§ 1404. Witnesses to be examined; proof required

1. Except as otherwise provided in this article, 2 at least, of the attesting witnesses must be produced before the court and examined before a written will is admitted to probate if so many of the witnesses are within the state and competent and able to testify.

2. Where the will offered for probate is on file in a court or public office under the laws of which jurisdiction the will cannot be removed the court may issue a commission to a person authorized to take a commission under CPLR 3113 or to an attorney and counsellor-at-law of the state or of the jurisdiction in which the commission is to be taken, to take the testimony and may admit the will to probate upon proof of its provisions, of its existence at the time of the death of the testator and of its due execution. Where the will offered for probate is brought to the surrogate's court by a representative of a public office of another jurisdiction, the court may take proof of the will and permit the representative to return the will to such other jurisdiction. The decree admitting the will to probate shall set forth the full text of the will. The proof so taken and the decree admitting the will to probate shall have the same force and effect as though the will had been filed or had remained in the court.

3. Before a nuncupative will executed under the provisions of EPTL 3-2.2 is admitted to probate its execution and the tenor thereof must be proved by at least two witnesses. Before a holographic will made under the provisions of that section is admitted to probate its execution and the handwriting of the testator must be proved.

4. In all cases the proofs must be reduced to writing. Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents and, upon application to the court based upon special circumstances, any person whose examination the court determines

may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will. No person who has been examined as a witness under this section shall be examined in the same proceeding under any other provision of law except by direction of the court. The attesting witnesses, the person who prepared the will, the nominated executors in the will and the proponents may be examined as to all relevant matters which may be the basis of objections to the probate of the propounded instrument. There shall be made available to the party conducting such examination, all rights granted under article 31 of the civil practice law and rules with respect to document discovery.

5. Unless the court directs otherwise for good cause shown, the costs of the examinations conducted pursuant to subdivision 4 of this section shall be paid as follows:

(a) In the case of examinations conducted before objections are filed, the testator's estate shall pay the costs of:

(1) the initial production or commission and the examination of (A) the first two attesting witnesses within the state who are competent and able to testify who are produced by the proponent, or (B) if no witness is within the state and competent and able to testify, the witness without the state who resides closest to the county in which the probate proceedings are pending and who is competent and able to testify; and

(2) the stenographer and one copy of the transcripts of such examinations for the court and any guardians ad litem.

The costs of all other examinations, including subsequent examinations of the witnesses described in subparagraph (1) of this paragraph, shall be governed by article 31 of the civil practice law and rules.

(b) In the case of examinations conducted after objections are filed, all costs of such examinations shall be governed by article 31 of the civil practice law and rules.

(c) All costs of document discovery in connection with such examinations shall be governed by article 31 of the civil practice law and rules.

6. Unless the court directs otherwise for good cause shown, if more than one person shall have been involved in the preparation of the will,

the term "person who prepared the will" shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator.