

## Trusts and Estates Update

## Expert Analysis

# Variety Fare: Counsel Disqualification, Directed Accounting, Sua Sponte Review

The past several months have witnessed significant decisions on a multitude of issues affecting the field of trusts and estates. While typically this column has taken a themed approach, the adage “variety is the spice of life” comes to bear in this month’s column, which will address some of the many topics of interest to the Surrogate’s Court practitioner.

### Counsel Disqualification Denied

Before the Surrogate’s Court, Bronx County, in *In re Stanescu*, was a contested probate proceeding in which the objectant, one of the decedent’s two sons, moved to disqualify counsel for the petitioner, who was the nominated executor under the propounded will and nominated successor trustee of the decedent’s revocable trust.

The decedent died survived by two sons and a daughter. Approximately two months before her death, she executed a will that directed that the residue thereof pour over into an inter vivos trust executed on the same day. Both instruments were attorney drafted and supervised, and were witnessed by two attorneys and a paralegal from the drafting attorney’s law firm.

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In support of his motion for disqualification, the objectant alleged, inter alia, that counsel previously represented him in a substantially similar matter that related to the estate, that the interests of the petitioner and counsel were materially adverse to his interests, thereby creating

In ‘*In re Ingraham*’, the objectant was directed to account with respect to each of the subject trusts.

a conflict of interest for the firm, and that counsel assisted the petitioner in shielding income belonging to the decedent’s estate. In opposition to the motion, counsel asserted that it never represented the objectant in any matter, and that the same issue was decided against disqualification in a Supreme Court action involving the objectant and the same facts. Counsel further noted that objectant’s motion was brought more than five years after the commencement of the proceeding, and,

thus, was designed solely to delay the matter and harass the petitioner.

The court opined that a party’s entitlement to counsel of his or her own choosing should not be abridged absent a clear showing that disqualification is warranted. A party seeking to disqualify an attorney or law firm must establish the existence of a prior attorney-client relationship, and that the former and current representations are both adverse and substantially related. Based on these criteria, the court found that although the interests of the proponent and objectant were adverse, there was no evidence, in the form of a written retainer agreement or otherwise, that counsel ever represented the objectant previously. In view thereof, as well as the objectant’s delay and apparent tactical purpose in seeking disqualification, the objectant’s motion was denied.

*In re Stanescu*, N.Y.L.J., May 26, 2017, at 23 (Surrogate’s Court Bronx County).

### Accounting Directed

In *In re Ingraham*, the Surrogate’s Court, New York County, was confronted by a petition by the successor trustee of two separate inter vivos trusts to compel two former trustees of the trusts to account. One of the trustees, who had been removed by the grantor, filed his accountings; the other trustee, who had resigned, objected to the petitions relying on language in the trust instruments,

which she claimed relieves her of any duty to account, as well as releases executed by the grantor and the other trustee.

At the time the objectant resigned, the grantor executed instruments by which she was released from any and all claims related in any way to her role as trustee, with the exception of claims arising from fraud or willful misconduct. The release further acknowledged that the grantor desired to forgo a formal account. The accounting trustee signed a similar release, and assented to any account (former or informal) rendered by the objectant. Further, it appeared that the terms of each trust instrument dispensed with the need for the trustees to file periodic judicial accountings.

The court held that the objectant's reliance on the releases to insulate her from her duty to account was misplaced, inasmuch as the instruments reserved the releasers' rights to seek relief for any fraud or willful misconduct. Further, the court rejected any claim by the objectant that the releases relieved her of her duty to account, a responsibility that was incidental to the trustee's duty and fundamental to any fiduciary relationship. Indeed, the court found that while the release executed by the grantor may have arguably consisted of a waiver of her right to an accounting, the court found that it did not constitute a clear and unambiguous waiver of an accounting by the other trustee and trust beneficiaries.

Additionally, the court held that the provisions of the trust instruments only exempted the objectant from filing periodic accountings, but did not relate to the final accounting sought by the proceedings. Finally, the court observed that where a former trustee has failed to account within a reasonable time and full releases do not relieve her of the duty to account, the court may sua sponte direct an accounting pursuant to SCPA 2205.

Accordingly, the objectant was directed to account with respect to each of the subject trusts.

***In re Ingraham*, N.Y.L.J., June 26, 2017, at 22 (Surrogate's Court, New York County).**

### **Sua Sponte Surcharge**

In *In re Colt*, the Surrogate's Court, New York County, exercised its authority to review sua sponte the fiduciary's commissions as executor and trustee.

Before the court were contested accountings of the fiduciary as executor of the decedent's estate and successor trustee of a revocable trust created by the decedent in 2006. Following the dismissal of certain objections and the

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In '*In re Colt*', the court held that the fiduciary had demonstrated a gross neglect of his duty and a substantial disregard of the rights of the beneficiaries warranting a denial of his commissions both as executor and trustee.

withdrawal of others, the court held a hearing on the remaining issue of the legal fees payable to the fiduciary's counsel. The record at the hearing revealed that much of the work performed by counsel related to conflicting claims to the assets of the estate and trust. More specifically, it appeared that in 2004, the decedent had executed a pour over will and revocable trust into which he transferred his condominium and brokerage account. Two years later, he executed the subject 2006 trust, as well as a new will, which, again, contained a direction that his residuary estate pour over into the trust. The 2004 trust and 2006 trust essentially had the same legatees, but the beneficiaries of the decedent's residuary estate differed.

Significantly, the draftsman of both wills and trusts was the fiduciary, who was the decedent's estate planning attorney. Of equal note was the fiduciary's

acknowledgment that the decedent intended his assets to pass pursuant to the 2006 trust, and his admission that he failed to have the decedent revoke the 2004 trust and fund the 2006 trust with the assets with which the 2006 trust had been funded. Although the controversy regarding the rightful owners of these assets was settled, the court found that the decedent's estate had a claim against the fiduciary for the legal fees incurred to resolve the trust issues that were created from his failure to properly advise the decedent. Indeed, regardless of whether the statute of limitations on any claim for malpractice had expired, or the fiduciary had been shielded from claims based upon the privity doctrine, the court concluded that the fiduciary's duty as executor required that he make the estate whole for the legal fees resulting from his negligence. His failure to fulfill this duty was exacerbated by his affirmative approval of the considerable legal fees incurred, which he apparently made no attempts to control.

In view thereof, the court held that the fiduciary had demonstrated a gross neglect of his duty and a substantial disregard of the rights of the beneficiaries warranting a denial of his commissions both as executor and trustee.

***In re Colt*, N.Y.L.J., April 14, 2017, at 22 (Surrogate's Court, New York County).**