“I DID, BUT NOW I DON’T.”
VACATUR OF A PROBATE DECREE ADMITTED ON CONSENT RARELY GRANTED

By Gary E. Bashian*

“Droll thing life is -- that mysterious arrangement of merciless logic for a futile purpose. The most you can hope from it is some knowledge of yourself -- that comes too late -- a crop of inextinguishable regrets.”

— Joseph Conrad

Clients often come to regret past decisions, and very often seek counsel for a means to resolve the difficulties and complications that result from them. Commonly, a client will approach counsel, often indignant, sometimes sheepishly, and ultimately admit that they have found themselves bound to an agreement of which they now want, for lack of a better term, to get out of. An unforeseen, unintended, or a simply poor result has forced a reconsideration and change of mind as is often the case; what was once opportunity, is now a liability that needs remedy.

Ordinarily, there are a host of ways to counsel clients who find themselves in situations such as these, depending of course on the facts, circumstances, and law as it relates to the issues at hand.

In a majority of these situations, the Court’s involvement in a matter has just begun, i.e.: the litigation is in its infancy, the Pleadings have just been served, and no in-depth consideration by the Court has yet been undertaken.

However, there are occasions where, long past the preliminary stages of a matter, and more importantly, after the Court has ruled on an issue, a client wants an agreement that they entered into, and which the Court has already considered, undone.

This situation can emerge where an interested party, sometimes even a Fiduciary themself, Petitions the Surrogate’s Court pursuant to CPLR § 5015 in order to vacate a Probate Decree; a prayer for relief that presents several significant hurdles, especially given the fact that a Probate Decree is usually issued only after the individual seeking its vacatur has consented to the issuance of the Decree in the first place.

As one might expect, persuading the Court to vacate its own Probate Decree (a Decree that will only have been issued after the satisfaction of stringent procedural requirements, the Court’s close scrutiny of the nominated Fiduciary’s qualifications, the validity of the instrument offered for Probate, and the nature of the Estate itself) presents a number of procedural, and pleading challenges.

Indeed, granting an application to vacate a Probate Decree is at the sound discretion of the Court, and given that the Court recognizes that vacatur necessarily "disrupts the expected and orderly process of the Estate's administration," and "creates the continual aura of uncertainty and nonfinality" the governing rule is that "a probate decree will be vacated only in extraordinary circumstances" (Matter of Loverme, 27 AD3d 747 [2006]).

Extraordinary circumstances cannot be found where a Petitioner was fully apprised and aware of the Probate, where there is evidence of laches, nor where the record does not establish that there were any improprieties which led to the issuance of the Decree. (see generally Matter of Gori, 129 Misc. 541, 543 [Bx. Cnty. Surr. 1927], In the Matter of Ogden, 11 Misc. 2d 1010 [Stuben Cnty. Surr. 1958]). Additionally, the Court should not vacate a Probate Decree where it will constitute a waste of judicial resources or be construed as frivolous conduct. (Matter of Anderson, 16 Misc. 3d 1101 (A), 2 [Dutchess Cnty. Surr. 2007]).

As though these hurdles were not enough, a "party seeking to set aside a decree admitting a will to probate entered upon his or her consent must show that such consent was obtained by fraud, overreaching, was the product of misrepresentation or misconduct, or newly discovered evidence, clerical error or other sufficient cause justifies the reopening of a decree" (Matter of Coccia, 59 AD3d 716 [2009]).

This is an essential point for both Petitioner and Respondent when dealing with a Petition such as this, as a failure to, at the very least, plead these circumstances, and later prove them, will warrant dismissal of the Petition. A Petitioner cannot merely argue that they did not know or understand (absent of course special circumstances) that they had provided their consent to the issuance of the now "contested" Probate Decree, but must plead, and later prove, that their consent was somehow improperly procured according to the principles set forth in *Coccia* (supra).

Furthermore, in order to be granted vacatur of a Probate Decree, a Petitioner must also, in addition to establishing the *Coccia* factors, demonstrate a "substantial basis for its contest and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original probate proceeding" (Matter of American Comm. for Weizmann Inst. Of Science v Dunn, 10 NY3d 82, 96 [2008]); often a difficult task absent egregious or unusual facts.

For example, the basis a Petitioner relies upon when moving for vacatur of a Probate Decree almost invariably mirrors the objections that are made to Probate prior to the issuance of a Probate Decree. Indeed, an interested party seeking vacatur of a Probate Decree is essentially seeking the same outcome that could have been achieved

by contesting the Probate of the Estate prior to the issuance of the Decree, i.e.: the rejection of the instrument or instruments offered.

Accordingly, the traditional burdens of proof, presumptions of law, and issues of standing apply to a Petitioner when attempting to establish that they have a substantial basis for both the contest of the instrument or instruments admitted, and a reasonable probability of success in having their alternative instrument or instruments admitted. This of course includes meeting the burden, through a showing of competent evidence (remember, allegations made upon information and belief have no probative value (Noel v L&M Holding Corp., 35 AD3d 681[2006])) that the familiar elements of Testamentary Capacity, Due Execution, and the absence of Fraud and Undue Influence have been met. The Presumption of Due Execution afforded by an attorney's supervision of the signing will clearly have an impact on the likelihood of Petitioner's success, as will the physical and mental condition of the Decedent in terms of their capacity, and factual circumstances as established on the record regarding the procurement of Decedent's consent in executing the instrument or instruments as they relate to Fraud and/or Undue Influence.

Again, depending on the facts, this can be a difficult task for a Petitioner as it requires that they show not only the invalidity of the instrument or instruments already considered by the Court and found to be valid, but often in addition, to establish the validity of whatever other instrument or instruments which they seek to offer as a substitute. This, therefore, effectively places the burden of proof firmly on a Petitioner who seeks vacatur, and a weighty burden at that.

Although a Petitioner's success on a motion to vacate a Probate Decree is far from unobtainable, for the reasons articulated above it is more often than not an uphill battle, and for good reason. The factual and procedural requirements that must be met in order to be granted vacatur of a Probate Decree are necessary in order to prevent at best the ill-advised, and at worst the ill-intentioned, from upsetting a matter that has often already been determined based on their own consent. Without these somewhat burdensome requirements, the force and authority of any Probate Decree could be called into question at any time. The practical implications of allowing the free grant of vacatur in such situations being potentially disastrous as Fiduciaries might never know if their duties were properly met, and Beneficiaries would never know if their bequests could be pulled out from under them at any moment. Nevertheless, where appropriate, and in rare circumstances, parties are not left without recourse, so long as their consent to the Probate of an instrument or instruments was not truly given, and the instrument or instruments they seek to offer as a substitute can be shown to be a true reflection of the Decedent's testamentary intent.

*Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

Mr. Bashian gratefully acknowledges the contributions of Andrew Frisenda, an associate at Bashian & Farber, LLP, for his assistance in the composition of this article.