HEARSAY ISSUES IN SURROGATE'S COURT HEARINGS AND TRIALS

**Presented by John R. Morken, Esq.
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Introduction

A great deal of the evidence offered at a trial or hearing in the Surrogate's Court is hearsay, or at least appears to be hearsay. What did the decedent say? What did his attorney hear from others? Does it matter who the speaker was? What about the attorney's notes: should they be admitted, and if so, for what purpose? What about diary entries and doctor's notes? These are but examples. This article is intended to highlight some hearsay basics which come up frequently in Surrogate's Court trials or hearings.

Definition and Rationale for Excluding Hearsay

The starting point in an evidentiary analysis of admissibility is to identify what is hearsay and what is not hearsay (see generally, Guide to New York Evidence, Article 8). The question then becomes, if it is hearsay, is it excluded, or is there an applicable exception? "[A] statement made out of court … is hearsay if the statement is offered for the truth of the fact asserted in it".

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(Prince, Richardson on Evidence (11th ed, § 8-101))[2]. If the proffered evidence fits this definition, and no exception is available and an objection is raised, then the evidence must be excluded.[3] Why? Since the statement was made out of court, it may be difficult, if not impossible, for the fact finder to evaluate the credibility of the speaker or writer and, most importantly, the party objecting to the evidence has no means of cross-examining the speaker or writer (Richardson § 8-102).

Apparent Exception – Res Gestae

If an out-of-court statement is being offered into evidence not because of its truth or falsity, but simply because it was made, then it not hearsay. An example is what is called "res gestae". Literally res gestae means "the thing done" (Richardson § 8-601). Generally, what is meant by this concept is that with the act or conduct being described, declarations made simultaneously may be admissible as explaining the act itself. (It should be noted that the use of the phrase "res gestae" has been severely criticized, as not adding anything to hearsay analysis (see Younger, Hearsay: A Practical Guide Through the Thicket § 3.9).) Four examples which come up frequently in Surrogate's Court litigation, illustrating what may be called res gestae, are with regard to execution of a will, revocation of a will, statements associated with gifts, and statements evidencing a promise.

Physical destruction of a will alone does not constitute a revocation. There must be an intent to revoke which accompanies the destruction. Consequently, a person's statements of intent which accompany the act of destruction would be admissible (*Waterman v. Witney*, 11 NY 157). Similarly, in a gift case where intent is one of the elements, a declaration of intent which accompanies the delivery would be admissible to show that the gift is indeed a gift (Richardson § 8-602).

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[2] Hereafter referred to as "Richardson".

[3] The conduct of a person, albeit non-verbal, may itself be hearsay if it is intended to communicate a statement. (*People v. Caviness*, 38 NY2d 227, 230). An obvious example is sign language. Another is a nod or shake of the head. (Richardson § 8-103)

In a claim case, such as one involving a promise to provide services for pay, or in a constructive trust proceeding where there allegedly was a promise between parties in a confidential relationship, testimony as to what was said by the parties when the promise was made, at least one of whom is not present in court, would be admissible simply because the promise was made, and would therefore not be hearsay. (*Melkon v. H.B. Kirk & Co.*, 232 A.D. 134).

Similarly, in a probate proceeding, declarations of the testator during the will execution ceremony are admissible to satisfy the statutory publication requirement (EPTL 3-2.1(a)). Publication requires a declaration by words or some other sign by the testator that it is his or her will, and that the testator wants the witnesses to witness it. The declarations of the testator at the time of signing the will are part of the act itself and are admissible to show publication (*see Matter of Athanasiou,* 24 Misc 2d 12 [Surr. Ct. New York Cty.1960]). In effect, a meeting of the minds between the testator and the attesting witnesses is evidenced by the declarations of the testator to the witnesses and the conduct of the witnesses in signing the will (*see* Pattern Jury Instructions, § 7:45, Comment).

Apparent Exception – State of Mind

This brings us to what is called the state of mind, apparent exception to the hearsay rule. Besides proving publication, statements made by a testator at or about the time of a will's execution may be admissible for the sole purposes of evidencing the testator's state of mind at the time of the execution (*Waterman v. Witney*, supra). An example of this is illustrated in the well known case of *Matter of Putnam* (257 NY 140). There, the Court of Appeals stated that the testator's statements in the circumstances were "not evidence of the facts to which they may relate. They would not be, for instance, evidence of what the lawyer did or said at the time of the making of the will or on any other

occasion. Her statements, however, both before and after the making of the will, would be competent to show the state of her mind, her mental capacity, her attitude and feeling toward her lawyer, and her ability to resist his influence" (Id. at 144).

Out-of-court statements may also be admitted as not being hearsay, if meant to show that the speaker is either normal or abnormal, competent or incompetent, rationale or insane (Richardson § 8-106).

Another example of the state of mind apparent exception occurs when the statement is being offered not to prove the truth of what it asserts, but its effect upon the hearer, explaining his conduct upon hearing the statement (*People v. Felder* 37 NY2d 779; see generally, Younger, Hearsay: A Practical Guide Through the Thicket, § 1.5). Conversely, a declaration made out-of-court may be admissible to show the state of mind or the mental condition of the declarant, and not the state of mind of the person who heard the declaration. Statements made by decedent are often relevant, and not hearsay, if they are submitted solely to show his or her relationship with other people, such as beneficiaries under a will, or persons who are being disinherited. The decedent's relationship to others is almost always relevant in will, gift, and construction cases, and accordingly such statements would be admissible simply because they were made by the decedent and show how he or she felt about others. Thus, where a testator had heard something and believing what he had heard to be true, acted on it by executing a new will in a certain manner, testimony as to what the testator had heard would be admitted to explain his or her decision. (see *Bergstein v. Board of Education*, 34 NY2d 318, 324).

A well known example of the state of mind, apparent hearsay exception is found in the Court of Appeals decision in *Loetsch v. NYC Omnibus Corp.(* 291 NY 308). In that case, a husband sued for the wrongful

death of his wife. The relationship between the husband and wife was relevant to the pecuniary loss allegedly suffered by the husband. The Court of Appeals held admissible a statement by the wife in her will that the husband had been cruel to her and had failed to support her. The will was executed just a few months before the fatal accident. In admitting the statement into evidence, the Court held: "[n]o testimonial effect need be given to the declaration, but the fact that such a declaration was made by the decedent, whether true or false, is compelling evidence of her feelings toward, and relations to, her husband" (Id. at 311).

As a predicate for getting a will into evidence because of a statement made in it, would the will first have to be admitted to probate? The answer is no, if the attorney draftsman can testify independently as to the statement made by the declarant/testator (*see* e.g., *Matter of Arrathoon*, NYLJ, 10/22/07 [Surr. NY]). Indeed, that the writing in *Loetsch* was in the form of a will was not critical to the conclusion reached by the Court of Appeals. Rather, once an adequate foundation was made, the document was admissible to show the state of mind of the author regardless of the fact that it was a will (*see In re Karp*, NYLJ, 7/12/12, at 32 [Surr. Ct. NY County]).

Intention

Where intent is one of the elements to be proved, evidence of such intent will be admissible. For example, if the issue is domicile, statements made out-of-court evidencing existing intent would be admissible (*Matter of Newcomb*, 192 NY 238). Is this testimony admissible as an apparent exception to the hearsay rule, or as a true exception? Citing *Loetsch v. NYC Omnibus Corp.* supra, Richardson makes the following interesting observation:

> "If the statement is offered to evidence the declarant's state of mind circumstantially, the hearsay rule is not encountered (citing *Loetsch*). If the statement is offered for the truth of the fact asserted, e.g. "I hate X," the statement is hearsay but is admissible under the state-of-mind exception to the hearsay rule. Since the statement is admissible in either event, it seems of no practical importance to determine in a given instance whether the statement offered to show the declarant's existing state of mind is technically hearsay or non-hearsay" (Richardson 8-611).

A very significant example of such "intent" testimony concerns declarations of intent made with respect to future conduct, as opposed to past acts. The U.S. Supreme Court addressed this issue in *Mutual Life Insurance v. Hillmon* (145 US 285). In that case, which involved life insurance, declarations by a person with regard to his intention to go on a journey were admitted as at least some evidence that he actually did go on the journey. The U.S. Supreme Court held as follows: "[t]he existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be".

However, the U.S. Supreme Court has referred to its holding in *Hillmon* as "the high waterline beyond which courts have been unwilling to go" (*Shepard v. U.S.*, 290 US 96, 105). Thus, a declaration of a presently existing state of mind is not admissible to prove a past act, as opposed to future conduct. (See generally Younger, Hearsay: A Practical Guide Through the Thicket, § 5.8).

New York's Appellate Division applied *Hillmon* in *People v. Malizia* (92 AD2d 154, affd 62 NY2d 775). The Appellate Division held in that case that it was "persuaded that a statement by a deceased that he intends to meet another is admissible where the statement is made under circumstances that make it

probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place".

The New York Court of Appeals has fleshed out the parameters for review in cases applying *Hillmon*, where such statements are allowed in evidence for the truth asserted in the statement. *In People v. James* (93 NY2d 620), the Court of Appeals held that the out-of-court statements made by a declarant who was not available to testify were admissible not only to show his future act, but also to show "expressly or impliedly … a prior understanding or arrangement with the non-declarant", provided that a sufficient foundation was laid showing that the statement was worthy of belief (see also *Nucci v. Proper*, 95 NY2d 597).

The issue of intent is key in abandonment cases. The burden of proof is on the party asserting abandonment, which will usually require a showing that there was no consent or acquiesces in the separation between the spouses. As the Nassau Surrogate held in one abandonment case, "proof that she (the decedent) did not consent necessarily implicates her state of mind at or around the time of separation and thereafter. Generally, the mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the declarant (cites omitted)". (*Matter of Reisman* NYLJ 2/8/00, p. 33, col.3). Significantly, the Court in *Reisman* went on to state: "[b]ecause human relations between spouses are so complex and separations often occur with or without consent and the burden on a petitioner to show lack of consent is often frustrated by the absence of the decedent, wide latitude should be given in accepting this evidence of state of mind". The Court allowed certain testimony as to what the decedent had said about her husband because such evidence was relevant on the issue of consent and, in fact, demonstrated that "she would go back to him in a heartbeat if he would let her".

The Court in *Reisman* distinguished the decision in *Matter of Campbell* (186 Misc. 842). In *Campbell*, the Surrogate had held that certain testimony as to statements made by the decedent "were pure hearsay and not receivable", because such evidence was "tendered on the theory that the declarations of deceased, if received, would establish that the separation was without fault on his part and that it was due to a willful disregard of her marital obligations by the surviving spouse". In *Reisman*, similar statements were not tendered to show whether the separation was justified or unjustified, but rather solely on whether the decedent had consented to the separation. The evidence was admissible since it solely went to her intent. The different holdings in *Campbell* and *Reisman* illustrate how it is necessary clearly to articulate the basis for such testimony as solely being relevant to intent.

Lost Wills

Proving a lost will may, of course, be very difficult. SCPA §1407 provides that a lost or destroyed will may only be admitted to probate if: "(i) It is established that the will has not been revoked, and (ii) Execution of the will is proved in the manner required for the probate of an existing will, and (iii) All the provisions of the will are clearly and distinctly proved by each of at least two creditable witnesses or by a copy or draft of the will proved to be true and complete". Declarations of the testator are not admissible for the purpose of proving the contents of a lost or destroyed will. Additionally, declarations of the testator are inadmissible to prove non-revocation, and thus to establish the existence of the will at the time of death (Richardson, § 8-613). The Court of Appeals has held that oral statements of the testator that he had mistakenly destroyed his will about a year before he died were inadmissible hearsay (*Matter of Bonner*, 17 NY2d 9, *see* also *Matter of Kennedy*, 167 NY 163).

Exceptions -- Pedigree

Statements of personal history, where the declarant is unavailable, may be admissible. Thus, in *Matter of Tumpeer* (NYLJ 6/4/08, p. 39, c. 4 [NY Surr. 2008]), in attempting to establish her status as a niece of the decedent, an alleged distributee testified as to a conversation she had had with her mother about her family history. The alleged distributee's mother claimed that her sister (allegedly the decedent) had changed her maiden name in order to deceive her husband into believing she was Jewish, and thus had a different maiden name then the alleged distributee. The Court held that the testimony could be admitted under the pedigree exception to the hearsay rule. The evidence satisfied the following requirements: the declarant was not available to testify (either as a result of death or other cause), pedigree was directly an issue, the declarant was related by blood or affinity to the family affected by the declaration, the declarations were made before the controversy arose, and there was at least some evidence to corroborate the statement.

Similarly, in a contested probate action, a contestant may be able to utilize the pedigree exception to establish that he is indeed a distributee of the decedent (*Matter of Esther T*, 382 NYS2d 916 [NY Surr. Ct. 1976])).

Exceptions – Admissions, Declarations against Interest and Prior Inconsistent Statements

Any out-of-court statement made by a party which may be inconsistent with his or her position at trial may be given in evidence as an admission. As a hearsay exception, it is received as evidence of the fact admitted (Richardson, § 8-201). Of course, the party-declarant has a right to explain his prior statement (Richardson, § 8-211).

An interesting exception to the general rule concerning admissions comes up in certain probate cases. If a will has only one legatee, then an admission by him or her will be competent evidence. On the other hand, there is a general rule that an admission by one party in interest cannot be admitted against another party of interest. That rule results in the evidence being excluded entirely, because it would be impossible to admit the will as to one legatee, but to reject it as to another. (*Matter of Kennedy*, 167 NY 163 supra).

Out-of-court statements made by administrators and executors are admissible against the estate, if made while acting in their official capacity (Richardson, § 8-230). Such is analogous to evidence of an out-of-court statement made by an agent being admitted into evidence as an admission by the principal (Richardson § 8-208; *see*, e.g., *Kynast v. Dora Holding Corp*., 21 AD2d 865).

It is important to distinguish admissions from declarations against interest. An admission need not be against interest when made. Declarations against interest, on the other hand, are admissible whether the declarant is a party or not a party. A declaration against interest is an out-of-court statement which was against the declarant's interest at the time of its making, and is admissible because it is surmised that people do not usually make statements that are against their personal interest, and such statements therefore are more likely to be reliable than not. (Richardson § 8-203).

It is also important to distinguish admissions from prior inconsistent statements. The latter is used to impeach the credibility of the witness, and not for proof of the statements contained therein (Pattern Jury Instructions § 1:66). Accordingly, such constitutes an apparent exception to the hearsay rule.

Exception -- Business Records

CPLR § 4518 governs business records. It is important that any practitioner in the Surrogate's Court be familiar with this section. In order for a document to be admissible as a business record, the following four foundational elements must first be shown: "that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter". Additionally, the person who made the record must have had actual knowledge of the recorded event or received his information from someone with actual knowledge who had a business duty to report the same (S*ee Johnson v. Lutz*, 253 NY 124; *Prado v. Onor Oscar Inc.*, 44 AD2d 604).

The term business "includes a business, profession, occupation, and calling of every kind" CPLR § 4518(a). Accordingly, personal private records and documents generally would not be admitted in evidence based upon CPLR § 4518. Private memoranda not made as part of a business, such as a personal check register, may not satisfy the requirement (*Matter of Lauro*, NYLJ Dec. 26, 2001, at 21 [Surr. Ct. Nassau]).

Hospital records provide a significant instance of records coming under the business record exception (CPLR § 4518(c)). To be admissible, they must bear a certification or authentication by the head of the hospital. However, to satisfy the exception, such records must "relate to the condition or treatment of a patient" (CPLR 2306(a)). Thus, in any given instance, the hospital records should be carefully studied to make sure that extraneous materials, not related to the condition or treatment of the patient, are excluded.

The business records rule has been liberally applied (Richardson, § 8-308). That being said, careful scrutiny should be given to any document, whether a hospital record or business record, so as to ensure that it does not contain double hearsay, i.e., hearsay within hearsay. Double hearsay statements are declarations made within a document which are based upon statements made to the recorder by someone else. That portion of the document will be excised by the Court unless it is shown to the Court's satisfaction that it was obtained from someone whose statement itself satisfies a hearsay exception, or the statement within the record is not being offered for its truth (*People v. Patterson*, 28 NY3d 544). If it is being offered for the truth of the statement recorded, and the statement is not an admission or statement against interest, the question then turns on whether the person providing the information was under a duty to do so (Id. at 550).

An example which frequently comes up in Surrogate's Court, particularly in will contests, involves the notes of the attorney draftsperson. Upon the proper foundation being made, these notes would clearly be admissible as a business record. The question is whether statements made by the testator within them come in, and if so, do they come in for the truth of the statements, or simply that those statements were made to the attorney draftsperson because they confirm the testator's intent. The latter is admissible for sure, but depending on the foundation laid and the circumstances, an argument could be made that the testator was, in effect, under a business duty to provide this information to the attorney draftsperson, as part the estate planning being done by the attorney draftsperson. Arguably, then, the entire document could be admitted as a hearsay exception, for the truth of the statements contained therein. (see *People v. Orega*, 15 NY3d 610, 620-621; *Cover v. Cohen*, 6 NY2d 261, 274; *cf. Ruegg v. Fairfield Securities Corp.*, 308 NY 313, 322-323, where office memorandum of a phone call was admitted into evidence).

Exception – Prior Testimony

Prior testimony may be admitted under certain circumstances, whether it be from a deposition (CPLR §3117) or from a prior trial (CPLR §4517). Three conditions are set forth for the admission of former testimony at a trial: (i) unavailability of the witness; (ii) identity at the subject matter; and (iii) identity of the parties. Of course, such testimony can also be used for impeachment purposes.

Past Recollection Recorded

Attorney draftspersons of wills often prepare memoranda to the file describing the conferences with the testator and the will execution, as a protective measure in the event of a contest. Does such a memorandum come into evidence, or can it only be used to refresh the recollection of the attorney draftsperson when he or she testifies, perhaps years after the will's execution? Clearly the memorandum could be used to refresh recollection, but that alone would not therefore make it admissible. However, it could be admitted as past recollection recorded, if an adequate foundation is laid. That foundation requires a showing that the attorney draftsperson observed what is set forth in the memorandum, the memorandum was prepared very soon after the events took place, and the attorney draftsperson can testify that the memorandum "correctly represented his (or her) knowledge and recollection when made", although he or she presently does not have sufficient present recollection to testify as to the details set forth in the memorandum (*People v. Taylor*, 80 NY2d 1, 8; see also *People v. Raja*, 77 A.D.2d 322).

Judicial Notice

The Court may take judicial notice of its own files. Care should be taken to ensure, however, that portions of the Court's files are not utilized for this purpose where there is a hearsay problem, or expressions of opinion, which would not be admissible. Thus, for example, the judicial notice doctrine would not allow the introduction of an affidavit which happened to be in the Court's file. Incredibly, this actually happened in a jury trial, where an affidavit, not previously marked or introduced into evidence, was read to the jury on summation. The trial court permitted the affidavit to be marked as a court exhibit, and gave it to the jury. The Appellate Division reversed the jury verdict because of this error. While clearly part of the court record, it should not have come into evidence (*Ptasznik v. Schultz*, 247 A.D2d 197).

Exception – Excited Utterance

"One of the better-known exceptions to the injunction against the reception of hearsay testimony permits the introduction of a spontaneous declaration or excited utterance -- made contemporaneously or immediately after a startling event -- which asserts the circumstances of that occasion as observed by the declarant". (*People v. Edwards*, 47 NY2d 493, 496-497).

Since the person making the statement is generally not available for cross-examination, admissibility of a statement under this exception pushes the boundary, as it were, of the hearsay rule. Accordingly, the court has to carefully assess all the facts and circumstances. "In making the determination (of admissibility), the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed

between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of the studied reflection" (*People v. Edwards,* supra; *see Lagner v. Primary Home Care Services, Inc.*, 83 AD 3d 1007 [2d Dept. 2011]. That judges may differ in assessing whether such testimony is admissible is illustrated in comparing the majority decision versus the dissent in *People v. Simpson* (238 AD 2d 611 [2d Dept. 1997]).

The Hearsay "Residual Exception"

The Federal Rules of Evidence, Rule 807 set forth the so-called "Residual Exception", which applies in the federal court. Rule 807 would allow into evidence, in the court's discretion, out-of-court statements not specifically covered by a hearsay exception, if that statement is found to have "circumstantial guarantees of trustworthiness", is not available from "other evidence", and its admission "will best serve the purposes of these rules and the interests of justice".

While at times it appears that courts seem to apply the Residual Exception in allowing what is otherwise hearsay evidence, New York has refused to follow the Residual Exception (see *People v. Nieves*, 67 NY2d 125, 131 [1986]; *People v. Wlasiuk*, 32 AD3d 674 [3d Dept. 2006]. The reason is obvious: liberally applied, the exception would swallow the rule. The right of counsel to cross-examine, which underlies the refusal of the courts to allow hearsay, will have given away to the court's determination as to what is reliable (for a discussion of the Residual Exception, see Younger, Hearsay: A Practical Guide Through the Thicket, § 6.1).

Non-Jury Trials, Jury Trials, And Harmless Error

In a probate trial or a trial in a discovery proceeding under SCPA 2103, where there is a right to a jury, it is important for the Surrogate to quickly and accurately rule on evidentiary issues, including that of hearsay. However, the same urgency may not be the case in non-jury trials. There, particularly where close evidentiary questions are involved, careful deliberation and trial memoranda from both sides may be in order. In such instances, the Surrogate may be advised to conditionally allow the testimony or documents, subject to a ruling in the Court's decision post-trial as to admissibility, being mindful of any potential for prejudice to the Court as trier-of -the-facts. Reserving decision would be within the sound discretion of the trial judge, depending on the circumstances (*cf. Matter of Leon RR*, 48 NY2d 117, 123).

Finally, it should be noted that as with all evidentiary rulings, on appeal such would be subject to a harmless error analysis (CPLR 2002). That section provides that "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced". Such requires an analysis of the evidence generally, to see if improperly admitted evidence, or excluded evidence, was such that "if the absence of the error would have made possible some other view of the evidence under which the appellant cold have prevailed," or if the error was "so gross as to result in an unfair trial, thereby affecting a substantial right" (Buzard & Newman, New York Appellate Practice, § 4.15, pp 4-101 to 4-102).

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