

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Commission to take testimony

In *In re Levine*, the court denied a request by the petitioner for an open commission to take the deposition of non-party witnesses in Florida. Pending before the court was a contested discovery proceeding, in which the executor of the estate sought information from the decedent's surviving spouse regarding, *inter alia*, certain personal and household effects contained in a Florida home that had been owned by the decedent. The application was opposed by the decedent's spouse. The court opined that in order to justify the issuance of a commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate that the information sought is material and necessary to the prosecution and defense of claims, and that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or cooperation of the witness either in New York or the other state. Absent such a showing, the moving party has failed to sustain his burden of demonstrating that a commission is necessary or convenient. Based upon the foregoing, the court held that while the petitioner had demonstrated that the testimony and information

sought was relevant, the application was devoid of information concerning the efforts, if any, made by petitioner's counsel to obtain the cooperation and voluntary appearance of the non-party witnesses. Accordingly, the motion for a commission was denied, without prejudice.

***In re Levine*, N.Y.L.J., Apr. 22, 2013, at 32 (Sur. Ct. Nassau County)**

In Terrorem Clause

In *In re Weintraub*, the Surrogate's Court again had occasion to examine the safe harbor provisions of EPTL 3-3.5 and the provisions of SCPA 1404, within the context of the decisions in *Baugh*, *supra*. and *Singer*, *supra*. Before the court was an application by the decedent's son to examine the associate of the attorney-draftsman and attorney who supervised the execution of the propounded instrument pursuant to the provisions of SCPA 1404, in order to avoid triggering the instrument's in terrorem clause. The court noted that following the decision in *Singer*, the legislature amended the provisions of both EPTL 3-3.5 and SCPA 1404 to authorize the court, upon a showing of special circumstances, to permit the examination "of



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any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will." The record revealed that the decedent had been diagnosed with Alzheimer's disease prior to the execution of the will,

which occurred in the hospital, and that two days prior to executing the will, she was confused as to how she wanted to dispose of her estate, and did not recall speaking with the attorney-draftsman about her testamentary plan, although she had done so. Based upon these circumstances, the court granted the application, finding that special circumstances existed to permit the requested examination as part of the SCPA 1404 examination.

***In re Weintraub*, 2103 NY Slip Op 5107 (U) (Sur. Ct. Nassau County)**

Disclosure

In *re Selvaggio*, a contested probate proceeding, the court granted the objectant's request for, *inter alia*, financial records, including income tax returns, accounting records and books, and bank records of a corporate non-party. The record revealed that the corporation was either solely owned

by the decedent, or owned jointly by the decedent and one or both of the petitioners. Thus, the court held that the relationship between the family members in the closely held corporation, and particularly the existence of any transactions between them as shareholders, appeared relevant to the issue of undue influence. Moreover, the court found that the records were relevant to the decedent's financial status, and thus to the issues of fraud, and again undue influence, where the value of the decedent's estate is a proper scope of inquiry. The court directed that the records be produced for a period that extended beyond the scope of the three year/two year period concluding that the objectant had submitted sufficient evidence of a continuing course of conduct of undue influence or a scheme to defraud the decedent.

***In re Selvaggio*, N.Y.L.J., Oct. 17, 2013, at 25 (Sur. Ct. Queens County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is immediate past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.