

## TRUSTS AND ESTATES

## Expert Analysis

# The Halfway Point: Decisions of Interest Mid-2022

**A**s 2022 reaches its midway point, consideration should be given to some of the recent opinions rendered by the Surrogate's and Appellate Courts that are of significance to the practice of trusts and estates. This month's column addresses several of these decisions of interest.

By  
Ilene  
Sherwyn  
Cooper



to comply with a so-ordered discovery stipulation, and that no triable issues of fact existed with respect to the validity of the propounded instrument. The objectant opposed and filed a cross-motion requesting dismissal of the probate proceeding and sanctions, on the grounds that the petitioner had failed to comply with discovery demands and schedule SCPA 1404 examinations, or in the alternative a so-ordered discovery schedule directing the proponent to pay the costs of the SCPA 1404 examinations.

The record revealed that the court had issued a discovery order providing for SCPA 1404 examinations and the filing of

objections thereafter. Nevertheless, at a compliance conference, counsel for the objectant indicated that SCPA 1404 examinations had not yet been held because the proponent had failed to respond to his discovery demands or to produce the attesting witnesses or attorney-draftsperson for their examinations. Despite the foregoing, objections to probate were filed alleging lack of due execution, lack of testamentary capacity, fraud, undue influence, duress, and that the decedent failed to understand its terms.

In response, the proponent alleged that despite two prior discovery orders scheduling SCPA 1404 examinations, the objectant, who was at one point acting pro se, failed to schedule same. Moreover, the proponent claimed that the drafting attorney and witnesses were not under his control, and that as such, he had no duty to

### Summary Judgment Denied Pending Further Discovery

In *In re Bux*, N.Y.L.J., Dec. 13, 2021, at p. 20 (Sur. Ct. Bronx County), the Surrogate's Court, Bronx County, denied the petitioner's motion for summary judgment, without prejudice, in order to allow the objectant further discovery. The petitioner, the decedent's son, sought dismissal of the objections to probate filed by another son, on the grounds that he failed

ILENE SHERWYN COOPER is a partner with Farrell Fritz, P.C., in Uniondale, where she concentrates in the area of trusts and estates.

produce them. The proponent thus requested that the objectant be precluded from seeking additional discovery and that the will be admitted to probate.

In support of his cross-motion, objectant requested that the proponent be directed to respond to his document demand, inasmuch as he had access to the requested documents, as preliminary executor, and that the proponent be required to produce the attesting witnesses for examination. Further, in opposition to the motion for summary judgment, the objectant contended that the decedent executed her will one week prior to his death in a nursing home, while being administered pain-killing drugs, which disposed of real property that he no longer owned.

The proponent replied relying on the presumption of due execution that exists from an attorney-supervised will. Moreover, he argued that although the decedent was terminally ill and confused when admitted to the nursing home, his cognitive facilities improved and he was lucid in the days prior to the execution of the propounded instrument. Moreover, proponent argued that the affidavits of the attesting witnesses created

a presumption of testamentary capacity and was prima facie evidence of the facts therein stated.

Upon review of the record, the court held that significant issues of fact existed regarding the issue of testamentary capacity, and further, that it was premature to assess the remaining objections given the paucity of document produc-

---

The court concluded that the respondent's conduct thwarted the administration of the trusts, and held that the Surrogate's Court improvidently exercised its discretion in denying petitioner's application for her removal.

tion by the proponent and the absence of SCPA 1404 examination transcripts. In this regard, the court noted that the record demonstrated numerous unanswered requests for document production and scheduling of SCPA 1404 examinations, and opined that while the attesting witnesses may refuse to appear absent a judicial subpoena, it was proponent's responsibility to produce them. Further, the court found it incredible that the proponent, who alleg-

edly worked with the decedent, held his power of attorney and health care proxy, and, as aforesaid, was issued preliminary letters, did not possess or could not obtain the demanded documents.

Accordingly, petitioner's motion for summary judgment was denied, without prejudice, and objectant's cross-motion seeking compliance with discovery was granted to the extent set forth in the decision, including but not limited to a direction that the proponent pay for the costs of the examinations of two of the attesting witnesses.

### **Motion To Reargue Granting Summary Judgment Denied**

In *In re Ramos*, N.Y.L.J., April 19, 2022, at 30 (Sur. Ct. Ulster County), the Surrogate's Court, Ulster County, denied a motion to reargue its decision granting summary judgment in favor of the proponent admitting the decedent's will to probate. The court noted that the objectant relied on expert opinions of the decedent's capacity based solely on a post-mortem review of the decedent's medical records. Moreover, in this regard, the court observed that these records consisted of bi-monthly reports of a registered

nurse who opined, in pertinent part, that the decedent suffered from a personality disorder, and paranoid ideation. In adhering to its original determination, the court opined that a registered nurse is not legally competent to make a medical diagnosis. Additionally, the court held that the objectant's bald assertions of undue influence were not sufficient to defeat a motion for summary judgment.

### **Third Department Examines In Terrorem Clause**

Before the Appellate Division, Third Department, in *In re Strom Irrevocable Trust III*, 2022 N.Y. App. Div. LEXIS 1349 (3d Dep't 2022), was an appeal from an Order of the Surrogate's Court, Warren County, which granted petitioner's motion determining that the respondent triggered the in terrorem clause of an irrevocable trust of which she was a beneficiary.

The record revealed that the subject trust was created by the grantor/decedent for the benefit of her two daughters. Shortly before her death, she transferred her home in New Jersey to the trust and the proceeds from the sale of the house were subsequently deposited into the trust. The trust agreement

contained an in terrorem clause whereby any beneficiary who challenged any of the terms of the trust forfeited her interest thereunder. Notably, the clause specifically exempted from its scope the provisions for discovery set forth in EPTL 3-3.5 and SCPA 1404, but also stated that any attempt to expand the discovery beyond what was typically authorized by the provisions would result in a forfeiture. The trustee subsequently filed an order to show cause seeking a determination that the respondent had violated the clause based upon, inter alia, conduct she engaged in during the course of SCPA 1404 examinations regarding the decedent's will. The Surrogate's Court granted the trustee's order to show cause in its entirety, finding that the respondent violated the clause.

In affirming the order of the Surrogate's Court, the Appellate Division observed that while engaging in SCPA 1404 discovery, the respondent filed affidavits in which she questioned whether the grantor's home had been lawfully and properly transferred to the trust, and therefore whether the trust may fail due to being unfunded. She also engaged in discovery and

depositions of numerous individuals who were involved in the sale of the home, which had no connection to the probate of the will, and was thus found to be in violation of the grantor's intent as expressed in the no contest clause. Specifically, the court was troubled by the respondent's conduct questioning the deposit of the sale proceeds into the trust rather than the grantor's estate, when the house was the primary asset of the trust.

Accordingly, the court held that the Surrogate's Court had correctly determined that the respondent triggered the in terrorem clause and forfeited any disposition to her under the trust.