

New York vs. Florida: A Forum Selection Guide for Will Contests

By Amy B. Beller

We are all familiar with “Snowbirds”—retired or semi-retired New Yorkers who spend the winter months in Florida.¹ A recent study by the University of Florida reported that approximately 920,000 people temporarily reside in Florida in the winter and that 13 percent of those are New Yorkers over age 55.²

The Snowbird phenomenon raises interesting legal issues relevant to our practice, since New York-to-Florida Snowbirds often own real property and personalty, and may have bank or investment accounts, in both states. (And indeed, Snowbirds may be up to more mischief than just keeping property in both states—the *New York Daily News* reported in August of 2004 that at the time of the 2004 presidential election, over 46,000 voters were registered to vote in both New York and Florida³).

Multi-state property ownership by testators provides estate litigators with a unique opportunity for forum selection with respect to any challenge concerning the validity of a Snowbird’s will.⁴ For instance, imagine representing a wealthy Snowbird who wants to disinherit her children in favor of a second spouse. Defensive estate planning with a probable will contest in mind might accomplish the goal of establishing jurisdiction over the litigation in one state or the other. Perhaps there will be enough at stake to warrant a change of domicile.⁵ Even post-mortem, there may be strategies, such as filing for original probate in one jurisdiction over another, which may determine the law applicable to the eventual will contest.

Of course, the jurisdictional and conflicts of law analyses are complicated, and will not be considered here. In the end, an estate litigator seeking to validate his choice of one forum’s law over another may not succeed. However, even if unsuccessful, creating an additional strategic hurdle—one in which the opposing party’s lawyer will have to fight to prevent the application of the unfavorable law of the chosen jurisdiction—in itself may be advantageous.

This article will compare the laws of New York and Florida with respect to a number of key factors inherent in most will contests (based on lack of capacity, undue influence or fraud) on which these states’ laws differ: (1) notice and standing; (2) discovery; (3) *in terrorem* clauses; (4) mediation; (5) the

Dead Man’s Statute; (6) burdens of proof; (7) right to a jury trial; and (8) homestead.

1. Notice and Standing

In New York, all interested persons must be served in advance with citation on a petitioner’s application for probate and for issuance of letters testamentary.⁶ Interested persons include distributees of the decedent, persons designated in the propounded will, or persons named in a prior will on file with the court, whose interests are adversely affected by probate of the propounded instrument.⁷ The proponent has no choice—he must serve all potential objectants with advance notice and hope that they simply do not object to probate on the return date of the citation.

In Florida, however, there is no provision for advance notice of probate unless the prospective contestant has filed a “caveat” in the Probate Court.⁸ The caveat requires the probate petitioner to serve the “caveator” with formal notice of the petition, giving the caveator twenty days in which to object.⁹ Assuming no caveat has been filed (as is usually the case), probate is routinely granted *ex parte*, and letters are issued to the named “Personal Representative” (*i.e.*, the executor), with notice of administration served only upon those persons named in the propounded will.

How does this apply in practice? Suppose our wealthy Snowbird, who is leaving all of her assets to her second husband, has three estranged adult children who are scattered across the United States. In New York, each of the adult children must be served with a citation informing him or her of the return date on the probate petition. In Florida, the will is likely to be admitted to probate and letters issued to the named Personal Representative in short order, without notice to any of the children despite their status as distributees. Although the children can bring a proceeding to revoke probate up until the time when the Personal Representative is discharged,¹⁰ the momentum in the Personal Representative’s favor renders a revocation proceeding difficult.

2. Pre- and Post-Objection Discovery

a) Pre-Objection Discovery: 1404s

New York estate litigators are almost universally enamored with SCPA 1404, which permits a potential

objectant to obtain discovery and take the depositions of the proponent, the drafting attorney, and the attesting witnesses, before deciding whether to file objections to probate. The advantage of such pre-objection discovery is clear—the potential objectant is given a one-way license to fish for possible grounds for her will contest. For the lawyer, SCPA 1404 provides an opportunity to assess the case before committing to represent the potential objections in full-blown litigation.

In Florida, there is no specific statutory authority allowing pre-will contest discovery. Florida Probate Rule 5.080(c) permits the use of all available discovery devices even when there is no adversarial proceeding pending. However, Rule 5.080(c) seems rarely utilized and a potential objectant's pre-litigation discovery demand is likely to be met with a motion to quash or for a protective order. In all probability, the Florida litigant will have difficulty obtaining any meaningful discovery until after a petition to revoke probate has been filed.

b) Post-Objection Discovery: Bills of Particular and the Three-Year/Two-Year Rule

Post-objection discovery is substantially similar in New York and Florida. Both forums provide for comparable discovery from parties and non-parties and for motion practice in connection with such discovery attempts. One difference, however, is the unavailability in Florida of a bill of particulars. The bill of particulars, although often overlooked, can be a very useful weapon in a will contestant's discovery arsenal, requiring the objectant to particularize her objections based on undue influence and fraud.¹¹

Another difference in the discovery arena is that Florida has no equivalent to the three-year/two-year rule set forth in section 207.27 of the Uniform Rules for Surrogate's Court. Section 207.27 states that in any contested probate proceeding, the items upon which an examination before trial may be held is confined to a period of three years prior to the date of the propounded instrument and two years thereafter (or to the decedent's death). The limitation of section 207.27 has been applied to all kinds of discovery.¹² The three-year/two-year framework can be expanded by the court only upon a showing of "special circumstances."¹³

Since Florida has no periodic limitation on discovery, it may be the preferred forum if one seeks to uncover evidence outside the applicable three-year/two-year period that frames discovery in New York will contests. On the other hand, if one wishes to keep some older skeletons in the closet, New York might be the better option.

3. In Terrorem Clauses

In terrorem, or no contest, clauses, which are designed to discourage will contests, have created conflicts among the various states' courts and statutes. On one hand, enforcement of such clauses discourages frivolous litigation, family feuds and the unnecessary waste of a decedent's assets. On the other hand, enforcement of *in terrorem* clauses may chill meritorious challenges to probate, possibly allowing for dispositions of property which are contrary to the testator's true intent.¹⁴

In New York, *in terrorem* clauses are enforceable and are a frequently used strategy at the estate planning stage to prevent litigation.¹⁵ In Florida, however, *in terrorem* clauses are unenforceable.¹⁶ Thus, if our wealthy Snowbird is willing to leave enough money to her children to dissuade them from bringing suit, then there may be an enormous benefit to executing a will which will be governed by New York law so that her *in terrorem* clause will be upheld.

In many cases, however, the testator is unwilling to leave estranged family members enough to deter them from litigation, if anything at all. In such cases, whether or not the forum jurisdiction will enforce an *in terrorem* clause is inconsequential, since it will not prevent a will contest.

4. Mediation

Although New York permits alternative dispute resolution on consent of the parties, Florida has instituted a court-sanctioned mediation process. Florida judges are authorized to refer civil matters to mediation, and frequently require mediation before trial. Mediation in Fort Lauderdale's Fifteenth Judicial Circuit was successful in resolving over 4,000 cases in 2004.¹⁷

Often the biggest obstacle to settling litigation is simply getting the parties to sit down at the bargaining table. From a lawyer's perspective, neither side wants to be the first to suggest settlement negotiation, as it is traditionally viewed as a sign of weakness or lack of confidence in one's case. Court-ordered mediation resolves that problem, and for that reason it may be advantageous to both sides.

5. The Dead Man's Statute

To the delight of some and frustration of many others, New York's Dead Man's Statute, CPLR 4519, is still alive and well. Florida repealed its Dead Man's Statute, section 90.602, effective July 1, 2005. In New York, the Dead Man's Statute bars the admission of any evidence of a transaction with a decedent in which the witness offering the evidence has an interest.

To all but the experienced estate litigator, the Dead Man's Statute may seem like a minor consideration. However, application of the Dead Man's Statute can significantly affect the outcome of a case. Suppose our wealthy Snowbird told her new spouse, on her deathbed, that she wished to leave everything to him because he was the only one who cared for her during her final illness—her ungrateful children didn't even send her a card. Under New York law, the Snowbird's spouse cannot testify to this conversation during trial because of CPLR 4519. In Florida, however, there is no such bar. Assuming the will proponent gets past a hearsay objection, the testimony will be admissible. Imagine the effect of the Snowbird's own words on the finder of fact!

It is worth mentioning that in collateral, non-probate estate litigation, such as a discovery proceeding pursuant to SCPA 2103 to recover assets claimed to belong to the estate, the application the Dead Man's Statute can be *the* pivotal issue in the case. For example, suppose an executor of a decedent's estate seeks to recover a substantial sum of money from the decedent's housekeeper. The housekeeper claims the money was given to her shortly before the decedent's death, and that the decedent told her she wanted to reward the housekeeper for her hard work and loyalty. In the ensuing litigation in New York, the housekeeper would be barred from testifying at trial as to the decedent's statements concerning the gift. The fact-finder would hear only that a sum of the decedent's money was transferred to the housekeeper. Without the missing piece of information—why the decedent made the gift—the fact-finder would be free to speculate as to all kinds of suspicious facts concerning the decedent's transfer of significant assets to her employee. Depending on the identity and relationship of the parties, and of course on the facts of the specific case, the exclusion of such information may cause an unfortunate frustration of the decedent's intent.

The hypothetical case discussed above demonstrates the importance of the Dead Man's Statute in our area of practice which, by definition, involves the disposition of the assets of a decedent. Supporters of the Dead Man's Statute argue that Florida's elimination of the rule is dangerous, as testimony may be fabricated. To avoid such false testimony is the very purpose for the Dead Man's Statute—the decedent is not present to verify the truth of the interested witness's testimony.¹⁸

In an effort to level the playing field, simultaneous with repeal of its Dead Man's Statute, Florida enacted a new exception to the hearsay rule. Florida Statute § 90.804 provides that where the declarant is unavailable as a witness (*i.e.*, deceased or incompe-

tent), evidence of any statement of the declarant which is similar in subject matter to statements of the declarant previously admitted into evidence shall not be excluded as hearsay. Only time will tell what effect these changes in Florida law will have on the trial of will contests.

6. Burdens of Proof

In a Florida will contest, the proponent has the burden of proof on due execution only, and the objectant carries the burden of proving testamentary incapacity, undue influence and fraud.¹⁹ A New York proponent must prove testamentary capacity as well as due execution, but the burden on undue influence and fraud, as in Florida, rests with the contestant.²⁰

However, in New York, the proponent can usually establish a *prima facie* case on testamentary capacity simply with the testimony of the attesting witnesses.²¹ The burden then shifts to the will contestant to prove incapacity. Thus, the actual difference between Florida's and New York's respective burdens of proof on testamentary capacity may be inconsequential in practice.

In both Florida and New York, a confidential relationship between the testator and a person alleged to have unduly influenced the testator will shift the burden of proof on undue influence. Florida Statute § 733.107 actually provides for a presumption of undue influence, which expressly implements the public policy against abuse of fiduciary or confidential relationships.

7. Right to a Jury Trial

The right of a will contestant to a trial by jury is established in New York by statute, SCPA 502. Such right is a cornerstone of any New York will contest, and it shapes the course of the litigation from its inception. Proponents, especially those with confidence in their cases, frequently prefer bench trials. Contestants, on the other hand, may rely on juries to reach beyond the rigid standards for invalidating a testamentary instrument, often playing upon some unusual or unsavory facts disclosed during discovery to tip the scales in their favor.

In Florida, there is no constitutional right to a jury trial in a will contest.²² Nor is there any statutory authority requiring a jury trial when demanded by a party to a will contest. A Florida court, in its discretion, may submit a factual question to a jury, or it may consider the verdict of an advisory jury, but it is not required to do so.²³

That a will contestant may be unable to obtain a jury trial in Florida can be either an enormous benefit or a serious detriment, depending on one's perspective and the facts of a given case. In any event,

this is a significant difference which must enter into any analysis relating to forum selection between New York and Florida.

8. Homestead

Florida's homestead laws serve many public policy goals. Although the complexities of Florida homestead are beyond the scope of this article, for the purpose of this discussion the relevant homestead provisions concern the devise and descent of homestead property. Simply put, a testator who is survived by a spouse and a minor child cannot validly devise homestead property, although if the testator is survived by a spouse and no minor child, the homestead may be devised to the spouse.²⁴ In default of a valid devise of homestead property, in the case of a testator survived by a spouse and children, the spouse will take a life estate in the property, with the remainder interest passing to the testator's children.²⁵

New York, of course, has no equivalent to homestead. Subject to a spouse's right of election, a testator can devise his real property to whomever he chooses.

The effect of homestead laws on Florida estate litigation is significant. Consider our original hypothetical in which the Snowbird is survived by a spouse and adult children from a prior marriage. The Snowbird's Will devises the homestead property to her spouse, which is a valid disposition. However, even if the children are successful in establishing that the Snowbird's Will is invalid, the Snowbird's spouse will retain a life estate in the homestead property. If the spouse is significantly younger than the testator, this may mean that the Snowbird's children will have to wait decades before they can obtain possession of the homestead property. Coupled with a spouse's right of election (in Florida, equal to thirty percent of the estate²⁶) which is in addition to homestead,²⁷ the contestants may conclude that there is not enough to be gained to justify litigation.

Consider another example: Suppose a testator is estranged from his ex-wife and minor children. If he is not remarried, he will not be able to devise his Florida homestead property to anyone other than his minor children. In effect, the homestead provisions operate as a forced inheritance scheme in favor of the testator's children, potentially overriding the testator's wishes. However, note that this will only apply when the children are minors—if the testator is survived by no spouse and only adult children, he may devise his homestead as he pleases.

Conclusion

Assuming that the estate litigator can choose her forum for the contest of a will of a New York-Florida Snowbird, either by careful pre-mortem planning or clever post-mortem tactics, there are many factors to be considered in assessing the strategic advantages of one jurisdiction over the other. Of course, these factors must always be analyzed based upon the specific facts and circumstances of a given case.

Endnotes

1. See www.wordsmith.org, archives for March 25, 2004, defining a Snowbird as a person who moves to a warmer climate for the winter. Example: "Song has grabbed some of the snowbird business that JetBlue relies on to fill its seats between New York and Florida." Jeremy Kahn, Investors Head for the Exits at JetBlue: Fortune (New York: Feb. 10, 2004).
2. "UF Study: New York leads in snowbirds moving temporarily to Florida," November 22, 2004 (<http://news.ufl.edu/2004/11/22/snowbirds-2/>).
3. "The News Rocks the Vote," *New York Daily News*, August 23, 2004.
4. SCPA 205 gives the New York Surrogate's Courts jurisdiction over the estate of any New York domiciliary, and SCPA 206 provides jurisdiction over the estates of non-domiciliaries who leave property in the State. Section 733.101 of Florida's Probate Code infers jurisdiction over the estate of a non-domiciliary with Florida assets, and section 731.106 provides that a non-resident may nonetheless elect to have Florida law apply to the testamentary disposition under his will. With respect to the disposition of real property, case law in both New York and Florida indicates that only the courts of the State in which such property is located can determine the disposition of such property (hence ancillary administration proceedings), and that the law of such forum State will apply. See *Lynes v. Townsend*, 33 N.Y. 558, 561 (1865); *DeFrance v. DeFrance*, 710 N.Y.S. 2d 612, 613 (2d Dep't 2000); *Kyle v. Kyle*, 128 So. 2d 427 (Fla. 2d DCA 1961); *Conner v. Elliott*, 85 So. 164 (Fla. 1920); *Beale v. Beale*, 807 So. 2d 797 (Fla. 1st DCA 2002).
5. There may be very important tax or other financial considerations which effect a choice of domicile, including but not limited to the decoupling of the New York estate tax, the fact that Florida has no income tax, and the protections of Florida homestead property from creditors. These issues are the subject of another article for another day.
6. See SCPA 304, 306 and 1403; see also SCPA 1410: Who may file objections to probate of an alleged will.
7. SCPA 1403.
8. See Florida Statute § 733.212. and Probate Rule 5.201 (required notice); Florida Statute § 731.110 and Probate Rule 5.260 (regarding procedures for filing a caveat).
9. Probate Rules 5.260(f) and 5.040(a).
10. Florida Statute § 733.109.
11. See Rule 207.23 of the Uniform Rules of Surrogate's Court.
12. *In re Abbate*, N.Y.L.J. 6/25/2003 (Sur. Ct., N.Y. County).
13. Uniform Rules for Surrogate's Courts, § 207.27.
14. Dukeminier, Johanson, Lindgren and Sitkoff, *Wills, Trusts and Estates*, 7th ed. (Aspen Publ. 2005), at p. 167.

15. See, e.g., *In re Ellis*, 252 A.D.2d 118, 683 N.Y.S.2d 113 (2d Dep't 1998), *appeal denied*, 93 N.Y.2d 805, 689 N.Y.S.2d 429 (1999) (decendent's sons violated *in terrorem* clause and therefore forfeited right to bequests under Will).
16. Florida Statute § 732.517 provides: "A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."
17. 2005 Florida Mediation and Arbitration Programs: A Compendium, 18th ed., prepared by Florida Dispute Resolution Center (available at www.flcourts.org).
18. The Committee Report for Bill CS/SB, 4/27/05, states: "The main purpose of the prohibition on testimony by an interested party is to protect the decedent's estate from false or fraudulent claims. It was also thought that it would be unfair to the estate of the deceased person to allow an interested party to have the benefit of giving testimony that cannot be contradicted by the other party to the oral communication, who is now deceased or incompetent."
19. Florida Statute § 744.107 and Probate Rule 5.275.
20. *In re Kumstar*, 66 N.Y.2d 691, 496 N.Y.S.2d 414 (1985); *In re Walther*, 6 N.Y.2d 49, 188 N.Y.S.2d 168 (1959); *Delafield v. Parish*, 25 N.Y. 9 (1862); *Estate of Watson*, 37 A.D.2d 897, 325 N.Y.S.2d 347 (3d Dep't 1971).
21. See *In re Fiumara*, 47 N.Y.2d 845, 418 N.Y.S.2d 579 (1979) (jury verdict finding testamentary capacity based on testimony of attesting witnesses would not be set aside); *In re Leach*, 3 A.D.3d 763, 772 N.Y.S.2d 100 (3d Dep't 2004) (affidavit of attesting witnesses creates presumption of testamentary capacity); but see *Estate of Warsaki*, N.Y.L.J. 1/4/1996 (Sur. Ct., N.Y. County) (attesting witnesses did not demonstrate that testator was free from insane delusion).
22. See *Estate of Howard*, 542 So. 2d 395 (Fla. 1st DCA 1989); *Estate of Fanelli*, 336 So. 2d 631 (Fla. 2d DCA 1976).
23. *Estate of Fanelli*, *supra* note 22.
24. Florida Statute § 732.4015.
25. Florida Statute § 732.401. Technically, the provision applies if the testator is survived by a spouse and "lineal descendants."
26. Florida Statute § 732.2065.
27. Florida Statute § 732.2105.

Amy B. Beller is an associate in the West Palm Beach, Florida office of Kaye Scholer LLP. Ms. Beller, who practiced law in New York from 1992 until 2004, focuses her practice primarily in the area of trust and estate litigation.

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