

A Potpourri of Issues

By Ilene Sherwyn Cooper

January 3, 2025

As the year 2024 came to a close, and we entered a new year, the Surrogate's Court offered opinions addressed to a multitude of issues affecting trusts and estates. Consider the following decisions of interest.

Disqualification of Counsel Ordered in Contested Probate Proceeding

Before the Surrogate's Court, Westchester County, in *In re Feigen* was a motion by the objectants for an order (1) disqualifying the attorney-draftsperson and his law firm as attorneys for the nominated executors under the propounded instrument, (2) reopening the depositions of the attorney-draftsperson and his colleague, who was also involved in the preparation of the will as well as its execution, and (3) directing counsel to submit to examinations before trial prior to the examinations of the objectants.

The motion was opposed by the proponents, who cross-moved, *inter alia*, for sanctions and to seal a portion of the record. The motion was granted in part, and the cross-motion was denied, except that portion thereof that requested the sealing of counsel's invoices, which was held in abeyance pending the court's review.

The decedent died survived by his third wife, and two children from his first marriage, Philippa and Richard. Pursuant to the pertinent provisions of his will, the decedent nominated his wife, and

two other individuals as executors, and directed that the residue of his estate be poured over to a revocable trust executed on the same date as his purported will.

The revocable trust provided for multi-million cash distributions to Philippa and Richard, \$50,000 to each of his surviving spouse's three children, and the residuary outright to his spouse. The testamentary scheme created by these instruments differed from the decedent's prior estate plans, which bequeathed 50% of his estate to his spouse, and divided the remaining 50% thereof equally between Phillipa and Richard.

Following SCPA 1404 discovery, objections to probate were filed by Phillipa and Richard alleging lack of due execution, lack of testamentary capacity, undue influence and fraud practiced upon the decedent by his spouse and others. The proponents then moved for summary judgment dismissing the objections, which motion was granted as to the objections based on lack of due execution and testamentary capacity, but otherwise denied.



Photo: Rick Kopstein

Ilene Sherwyn Cooper.

In support of their motion for disqualification, objectants argued that the attorney-draftsperson and members of his firm were necessary witnesses at the trial of the matter, and that their testimony would be prejudicial to the surviving spouse.

More specifically, objectants alleged, *inter alia*, that: 1) subsequent to the decedent's brain surgery and stroke, his spouse began communicating with the subject law firm about revisiting his estate plan; 2) the decedent's spouse was present at almost all meetings with the attorney-

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draftsperson and his colleague regarding the decedent's estate planning, including those culminating in the propounded will and revocable trust; 3) the attorney-draftsperson communicated independently with the decedent's spouse regarding his estate plan; 4) the decedent's spouse was in the room with counsel when the decedent executed his will; 5) the decedent's spouse complained about the decedent's initial desire to leave objectants more than they ultimately received under the revocable trust, which resulted in the decedent reducing the amount; 6) after execution of the propounded instrument, the decedent's spouse continued to communicate directly with the attorney-draftsperson and his colleague about the decedent's affairs, and expressed her concerns about a probate contest.

This concern resulted in her arranging for the decedent to see a neurologist, and a letter being

prepared by the doctor following her examination of the decedent. This letter was sent to the attorney-draftsperson, who revised same in order to delete any references to the decedent's spouse being present on the date of the examination, and to add a sentence indicating that that the decedent's "cognitive functioning was very strong..." The revised letter was signed by the doctor, and was produced in pre-objection discovery; 7) the marked-up copy of the letter together with 700 additional documents, initially withheld as privileged, was produced following the court's decision on the motion for summary judgment.

In opposition to the motion, proponents maintained, amongst other things, that it was a litigation tactic designed to wear down the decedent's spouse, and deprive her of her chosen counsel. Additionally, they argued that the attorney-draftsperson was not a necessary witness because the testimony sought from him could be presented through non-lawyer witnesses, was undisputed, cumulative of other testimony, insignificant, or irrelevant. Finally, proponents alleged that the objectants did not satisfy the standard for disqualification because the testimony would not be prejudicial. The objectants replied and opposed the proponents' contentions.

Referencing the advocate-witness rule set forth in Rule 3.7 of New York's Rules of Professional Conduct, the court opined that before disqualification will be ordered there must be a clear showing that the testimony of counsel is necessary to the movant's case and that such testimony would be prejudicial to the opposing party. To this extent, the court noted that the testimony of the attorney-draftsperson and other attorneys in his firm who were involved in the decedent's estate planning and related matters would be necessary to support the objectants' claim of undue influence.

Indeed, the court observed that the direct involvement of the decedent's spouse in the

decedent's estate plan could serve as circumstantial evidence of undue influence, and indicia of whether she was in a confidential relationship with the decedent.

Further, the court found that because the credibility of the witnesses played a role in assessing the circumstantial evidence of undue influence, the testimony of the attorney-draftsperson and his colleagues could prove prejudicial to the proponents. As such, the motion to disqualify the attorney-draftsperson and his colleague was granted.

With regard to the disqualification of the attorney-draftsperson's law firm, the court found that the same considerations that warranted the disqualification of counsel were at issue

With regard to the disqualification of the attorney-draftsperson's law firm, the court found that the same considerations that warranted the disqualification of counsel were at issue. Nevertheless, the court noted that the majority view in probate proceedings favored delaying disqualification until trial. In view of the discovery and motion practice that had taken place to date, the fact that proponents were not unsophisticated, and that they wanted to continue with the firm, the court concluded that to disqualify the firm at the present stage of the proceedings would cause undue hardship.

Moreover, the court granted the motion to reopen the depositions of the attorney-draftsperson and his colleague, who was involved in the planning and execution of the will, but limited the areas of inquiry to any documents not produced prior to the SCPA 1404 examinations and the subject matter contained therein, as well as to any relevant, non-privileged material in the firm's invoices that were produced after the summary judgment motion was decided. Finally, the court

directed that the depositions of the objectants proceed as scheduled in advance of the continued examinations of counsel.

In re Feigen, N.Y.L.J., Dec. 9, 2024, at 17 (Sur. Ct. Westchester County).

Expansion of Three Year/Two Year Rule Denied

In a probate proceeding, the Surrogate's Court, New York County, in *In re Landau*, addressed respondent's motion to expand the time frame for pre-objection SCPA 1404 discovery set forth in Uniform Court Rule ("U.C.R.") 207.27, and for an order granting him leave to depose his brother without triggering the propounded instrument's in terrorem clause.

The decedent died survived by her daughter and eight grandchildren, including the respondent and his brother, as her sole distributees. Pursuant to the pertinent provisions of her will, the decedent left the majority of her testamentary assets to her daughter, \$5 million to each of five grandchildren, including the respondent, and a portion of her residuary estate to her other three grandchildren. Only the respondent requested SCPA 1404 examinations.

Pursuant to the provisions of U.C.R. 207.27, discovery in a probate proceeding is limited to the three-year period prior to the date of the propounded instrument and two years thereafter, or to the decedent's date of death, whichever is the shorter period, unless special circumstances are shown. While a finding of special circumstances lies within the court's discretion, the court observed that expansion of the three-year/two-year rule has generally been based upon allegations of a continuing scheme or course of conduct evidencing undue influence or abuse of the testator's finances, or fraud by the proponent or beneficiaries under the propounded will.

In view thereof, the court held that respondent's allegations that his brother had received more assets from the estate of his father, that as a residuary beneficiary under the propounded will he stood to receive a substantially larger

portion of the decedent's estate, and that he played a key role in the family business, failed to establish the requisite special circumstances for expanding the scope of discovery pursuant to the Uniform Court Rule. The court found respondent's claims of undue influence by his brother to be conjectural and speculative, and therefore insufficient to deviate from the applicable five-year time frame.

Additionally, the court held that respondent had failed to present a basis for granting him leave to examine his brother prior to the filing of objections. Specifically, the court held that respondent had not demonstrated that his brother had information concerning the validity of the propounded instrument "that [was] of substantial importance or relevance to a decision to file objections" to probate. Indeed, the court observed that the question in the pending proceeding was the validity of the decedent's will, and not the will of the respondent's father, and thus, the proceeding *sub judice* was not the proper forum to obtain information concerning that estate.

In re Landau, N.Y.L.J., Dec. 12, 2024, at 17 (Sur. Ct. New York County).

Letters of Administration Revoked Based on Filing of False Petition

In *In re Scott*, the Surrogate's Court, Kings County, revoked the letters of administration issued to a non-distributee of the decedent based on falsehoods contained in her peti-

tion. The subject petition was accompanied by a waiver and consent and designation of the petitioner to serve as administrator purportedly executed by the decedent's daughter, who was her sole distributee. In addition, the petition indicated at paragraph 7(b) thereof that there were no persons interested in the proceeding who were infants or under a disability.

Subsequent to the appointment of the petitioner as administrator, the court was informed, *inter alia*, that the decedent's daughter was residing in a nursing home, and not, as the petition stated, at her residence in Brooklyn. Further, the court was informed that the petitioner had no familial relationship to the decedent's daughter, who was suffering from dementia.

In view of the foregoing, the court issued an order to show cause directing the administrator to provide information regarding the circumstances surrounding her appointment. Based on the testimony and evidence at the hearing that followed, the court concluded that the statements made under oath by the petitioner were misleading and untrue, and constituted a material misrepresentation for the purpose of obtaining letters of administration.

Accordingly, the letters of administration issued to the petitioner were revoked, pursuant to SCPA §§711 and 719.

In re Scott, N.Y.L.J., Dec. 24, 2024, at 17 (Sur. Ct. Kings County).

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