

# Following Formalities of Will Execution And Availability of Attorney Testimony Defeats Undue Influence Claims

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While undue influence claims are commonly asserted in probate proceedings, especially with the increased prevalence of dementia and similar disabilities, two recent cases from New York's Appellate Division illustrate how following the formalities of will execution, supervised by an attorney, can protect against such claims and lead to their summary dismissal.

In *Matter of Fiorentino*, 2024 WL 462232 (2<sup>nd</sup> Dep't February 7, 2024), the decedent's sister, who received nothing under the decedent's will, challenged the will on the grounds of lack of testamentary capacity and undue influence. The executor submitted to Surrogate's Court the deposition testimony of the attorney who drafted the will and supervised its execution, and of the two attesting witnesses; and Surrogate's Court granted summary judgment dismissing the sister's objections to probate. On the sister's appeal, the Appellate Division affirmed.

Finding that the executor "demonstrated that the statutory requirements for due execution were satisfied," referring to New York EPTL 3.2-1, the court stated that "[w]here the will is drafted by an attorney and the drafting attorney supervises the will's execution, there is a presumption of regularity that the will was properly executed in all respects." On the basis of the same evidence, the court gave short shrift to the sister's claims, finding that the executor "demonstrated her prima facie entitlement to judgment as a matter of law through evidence that the will was duly executed, that the decedent possessed testamentary capacity, and that the will was not the product of undue influence."

In *Matter of Estate of Timer*, 221 A.D.3d 1103 (3<sup>rd</sup> Dep't November 2, 2023), the Appellate Division reached the same result on somewhat more complex facts. In *Timer*, the decedent named his fiancé as both executor and residuary beneficiary, and expressly disinherited one of his two children, making no reference in the will to the other child. That other child challenged the will on the grounds of lack of testamentary capacity and undue influence on the part of the fiancé. The executor offered

the testimony of both the attorney who prepared and supervised the execution of the will, and the attorney's paralegal who was the other witness to the execution of the will. It being relevant whether the decedent "knew the persons who were the natural objects of his bounty, and his relationship to them," the unmentioned child "emphasize[d] that she was not mentioned in the will – arguing that this is evidence that decedent did not know the natural objects of his bounty...." But the court found that "the failure to expressly disinherit respondent does not undermine decedent's testamentary capacity...." Similar to *Fiorentino*, "the testimony of both the supervising attorney and the paralegal created a presumption of testamentary capacity" that the unmentioned child failed to overcome.

**The takeaway:** The best defense to claims of lack of testamentary capacity and undue influence is the preparation and supervision of the will by an attorney who can be available to testify to that process, and the following of the formalities of New York EPTL 3.2-1.

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