New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 27
MONDAY, AUGUST 10, 2015

Trusts and Estates update

Expert Analysis

Discovery Matters, Will Revocation Issue, Reformation of Trust

By **Ilene Sherwyn Cooper**

With the advent of spring, the Surrogate's Courts have been actively engaged in offering instruction to practitioners on a variety of issues affecting trusts and estates. This month's column, addressed to the scope of discovery, the revocation of wills, jury demands, and the reformation of trusts, provides some highlights.

Stay of Discovery Sought

Before the Surrogate's Court, Queens County, in *In re Eshagian*, was a proceeding pursuant to SCPA 2103, seeking the discovery and turnover of estate assets, in which the respondent, the decedent's brother, moved for a stay and for a protective order denying the document demand by the petitioners, the decedent's wife and daughter.

The record revealed that the decedent and the respondent were engaged in the business of owning and managing real estate until the decedent's death in May 2003. Since that time, the petitioners were involved in multiple contested proceedings with the respondent concerning the ownership and valuation of real and personal property, worth several million dollars.

In the pending proceeding, the petitioners sought to examine the respondent regarding the entities involved in the management of the real estate in order to determine the extent and valuation of the decedent's ownership interest. To that extent, the court issued an order to show cause directing the respondent to appear and be examined, and to deliver to the petitioners all of the decedent's records, as well as all other information, in his possession, concerning these issues. Following the issuance of the order, the petitioners served a demand for discovery and inspection of documents pertaining to 21 of the real estate entities. In response, a motion seeking a stay of the proceeding and protective order regarding the document demand was filed.

Respondent argued that a stay should be imposed pending the outcome of a separate proceeding filed by him against the petitioners in the Surrogate's Court, allegedly dealing with the same issues as the pending proceeding. That separate proceeding was the subject of two appeals by the petitioners, which had yet to be decided.

> In 'Eshagian' the court denied respondent's motion for a protective order to the extent it sought to strike petitioners' notice for discovery and inspection.

The court opined that, except where otherwise prescribed by law, it had the discretion to grant a stay of proceedings in order to "avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." *Matter of Tenenbaum*, 81 AD3d 1187, citing *Zonghetti v. Jeromack*, 150 AD2d 561, 563. A stay should not be granted, however, unless the other action presents complete identity of parties, causes of action and relief sought.

Within this context, the court concluded that there was no basis to delay the prosecution of the SCPA 2103 proceeding due to the pendency of appeals in the separate proceeding that had been instituted by the respondent. In particular, the court noted that the subject of those appeals was its dismissal of counterclaims alleged by the petitioners, on grounds that they had been improperly made. On this basis, the court held that it would unduly delay the administration and final distribution of the estate to impose a stay on the SCPA 2103 discovery proceeding, particularly since that proceeding had been properly commenced. Accordingly, that branch of the respondent's motion seeking a stay was denied.

With respect to his demand for a protective order, respondent argued that Article 31 discovery was not permitted during the inquisitorial phase of an SCPA 2103 proceeding. The court disagreed and found the cases cited by the respondent inapplicable under the current statutory scheme regarding pre-trial discovery. Significantly, the court opined that CPLR 3120 provides that a party may serve any other party with a notice for discovery and inspection "after commencement of an action." The court acknowledged that although issue in the pending proceeding had not yet been joined, the proceeding had nevertheless been commenced, thereby making the provisions of CPLR 3120 applicable. The court declined to adopt the position of other courts that had found otherwise, concluding that the analysis of those opinions was based upon outdated and repealed statutes.

Accordingly, the court denied respondent's motion for a protective order to the extent it sought to strike petitioners' notice for discovery and inspection. On the other hand, it held that respondent need not produce several categories of documents that had been demanded, which petitioners already had in their possession.

In re Eshagian, NYLJ, June 9, 2015, at p. 29 (Sur. Ct. Queens County).

Whether Will Was Revoked

In *Matter of Powers*, the Surrogate's Court, Oneida County, was confronted with objections by the decedent's surviving spouse, who alleged that the propounded instrument had been revoked by the decedent prior to his death. Simultaneous with the filing of her objections, the decedent's spouse moved for summary judgment denying the will probate, and the proponent cross-moved for summary judgment striking the objections.

ILENE SHERWYN COOPER *is a partner with Farrell Fritz in Uniondale and the past-chair of the New York State Bar Association's Trusts and Estates Law Section.*

The propounded will was a typewritten instrument, but at the top of the first page, there were—handwritten and dated, in red by the testator—the words: "This Will is no longer valid." In addition, the testator indicated that after two years of consideration, she hand-wrote a new will, which she requested be "honored," until she was able to get the instrument "officially changed" and typed. Attached to the instrument, were 12 sheets of paper containing the testator's handwriting and signed by her. Notably, these handwritten sheets were never re-done in typed form prior to the testator's death. Moreover, none of the words of the testator on the top of the propounded instrument touched or obliterated any part of her will. Nevertheless, the objectant maintained that the testator revoked her will pursuant to the provisions of EPTL 3-4.1, which allows a will to be revoked by an act of burning, tearing, cancelling, or obliteration by the testator.

The court opined that when words of revocation and the signature of the testator are written directly across the face of a will, it obliterates the words on the instrument, thereby reflecting the intent of the testator to revoke it. However, in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute. Further, in response to the objectant's claim that the instrument had been cancelled by a writing, the court held that in order to be effective, such writing had to be executed in accordance with the statutory formalities of a duly executed will. Inasmuch as those formalities had not been complied with, objectant's argument failed.

Accordingly, based upon the foregoing, the proponent's motion for summary judgment was granted, and the objections to probate were dismissed.

In re Powers, NYLJ, July 14, 2015, at p. 29 (Sur. Ct. Oneida County).

Late Jury Demand Rejected

Before the Surrogate's Court, Kings County, was a request to file a late jury demand in a probate proceeding and three discovery proceedings, which sought the turnover of assets. The movant was the petitioner in the probate proceeding and one of the three discovery proceedings, and the respondent in the other two discovery proceedings.

The record revealed that the objectants in the probate proceeding had originally demanded a jury trial, but later withdrew their demand in writing at a pretrial conference. In support of his request to file a late demand in that proceeding, the movant argued that he inadvertently failed to request a jury trial after the objectants had withdrawn their demand. Further, he maintained that each of the discovery proceedings had been stayed after issue had been joined, and as such, his time to interpose a jury demand in those proceedings was also stayed.

Initially, the court found specious the movant's argument that his time to request a jury demand had been stayed. Indeed, the court noted that the stays in each of the discovery proceedings took effect after the time within which to make a jury demand had expired.

Generally, the provisions of SCPA §502 require a respondent to make a jury demand at the time of filing an answer or objections, and a petitioner to make a jury demand within six days after service of the answer or the objections upon him. Failure to timely file a jury demand results in a waiver of the right to make such a demand. However, the court opined that notwithstanding the foregoing time limitations, it had the discretion to allow the late filing of a jury demand upon a showing that there would be no prejudice if the extension were granted, that the failure to timely file was inadvertent, and the party requesting leave has done so promptly.

According to the court in 'Powers,' in view of the fact that none of the words written by the testator at the top of the instrument defaced the subject will, it could not be concluded that she revoked the instrument by physical act in conformity with the statute.

Within this context, the court noted that the movant's request for an extension of time in the probate proceeding was a year late, and his delay in the discovery proceedings ranged from three to nine months. In view thereof, the court held that even if the movant's failure to timely demand a jury trial was unintentional, and an extension would not prejudice the parties, his inordinate untimeliness in seeking relief warranted denial of his application.

Accordingly, the motions for an extension of time to file a jury demand in the probate and discovery proceedings were denied.

In re Marrelli, NYLJ, April 28, 2015, at p. 30 (Sur. Ct., Kings County).

Reformation of Trust Granted

Before the Surrogate's Court, Suffolk County, was an uncontested application by the petitioner, the decedent's niece, as successor trustee/beneficiary of the Victor Larson Revocable Trust, the trustee/beneficiary of the Victor Larson Irrevocable Trust, and beneficiary of the decedent's will for a construction of certain enumerated dispositions of the three instruments.

The record revealed that pursuant to the terms of his revocable trust, created on July 1, 2008, the decedent directed that $25,000 of the trust funds be distributed to each of his two grandsons, and the remainder thereof be distributed to his niece and nephew. It also appeared that the same day he executed the revocable trust, the decedent executed his will, wherein he directed that the residue of his estate pour over and be distributed in accordance with the terms of his revocable trust, or, in the event the trust could not be located, in accordance with the same dispositive scheme as set forth in the revocable trust instrument.

Several years after the execution of the foregoing documents, the petitioner, acting under decedent's power of attorney, met with counsel to discuss Medicaid planning on the decedent's behalf. As a result of that meeting, the petitioner created the irrevocable trust on behalf of the decedent, the terms of which mirrored the terms of the Revocable Trust and Will.

Unfortunately, the decedent died one month later, without all of his assets having been transferred into the Irrevocable Trust. The unintended result thereof was the existence of assets remaining in the decedent's name for disposition under both the revocable and irrevocable trusts, and a duplication of the bequests to the decedent's nephews, i.e., pursuant to the terms of the revocable trust, as well as the terms of the irrevocable trust. Accordingly, the petitioner requested that the irrevocable trust be amended to delete the bequests thereunder to the nephews.

The court opined that while it may be reluctant to construe a trust instrument when the language is unambiguous, it would be within its purview to reform the instrument in order to effectuate the settlor's intent. Toward that end, the court observed that it was required to review the dispositive scheme set forth in the decedent's will and trust instruments, and all the facts and circumstances surrounding the preparation of those documents. With this in mind, the court held that it was clear that the irrevocable trust was intended to maintain the integrity of the decedent's testamentary plan, and as such, to insure that the decedent's nephews receive bequests of only $25,000 each from the decedent's estate.

Accordingly, in order to effectuate the settlor's intent, the court held that the irrevocable trust should be reformed in order to delete the specific bequests to the decedent's nephews.

In re Larson Irrevocable Trusts, NYLJ, June 26, 2015, at p. 43 (Sur. Ct. Suffolk County).

Reprinted with permission from the August 10, 2015 edition of the NEW YORK LAW JOURNAL © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-08-15-24 Farrell