

TRUSTS AND ESTATES UPDATE

Expert Analysis

The Close of 2016 Provides Useful Instruction

As we conclude the year and look forward to 2017, we continue to appreciate the instruction we receive from Surrogate's Court opinions addressed to trusts and estates practice. Toward that end, the final months of 2016 were distinguished by decisions involving joint bank accounts, probate proceedings and the scope of discovery, and removal. Consider the following.

Bank Account Question

In re Asch involved a dispute between two sisters, co-executors of their mother's estate, over a joint bank account between one sister and the mother. The Surrogate's Court, Richmond County, denied the petitioner's motion for summary judgment determining that she was entitled to 50 percent of the bank account titled in the joint name of the decedent and the respondent

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while finding the petitioner failed to submit the requisite proof to rebut the presumption that the account was a validly created joint account.

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daughters, who were her sole surviving heirs. The instrument was admitted to probate by the court, and letters testamentary issued to the decedent's daughters, as the nominated co-executors of her estate. Thereafter, one of the co-executors commenced a discovery proceeding against her co-executor/sister seeking recovery of a joint bank account in the name of the decedent and the

respondent. The petitioner then moved and the respondent cross-moved for summary judgment with respect to the issue of whether a valid joint account had been created.

The court found that the survivorship language on the bank documents triggered the statutory presumption that the account was a joint account with right of survivorship. Nevertheless, the court opined that the presumption could be rebutted by direct proof that no joint account was intended, or substantial circumstantial proof that the joint account was opened for convenience only. Further, the court noted that the validity of a joint account may be attacked for fraud, undue influence or lack of capacity, with the burden of proof resting on the party asserting such claims.

In support of her claim that the subject account was created as a matter of convenience, the petitioner alleged that the decedent was the sole depositor in the account, the creation of the joint account conflicted with the decedent's testamentary

plan of dividing everything between her two daughters, and, with few exceptions, the account was used exclusively by the decedent. Nevertheless, the court found that the petitioner had failed to support these contentions with documentary proof or testimony from a person with first-hand knowledge as to the circumstances surrounding the creation of the account.

In reaching this result, the court found it significant that no proof had been offered as to how the respondent treated the subject account during the decedent's lifetime, or how, if at all, she characterized her interest in the account on her tax returns, or to third parties. As such, the court held that the petitioner had failed to submit the requisite proof to rebut the presumption that the account was a validly created joint account.

On the other hand, the court found that the medical proof offered by the petitioner and the respondent created a question of fact as to whether the decedent possessed the requisite capacity to create the joint account. Indeed, while the records submitted by the petitioner indicated that the decedent was disoriented and suffered from decreased memory and orientation, the reports submitted by the respondent revealed that she was alert and oriented, fluent in her speech, and that her comprehension was intact.

Accordingly, given the disparity in the decedent's mental capacity at or about the time the subject account was created, the court found an issue of fact as to whether the decedent had the capacity to convert the account in question into a joint survivorship account, and denied the petitioner's motion and the respondent's cross-motion for summary judgment.

In re Asch, NYLJ, Sept. 28, 2016, at p. 28 (Sur. Ct. Richmond County).

Three-Year/Two-Year Rule

As discussed in prior columns, the three-year/two-year rule limits the scope of examinations and discovery in contested probate proceedings to the period three years prior to the date of the propounded will, and two years thereafter, or to the decedent's date of death, whichever is the shorter period. See Uniform Court Rule (U.C.R.) 207.27; see also *In re Liebowitz*, NYLJ, Feb. 29, 2016, at p. 23 (Sur. Ct. New York County) (Sur. Anderson) (addressing testimony); *In re Christie*, NYLJ, April 14, 2016, at p. 34 (Sur. Ct. Suffolk County) (addressing documents).

In *In re Esposito*, the Surrogate's Court, Suffolk County, again had occasion to address the provisions of U.C.R. 207.27, and refused to direct the production of unexecuted wills or trust instruments outside the scope of the three-year/

two-year period. Before the court in the underlying probate proceeding, was a motion by the respondents, the decedent's three children, seeking, inter alia, an order compelling the petitioner, the decedent's surviving spouse, to produce documents responsive to their Notice for Discovery and Inspection. In pertinent part, the respondents' document demand sought originals and copies of executed and unexecuted wills and/or trust instruments without limitation to the period proscribed by the three/two rule. Petitioner opposed the motion and cross-moved for a protective order.

Both petitioner and respondents relied on the decision in *In re Manoogian*, NYLJ, Feb. 28, 2014, p. 22 (Sur. Ct. New York County) for their position. The court observed that in *Manoogian*, the court addressed the issue of production of prior wills beyond the scope of the three-year/two-year period, and held that because the production of a will can be compelled from any person, pursuant to the provisions of SCPA 1401, regardless of its date, prior testamentary instruments should be discoverable irrespective of U.C.R. 207.27, unless there was some basis for issuing a protective order. Respondents asked that the holding in *Manoogian* be expanded to authorize discovery of all executed and unexecuted wills and trust instruments.

The court rejected the respondents' request, reasoning that the provisions of SCPA 1401 do not apply to unexecuted wills or trust instruments, and thus, no basis existed for directing the production of these documents beyond the period established by U.C.R. 207.27. In view thereof, the court directed the production of wills, whether executed or unexecuted, within the three-year/two-year period, inasmuch as the petitioner alleged that she did not possess any trust instruments, within that time frame.

In re Esposito, NYLJ, Sept. 16, 2016, at p. 40 (Sur. Ct. Suffolk County).

Application for Removal

In *In re Carey*, the Surrogate's Court, New York County, denied a motion for summary judgment by the beneficiaries of the estate seeking removal of the executor.

The record revealed that the decedent died with an estate worth millions of dollars. Following his death, the decedent's brother, who was a domiciliary of Pennsylvania, and the respondent, who was a domiciliary of Connecticut, petitioned for letters testamentary and of trusteeship with respect to his estate. Although the respondent was not a citizen of the United States, he was identified in the probate petition as such. Subsequently, the decedent's brother petitioned to resign as co-executor

and co-trustee, and in each of those applications, the respondent was identified as a citizen of the United States.

Following an arbitration proceeding in which the respondent alleged that he was a citizen of Germany, the attorney general commenced the subject removal proceeding, contending that the respondent was ineligible to serve pursuant to the provisions of SCPA 707(1)(c), which provides that a "non-domiciliary alien" is ineligible to receive letters testamentary, except in the discretion of the court, and only with one or more co-fiduciaries, at least one of whom is a resident of the state. In addition, the petitioner claimed that the respondent's letters should be revoked on the grounds that they had been obtained by a false suggestion of a material fact, rendering him unfit to serve on the basis of dishonesty.

The respondent answered arguing, inter alia, that the work of the executors was near completion, and in addition, by challenging the constitutionality of SCPA 707(1)(c). Pending the return date of citation, the court suspended the letters testamentary and letters of trusteeship that had been issued to the respondent, and scheduled the matter for a hearing. Thereafter, respondent filed an affidavit stating that he had become a domiciliary of New York. A motion for

summary relief revoking the appointment of the respondent as fiduciary followed. The motion was opposed by the respondent.

Referencing the provisions of SCPA 713, the court noted that in a proceeding to revoke letters issued to a person, who was ineligible at the time letters were issued, revocation is not mandatory. In exercising its discretion in this regard, the court stated that, under the circumstances, it was required to consider whether the respondent deliberately misled the court. Although the respondent also challenged the constitutionality of SCPA 707(1)(c), the court observed that it was "obliged to avoid constitutional questions to the extent possible." Given the issues regarding respondent's possible deception, the court held that it was not required to consider the statute's constitutionality. Accordingly, the motion for summary judgment was denied.

In re Carey, NYLJ, Sept. 19, 2016, at p. 24 (Sur. Ct. New York County).