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Vacating Surrogate's Court Judgments, Orders and Decrees

Although N.Y. Civil Practice Law and Rules 5015 contains a list of grounds for vacating a judgment, order or decree, that list is not exhaustive. The courts have recognized additional grounds upon which to grant vacatur. This article explores the statutory and common law bases upon which to secure the vacatur of a surrogate's court judgment, order or decree, and addresses the time period within which a party seeking such relief must do so.

Grounds for Vacatur

Absent statutory guidance with respect to the vacatur of judgments, orders and decrees in the N.Y. Surrogate's Court Procedure Act, the CPLR governs requests for such relief in the surrogate's courts.[1] The grounds enumerated in CPLR 5015 apply and provide that judgments, orders and decrees may be vacated for the following reasons:

1. Excusable default – if the application is made within one year after service of a copy of the decree or order with written notice of its entry upon the applicant, or if the decree or order was entered by the applicant, then within one year after such entry.
2. Newly discovered evidence which if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under CPLR 4404.
3. Fraud, misrepresentation or other misconduct of an adverse party.
4. Lack of jurisdiction to render the judgment or order.
5. Reversal, modification or vacatur of a prior decree or order upon which it is based.[2]

Newly Discovered Evidence

The New York Court of Appeals recently applied CPLR 5015 in the context of a motion to vacate a probate decree on the grounds of newly discovered evidence.[3] In *American Committee for Weizmann Institute of Science v. Dunn*, the petitioner, a charity to which the decedent allegedly promised to bequeath her cooperative apartment, commenced a proceeding to vacate a probate decree.[4] The petitioner based its request for relief on two grounds: (1) newly discovered evidence, namely, letters from the decedent's former attorney and the Institute's vice president, both of which, the petitioner contended, evidenced the decedent's intent to leave her co-op to the Institute and "form[ed] an integrated contract"; and (2) newly discovered evidence, which established that the decedent's brother and niece, both of whom cared for the decedent during her illness, unduly influenced the decedent into revising her will and bequeathing the co-op to her niece some five days before she died.[5]

Noting that the letters were insufficient to establish the decedent's intent to forgo the right of testation, the Court cast aside the petitioner's first argument and addressed the undue influence argument.[6] In that regard, the Court reiterated that the standard for vacating a judgment, order or decree on the basis of newly discovered evidence requires the presentation of a "substantial basis for challenging the proffered will" and "'reasonable probability of success' on the merits of its challenge."[7] Applying that standard, the Court held that the petitioner's newly discovered evidence did not give rise to a substantial basis upon which to vacate the contested probate decree.[8]

The Court premised its decision on the theory that the proffered evidence merely established that the decedent made a bequest to "a close relative whose father – the decedent's brother and executor – opened his home to decedent while she received hospice care for terminal cancer during her final days."[9]

More recently, in *In re Efros*, Surrogate's Court, New York County, reached a contrary conclusion, based on the same standard.[10] There, JP Morgan Chase Bank, N.A. ("JP Morgan") moved for an order vacating a previously probated will, asserting that there was newly discovered evidence of undue influence.[11] According to JP Morgan, the newly discovered transcripts of telephone conversations established that the decedent's closest family members unduly influenced her into changing her will.[12] Applying the standard set forth in *Weizmann Institute*, the court found that the circumstances

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warranted vacatur,[13] reasoning that the decedent, a 93-year-old woman, "believed she 'had no choice' but to change her will to accord with the unremitting demands of her closest family members."[14]

In addition to establishing the requisite substantial basis and reasonable probability of success on the merits, a party seeking vacatur on the grounds that there is newly discovered evidence must make a number of other showings. Most notably, the petitioning party must demonstrate that the newly discovered evidence is material, as opposed to cumulative, and could not have been discovered at an earlier time by the exercise of due diligence.[15] Simply presenting new evidence that impeaches the credibility of a witness will not suffice.[16]

As such, in *In re Catapano*, the Appellate Division, Second Department affirmed an order of Surrogate's Court, Suffolk County. That court had denied the appellants' motion to vacate a decree on the ground of newly discovered evidence because said evidence failed to refute the trial testimony of the respondent's witness.[17]

Excusable Default

The standard for vacatur is identical where the basis for such relief is excusable default. In *In re Wang*, the Appellate Division, Second Department considered whether Surrogate's Court, Suffolk County, properly denied the appellants' motion to vacate a probate decree for excusable default.[18] Before answering that question, the court reiterated that, "[i]n order for the decree to be vacated, it must appear that there is a substantial basis for the contest and a reasonable probability of success on the part of the petitioner."[19] Accordingly, the court, noting that the appellants' evidence amounted to little more than speculation, found that the appellants did not establish the requisite substantial basis and affirmed the surrogate's order.[20]

Fraud, Misrepresentation or Other Misconduct

There appears to be some tension with respect to the standard and its application in the context of vacatur on the basis of fraud, misrepresentation and other misconduct. On the one hand, the prevailing view is that the standard set forth above applies with equal force in situations involving fraud, misrepresentation and other misconduct.[21] For example, in *In re Kaufman*, the Appellate Division, Fourth Department affirmed an order of Surrogate's Court, Monroe County, in which that court denied the petitioner's motion to vacate a decree on the basis of fraud.[22] As the Appellate Division explained, "the moving party must fulfill his burden of proof by establishing sufficient facts from which the court can determine that a fraud has been committed."[23]

On the other hand, there is limited support for the proposition that the standard is somewhat more lenient where the basis for vacatur is fraud, misrepresentation or other misconduct. Indeed, at least one trial court has held that a party seeking to vacate a probate judgment, order or decree need not plead facts sufficient to establish a reasonable probability of success on the merits.[24] To the contrary, as Surrogate's Court, New York County, explained in *In re Sandow*, the party need only show, with some degree of probability, that its "claim is well founded and that, if afforded an opportunity, [it] will be able to substantiate" the claim.[25] It is arguable, however, whether that remains good law in light of the *Weizmann Institute* decision.

This point is somewhat more cogent where there is evidence of a confidential relationship.[26] In such a circumstance, there appears to be a presumption in favor of fraud, such that the burden shifts to the fiduciary to establish the absence of fraud or misconduct by clear and convincing evidence.[27] It has been held that the fiduciary's failure to carry that burden warrants vacatur.[28]

In re Hunter, in which the respondent, the decedent's granddaughter, commenced a proceeding to vacate the court's decree, helps illustrate the point.[29] The decree settled the first intermediate account of the co-trustee of the trust created for the respondent's benefit, and the respondent sought to withdraw her waiver and consent, arguing that the co-trustee secured such waiver and consent through fraud, misrepresentation or other misconduct.[30] Upon consideration of the fraud argument, the court ruled in favor of the respondent, finding that the co-trustee failed to make full and adequate disclosure of the respondent's rights and the pertinent facts to the respondent.[31] The court was particularly troubled by the fact that the co-trustee forced the respondent to sign the disputed waiver and consent before reviewing it.[32] Accordingly, the court concluded that the co-trustee could not establish that the circumstances surrounding the respondent's waiver were "just and fair" and vacated its decree.[33]

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Interests of Justice

The list contained in CPLR 5015 is not exhaustive, and it does not constrain the surrogate's courts from vacating probate judgments, orders or decrees on other grounds.[34] Indeed, New York courts, including the surrogate's courts, are vested with discretionary authority to vacate judgments, orders and decrees for good cause shown.[35] Although courts typically exercise this power sparingly, they do so where the interests of justice require vaca-

tur.[36] The standard for vacatur in the interests of justice is fact-specific and oftentimes turns upon the peculiarities of particular cases, rather than broadline rules.[37] As Surrogate Preminger explained in *In re Ziegler*, "[t]here is . . . no ready template for this standard."[38]

In *In re Culberson*, the Appellate Division, Third Department addressed this very issue.[39] There, the decedent had died, leaving a will in which he bequeathed all of his property to his children; he named one of the respondents to act as the executor of his estate.[40] The respondents refused to furnish the petitioner with a copy of the decedent's will or to file said will for probate for more than four years after the decedent's death. Surrogate's Court, Rensselaer County, dismissed the petitioner's proceeding, *sua sponte*, for failure to prosecute.[41] Insofar as the surrogate's court dismissed the petitioner's proceeding without prejudice, the petitioner commenced a second proceeding and moved to vacate the surrogate's previous dismissal.[42] Although the surrogate's court had initially denied the petitioner's motion, the Appellate Division reversed that court's decision, finding that the interests of justice required vacatur.[43] The Third Department based its decision on the fact that the respondents had caused the delay in question, among other things, and, therefore, could not assert prejudice as a ground for denying the petitioner's motion for vacatur.[44]

Time for Seeking Vacatur

Except as to excusable default, for which there is a one-year limitations period, CPLR 5015 does not contain a statute of limitations for the vacatur of a judgment, order or decree.[45] However, in the absence of such a limitations period, courts have held that a party seeking to vacate a probate decree must attempt to do so within a reasonable time after the date upon which the disputed judgment, decree or order is entered.[46] The failure to make the requisite motion or petition within a reasonable time may result in its denial.[47]

Further, the petitioning party's failure to make a motion or commence a proceeding for vacatur within a reasonable time may arm that party's adversary with the affirmative defense of laches.[48] Courts have held that the applying party's unreasonable delay, when coupled with prejudice to that party's opponent, serves as a valid basis upon which to deny a motion or petition for vacatur.[49] The lone instance in which this affirmative defense does not apply, is a motion to vacate for lack of jurisdiction, as delay alone will not suffice for the purpose of conferring jurisdiction upon a court.[50]

Conclusion

Given that the list of grounds for vacatur set forth in CPLR 5015 is not exhaustive, the prudent practitioner will recognize the need to look beyond the text of that statute when called upon to make or oppose a motion to vacate a probate judgment, order or decree. Indeed, because CPLR 5015 does not contain a complete list of the bases for vacatur, an attorney must look to the pertinent case law to effectively represent his or her client's interests on a motion to vacate a surrogate's court judgment, order or decree. The attorney's failure to review both the statutory and common law authority, and to do so within a reasonable time after the surrogate's court enters its judgment, order or decree, may prove fatal for the purpose of a motion or petition to vacate a prior decision. ■

1. N.Y. Surrogate's Court Procedure Act 102 (SCPA).
2. CPLR 5015.
3. *See generally Am. Comm. for Weizmann Inst. of Science v. Dunn*, 10 N.Y.3d 82, 854 N.Y.S.2d 89 (2008).
4. *Id.* at 86.
5. *Id.* at 91–97.
6. *Id.*
7. *Id.* at 94–96.
8. *Id.* at 98.
9. *Id.*
10. *In re Efros*, N.Y.L.J., Mar. 27, 2008, p. 34, col. 1 (Sur. Ct., N.Y. Co.).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *In re Catapano*, 17 A.D.3d 673, 674, 794 N.Y.S.2d 403 (2d Dep't 2005).
16. *Id.*
17. *Id.*
18. *In re Wang*, 5 A.D.3d 785, 787, 773 N.Y.S.2d 578 (2d Dep't 2004).
19. *Id.* at 787.
20. *Id.*
21. *In re Leeper's Will*, 53 A.D.2d 1054, 1055, 385 N.Y.S.2d 887 (4th Dep't 1976).
22. *In re Kauffman*, 54 A.D.2d 1067, 388 N.Y.S.2d 765 (4th Dep't 1976).
23. *Id.*
24. *In re Sandow*, 25 Misc. 2d 356, 357, 206 N.Y.S.2d 694 (Sur. Ct., N.Y. Co. 1960).
25. *Id.* at 359.
26. *In re Hunter*, 190 Misc. 2d 593, 599, 739 N.Y.S.2d 916 (Sur. Ct., Westchester Co. 2002).
27. *Id.*
28. *In re Levy*, 19 A.D.2d 413, 418–19, 244 N.Y.S.2d 22 (1st Dep't 1963).
29. *Hunter*, 190 Misc. 2d at 595.
30. *Id.*
31. *Id.* at 598–600.
32. *Id.*
33. *Id.*
34. *In re Culberson*, 11 A.D.3d 859, 861, 784 N.Y.S.2d 167 (3d Dep't 2004).
35. *In re Masline*, 52 A.D.2d 739, 382 N.Y.S.2d 180 (4th Dep't 1976).
36. *Culberson*, 11 A.D.3d at 862.
37. *In re Ziegler*, 161 Misc. 2d 203, 207, 613 N.Y.S.2d 316 (Sur. Ct., N.Y. Co. 1994).
38. *Id.* at 207.
39. *Culberson*, 11 A.D.3d at 860–61.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 861–62.
44. *Id.*
45. CPLR 5015.
46. *Green Point Sav. Bank v. Arnold*, 260 A.D.2d 543, 544, 688 N.Y.S.2d 595 (2d Dep't 1999); *see also In re Smith*, N.Y.L.J., Oct. 6, 2006, p. 34, col. 5 (Sur. Ct.) (explaining that an application for vacatur "must be made within a reasonable time of the discovery of the new evidence").
47. *Id.*
48. *In re Petrolino*, N.Y.L.J., July 7, 1995, p. 36, col. 6 (Sur. Ct.).
49. *In re Bobst*, 165 Misc. 2d 776, 783, 630 N.Y.S.2d 228 (Sur. Ct., N.Y. Co. 1995).
50. David D. Siegel, McKinney's Practice Commentary: CPLR 5015 (2007).