



LEGAL NOTES

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REFLECTIONS

By **Burt J. Blustein, J.D., Senior Partner**

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Rather than write the usual article about a specific area of law, the time seemed appropriate to reflect upon the past and look to the future.

On December 22, 2011, I celebrated the 47th anniversary of my admission to the New York State Bar. I do not know of many people who can honestly say that they have enjoyed their chosen career path as much as I have. For the first six years of my career I practiced in New York City, but something did not quite feel right. We had two young children and I was facing the prospect of spending a good part of my days commuting back and forth from home to office. I looked around for alternatives and I found Orange County, where I started my new career in January of 1970. It has been an exciting and wonderful ride.

For the first few months as I drove up from New York City every morning, I observed that I saw more cows than people. Over the last 41 years, the landscape has changed dramatically and Orange County has, for better or worse, morphed into an exurb of New York City. At

the beginning of my career, the greatest technological innovation in most law offices was the IBM Selectric typewriter; computers were strange objects that filled entire rooms. In 1979 I acquired my first computer, and although by today's standards it offered little in the way of operation capability, it was an enormous advance over the Selectric typewriter. The technical revolution that changed law offices and all forms of communication and information technology roared into existence. It seems that every day new applications and new capabilities are created, ever expanding our capabilities to obtain information and perform our daily tasks. No longer are we constrained by the slowness of the United States mail; instead, communication is instantaneous. We also have the ability to do legal research online, which indeed has revolutionized the legal profession's ability to generate work products speedily and efficiently. No longer can attorneys get by telling clients that work product takes time, as everybody is aware that the access to information is at our fingertips. So, the demands of the practice have increased because of the immediacy that computer access provides.

When my son Michael joined my practice in 1997, we felt that as a result of the technological revolution that was changing the way attorneys practiced law, the days of the single practitioner

were numbered. We therefore determined that the best course of action would be to put together a law firm in which attorneys would concentrate in specific areas of practice, rather than to try and accommodate clients with a broad spectrum of services in which a single practitioner can only provide a varying level of competence.

Since 1999 we have grown dramatically and my role has gratefully shifted from Managing Partner to Senior Partner. A major part of my mission has become adviser to the younger attorneys. I look around our beautiful two-year old offices in Goshen with a feeling of extraordinary pride that we have such an array of talented attorneys who can offer our clients just about any type of service they require. We pledge that we will continue to provide the highest quality of services available and expand those services to serve our clients' needs.

It seems the appropriate time of the year to thank our clients for their loyalty and to wish all a healthy, happy and prosperous New Year!

WILL CONTESTS REVISITED

By Rita G. Rich, J.D.

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About a year ago I wrote an article for *Legal Notes* entitled "Will Contests." In that article I discussed various New York court decisions that provided insight on what is required for a Last Will and Testament to be "admitted to probate," and what type of factors, if proven, may cause a Will to be "denied probate."

Here are some other New York cases that involved challenges to the validity of the Wills in question:

- In 2010, the Last Will and Testament of a woman who died in 1987 was denied probate. Testimony established that the

attorney who drew the 1986 Will received instructions for its provisions from the decedent's son, the primary beneficiary, and not the decedent. The decedent had suffered a stroke in 1979 and was partially paralyzed. Although the attorney had drafted and supervised over 1000 Wills in over 50 years of practice, he failed to follow appropriate procedures in the preparation and execution of this Will. He did not sufficiently converse with the decedent to determine that she had testamentary capacity and did not establish that the Will he prepared in accordance with her son's request actually reflected her wishes. The decedent was elderly, unsophisticated and disabled. Matter of Ford, 920 N.Y.S.2d 241 (2010)

- In another case, several relatives of the decedent objected to her Will that favored her brother's children. She had changed her testamentary plan after she reconciled with her brother. Although her brother had both motive and opportunity to unduly influence her while driving her to chemotherapy and radiation treatments, the Court found that it was neither unusual nor a radical change to her earlier plan. There was no evidence of undue influence by anyone, and the decedent's weakened and/or confused state was held irrelevant and immaterial. The Will was admitted to probate. Matter of Malone, 846 N.Y.S.2d 782 (2007)
- After a non-jury trial in Kings County, a decedent's Will was denied probate because it was determined to be a product of undue influence. Decedent's live-in home health care aide, who took care of all of the decedent's personal needs, had hired an attorney to draft decedent's Will. It was at a time when the decedent had congestive heart failure

and had also suffered a heart attack. Under the Will, the aide inherited the bulk of decedent's estate. The aide appealed the Surrogate's decision denying probate. The Appellate Division, a higher court, gave "great weight" to the Surrogate's decision that reflected the credibility of witnesses. Basically, because of the decedent's weakened physical condition at the time the Will was executed, there was sufficient evidence to establish that the Will was the result of the aide's subtle, but pervasive, form of coercion and influence, and that the aide overwhelmed and manipulated the decedent. Matter of Neary, 843 N.Y.S.2d 689 (2d Dept. 2007)

- Forgery was the issue of a Niagara County Surrogate's Court probate proceeding. After a bench trial in 2005, the Surrogate found that a 1992 Will was a forgery, denied probate, and then admitted an earlier Will to probate. In this case, the Appellate Division, upon appeal, did not give the Surrogate's finding concerning the 1992 Will "great weight" as in the Neary case above. The Surrogate's decision was reversed. Here's why: the 1992 Will ceremony was witnessed by a disinterested attorney and supervised by the attorney-draftsperson. There was also testimony by a handwriting expert, as well as one of the decedent's daughters, that the 1992 signature was indeed decedent's. Matter of Dane, 821 N.Y.S.2d 699 (4th Dept. 2006)

There is no set pattern of court decisions with respect to probate contests, but it is clear that using an experienced, attentive attorney to help properly design and draft an estate plan is a must.

I'VE BEEN PULLED OVER: SHOULD I TAKE THE BREATHALYZER TEST?

By Jamie T. Ferrara, J.D.

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The situation: You are driving home from your favorite saloon. You look in your rearview mirror and you see those all-too familiar flashing lights affixed atop that unfriendly police cruiser. Your first response is the unconscious and uncontrollable spike in your heart rate that makes you feel slightly dizzy and uncomfortable. Your palms are clammy. Your mind flutters with a torrent of thoughts. You think to yourself: "was I speeding? Did I swerve across the double yellow? What did I do wrong?" You may have in fact done nothing wrong. And in an otherwise benign situation, the worst that may happen is you are issued a summons for a traffic infraction.

But this is not an otherwise benign situation. You've been drinking and driving, and now you may have just been caught.

Let's not forget that driving while intoxicated is a crime, and now you are in the unenviable position of trying to wiggle yourself out of a precarious situation.

As the officer approaches your window, a number of questions enter your head: "How much did I drink? When did I start to drink them? What do I tell the cop when he asks me? Do I act friendly and cooperative? Do I act cold and deliberate? Where am I? Where am I going? Where was I coming from?"

And then you hear, "Do you know why I pulled you over?"

And the ultimate question enters your brain: "if he asks me, do I take that Breathalyzer test?"

Unfortunately, no one can ever answer this last question definitely on any given situation. The simplest, easiest answer is, "it depends." Whether to take the Breathalyzer test depends upon a multitude of factors, any one of which can play a small or large role.

Some of those factors are the obvious: how much did you drink and over what time period? What type of alcohol were you drinking? How much do you weigh?

Other factors are not so obvious: Did you eat anything? What did you eat? Have you ever been convicted of Driving While Intoxicated before and if so, how long ago? Was there an accident, and if so, was anyone injured? Was there any property damage? If the traffic stop occurred in New York, were you pulled over by a State Trooper? A local police officer? A Sheriff's Deputy? Some type of federal law enforcement agent? Or a park ranger? Are you driving a car or piloting a boat (because BWI or boating while intoxicated has the same consequences as its landlubber counterpart)? What County/State are you in?

Many people are surprised to learn that the County/State you are in, although the least relevant factor in determining whether or not you are intoxicated, is probably the most relevant factor in determining the outcome of your case. If you are arrested for DWI, the local prosecutor will offer you a plea and you can either accept it and plea guilty or go to trial. Whether you should plead guilty or take your case to trial depends on the evidence against you. The plea you are offered depends on the strength of the prosecutor's case or a policy the prosecutor's office may have regarding DWI.

So, do you blow or not?

If you do blow, you may receive the wrath of the prosecutor because he will have a stronger case against you. If you don't blow, you will get an automatic revocation of your license by

the NYS Department of Motor Vehicles under the Vehicle and Traffic Law of New York.

Here is yet another monkey wrench: Some counties offer an automatic reduction to Driving While Impaired on a first offense. In that case it would be best to take the Breathalyzer test. Other counties only offer a reduction if you are "under" a certain Breath Alcohol Content ("BAC"), which, in layman's terms, is the number produced after you blow. In many local counties, you will only get a reduction if your BAC reading is under a certain prescribed amount that will vary from jurisdiction to jurisdiction. If you think there is a good chance that you are under that BAC, then blow. If you think you are over that limit, don't blow.

Some prosecutor's offices have a blanket rule of no reductions for "refusal cases". In this case, it would make sense to blow. Other counties are more cautious and will generally reduce a "refusal case" if there are few or no aggravating circumstances, such as an accident or injuries. In this case, whether to blow depends on where you've been pulled over.

You can also try to do a mathematical breakdown of your BAC. All people eliminate alcohol from their bodies at a generally accepted rate yet by definition some "bodies" do this faster than average and some slower than average. Are you a fast metabolizer of alcohol? Slow metabolizer? Average? I can guarantee that greater than 99% percent of the population does not know this answer. But it matters. If you are a fast metabolizer and you've had three drinks in an hour, it may be best to blow. If you are a slow metabolizer, it may be best to refuse. If you've had 20 drinks, it may be best to blow and deal with the prosecutor as opposed to dealing with a revoked license from the DMV. If you are in that range near .08% BAC, the current legal limit, it all becomes extremely fact dependent and I cannot provide a definitive answer.

If you've been pulled over, you would have the virtually impossible task of asking yourself the above questions above and instantaneously knowing the answers. Chances are, you probably won't know the answers and you will have to make a "gut" decision.

The best solution is this: don't drink and drive. But if you do happen to wake up with a bad hangover and an appearance ticket for DWI,

Blustein, Shapiro, Rich & Barone, LLP will help you get through this untidy process with grace, dignity and professionalism. We understand that mistakes are made and that your goal is to get your life back on track. Our goal is to help you achieve that result with the most favorable outcome possible.

EDUCATIONAL WORKSHOPS

Estate Plans That Work™

January 12, 2012 (3:00 p.m. to 6:00 p.m.)

January 26, 2012 (3:00 p.m. to 6:00 p.m.)

Elder Law and Medicaid Planning

January 17, 2012 (4:00 p.m. to 6:00 p.m.)

All workshops are held at the BSRB Education Center, 10 Matthews St. Goshen, New York, 1st Floor

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

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