

TRUSTS AND ESTATES UPDATE

Expert Analysis

Requests for Disclosure: Protective Orders and Preclusion

Motions for protective orders and orders of preclusion are defensive measures frequently utilized by Surrogate's Court practitioners as a means of curtailing overly broad and/or improper requests for disclosure. Over the past several months, the surrogates in Suffolk, Westchester and Kings counties have had the opportunity to opine on applications seeking this relief.

Tape Recordings

Before the Surrogate's Court, Westchester County, in *In re Palmieri*, was a contested probate proceeding in which the respondent sought an order, inter alia, precluding the petitioner from offering evidence on the issue of undue influence, and suppressing use and admission at the trial of the matter of certain tape recordings, as well as derivative materials from the recordings, including copies of the recordings, transcripts thereof, and testimony concerning their contents.

The decedent died survived by her two daughters, the petitioner and the

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respondent, respectively. Pursuant to the pertinent provisions of her will, the decedent devised and bequeathed her residuary estate to the petitioner, and bequeathed the respondent the sum of

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\$100,000. In addition, the instrument contained an in terrorem clause, and named the petitioner the executor. A prior will of the decedent bequeathed the principal portion of her estate in equal shares to the petitioner and the respondent. According to the probate petition, the estate was valued at approximately \$500,000.

The subject of the motion before the court was a series of tape recordings made by the respondent, which the petitioner's husband admitted to having taken from the decedent's home, and copied, without respondent's knowledge or consent. More specifically, according to the respondent, these recordings were of telephone conversations that decedent had with persons, including the petitioner, as well as conversations that the decedent had with the respondent, while the respondent was living with the decedent in the decedent's home. The petitioner's husband testified during the course of his deposition that he copied the recordings onto the hard drive of a computer used by the petitioner, as well as to another computer that belonged to him, and listened to them on a tape recorder. He further stated that he subsequently returned all the recordings to the decedent's home, without the decedent's or the respondent's knowledge.

During the pendency of the proceeding, respondent served a notice for discovery and inspection on the petitioner requesting, inter alia, all audiotapes and/or videotapes of the decedent, and all documents concerning disputes and strains on the relationship between the petitioner and the decedent.

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A privilege log was also requested. Thereafter, petitioner's husband sent to petitioner's counsel two flash drives purportedly containing copies of what he claimed were the tape recordings made by the respondent, and indicated that one such recording contained an argument with the decedent. Nevertheless, in response to the notice for discovery and inspection, petitioner's counsel responded that she had no audiotapes or videotapes in her possession, and no documents regarding problems or difficulties or strains in the relationship between petitioner and the decedent.

In support of her motion, respondent claimed that petitioner should be precluded from introducing the tape recordings at the trial of the matter since she willfully failed to answer respondent's discovery demands. Moreover, respondent claimed that the authenticity of the recordings could not be established, since their chain of custody had been corrupted when petitioner's husband had illicitly removed them from the decedent's home. In opposition, petitioner claimed that her counsel inadvertently failed to produce the flash drives containing copies of the tape recordings, but that they were ultimately produced following the deposition of petitioner's husband. In addition, petitioner maintained that none of the tapes were tainted, and that she provided respondent with a list of the tapes and transcripts of the recordings, all of which matched the tapes respondent had in her possession in every respect.

The court opined that a party seeking the admission of a tape-recorded conversation must present proof of the authenticity and accuracy of the tape by clear and convincing evidence establishing that the offered evidence

is genuine and that there has been no tampering with it. Within this context, the court found that the authenticity of the tape recordings could not be established and precluded the petitioner from introducing them at trial. Significantly, in this regard, the court pointed to the fact that petitioner's husband surreptitiously removed the tape recordings, and that one of the computers to which he had copied them had been discarded. Further, the court noted that although the respondent had indicated that she regularly taped the conversations the decedent had, both with her and the petitioner, none of the tape recordings contained petitioner's voice.

Additionally, the court held that even if the tape recordings could be authenticated, the failure of petitioner's coun-

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sel to timely disclose that they were in their possession precluded their use at trial. Pursuant to CPLR 3103(c), if any disclosure has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court may, on motion, make an appropriate order, including an order that the information be suppressed. In addition, the court noted that the

provisions of CPLR 3126(2) provide that where a party or a party's agent willfully fails to disclose information that the court finds ought to have been disclosed, then the court may make an order prohibiting the disobedient party from supporting or opposing claims or defenses, or introducing in evidence designated items or testimony.

Based on the totality of the record, the court found that the failure of petitioner's counsel to produce the subject recordings was not merely inadvertent, and held that it would not countenance or tolerate the withholding of discovery material, or a failure to timely produce it.

Accordingly, respondent's motion was granted to the extent that petitioner was precluded from introducing the tape recordings, and all of their derivative materials, including copies of the taped materials, their transcripts, and testimony concerning their content.

In re Palmieri, NYLJ, June 6, 2016, at p. 24 (Sur. Ct. Westchester County).

Examinations

In *In re Trataros*, the Surrogate's Court, Bronx County (Lopez Torres, S.), the decedent died survived by a spouse and three adult daughters. Before the court was a proceeding for probate of his will, which expressly disinherited two of his daughters (respondents), and named the third daughter the executor thereunder. Once jurisdiction was complete, the decedent's two daughters, prior to filing objections to probate, sought examinations pursuant to SCPA 1404. Toward that end, the respondents moved for leave to examine an attorney employed by the attorney-draftsman's law firm and the decedent's spouse, pursuant to the provisions of SCPA 1404(4).

The respondents sought to examine the attorney-employee of the draftsman's law firm on the grounds that he purportedly assisted the decedent in understanding the attorney-draftsman by translating their conversations regarding the will and its terms into Greek. Further, the respondents claimed that the propounded instrument was drafted based on information provided the draftsman by the attorney, and that, as a result, his examination was important to ascertaining whether the will reflected decedent's intent. Additionally, the respondents sought the examination of the decedent's spouse, claiming that special circumstances existed for doing so, based on her advanced age, and her purported personal knowledge of the circumstances surrounding the execution of the decedent's will, and his testamentary wishes.

The motion was opposed by the petitioner, who argued that special circumstances did not exist requiring that the decedent's spouse be examined. Further, the petitioner cross-moved for a protective order to limit the scope of any such examination directed by the court, and to exclude the respondents from being present.

The court observed that the purpose of the limited discovery afforded by SCPA 1404(4) is to enable a potential objectant to ascertain whether there is any basis for filing objections. The statute allows for the examination of the attesting witnesses to the propounded will, as well as the draftsman of the instrument. In addition, if the will contains an in terrorem or a no-contest clause, the statute authorizes the examination of the nominated executor and proponent of the will, and further, where special circumstances are found to exist "any other persons

whose examination the court determines may provide information with respect to the validity of the will..."

Based on the foregoing, the court opined that the plain language of SCPA 1404(4) clearly specified the category of persons who could be examined prior to the filing of objections to probate, none of which applied to the decedent's spouse. Moreover, the court held that since the propounded will did not contain an in terrorem clause, the provision of the statute providing an exception to the scope of discovery where "special circumstances" were demonstrated, had no application.

Accordingly, the respondents' motion seeking to compel the examination of the decedent's spouse was denied. Further, the court denied the respondents' motion to depose the attorney-employee on the grounds that their assertions as to the need for his examination were made by counsel, rather than by an individual with personal knowledge of the facts.

In re Trataros, NYLJ, May 12, 2016, p. 22 (Sur. Ct. Kings County).

Discovery Requests Stricken

In *In re Christie* (NYLJ, April 14, 2016, at p. 34), a contested probate proceeding, the Surrogate's Court, Suffolk County, opined that on an application to compel discovery, the party seeking disclosure has the burden of making a proper demand, which is neither overbroad, lacking in specificity, nor seeking irrelevant documents.

Within this context, the court observed that respondent's demand for discovery and inspection was several pages long, and appeared to be a template, with incorrect and incomprehensible references to "defendant" and "plaintiff," neither of which was applicable to the pending proceeding. Further, the court

noted that the breadth of respondent's demands, seeking "all" or "any and all" records for a six-year period, and its lack of specificity, made them overly burdensome and of questionable relevance to the pending proceeding.

The court noted that pursuant to the provisions of CPLR 3101(a) there shall be full disclosure of all matter "material and necessary" to the prosecution or defense of an action. In the determination of whether requested disclosure falls within the confines of this rule, the test is whether it will provide "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." See *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406. In a contested probate proceeding, the parameters for discovery are further circumscribed by the three-year/two-year rule, which, in the absence of special circumstances, limits disclosure to the period three years prior to the date of the propounded instrument, and two years thereafter, or to the date of the decedent's death, whichever is earlier. See 22 NYCRR 207.27.

Concluding that it was not its duty to re-craft and limit the respondent's demands until appropriate, the court denied the respondent's motion, and directed that the demands be stricken.

In re Christie, NYLJ, April 14, 2016, at p. 34 (Sur. Ct. Suffolk County).