

TRUSTS AND ESTATES UPDATE

Expert Analysis

As Fall Begins, Looking Back at Cases

As the summer ends, and the colors of fall emerge, Surrogate's Courts throughout the state continue to examine a broad range of issues impacting the field of trusts and estates. This month's article considers a few of the many significant opinions rendered over the past several months addressing the discovery of assets, standing, and probate of a home-drawn will.

Post-Trial Determination on The Discovery of Assets

Before the Surrogate's Court, Albany County, *In re Mahoney* was a consolidated trial of two proceedings commenced pursuant to SCPA Article 21. The first proceeding was commenced by two of the decedent's children, as fiduciaries of the estate pursuant to SCPA §§2103 and 2104, seeking the return of certain property allegedly being wrongfully withheld from the estate by the

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respondent, the decedent's "long-time companion" and "dear friend," and a trust beneficiary under her will. The second proceeding was commenced by the respondent against the fiduciaries, pursuant to SCPA 2102(4), seeking to compel payment of annual trust distributions to him as required by the decedent's will, together with interest, or alternatively, the removal of the fiduciaries as executors and trustees due to their failure to fund the trusts established under the will for his benefit.

Following the close of petitioners' case on the discovery petition, the court granted respondent's motion for a directed verdict as to some of the assets in issue, and reserved decision with respect to petitioners' allegations regarding a transfer of assets

from the decedent's checking account to the respondent's personal account, the contents of a safe located in the decedent's Florida condominium, and a withdrawal of funds from a jointly held investment account.

To this extent, the court observed that in a turnover proceeding, the burden of establishing that the property was that of the decedent rests with the petitioner. Once that burden is met, it shifts to the respondent to establish, by clear and convincing evidence, that the subject property was a gift.

Within this context, the court turned to the fiduciaries' contentions regarding the decedent's ownership of funds in the subject checking account, and noted that the source of those funds was a joint account between the decedent and respondent. According to the respondent, the decedent was aware that a portion of the funds would be utilized by him to purchase certain coins, and that toward that end, the decedent authorized, by phone, a transfer of those funds into his personal checking account.

The evidence established that the respondent utilized the subject fund to purchase the coins. Moreover, the evidence revealed that when asked to examine the propriety of the transfer by the decedent's attorney-in-fact, the bank determined that it was not fraudulent. Although petitioners maintained that the decedent would not have typically authorized a transfer of funds telephonically, they offered no documentary evidence to support that claim. Petitioners' additional contentions that the decedent never gifted money to anyone was belied by her checking account records which revealed that she made, sometimes sizeable gifts, to family members and the respondent.

Accordingly, based on the foregoing, the court found that petitioners had failed to satisfy their burden that the funds in issue were an estate asset, and even assuming that they had, that they were not intended to be a gift to the respondent.

As for the claimed assets in the safe, known as "Bill's [the respondent's] safe" located in the decedent's condominium, the court found that petitioners had failed to provide any convincing documentary proof that the contents thereof, which included coins and cash, belonged to the decedent. Although the petitioners relied on notes written by the decedent regarding the coins, the court found that they were of little probative value due to the passage of time. Instead, the court noted that petitioners should have proffered receipts, bank

statements and/or invoices demonstrative of the decedent's ownership of the cash and/or the coins in issue. Accordingly, petitioners' request for recovery of the contents of the safe was denied.

With respect to the joint investment account, the record revealed that the respondent removed all of the funds

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from that account prior to the decedent's death. The court noted that had the funds remained in the account, the entire account would have belonged to the respondent as joint tenant. However, the petitioners maintained that since the account was improperly closed by the respondent, he was required to return half of the account to the decedent's estate.

The court observed that when funds of a joint account/tenancy are withdrawn in excess of each tenant's one-half interest or moiety, the withdrawing joint tenant is subject to suit for the excess, and has the burden of proving by clear and convincing evidence that the withdrawals were with the other joint tenant's consent. Where it is demonstrated that the withdrawals were made to or for the benefit of the other joint tenant, return of the excess funds will not be required. To this extent the

court found that while the respondent removed the funds from the account as a defensive measure, after a call from the brokerage institution that the account was being tampered with, the evidence as to his use of the monies thereafter was too vague and indirect to establish that they were used for the decedent's benefit. Accordingly, the court directed that the respondent and the decedent's estate were each entitled to one-half of the account.

Turning to the respondent's request for statutory interest on the annual trust distributions, the court found that in instituting the suit for discovery the fiduciaries did not act in good faith or have the best interests of the estate or the wishes of the decedent in mind. Specifically, the court noted that the petitioners had minimal evidence to support their claims, yet nevertheless, deprived the respondent of the funds which the decedent sought to provide for him. Accordingly, the court held that respondent was entitled to interest at the rate of 9% per annum on his yearly distributions to the date of its order.

In re Mahoney, NYLJ, Aug. 21, 2020, at 35 (Sur. Ct. Albany County).

Standing to Conduct SCPA 1404 Examinations Denied

Before the Surrogate's Court, New York County, in *In re Kaufman*, was a motion, inter alia, to strike the SCPA 1404 discovery demands of the decedent's wife based on lack of standing.

The record revealed that the decedent was in the midst of a divorce at the time of his death, and had executed a Stipulation of Settlement and Agreement providing for the division of their marital assets. That agreement provided, in pertinent part, that each party waived and relinquished all claims, rights, or interests as a surviving spouse in or to any property of the other at death, including rights under the elective share statute, to exempt property, and pursuant to the laws of intestacy.

The decedent's will divided his estate equally between decedent's nephew and another family member. Notwithstanding the waiver language in the Agreement, the respondent/surviving spouse requested SCPA 1404 examinations and related discovery, in response to which the motion sub judice was filed.

In granting the motion, the court reasoned that the purpose of SCPA 1404 discovery was to acquire information that might provide a basis for filing objections to probate. Thus, the court observed that lack of standing to file objections to probate forecloses discovery pursuant to SCPA 1404. As defined by the provisions of SCPA 1410, any one whose interest—i.e., pecuniary interest—in the property or estate of the testator is adversely affected by the admission of the propounded will to probate may file objections.

Within this context, the court found respondent's claim that the Settlement

Agreement did not foreclose her rights under SCPA 1404 to be without merit. More specifically, the court concluded that by the terms of the agreement the respondent unequivocally waived her right to object to probate, and thus lacked the requisite pecuniary interest and standing to file objections. As a result, SCPA 1404 discovery would serve no useful purpose.

In re Kaufman, NYLJ, July 10, 2020, at 22 (Sur. Ct. New York County).

Objections to Pre-Printed Will Dismissed

In *In re Tsinopoulos*, the petitioner moved for summary judgment dismissing the objections to probate

Recording artists are trying to establish that their master recordings are not works for hire for music labels.

alleging lack of due execution, lack of testamentary capacity, undue influence and fraud. The propounded instrument was a two-page pre-printed document with the blanks allegedly filled in by the testator, which left an \$11,000 bequest to the objectant, and the balance of the decedent's estate to the petitioner.

The record revealed that the decedent executed the instrument at a bank under the guidance of the bank's manager. The court found that the petitioner established a prima facie case of due execution through the deposition

testimony of the bank manager, and the existence of an attestation clause in the instrument, which created a presumption that the document had been duly executed. Although the objectant alleged a handwriting discrepancy between the two pages of the instrument, the court held that, even though true, it did not bear on the issue of due execution. Moreover, objectant conceded that the decedent was of sound mind, and could not be convinced by the petitioner to do something she did not want to do. Finally, the court found that while objectant argued that the propounded instrument was a fraud, and surmised that the petitioner could have substituted a page of the instrument, the court concluded that no proof of this allegation was submitted.

Accordingly, petitioner's motion for summary judgment was granted.

In re Tsinopoulos, 68 Misc3d 1201(A) (Sur. Ct. Rockland County).