New CPLR Provision May Simplify Execution of New York Wills Overseas

By Stephen L. Ham IV and Ronald J. Weiss

A recent change to New York Civil Practice Law and Rules section 2106 may herald a new era of simplicity in advising New York-based clients who execute their wills outside the United States. Last year saw the addition of new paragraph (b) to CPLR 2106, which provides that affirmations made outside the jurisdiction of any state or territory of the United States will have the same effect as a sworn affidavit made inside the United States, so long as the person making the statement includes certain language subjecting himself or herself to perjury penalties in New York. CPLR 2106(b) thus has the potential to significantly simplify the creation of a self-proving affidavit—in technical parlance, a self-proving affirmation—that will be respected under New York law and limit the chance that witnesses will be called to testify in court as to the circumstances surrounding the execution of the will.

Before delving into new law, however, it is worth revisiting the statutory basis for a traditional self-proving affidavit. Surrogate's Court Procedure Act 1406(1) provides that the attesting witnesses to a will may (i) at the request of the testator or (ii) after the testator's death, at the request of (a) the executor named in the will, (b) the proponent or his attorney or (c) any interested person, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint.[1]

Although SCPA 1406(1) provides for several methods of creating a self-proving affidavit, in the authors' practice the affidavit is executed as part of the ceremony where the testator and witnesses subscribe their names to the will. SCPA 1406(1) provides that the self-proving affidavit shall be accepted by the court as an in-court statement by the witnesses unless (i) a party entitled to process in the proceeding raises an objection or (ii) for any other reason the court requires that the witnesses be produced and examined.[2]

While the presence of a self-proving affidavit is no guarantee that the Surrogate will apply the presumption of due execution when a will is offered for probate, it is highly unlikely that a supervising attorney would choose not to execute one under ordinary circumstances. That calculus changes, however, when the client is not physically present in the United States; trusts and estates practitioners with even occasional exposure to international clients know how onerous it can be for those clients to execute a will containing a self-proving affidavit that is valid under New York law.[3] Even if the client is in a jurisdiction where the equivalent of a "notary public" is recognized, a foreign notary's seal will not have the same effect in New York without some additional verification—often through a Hague Convention "apostille"—of the foreign notary's qualifications. The alternatives to foreign notaries are U.S. consular officers, but the delays concomitant with making an appointment at a local U.S. embassy or consulate and travel to and from the embassy or consulate make consular officers an unattractive choice for clients who are under time or other pressures to execute their wills.

Enter CPLR 2106(b), which, on its face, eliminates the hurdles that come with authenticating a foreign notary's seal or finding a consular officer. It provides that

> [t]he statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
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> I affirm this ___ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
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> (Signature)[4]

Thus, so as long as the person making a statement is outside the United States and accompanies the statement with the "magic words" provided by CPLR 2106(b), that statement can be used with the same effect as, and rather than, an affidavit in a court proceeding.[5]

It is not difficult to imagine how CPLR 2106(b) could drastically simplify the will execution process for

any testator or testatrix executing a New York will in a foreign country. The self-proving "affirmation"—no longer an affidavit, because it will not be attested to by a notary public or analogous official—will be signed by the witnesses as usual, but will also include the affirmation language provided by CPLR 2106(b) and a signature line for each attesting witness. Later, when the will is offered for probate, the self-proving affirmation should have the "same force and effect as" a self-proving affidavit, helping establish the presumption of due execution without the hassle of having authenticated a foreign notary's seal or tracked down a consular officer.

Regardless of the plain language of CPLR 2106(b) and its obvious utility in the will execution process, several commentators have expressed skepticism that attorneys should encourage clients to use self-proving affirmations when executing their wills overseas. First, no Surrogate's Court decision discusses whether to admit a self-proving affirmation with "the same force and effect" as a self-proving affidavit, meaning that the cautious attorney might wait to employ self-proving affirmations until the time when such an affirmation has met with specific approval from at least one Surrogate. Second, some commentators have pointed to the legislative history of CPLR 2106(b), which was primarily introduced as a means of simplifying commercial litigation, as counseling against its applicability in probate proceedings. Finally, there is a sense among some in the New York trusts and estates bar that a self-proving affirmation is not as reliable as a self-proving affidavit and that a Surrogate would be unlikely to accept the affirmation in the affidavit's place.

There are strong counterarguments to each of the foregoing concerns. The lack of a Surrogate's Court ruling is understandable given the combination of the short period of time CPLR 2106(b) has been in effect and the natural delays between its introduction, the actual use of its language in practice and the eventual offering for probate of a will containing its language. The plain language of CPLR 2106(b) does not limit its application to commercial transactions or exclude its use in Surrogate's Court proceedings; surely, if the drafters intended a narrow reading of its provisions, they would have explicitly constrained its applicability. Finally, although the stamp, seal and signature of a notary public or other official lends an air of formality and credence to a self-proving affidavit, the same can be said for the *mandatory* form of a CPLR 2106(b) affirmation, in which a witness states that he or she can be subject to fines or imprisonment for signing his or her name after a false statement.

Even with answers to these and other questions regarding the use of CPLR 2106(b) in the will execution context, attorneys may remain reluctant to put its provisions into practice until there is more definitive guidance from the legislature or the Surrogate's Courts. Until that time, however, there is no denying the potential of CPLR 2106(b) to simplify the will execution process for New York trusts and estates practitioners and their overseas clients.

Endnotes

1. *See* N.Y. Surrogate's Court Procedure Act 1406(1) (SCPA).
2. *See id.*
3. This does not foreclose the testator from executing a will valid under the law of the foreign jurisdiction but not necessarily valid under New York law. Estates, Powers and Trusts Law 3-2.1 provides that a will executed in a foreign jurisdiction is valid and admissible to probate in New York if it is (i) in writing, (ii) signed by the testator and (iii) executed and attested in accordance with (a) New York law, (b) the jurisdiction where the will is executed at the time of execution or (c) the jurisdiction in which the testator was domiciled, either at the time of execution or at death. An attorney admitted in New York but not admitted to practice law in another state or a foreign country, however, should be wary of advising the client on options (b) and (c) for reasons relating both to the attorney's own competence and liability for the unlicensed practice of law, making the self-proving affirmation a potentially safer alternative.
4. N.Y. Civil Practice Law & Rules 2106(b).
5. *See id.*

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