

# Injunctive Relief in Surrogate's Courts: Trends and Considerations

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An executor commencing a turnover proceeding for the return of a Picasso allegedly gifted by the decedent shortly before his death to the respondent, and now in respondent's possession, would be wise to seek injunctive relief safeguarding that painting pending the outcome of the proceeding.

The provisional remedy of a preliminary injunction is governed by CPLR 6301, which provides in part:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing ... an act in violation of the plaintiff's rights respecting the *subject of the action*, and tending to render the judgment ineffectual... (emphasis added).

In addition, the movant must demonstrate three elements: (1) a likelihood of success on the merits, (2) irreparable harm absent the injunctive relief, and (3) a balance of equities in movant's favor.<sup>1</sup>

Assuming the merits and equities are in the executor's favor, a preliminary



injunction will likely issue as the "subject of the action" is a unique painting and the estate stands to be irreparably injured if possession is not secured.

Now assume the merits and equities again favor the movant, but rather than a unique chattel, the subject of the litigation is money, such as the return to the estate of cash gifts allegedly made by the decedent, a dispute over a joint account with right of survivorship, or an alleged monetary loss to the trust for which a surcharge is sought.

With respect to the "irreparable harm" element, it has long been recognized that alleged economic loss, compensable by money damages, does not constitute irreparable harm.<sup>2</sup> Similarly, courts have long recognized that the purpose of a preliminary injunction is not to secure an anticipated money judgment.<sup>3</sup> Thus, generally, where the

subject of a dispute is money and a money judgment is sought, courts will not grant injunctive relief.<sup>4</sup>

Surrogate's Courts have adhered to this general rule and departed from it under certain circumstances. We examine these cases, identify patterns that emerge and explore considerations as to why strict adherence to this rule may not be appropriate in Surrogate's Court practice.

### Judgment-Proof Respondent

Surrogate's Courts have granted preliminary injunctive relief when the responding party may not be able to satisfy a money judgment. *In Estate of Stanton*, 953 N.Y.S.2d 554 (Surr. Ct. Bronx Cty. 2012), the administrator of the estate brought a SCPA 2103 proceeding alleging the estate's entitlement to

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the proceeds of joint bank accounts with right of survivorship alleged to have been established when the decedent lacked capacity and/or was unduly influenced by the respondent. After decedent's death, respondent closed the accounts and deposited the proceeds into an account in his sole name. The court granted the administrator's motion for a preliminary injunction and enjoined both the respondent and the bank from transferring/utilizing the funds in respondent's account pending the conclusion of the proceeding.

The Surrogate noted that "respondent might have insufficient funds at the conclusion of the litigation to pay the judgment that may eventually be entered" (id. at \*3), and referred to "respondent's own statement that the funds at issue might be necessary to support his lifestyle, together with his failure to document that he has sufficient assets to repay the estate should that be necessary." Id. The court further observed that questions as to "the elderly respondent's mental capacity, arising in part from his repeated inability to not remember events during his deposition, ... also raise a concern as to whether he will retain sufficient assets to satisfy any judgment that might be entered." Id.

However, a Surrogate may not presume there is a risk of a judgment-proof respondent, where no such evidence has been proffered. *Testament of Raffé*, supra, involved the contested accounting of a testamentary trustee. A business owned by the trust, operating at a loss for years, was kept afloat by loans from the trust with an outstanding balance in excess of \$5 million. The objectants contended the trustee permitting continued losses by the company was exacerbated by these loans of which, objectants claimed, the trustee had no reasonable expectation of repayment. The trustee disputed these allegations.

The court denied the objectants' motion for a temporary restraining

order (TRO) restraining the trustee from transferring, loaning or otherwise using any trust assets for the benefit of the trust-owned company without further order of the court. The Surrogate concluded that a surcharge would make the objectants whole, observing that "there [was] no indication either way of [the accounting fiduciary's] financial ability to answer for any damages." Id. at \*3.

On the other hand, where very significant potential damages are estimated, Surrogate's Courts have concluded that a surcharge would provide insufficient compensation, even absent evidence of the fiduciary's economic situation. Thus, the court in *Matter of Kalikow*, Surr. Ct. Nassau Cty. File No. 340361/Dec. No. 237 (March 28, 2007),<sup>5</sup> restrained preliminary executors from completing and filing that portion of any estate tax return concerning the valuation of the assets of a marital deduction trust, established for the decedent's benefit under her predeceased husband's will and now includable in her taxable estate.

The marital trust held a partnership interest, which in turn owned income producing real estate. The preliminary executors and decedent's children (who were co-trustees and beneficiaries of trusts continuing from the now terminated marital trust) each had obtained appraisals of the underlying real estate that, according to decedent's children, were over \$10 million apart. The parties also disagreed over the valuation discount that was to be applied.

The decedent's children sought to restrain the preliminary executors from filing decedent's estate tax return until the children's request for suspension of the preliminary executors' letters, and for issuance of limited letters for the purpose of filing said return themselves, were determined. The children argued that if the preliminary executor's appraisal and stated discount were used for the return, the trust would be subject to substantial unnecessary estate tax—

possibly upwards of \$25 million—that might require liquidation of the trust's assets.

In granting the injunction, the court noted that decedent's children had established irreparable injury absent the injunction, observing that "a surcharge remedy in the accounting proceeding may be insufficient given the significant amount of potential damages ... ." Id. at 15.

### Potential for Asset Dissipation

Preliminary injunctions have been granted where there are serious allegations of wrongdoing by a party, thereby calling into question that party's trustworthiness to satisfy a money judgment. In *Matter of Kalichman*, 820 N.Y.S.2d 648 (3d Dept. 2006), the decedent suffered a severe brain injury in 1994. By 1999 his mental capacity deteriorated to the point where his long-time accountant and attorney each questioned decedent's capacity. Further, medical records indicated decedent was incompetent to make certain financial decisions after 1999.

Decedent's daughter commenced a proceeding challenging financial transactions allegedly orchestrated by, and benefitting, her mother and brother. Her primary claim was that, in March 2000, her mother and brother caused decedent to give all his stock in two closely-held corporations (valued at \$10 million) to her mother who, in turn, placed the stock in a grantor retained annuity trust. Pursuant to this trust, drafted by the brother's attorney, the mother was the sole annuitant for its three year duration and the brother was the sole trustee and remainderman. Decedent's two daughters claimed this scheme reduced the probate estate from in excess of \$10 million to \$800,000.

The Surrogate granted a preliminary injunction restraining the mother and brother from transferring, encumbering or otherwise disposing of these assets.

In affirming, the Appellate Division viewed as “compelling” the testimony of the decedent’s longtime attorney and accountant that decedent would not be able to comprehend the stock transaction and, further, that decedent had always emphasized his desire to treat his three children equally in his estate plan. The Appellate Division held: “Given the seriousness of the allegations of undue influence committed by both decedent’s wife and son, petitioner’s concern that the assets would be dissipated absent the preliminary injunction is well taken.” *Id.* at 651.

Likewise, *Estate of Urban*, 2007 N.Y. Misc. LEXIS 6124 (Surr. Ct. Queens Cty., Aug. 20, 2007), addressed a temporary restraining order granted to the administrator of decedent’s estate in the context of a turnover proceeding seeking the return of monies in joint accounts. The administrator alleged that decedent lacked the requisite mental capacity and that the respondent fraudulently induced and unduly influenced the decedent.

Respondent admitted to procuring and filling out the documents necessary to create the joint accounts, making gifts to herself and her family from these accounts, being decedent’s attorney-in-fact and in a confidential relationship with the decedent, who, respondent further admitted, was suffering from mild dementia when the subject accounts were created.

The TRO restrained the respondent, and certain financial institutions, from withdrawing, encumbering or transferring the funds in the accounts until the conclusion of the proceeding. Citing *Kalichman*, *supra*, the court denied respondent’s motion to vacate the TRO and found, *inter alia*: “Given the seriousness of the allegations of undue influence, fraudulent inducement, and decedent’s lack of capacity, Petitioner’s concern that the assets would be dissipated absent the [TRO] are well taken.” *Id.* at \*5.

Nevertheless, as with the alleged risk of a judgment-proof respondent, *Estate of Brooks*, *supra*, illustrates that Surrogate’s Courts are not inclined to presume that a respondent is dissipating assets so as to render a potential money judgment ineffectual.

In *Brooks*, the objectant in a contested accounting proceeding sought a preliminary injunction enjoining an accounting fiduciary from encumbering or transferring the fiduciary’s own assets pending the settlement of her account. In denying the requested injunctive relief, the court held that the objectant failed to establish the insufficiency of an award of money damages, as her “allegations that petitioner may dispose of her assets prior to [objectant] securing a judgment [were]

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insufficient to grant the relief requested.” *Id.* at \*4, citing *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000). The Surrogate further noted the objections sought a monetary award and that injunctive relief is not generally available where a party may be fully compensated with such an award.

In *Credit Agricole*, the court of Appeals held that where a plaintiff fears that defendant will secret property during the pendency of the action and render a money judgment uncollectable, the appropriate remedy is generally attachment (CPLR 6201), not an injunction. *Id.*, 94 N.Y.2d at 548.<sup>6</sup>

### Difficulty With Damages

In certain cases, Surrogate’s Courts have issued preliminary injunctions,

although it was alleged that the petitioner could be compensated by money damages, upon finding that such damages would be prohibitively difficult to prove or compute. Thus, for example, in *Estate of Rothko*, 336 N.Y.S.2d 130 (Surr. Ct. N.Y. Cty. 1972), the court issued a preliminary injunction restraining the executors of artist Mark Rothko’s estate from selling Rothko’s paintings pending the proceeding to suspend and/or remove them.

Acknowledging that the petitioner sought money damages and the authority that irreparable harm is not shown when such damages are sought, the court found injunctive relief was warranted due to highly conflicting estimates of the paintings’ values, based in part on decedent’s artistic reputation. The court concluded that “irreparable damage has been amply demonstrated in this proceeding.” *Id.* at 136.<sup>7</sup>

Further, in *Kalikow*, *supra*, injunctive relief was granted due, in part, to the difficulty decedent’s children would face, absent the injunction, in proving that the IRS would have accepted a lower value of the trust assets had the lower value (based on their appraisals and proposed discount) been used in the estate tax return, a showing required in order to substantiate the preliminary executors’ surcharge.

### Joint Account Cases

Finally, as seen in *Stanton* and *Urban*, *supra*, Surrogate’s Courts have granted injunctive relief where joint accounts are involved, even though “the subject of the action” is money. *Estate of Sanabria*, 2011 NY Slip Op. 51802(U) (Surr. Ct. Bronx Cty., Oct. 13, 2011), is another example.

In *Sanabria*, the temporary administrator alleged the sole asset of the estate was a joint account decedent held with his daughter. The temporary administrator noted the account’s signature card did not contain survivorship language

and, in correspondence with the daughter's attorney in August 2011, alleged it was a convenience account. The court granted a TRO restraining daughter from reducing the account to an amount less than \$108,000, representing the approximate value of the decedent's spouse's elective share.

On the October 2011 return date, at which the daughter failed to appear, counsel for the administrator informed the Surrogate that he learned the daughter withdrew a total of \$358,000 from the account and closed it, with most of the withdrawals occurring in August (the same time when the attorneys for the daughter and administrator were exchanging correspondence on the issue). The administrator requested that the court enjoin the daughter from transferring or disposing of all funds that had been in the joint account, regardless of current location. Observing the rule that injunctive relief is not generally available where a party may be fully recompensed with a monetary award, the Surrogate granted this relief.

The court concluded that the petitioner "demonstrated the estate will suffer irreparable injury and a balancing of the equities in his favor, as the alleged assets of the estate were entirely withdrawn [from the joint account] and transferred by [decedent's] daughter at a time when she was fully cognizant of the estate's claim of right thereto through the decedent . . . Thus, the status quo should be maintained and the alleged assets of the estate preserved pending a determination of the competing claims of entitlement to the funds at issue." *Id.* at \*2.

## Conclusions

Although the subject of the litigation is money, and money is fungible, the joint account cases may be viewed as an extension of a line of cases, mostly in the context of commercial litigation,

granting injunctive relief where a specific, identifiable fund is at issue.<sup>8</sup>

More broadly, though, the role of the Surrogate is different than that of a judge in another court deciding rights and claims as between a plaintiff and defendant. That the Surrogate has independent and ongoing responsibility to protect the estate (the overall "subject of the proceeding"), is seen, *inter alia*, in his or her power to remove a fiduciary *sua sponte*<sup>9</sup> and, in the absence of any objection, rule upon the sufficiency of an accounting<sup>10</sup> and the genuineness of an instrument offered for probate.<sup>11</sup>

As one Surrogate observed:

[A]ny dispute over the assets of a decedent's estate necessarily involves more than just a plaintiff and defendant. Instead it involves the testator as well as all the beneficiaries and persons interested in the estate, who may be infants, incapacitated persons, unknown persons, charities or creditors of the decedent. . . . It is the unique responsibility of the Surrogate to consider the effect upon all these persons of any resolution of a dispute over estate assets and to see to it that the interests of all the beneficiaries of the estate are protected . . .

The Surrogate in a turnover proceeding has just as much responsibility to see to it that all the beneficiaries of the estate are protected as he or she does in a probate or accounting proceeding. Furthermore, if assets are fraudulently or negligently removed from the estate, the intent of the testator is defeated.<sup>12</sup>

Thus, as seen above, considerations related to the unique function of the Surrogate's Court, including its responsibility to the estate and for the interests of those who may not be parties to the dispute in which injunctive relief is sought, support the Surrogate's being afforded broad discretion with respect to the application of the general rule that where money damages are sought, injunctive relief is not appropriate.

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1. *Nobu Next Door v. Fine Arts Housing*, 4 N.Y.3d 839 (2005).

2. *Testament of Raffé*, 312197/S, NYLJ 1202647519848 (Surr. Ct. Nassau Cty., March 7, 2014).

3. *Fatima v. Twenty Seven-Twenty Four Realty*, 885 N.Y.S.2d 224 (2d Dept. 2009); *Dinner Club v. Hamlet on Olde Oyster Bay Homeowners Assn.*, 801 N.Y.S.2d 25 (1st Dept. 2005).

4. See, e.g., *Testament of Raffé*, *supra*; *In re Rice*, 963 N.Y.S.2d 327 (2d Dept. 2013) (affirming Surrogate's Court's denial of an injunction, where plaintiff sought money damages, underscoring the conclusion that money damages were sufficient); *Estate of Brooks*, 2005 N.Y. Misc. LEXIS 8282 (Surr. Ct. Suffolk Cty., Jan. 7, 2005); *Will of Nelson*, 487 N.Y.S.2d 777 (1st Dept. 1985) (vacating a TRO granted by the Surrogate's Court, where the party who obtained the TRO failed to show that money damages would not suffice, and in fact sought money damages).

5. The authors' law firm represented one of the preliminary executors in that case.

6. See also *Lauder v. Jacobs*, 809 N.Y.S.2d 482 (Surr. Ct. Westchester Cty. 2005), *aff'd*, 826 N.Y.S.2d 719 (2d Dept. 2006), denying estate administrator's motion for an order of attachment with respect to decedent's funds transferred to defendant, but directing defendant and account holders to notify plaintiff and court, in writing, of withdrawals over a certain amount.

7. See also *Matter of Brion*, 2012 WL 5456384 (Surr. Ct. Kings Cty. 2012).

8. See *Credit Agricole*, *supra* (denying injunction on the basis that, unlike in cases cited by the plaintiff, plaintiff did not claim rights to a specific fund rightly regarded as "the subject of the action" under CPLR 6301); see also *Destiny USA Holdings v. Citigroup Global Markets Realty*, 889 N.Y.S.2d 793, 798 (4th Dept. 2009) (recognizing that "preliminary injunctions have been awarded where the subject action involves a specific fund"); *Amity Loans v. Sterling Nat. Bank & Trust Co. of New York*, 575 N.Y.S.2d 854, 855 (1st Dept. 1991) (finding that, "[a]lthough injunctive relief is not appropriate in actions . . . where the movant has an adequate remedy at law for monetary damages, . . . injunctive relief is appropriate to remedy the conversion of identifiable proceeds").

9. SCPA 719.

10. *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995).

11. SCPA 1408.

12. *Matter of Milnes*, 11/22/2002 NYLJ 29, (col. 2) (Surr. Ct. Broome Cty.).