the term "books" in favor of the decedent's son and held that the rare book collection was part of the decedent's residuary estate.[18]

The court noted the "absence of a clear burden of proof" and that its "primary, overriding task... [was] to determine the decedent's intent."[19] In support of its conclusion, the court stated that it was highly unlikely that the decedent intended his life passion to be included in the mundane category of basic household items, and his failure to specifically mention same in the bequest of tangible personal property more likely reflected his intent to leave his wife "a home filled with that which she herself used" but to have his major assets be included in the residuary estate.[20] The court also considered and relied upon a letter from the decedent to his stepdaughter in which he expressed his intention to leave his son one-third of his estate and concluded that the testator's intent would be obviated if the rare book collection was not included in the residuary estate.[21]

Some Practical Advice

What can be learned from the *Matter of Gourary* case and others upon which it relies? While the case itself highlights that attorneys should take extreme care in drafting a specific bequest of tangible personal property and should take into account all assets owned by the decedent that could pass pursuant to this clause, the same standard should be applied to each and every will clause. The best and most prudent advice is:

a) First and foremost, know what your client owns and intends to devise in a residuary clause so that it does not abrogate or cloud a specific bequest. Be certain that the bequest is not only described correctly but that no other clause in the will could put that bequest at risk by the interpretation of language.

b) Remember that there is no clear burden of proof in a will construction proceeding. Each party has its own interpretation of the meaning and intent of the propounded instrument and each bears the burden of proof of the meaning it seeks to have control the distribution of assets. Therefore, make certain that you take careful note of the testator's intent and preserve those notes in your file.

c) Be certain that you are consistent in the description of the item at issue at all times. For example, in *Matter of Gourary*, the proponent/executor of the will (the widow), in preparing the federal estate tax return, valued the "rare book collection" at $5.2 million, but, despite that description, contended that it was included in the specific bequest contained in Article Second. That description was considered by the court in deciding that the testator did not intend to include that "collection" in the specific bequest of books and other tangible personal property to his wife.

d) Finally, and most importantly, follow the wisdom of the proverb—draft once, proofread twice—and make certain that the meaning and intent of the testator is conveyed so clearly that you never have to answer the question: When is a book not a book?

1. 932 N.Y.S.2d 881 (Sur. Ct. New York County 2011).
2. See id. at 883.
3. See id.
4. Id. (emphasis added).
5. See id.
6. See id.
7. See id.
8. See id. at 882-83.
9. *Matter of Carmer*, 71 N.Y.2d 781, 785 (N.Y. 1988); see *Matter of Falvey*, 15 A.D.2d 415, 419 (4th Dep't 1962); *Matter of Gustafson*, 74 N.Y.2d 448, 453 (N.Y. 1989); *Matter of Walker*, 64 N.Y.2d 354, 358 (N.Y. 1985); *Matter of Larkin*, 9 N.Y.2d 88, 91 (N.Y. 1961).
10. See *Matter of Gourary*, 932 N.Y.S.2d at 884; *Matter of Carmer*, 71 N.Y.2d at 785; *Matter of Falvey*, 15 A.D.2d at 419.
11. *Matter of Falvey*, 15 A.D.2d at 419; *Matter of Larkin*, 9 N.Y.2d at 91.
12. See *Matter of Gourary*, 932 N.Y.S.2d at 884; *Matter of Carmer*, 71 N.Y.2d at 785; *Matter of Falvey*, 15 A.D.2d at 419; *Matter of Larkin*, 9 N.Y.2d at 91.
13. See *Matter of Gourary*, 932 N.Y.S.2d at 888; *Matter of Falvey*, 15 A.D.2d at 419; *Matter of Larkin*, 9 N.Y.2d at 91 (asserting that the will must be read in light of decedent's testamentary plan even if a literal reading of the terms of said will suggests inconsistent meaning).
14. See *Matter of Gourary*, 932 N.Y.S.2d at 886.
15. See id. (commenting "[w]here the language of a will does not affirmatively show the claimed intention, the burden of establishing such intention is on the party seeking to effectuate it") (quoting *Matter of Revson*, 86 A.D.2d 872, 874 (2d Dept. 1982).
16. See *Matter of Gourary*, 932 N.Y.S.2d at 884, 887.
17. See id. at 884-85.
18. See id. at 889.
19. Id. at 885.
20. Id. at 887-88.
21. Id. at 888-89.