

## Discovering the Undiscovered

When a will has gone missing, or assets cannot be found, the issue usually becomes the subject of a Surrogate's Court proceeding. The past several months have seen decisions addressed to such issues, each of which are instructive to the practitioner.

**Presumption of Revocation Rebutted.** Before the Surrogate's Court, New York County (Anderson, S.), in *In re Kalt*, N.Y.L.J., May 1, 2018, at p. 18, was an uncontested proceeding pursuant to SCPA 1407 for probate of a photocopy of the purported will of the decedent. The proponent, who was the decedent's son, was the nominated executor under the instrument, and he and his brother were the sole beneficiaries of the decedent's estate.

The record revealed that the decedent died with an estate valued at approximately \$12 million to \$16 million. According to an affirmation filed by the lawyer who supervised the

By  
**Ilene  
Sherwyn  
Cooper**



execution of the will, the decedent had told her that he had arranged with the proponent to pick up the instrument from her office, and arrange for its safekeeping. The proponent confirmed that he retrieved the instrument from counsel's office several days later, and placed it in a safe deposit box owned by him and the decedent at a savings bank. However, thereafter it appeared that a burglary took place at the bank where the will was maintained, which involved a breach of the safe deposit boxes at the site. Following the burglary, the will could not be found.

The court recognized the general rule that when an original will last in the possession of the testator cannot be found after death, it is presumed to have been revoked by the testator with the intention of doing so. Nevertheless, the court acknowledged that this presumption can be rebutted

under appropriate circumstances demonstrating that the testator had no intention to revoke the instrument.

In view of the foregoing, the court found the evidence inconsistent with any intention by the testator to revoke his will, and held that the presumption of revocation had been rebutted. Moreover, based on the record, the court admitted the will to probate as a lost will, pursuant to SCPA 1407.

**Eviction Ordered in a Proceeding to Recover Estate Asset.** In *In re Kulukundis*, N.Y.L.J., June 15, 2018, at p. 19, the Surrogate's Court, New York County (Mella, S.) granted an application by the executors of the estate pursuant to SCPA 2103, directed respondent to vacate a cooperative apartment at The Pierre Hotel, in which the estate had an interest, and ordered the respondent, the decedent's surviving spouse, to provide the executors reasonable access to the premises on 48 hours' notice.

The record revealed that the subject apartment was held by a closely held corporation that was 100 percent owned by the decedent's estate. The apartment had not been specifically bequeathed, though respondent

ILENE SHERWYN COOPER is a partner with Farrell Fritz, P.C. in Uniondale, where she concentrates in the area of trusts and estates. She is the past-chair of the New York State Bar Association's Trusts and Estates Law Section.

was residing in it, and as such, it had been maintained since the decedent's death by the executors. The petitioners had allegedly commenced the turnover proceeding in order to fulfill obligations under a contract they had entered into for its sale.

The respondent objected to the petition, claiming that the contract of sale was invalid, that she had never consented to the sale of the apartment, that there was no economic need to sell the premises, as the estate could easily afford to continue to maintain it, and that the size of her elective share would likely require that she receive the apartment or the proceeds of its sale.

The court rejected each of respondent's contentions holding, in the first instance, that the issue as to the validity of the contract was not at issue. Moreover, the court opined that the executors had a duty to marshal the estate assets, and to prevent waste, and were not required to seek prospective approval of their administration from a person interested. The remedy for any breach of fiduciary duty would be addressed in an accounting. Finally, the court noted that the elective share of the estate claimed by the respondent was a pecuniary amount, and thus did not entitle her to ownership or use of a specific asset.

**Defense of Lifetime Gifts Held Insufficient to Preclude Inquiry Pursuant to SCPA 2103.** Before the Surrogate's Court, Suffolk County, in *In re Pietropinto*, N.Y.L.J., Oct. 18, 2018, at p. 44, was an application by the executor of the decedent's estate pursuant to SCPA 2103 seeking an

inquiry and return of estate assets.

Pursuant to the provisions of the decedent's will and codicil thereto, the decedent devised and bequeathed her estate equally among her four children, but noted in her codicil that she had gifted her real property in Brooklyn to three of her children, with the intent of equalizing the interest of all four children in her estate, since she had previously made lifetime gifts to her fourth child, the respondent, and the respondent's family.

The subject proceeding by the executor sought information pertaining to any personal property that the decedent had an interest in

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at the time of her death, as well any other estate assets. The respondent opposed the application contending that the decedent had made lifetime gifts to her children of all of her jewelry and personal property, and that all such assets had been distributed according to her wishes. In reply, the executor claimed that he was entitled to engage in an inquiry as to the status of estate assets.

The court noted that during the inquisitorial phase of a discovery proceeding pursuant to SCPA 2103, all that was required was a showing that a respondent possessed

or had information with regard to estate assets, provided that the proceeding was not being utilized for purposes of obtaining evidence for use in another matter. Although the court indicated that it was unclear why the executor singled out only the respondent as the subject of her inquiry, it observed that the pleadings fell within the ambit of the statute as an information gathering device for an estate fiduciary. Within this context, the court opined that while the decedent may have indeed made lifetime gifts of all of her assets, this defense raised by the respondent was not sufficient to derail the executor's request for her examination, particularly since a failure to conduct such an inquiry could subject her to a claim of breach of fiduciary duty.

Accordingly, the respondent was directed to appear for an examination pursuant to SCPA 2103.