

TRUSTS AND ESTATES UPDATE

Expert Analysis

New Year in Surrogate's Courts: Off to a Running Start

The beginning of 2013 has brought with it hope for a better year economically, for uninterrupted months of kinder weather conditions, and for countless days of good health and peace. For the court system, and the Surrogate's Court, in particular, it has brought continuing productivity and opinions of significance to the field of trusts and estates. Indeed, from issues affecting privilege, attorney-fiduciaries, confidentiality of court records, and fiduciary duty, this year portends important developments in Surrogate's Court practice.

Materials for Litigation

In *In re West*, the Surrogate's Court, New York County (Sur. Anderson), explored the scope and definition of the qualified privilege that attaches to materials prepared in anticipation of litigation.

Before the court was an application by the proponent of the decedent's will to compel discovery of the objectants' notes memorializing their communications with non-party witnesses after the decedent's death. Objectants opposed the application, contending that the notes constituted material pre-

pared in anticipation of litigation and were privileged. Additionally, objectants maintained that the documents fell outside the scope of the three year/two year rule and, therefore, were not subject to discovery. This rule limits the scope of discovery to the period three years prior to the execution of the will and two years thereafter or to the decedent's date of death, whichever is earlier.

The record revealed that in the course of deposing objectants, the proponent learned that information contained in the subject notes formed the basis for the objections to probate. The information was derived from telephone calls and in-person conversations with third parties pertaining to the decedent's estate plan and will. According to the deposition testimony, at the time of the conversations, the objectants were investigating whether they had grounds for opposing probate.

The court opined that while the provisions of CPLR 3101 generally require

"full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3101(d)(2) provides a qualified privilege for materials prepared in anticipation of litigation or for trial. The court found that this privilege is limited to materials that are prepared exclusively for litigation, and imposes upon the party seeking to prevent disclosure the burden of proving that the privilege applies. To this extent, when the motive for preparing the materials is mixed, even if a predominant motive is for use in litigation, the privilege does not apply.

In considering whether materials fall within the scope of the privilege, courts have considered the time when the documents were created, the possible uses of the information, and the relationship between the informant and the person to whom the information was provided. Thus, by way of example, the court noted that materials prepared during the investigatory stage of what later becomes a litigation are generally not privileged, as "...reports prepared for the purpose of assisting a party in making the decision to litigate or not are considered to have a mixed purpose, and therefore must be disclosed..." *Plimpton v. Massachusetts Mut. Life Ins.*, 50 A.D.3d 532, 533 (1st Dept. 2008).

Based upon the foregoing, the court concluded that when non-lawyers hold

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conversations to explore the facts that ultimately result in litigation, the notes derived from such conversations are not privileged.

Further, the court held that the subject documents were not shielded from discovery pursuant to the three year/two year rule. While the objectants argued that the subject notes were prepared after the decedent's death and therefore fell outside the scope of the rule, the court found that because the events described in the notes occurred within the time frame of the rule, they were subject to production.

In re West, NYLJ, Jan. 7, 2013, 2010-2218, NYLJ 1202583130049, at *1 (Sur. Ct. New York County, decided Dec. 28, 2012) (Sur. Anderson).

Disclosure Requirements

In an uncontested probate proceeding, the Surrogate's Court, Richmond County, considered whether the disclosure requirements of SCPA 2307-a applied to a non-domiciliary attorney/fiduciary, so as to preclude him from receiving a full statutory commission. Specifically, the attorney-fiduciary prepared a will for an out-of-state testator, who died a domiciliary of New York, and never executed an affidavit in compliance with the statute prior to death.

The record revealed that the attorney-draftsman and the decedent knew each other for 43 years and had a long-standing friendship. At the time the propounded will was executed in 1998, the decedent and the draftsman were both residents of New Jersey. However, three months thereafter, the decedent relocated to Staten Island, where he remained until his death in 2012.

In addressing whether the requirements of SCPA 2307-a were applicable to the attorney-draftsman, the court reviewed the provisions of the statute and the basis for the legislation underscoring its passage. The court noted that while the statute has been

the frequent subject of case law and commentary, there was little guidance regarding the application of the statute to the circumstances sub judice. The court found the decision in *In re Newell*, NYLJ, June 6, 2002, at 2, instructive but distinguishable.

In concluding that the attorney/fiduciary was entitled to a full statutory commission, the court found that the statute failed to make a distinction as to whether the attorney-draftsman subject to its terms must be an attorney licensed in New York or an attorney licensed elsewhere. More importantly, however, the court noted that a plain reading of the statute reveals that it was intended to address testamentary instruments to be proven in New York, a condition that could be difficult for an attorney-draftsman to predict. Indeed, the court recognized that an attorney-draftsman cannot always foresee where his client will be domiciled at the time of death in order to comply with the applicable laws of that state.

'West' explored the scope and definition of the qualified privilege that attaches to material prepared in anticipation of litigation.

Within this context, the court held that it was only logical to conclude that if a non-New York attorney drafts a will for a non-New York domiciliary and has no knowledge of the intent of the client to change his domicile, the attorney cannot be expected to comply with a New York-based statute, nor a statute of any other state or country to which the client may possibly move. Accordingly, under the circumstances, the court determined that the attorney-draftsman was not required to comply with the require-

ments of SCPA 2307-a, and was entitled to a full statutory commission.

In re Restuccio, NYLJ 1202584000596, at *1 (Sur. Ct. Richmond County, decided Dec. 31, 2012); published Jan. 14, 2013.

Sealing Considered

In *In re Rubin*, the Surrogate's Court, New York County (Sur. Glen) addressed an application to redact certain information submitted to the court four years ago within the context of a proceeding, since discontinued, to recover artwork claimed to be an asset of the decedent's estate. The proposed redactions generally included financial information, inventories of artwork, insurance documents, and descriptions of jewelry, furniture and other personal property. In support of the application, the movant alleged that inclusion of the foregoing information as part of the public record would cause the assets to be at risk.

The court opined that the right of public access to court records is recognized by common and statutory law. Furthermore, pursuant to the Uniform Rules of the Trial Courts, 216.1(a), court records shall not be sealed, either in whole or in part, except upon a written finding of good cause. The burden of proving good cause is upon the movant, and requires a showing of a legitimate need and a particularized risk of harm. The fact that the record in a Surrogate's Court proceeding may contain personal and financial information is not in and of itself sufficient to establish a basis for sealing a file. Nevertheless, the court noted that financial information will be sealed when copies of personal income tax returns or the Social Security numbers of a litigant are at issue.

With respect to the pending application, the court found it significant that the movant waited more than four years to assert the confidentiality of the subject pleadings. Moreover, the court found that the movant's claim that the assets were at risk failed to show any

particularized risk of harm.

Accordingly, the court denied the motion except to the extent of those portions of the record that contained movant's Social Security number, and the Social Security number of her daughter.

In re Rubin, NYLJ, Jan. 7, 2013, at 22 (Sur. Ct. New York County, decided Dec. 26, 2012) (Sur. Glen).

Claims of Unconscionability

Before the Surrogate's Court, Bronx County, was a discovery proceeding instituted by a coexecutor of the estate to set aside a transfer by the decedent of his 50 percent interest in the company, Aurora Gems Inc., to his stepson. Upon the trial of the matter, the petitioner argued that the stepson, as president of the company, had a confidential relationship with the decedent, which he breached in connection with the sale. Further, he maintained that because the attorney, who represented the decedent, also represented the company and stepson in the transaction, a conflict of interest existed for which a waiver from the decedent was required.

The petitioner claimed that these circumstances, combined with the alleged sale of the company at less than its fair market value, made the transaction unconscionable. Finally, the petitioner argued that the stepson had failed to meet his burden of establishing that the decedent intended to make a gift of his interest in the company to him, and that the transaction was free from fraud and overreaching.

In opposition to petitioner's contentions, the company and the stepson argued that the sale was an arm's length transaction at fair consideration. Alternatively, they claimed that in the event the consideration was found insufficient, the decedent intended to make a gift of the difference. Indeed, they maintained that the transfer accomplished the decedent's objective, as evidenced in prior testamentary instruments, of transferring his interest in the company

to his stepson, whom he considered to be like a son.

In concluding that there was no basis to set aside the transaction, the court discussed the prevailing principles of law governing fiduciary relationships, gifts and unconscionability. The court opined that the relationship between shareholders in a close corporation is akin to that between partners and imposes a high degree of fidelity and good faith. In order to recover damages for breach of these duties, a party must establish (1) the existence of a fiduciary relationship; (2) misconduct by the fiduciary; and (3) damages directly caused by the fiduciary's misconduct. On the subject of gifts, the court noted that a valid inter vivos gift by a decedent requires the donee to prove donative intent, delivery and acceptance by clear and convincing evidence.

Further, with regard to the issue of unconscionability, the court found that an unconscionable agreement is "one where the inequality is so strong as to 'shock the conscience' and confound the judgment of any person of common sense (citations omitted)." To that extent, the court held that in order to find a transaction or conduct unconscionable, the party must show both procedurally and substantively "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (citations omitted). However, if a contract is not unconscionable, the adequacy of consideration exchanged will not be considered.

Within this context, the court found that while the proof adduced established that the decedent suffered from various physical ailments during the last few years of his life, it was also clear that at the time of the subject transaction, he was intelligent, alert, responsive and had an outstanding memory. Additionally, based on the testimony of the witnesses, the court

concluded that the decedent always considered Aurora to be his stepson's brainchild, and considered his stepson to be like a son and natural object of his bounty.

To this extent, the court found it relevant that in each of his prior wills, the decedent disposed of his interest in the company to his stepson. Moreover, the court noted that while the decedent's stepson had an interest in the transaction, there was no proof that he made a single demand or suggestion as to the manner in which it was structured. Instead, the court found that the decedent's attorney of many years attempted in good faith to effectuate his testamentary plan through the inter vivos transaction, which apparently was to the decedent's satisfaction, as evidenced by the fact that he never took any steps during his lifetime to set it aside, despite his expressed concerns over his finances. Indeed, while the court found that the consideration for the transaction was less than might have otherwise been demanded from a stranger, it concluded that the consideration received by the decedent comported with the love and affection that he held for his stepson.

Accordingly, the court held there was no basis for setting aside the transaction on the ground of unconscionability, breach of fiduciary duty, undue influence or fraud, and dismissed the petition.

In re Rodman, NYLJ, Jan. 14, 2013, at p. 22 (Sur. Ct. Bronx County, decided Dec. 28, 2012).