

The burden of proof that a will was executed in accordance with formal requirements imposed by EPTL § 3-2.1 is on the will's proponent, who may be the executor, a beneficiary, or an interested person. These requirements are intended to prevent revisions to the will after it has been executed. Even if there are no objections, SCPA § 1408 provides that the court must be satisfied that will has been properly executed.

EPTL § 3-5.1 sets forth rules governing wills having some relation to a jurisdiction outside of New York. For a will to be admitted to probate in New York, it must be executed either in accordance with local law formalities imposed by (i) EPTL § 3-2.1; (ii) the jurisdiction where the will was executed; or (iii) the jurisdiction where the decedent was domiciled, either at the time of execution, or at the time of the decedent's death. If a will has been executed in accordance with local law, EPTL § 3-5.1(c)(3) further provides that "[a] will disposing of personal property, wherever situated, or real property situated in this state . . . is formally valid and admissible to probate in this state."

Thus, the will of a California domiciliary, whose will was executed in accordance with the laws of France, where decedent was domiciled when the will was executed, may be offered for probate in New York, if the will disposes of (i) any personal property, regardless of where the personal property is situated, or (ii) real property situated in New York. However, a New York Surrogate may decline to probate a will under the doctrine of *forum non conveniens* if decedent had minimal contacts with New York.

The law of the forum state applies to issues of due execution. However, in the context of a will contest, Surrogate Holtzman, citing EPTL § 3-5.1(c), held that New York law exclusively governs issues of testamentary capacity, fraud and undue influence, regardless of the forum in which the will was executed. In *re Gottfried*, N.Y.L.J., May 20, 2002 (Surr. Ct. Bronx Cty).

Most states recognize the common law doctrine of "incorporation by reference," which permits a will to reference extraneous documents. New York does not. Thus, a will consisting of a pre-printed form upon which the testator had written "see attached" was denied probate. However, EPTL § 3-3.7 creates a limited exception, permitting the testator to direct that probate assets "pour over" to an existing revocable or irrevocable trust. The rationale for this exception, which codified a decision by Judge Cardozo, is that the execution of trust instruments is customarily accompanied by ample safeguards. In *re Rausch*, 222 N.Y. 222 (1918).

Can a lost or destroyed will be admitted to probate? Yes. SCPA § 1407 provides that a lost or destroyed will may be admitted if it is established that (i) the testator had not revoked the will; (ii) due execution is proved in the manner required for an existing will; and (iii) all of the will provisions are clearly proved by at least two credible witnesses, or by a copy or draft of the will proved to be true and complete.

What if a will executed later in time has been intentionally destroyed by a beneficiary of an earlier will, who seeks to probate the earlier will? In such a case, the requirements of SCPA § 1407 with respect to proving the validity of a lost or destroyed will might be difficult to establish. Where the requirements of SCPA § 1407 could not be satisfied, the court admitted the earlier will to probate, but denied the right of the person who destroyed the later will to benefit

under the earlier will. A constructive trust was imposed for the benefit of the testator's son, who would have benefited under the destroyed will. *In re Katz*, 358 N.Y.2d 616 (Sur. Schoharie Cty, 1974).