

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Issues Affecting Estate Litigation and Practice

Litigation in the Surrogate's Court often brings with it a multitude of issues affecting the outcome of an estate litigation. These issues often involve pre-trial disclosure, standing, and the conduct of trials. This month's column provides some insight.

### Discovery of Tax Returns

The past six months have been witness to decisions from the Surrogate's Courts of Richmond and Bronx counties addressed to the production of the personal income tax returns of a fiduciary.

In *In re Ambrosio*, NYLJ, Oct. 6, 2015, at p. 26 (Sur. Ct. Richmond County), the court was confronted with a contested probate proceeding, in which the objectants moved for contempt against the petitioner for not providing discovery, and petitioner cross-moved for a protective order against some of respondents' discovery demands.

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In support of their motion for contempt, the objectants claimed that petitioner had failed to comply with the court's order, dated in November 2014, directing that all outstanding discovery be completed expeditiously. The court noted that following the

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issuance of this order, a conference of the matter was held, in January 2015, at which the petitioner's counsel informed the objectants that he would be filing a motion for a protective order against certain of the discovery sought. With this in mind, and more particularly, the relatively short interval between the issuance

of the November order, and the conference of the matter, the court, in the exercise of its discretion, declined to hold petitioner in contempt.

Petitioner's cross-motion for a protective order was addressed to various document demands and interrogatories pertaining, most notably, to his personal tax returns, other financial accounts, and personal relationships with his children, former spouse and the decedent. As to the discovery of the petitioner's financial information, the court opined that despite New York's liberal rules of disclosure, the discovery of personal financial records, including tax returns, are generally disfavored. In fact, an individual's income tax returns are not discoverable absent a strong showing that the information is indispensable to the matter and cannot be obtained from other sources.

However, the court noted that this policy is not without its exceptions particularly when the conduct of a fiduciary is at issue. In such instances, discovery of financial and tax information has been directed when the party seeking such information has

established a direct relationship between the information sought and allegations of self-dealing and divided loyalty against the fiduciary.

Within this context, the court found that at the present stage of the proceeding, the respondents had not made a sufficient showing as to warrant production of the financial information sought. Accordingly, the court granted the petitioner's request for a protective order, without prejudice, should, at a later time, respondents establish a clear nexus between the information and the objections to probate based on lack of testamentary capacity and undue influence.

Following the decision in *Ambrosio*, the Surrogate's Court, Bronx County, in *In re Marcus*, NYLJ, Nov. 24, 2015, at p. 27, also found that the application for the production of the successor trustee's personal tax returns was premature. Before the court was a contested accounting proceeding by the successor trustee of a testamentary trust, in which the objectant, one of the decedent's two daughters, moved to compel the fiduciary to produce her individual state and federal income tax returns for the period of her stewardship, or, in the alternative, authorization to obtain these records from the taxing authorities. The successor trustee was the decedent's second spouse; the beneficiaries of the trust were the objectant and her sibling, who was the executor of the estate.

The estate accounting, which was judicially settled in April 2015, revealed that the successor trustee received approximately \$15 million in assets from the estate, consisting principally of residential properties,

as well as some artwork and cash. During the course of her stewardship, some of these properties were sold. To this extent, the accounting of the successor trustee, which had been compelled, revealed that at the time of each building or apartment sale, the trust had been running at a deficit, all of which was being financed by the trustee from her personal funds. The accounting further indicated that any profit received from the sale of the properties was utilized to eliminate the deficit or to pay applicable taxes, and that the principal balance on hand was only \$500,000.

In her objections to the accounting, the decedent's daughter alleged, inter alia, self-dealing, fraud, gross negligence and imprudence by the successor trustee in her management of the assets of the trust estate, and sought surcharges, denial of commissions and attorney fees. The motion for discovery followed.

In support of her application, the objectant alleged that the tax returns of the fiduciary were relevant given her representations in her accounting that she utilized personal funds to keep the trust afloat financially. The successor trustee opposed, claiming, inter alia, that there had been no showing that the information sought could not be obtained from other sources, that the objectant had made discovery demands on third-party sources for the information, and that the court had no power to order the taxing authorities to turn over personal tax records. The objectant replied that discovery of the income tax returns was warranted due to the allegations of fiduciary misconduct, fraud and self-dealing.

Quoting from the opinion by the Surrogate of Richmond County, in *In re Ambrosio*, the court opined that discovery of personal tax returns was generally not available absent a strong showing that the information was indispensable to the matter and could not be obtained from another source. However, as in *In re Zirinsky*, 26 Misc3d 625 (2009) and *In re DeSantis*, 38 Misc3d 1216(A)(2013), the court noted that when there are allegations of self-dealing and usurpation of trust assets by a trustee, production of the fiduciary's individual income tax returns will be ordered. Significantly, though, the court observed that in each of these cases, the allegations against the fiduciary were buttressed with uncontroverted facts obtained through discovery.

In contrast, the court found that although the trustee in the pending proceeding had placed her personal wealth and the liquidity of the estate in issue, discovery was in its initial stages, document production remained incomplete, examinations before trial had not been held, and, as such, the allegations that the trustee had engaged in self-dealing had not been buttressed by anything obtained through discovery. Moreover, the court noted that the objectant had failed to establish that the information could not be obtained through other sources. Accordingly, the motion was denied, without prejudice, to renewal at a later time.

### Scope of Examination

Before the Surrogate's Court, New York County, in *In re Liebowitz* was a probate proceeding in which one of the three respondents, the decedent's

son, moved to depose the decedent's long-time business manager pursuant to SCPA 1404, and to extend the scope of that examination beyond the three-year/two-year time period otherwise authorized by the provisions of Uniform Court Rule 207.27.

The record revealed that the decedent died, testate, at the age of 96, survived by his son, as his sole distributee. Her estate, at death, was approximately \$50 million. The propounded instrument was the last of 29 testamentary instruments drafted by the proponent for the decedent in the last 12 years preceding her death. Pursuant to the pertinent provisions of the propounded will, the decedent provided her son with a 5 percent annuity in a \$3 million trust fund, bequeathed approximately \$10 million to charities and individuals, including the proponent and the business manager, who each received \$1 million, and named the proponent as executor and trustee of the estate, with the power to distribute the residue to such charities as he selected. Notably, the instrument also contained an in terrorem clause.

According to the decedent's son, the propounded instrument may have been the product of undue influence exercised by the proponent in concert with the business manager. Proponent was introduced to the decedent by the decedent's former attorney, who employed the business manager as a paralegal. The business manager became a regular resource upon whom the decedent relied for decades, and concededly had an ongoing role in the process by which the propounded instrument was prepared, albeit as nothing more than a scribe.

Generally, pursuant to the provisions of SCPA 1404(4), any party to a probate proceeding may examine any or all of the attesting witnesses to the propounded instrument, the person who prepared the will, and, in the event the instrument contained an in terrorem clause, the nominated executors in the will and the proponents. In addition to the foregoing, the court observed that when there is an in terrorem clause in a propounded will, a party may move for leave to examine, based upon special circumstances, 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.

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In *Ligreci*, a motion for a protective order quashing a subpoena was supported by an affirmation of objectant's counsel, rather than an affidavit by the objectant... The court concluded that objectant's counsel lacked standing to challenge the propriety of the subpoena, since it was his client whose property rights or privileges may have been violated by its issuance.

Considering the fact that the propounded instrument contained significant bequests to the draftsman and business manager, that a bequest to an attorney draftsman creates an inference that it was the product of undue influence, that the decedent's business manager conceded that he was intimately involved in her

affairs as well as his involvement in the preparation of the will, the court determined that special circumstances existed for the examination of the decedent's business manager, pursuant to SCPA 1404(4).

Further, the court opined that while the general scope of an examination before trial is limited by the provisions of Uniform Court Rule 207.27, otherwise known as the three-year/two-year rule, exceptions have been found in circumstances where there is an evidentiary basis for finding undue influence, and/or the propounded will contains an in terrorem clause.

Accordingly, under the circumstances, the court authorized the scope of the examination to be expanded so as to cover the period from the date the first of the decedent's 28 wills was prepared through the date of the decedent's death.

*In re Liebowitz*, NYLJ, Feb. 29, 2016, at p. 23 (Sur. Ct. New York County) (Sur. Anderson).

### Standing

In *In re Ligreci*, the Surrogate's Court, Richmond County, was confronted with a motion for a protective order quashing a subpoena served on the objectant in a contested accounting proceeding. The motion was supported by an affirmation of objectant's counsel, rather than an affidavit by the objectant. In view thereof, the court raised the issue of whether counsel had standing to seek a protective order.

The court opined that standing is a concept utilized to insure that a justiciable controversy is presented to the court. The requirement of standing is satisfied if it can be

said that the plaintiff has a legally protectable and tangible interest at stake in the litigation. Further, citing *Matter of Selesnick*, 115 Misc2d 993 (1982), the court observed that “a subpoena may only be challenged by the person to whom it is directed or by a person whose property rights or privileges may be violated.”

Based on the foregoing, the court concluded that objectant’s counsel lacked standing to challenge the propriety of the subpoena, since it was his client whose property rights or privileges may have been violated by its issuance. Additionally, the court held that inasmuch as the attorney’s affirmation in support of the motion was not based on his personal knowledge, it had no probative or evidentiary value. Finally, and in any event, the court found that the information requested by the subpoena bore a reasonable relationship to the issues raised by the objections to the petitioner’s account. Accordingly, the motion to quash the subpoena was denied, without prejudice.

*In re Ligreci*, NYLJ, Mar. 21, 2016, at p. 30 (Sur. Ct. Richmond County).

### Motion for Jury Trial Denied

In *In re Sinzheimer*, the Surrogate’s Court, New York County, was confronted with a motion by the petitioners for an order deeming their jury demand timely filed, or in the alternative, for an order permitting them to file the demand in the discretion of the court.

The underlying proceeding concerned the provisions for the removal and appointment of trustees contained in a family trust established by the decedent and his wife. Pursuant to these provisions, one of

the individual trustees of the trust removed the then-acting corporate co-trustee. That individual trustee subsequently resigned, and another individual trustee was appointed in his place and stead. However, a successor corporate trustee was never appointed to replace the corporate fiduciary that had been removed.

Petitioners, the decedent’s wife and the individual trustee of the trust, sought delivery of the trust assets from the former corporate fiduciary, which refused to transfer same pending the appointment of a successor corporate fiduciary in its place, or an order of the court. Accordingly, petitioners instituted the pending proceeding claiming that the former corporate trustee was wrongfully withholding trust assets, and seeking a court order enforcing the removal of the fiduciary and delivery of the trust estate.

In the alternative, the petitioners requested, inter alia, damages for what they characterized as the corporate trustee’s conversion of trust funds. The court noted that the former corporate fiduciary never unequivocally denied the individual trustee’s right to the assets, but took the position that a corporate co-trustee had to be appointed to serve with him.

Within this context, the petitioners sought a jury trial of the issues raised. The court opined that a right to a jury trial is dependent upon whether the cause of action is legal or equitable in nature. If the nature and substance of the relief sought is legal in nature, a right to a jury trial exists; if it is equitable in nature, there is no right to a jury trial.

With this in mind, the court analyzed the allegations in the petition, and observed that the charges of conversion against the corporate trustee were more in the nature of equitable claims for breach of fiduciary duty. Indeed, although the petitioners’ contentions were couched in terms of a refusal by the corporate trustee to convey title, the court concluded that the issue raised was not one of title, but rather, the corporate trustee’s right, under the circumstances, to temporarily withhold delivery of trust assets pending a determination as to whether a successor corporate trustee was required to be appointed in its place and stead. This issue, concluded the court, was not lodged in a claim for conversion.

Further, the court held that although petitioners had requested damages as an alternative remedy, full relief could not be accorded the parties without a construction of the subject trust instrument, which was an equitable claim, not subject to a trial by jury.

Accordingly, based on the foregoing, the court denied the petitioners’ motion.

*In re Sinzheimer*, NYLJ, April 26, 2016, at p. 27 (Sur. Ct. New York County) (Sur. Mella).