Gary E. Bashian, Co-Author

Revoking a Waiver and Consent Is Not As Easy As You Think

American author Alfred A. Montapert once said that "nobody ever did, or ever will, escape the consequences of his choices." That statement holds true in the field of trusts and estates, in particular when it comes to the execution of a waiver and consent in a probate proceeding. As this article will show, a party to a probate proceeding must exercise care in signing such a document, as it carries with it powerful consequences that cannot be easily undone.

Probate Process: Overview

In its simplest terms, the probate of a will is the process whereby the Surrogate's Court approves the will of a decedent and accepts the document as the decedent's instructions as to how his or her probate estate assets are to be distributed. In order for the court's decision to be binding on all parties, the court must have jurisdiction over all the "necessary parties" to enforce the judgement against each party. The necessary parties to a probate proceeding are described in Surrogate's Court Procedure Act ("SCPA") § 1403. They include those individuals and entities named as beneficiaries in the will and all individuals who would inherent in intestacy if there were no will. Personal jurisdiction over these necessary parties is obtained by their submission to the jurisdiction of the court or by the due issuance and service of process upon them.

By executing a Waiver of Issuance and Service of Process and Consent to Probate, a necessary party submits to the jurisdiction of the court and agrees to the probate of the decedent's will. If a necessary party chooses to sign a waiver and consent, the party must sign the document in the presence of a notary public and return it to the nominated fiduciary for filing with the Surrogate's Court. Execution and filing of the waiver and consent with the Surrogate's Court confirms the jurisdiction of the court over the necessary party.

If a necessary party chooses not to sign the waiver, then the nominated fiduciary's attorney will prepare a Citation and have it signed by the Chief Clerk of the Surrogate's Court. The Citation is then served in accordance with the applicable service rules upon all necessary parties named within it who have not previously submitted to the jurisdiction of the Surrogate's Court. The petitioner will then file proof of service of the Citation with the Surrogate's Court to confirm that the court has obtained jurisdiction over all the necessary parties. Upon receipt of the Citation, the cited parties have the option of either appearing or not appearing in court. By choosing not to appear, they waive their right to challenge the probate of the decedent's will.

Once all necessary parties have been cited and served with a Citation or signed a waiver and consent that has been filed with the Surrogate's Court, the proofs of jurisdiction over all necessary parties are complete.

Procedure for Revoking a Waiver and Consent

A party seeking to revoke a waiver and consent must make a direct application to the Surrogate by way of an order to show cause or by motion made on notice to all other parties. The burden of proof

lies on the party attempting to revoke a waiver. The standard of proof is clear and convincing evidence, which is a difficult standard to meet.

Standards for Withdrawing a Waiver and Consent

Generally, courts do not take lightly to the withdrawal of waivers and consents as "such actions disrupt the orderly process of administration and create a continuous aura of uncertainty." A waiver and consent is binding upon the party who has executed it and can be withdrawn only under certain circumstances.

Courts have established different tests for withdrawal of a waiver and consent before issuance of a probate decree or after issuance of a probate decree, making the latter more difficult to achieve as it requires the vacatur of the probate decree in addition to the withdrawal of the waiver. In both situations, the party seeking to set aside a waiver must show that the waiver was obtained by *fraud* or *overreaching*, was the product of *misrepresentation* or *misconduct*, or that *newly discovered evidence, clerical error* or *other sufficient cause* justifies revocation. If a probate decree has not yet been entered in the proceeding, then such a showing may be sufficient as long as there is no prejudice to the opposing party. In contrast, where a party seeks to set aside a waiver after the entry of a probate decree, the party must also demonstrate a substantial basis for contesting the will and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original probate proceeding.

Grounds for Revocation Denied

When reviewing the facts of a case to see if a party has provided clear and convincing evidence of fraud or other sufficient causes as set forth in the case law, the courts will not only look at the evidence regarding the underlying case but will also scrutinize the educational level and general experience of the individual seeking to revoke a waiver, particularly in cases where the petitioner claims not to have understood the significance of a waiver and consent. In *In re Estate of Titus*, the petitioner sought to revoke a waiver and consent that she had submitted on the grounds that she signed the document without understanding its significance. The court denied her petition, noting that she was a certified public accountant with a master's degree in business administration. Similarly, in the case of *In re Martin's Estate*, the court denied the petitioner's application to revoke a waiver, stating that "[t]he petitioner was a woman of mature years, education and culture." This was also the result in *In re Coccia*, where a court denied a party's attempt to withdraw his previously submitted waiver and consent by finding his "allegations that he did not appreciate or understand the significance of a waiver and consent" to be "unsubstantiated and conclusory."

Courts have also denied applications to vacate waivers based on the issue of notice. In the *Titus* case, the court pointed out that the petitioner was provided a copy of the decedent's will and therefore was deemed to have understood what she was signing. Similarly, in *In re Helmers' Estate*, the court denied the petitioner's application to revoke a waiver and consent, stating that the petitioner possessed a copy of the decedent's will and was "fully aware of the effect of such a waiver." Also, in the case *In the In re Durchin*, the petitioner's application was denied since she received "both actual and statutory

notice" of objections filed and did not take any formal action until after a decree admitting the will to probate was entered.

As *Durchin* demonstrates, if a necessary party executes and files a waiver and consent with the Surrogate's Court and then seeks to have it revoked, it is best if they attempt to revoke the waiver sooner rather than later, preferably before entry of a probate decree. In *In re Miller*, the petitioner waited nine (9) months before filing an application to revoke his waiver and consent, and the application was denied. This can be contrasted with the holding in *Estate of Bochicchio*, where the court allowed the withdrawal of a waiver when it was requested a few days after the waiver and consent was filed with the court.

Even though neither the nominated fiduciary nor his or her attorney is under an obligation to advise the necessary party of the nature and effect of the waiver and consent, necessary parties are deemed to have read and understood the contents and consequences of signing a waiver and consent. This can best be illustrated in *In re Anderson's Will*, where the court deemed a necessary party "chargeable with knowledge of the contents and the legal effect of such waiver [and consent] whether or not he availed himself to the advice of counsel at the time of the execution thereof."

Therefore, to ensure that an individual makes the correct choice in choosing whether or not to sign a waiver and consent, an individual should consult with an attorney upon receipt of such a document. Of course, consultation with an attorney can itself be grounds for a court to deny an application to withdraw a waiver and consent, as the court will most likely find that the individual understood the consequences of his or her actions.

Circumstances Where Withdrawal is Allowed

There are situations where the courts will allow a necessary party to withdraw a waiver and consent.

Courts will sometimes allow the withdrawal of a waiver and consent where evidence is brought to the court's attention that may alter the outcome of the probate proceeding. In *Estate of Culley*, for example, the decedent's distributes raised factual issues surrounding the decedent's testamentary capacity when he executed codicil submitted for probate. They alleged, among other things, that at the time they signed their waivers and consents, they were unaware the decedent had been residing in a nursing home operated by a religious group that was named as a substantial legatee in the codicil. The court also noted that the distributees had no attorney when they executed the waivers and that the nominated fiduciary incorrectly advised one of them that her waiver could be withdrawn at any time. Similarly, in the *Estate of Galas*, the Court allowed the petitioners to withdraw waivers and consents upon a showing that the proponent of the will, also the drafting attorney, misled them into signing the waivers. Also, in the *Estate of Carini*, evidence that came to light after the necessary party signed the waiver and consent was grounds for withdrawal of the waiver and consent.

Courts have also permitted the withdrawal of a waiver and consent in the interest of justice and in situations where a withdrawal would not prejudice any of the parties or where a will contest was

inevitable because other objections to probate had already been filed. In these circumstances, the court will grant the withdrawal of a previously submitted and fully executed waiver and consent.

The courts have also shown that in addition to allowing withdrawal based on the merits of the underlying case, they will honor an agreement made between the nominated executor and the party seeking to withdraw the waiver and consent, as was done in both the *Estate of Scienze* and *Estate of John Sanchez*. Similarly, if the parties enter into a stipulation of settlement, courts will honor the settlement as well.

Conclusion

As the foregoing illustrates, the execution of a waiver and consent is extremely important and should not be taken lightly, as it may not be able to be withdrawn once submitted. Necessary parties asked to sign such a document should consult with independent counsel.