



## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# Substantive and Procedural Issues Impact Surrogates' Decisions

**A**s summer began and came to an end much too quickly for us all, the Surrogate's Courts were busy producing opinions that impacted trust and estate practice, substantively and procedurally. Consider the following.

### The Advocate-Witness Rule

Before the Surrogate's Court, New York County, in *In re Christopher*, was a contested probate proceeding and a contested proceeding to remove the preliminary executor of the estate, a friend of decedent. The objectant, the decedent's brother, sought, inter alia, to disqualify three lawyers of the law firm representing the proponent of the will, who was the named executor, and the preliminary fiduciary, as well as the firm itself, on the grounds of the advocate-witness rule codified in Rule 3.7 of the Rules of Professional Conduct.

In pertinent part, Rule 3.7 prohibits a lawyer from acting "as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact..." or "another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client..."

ILENE SHERWYN COOPER is a partner with Farrell Fritz in Uniondale.

By  
Ilene  
Sherwyn  
Cooper



The court opined that Rule 3.7 was not to be applied mechanically, but was designed to offer guidance as to whether disqualification in a given case was warranted. To this extent, a court is required to balance the appearance of impropriety or harm to a party if disqualification is denied against a party's right to retain counsel of his/her own

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choosing. The court observed that the party seeking disqualification has the burden of establishing that such a drastic remedy is necessary.

Notably, the record revealed that the petitioner's counsel had represented the decedent for many years prior to her death, counseled her with respect to estate planning, and drafted the

instrument offered for probate. In his objections to probate, the decedent's brother alleged that the petitioner wrongfully took control of the decedent's assets, and was named her executor and principal beneficiary of her estate through the exercise of undue influence, while she was in a diminished state.

Within this context, the decedent's brother alleged that two of the lawyers in the firm facilitated the petitioner's control of the decedent's financial affairs, by permitting, among other things, his involvement in the decedent's will-drafting process. As to the third lawyer, who was serving as trial counsel, the decedent's brother alleged that his testimony about post-death events was necessary at trial.

The court observed that while the attorneys disputed the substance of the allegations made by the decedent's brother, they conceded that the two lawyers involved in the preparation of the decedent's will would be called as trial witnesses and thus were not representing the petitioner in the proceeding. As a result, outside counsel was retained to assist the third lawyer in the firm with the litigation.

Further, counsel alleged that disqualification of the firm would be prejudicial to the petitioner by depriving him of the firm's institutional knowledge of the decedent and her testamentary plan.

The court opined that there was no per se rule barring an attorney-drafter from representing a will proponent during the pre-trial stages of litigation. Moreover, the court found that there had been no showing that the attorney handling the litigation was a necessary witness at trial, or that any of the attorneys in petitioner's firm would be adverse to the interests of their client so as to require the disqualification of the entire firm. Accordingly, in light of the circumstances, the court denied the objectant's motion, without prejudice to renewal, should facts emerge that would shift the balance in favor of disqualification.

*In re Christopher*, NYLJ, Aug. 18, 2016, at p. 22 (Sur. Ct. New York County) (Anderson, S.).

### Invoking Privilege

In *In re Koeppel*, the Surrogate's Court, New York County, was asked to consider whether the respondent could be compelled to answer questions asked of him during a hearing for criminal contempt, despite his assertion of the privilege against self-incrimination. More specifically, the court was asked to consider whether the privilege could be invoked within the context of a proceeding for criminal contempt, and if so, whether it was waived by the respondent when he filed an affidavit in opposition to the proceeding with the court. As a general matter, SCPA 606 and 607, together with the Judiciary Law, Section 750, et al., allow for criminal contempt when a respondent fails to comply with a court order or decree directing the payment of a sum of money or the performance of an act.

Relying on a decision by the Supreme Court in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911), the court held that the privilege could be asserted in the pending proceeding.

As to the second issue, the court held that while a respondent in a criminal contempt proceeding may waive his or her right to assert the privilege against

self-incrimination, the statements by the respondent in his affidavit did not operate to do so. Rather, the court found that the affidavit was in the nature of a pleading that denied the allegation that his disobedience of court orders was willful. The court noted that the filing of a pleading, even one which contains affirmative defenses, does not constitute a waiver of the privilege, so long as the information that it provides is not incriminating.

To this extent, the court observed that no incriminating evidence, other than perhaps knowledge of the orders themselves, was revealed in the affidavit. An assertion of innocence, or a denial of guilt, could not be considered incriminating. Indeed, the court found that the respondent could not afford to forgo the filing of the affidavit, as to do so would have placed him in jeopardy of a default.

Accordingly, mindful of the principle that "courts must indulge every reasonable presumption against waiver of fundamental constitutional rights" (citing *Bradley v. O'Hare*, 2 AD2d 436 (1st Dept. 1956)), the court found that respondent did not waive his right to invoke his privilege against self-incrimination, and overruled petitioner's objection to his assertion of his 5th Amendment rights.

*In re Koeppel*, NYLJ, Aug. 12, 2016, p. 30 (Sur. Ct., New York County) (Mella, S.).

### Suspension of Letters

Before the Surrogate's Court, Richmond County, in *In re LaForgia*, was a petition for, inter alia, a compulsory accounting filed by the decedent's son against his two sisters, who were the co-executors of the estate. The petition was joined by the guardian ad litem appointed for a disabled grandchild of the decedent. The application was opposed by the co-executors, as well as the decedent's wife.

The record revealed that the decedent died, testate, survived by his wife and

three children. The pertinent provisions of his will included numerous provisions for tax-savings mechanisms and estate planning, including testamentary trusts. The court noted that these provisions of the will were seemingly ignored by the fiduciaries, who, significantly, failed to fund the subject trusts, including one for the decedent's disabled grandson. In addition, the court observed that the executors paid approximately \$750,000 in legal fees to various law firms, purchased an additional parcel of real property in excess of \$2 million, and expended an additional \$300,000 in unidentified administration expenses.

Most egregiously, the court found that the co-executors had willfully violated a temporary restraining order and had failed to fulfill their fiduciary obligations essentially since their appointment.

Opining that fiduciaries are required to conduct themselves with utmost loyalty and the "punctilio of honor," the court concluded that the co-executors, despite their representation by counsel, had evidenced an unfamiliarity with their duties to the estate and its beneficiaries, by failing to fund the trusts created under the decedent's will, liquidating a brokerage account in order to purchase a \$2 million parcel of real property, incurring excessive administration expenses, and removing funds from an estate account despite a court order restraining them from doing so.

Accordingly, in view of the foregoing, and in order to preserve the balance of the estate, and to safeguard it from further depletion, the court, sua sponte, suspended the letters testamentary issued to the co-executors pending a hearing as to their continued eligibility to serve.

*In re LaForgia*, NYLJ, Sept. 6, 2016, at p. 29 (Sur. Ct. Richmond County).