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TRUSTS AND ESTATES UPDATE

Unique Issues On the Road to Discovery

While discovery in the Surrogate's Court is generally guided by the provisions of the CPLR, it brings with it many unique issues and controversies. For example, while CPLR §3101 directs that "there shall be full disclosure of all matters material and necessary in the prosecution or defense of an action," Uniform Court Rule 207.27 circumscribes discovery in probate proceedings, absent a showing of special circumstances, to the period three years prior to the date of the propounded instrument and two years thereafter, or to the date of the decedent's death, which is the shorter period. Moreover, CPLR 4503(b) creates an exception to the attorney-client privilege in actions involving the probate, validity or construction of a will. Within this context, this month's column will examine decisions addressed to matters affecting discovery in the Surrogate's Court, including the privilege respecting material prepared in anticipation of litigation, disclosure of tax returns, open commissions, and the production of business records.

In Anticipation of Litigation

In *In re West*, the Surrogate's Court, New York County (Sur. Anderson), explored the scope and definition of the qualified privilege that attaches to material prepared in anticipation of litigation.

Before the court was an application by the proponent of the decedent's will to compel discovery of the objectants' notes memorializing their communications with non-party witnesses after the decedent's death. Objectants opposed the application, contending that the notes constituted material prepared in anticipation of litigation and were privileged. Additionally, objectants maintained that the documents fell outside the scope of the three-year/two-year rule and, therefore, were not subject to discovery.

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The record revealed that in the course of deposing objectants, the proponent learned that information contained in the subject notes formed the basis for the objections to probate. The information was derived from telephone calls and in person conversations with third parties pertaining to the decedent's estate plan and will. According to the deposition testimony, at the time of the conversations, the objectants were investigating whether they had grounds for opposing probate.

The court opined that while the provisions of CPLR 3101 generally require "full disclosure of all matter material and necessary in the prosecution or defense of an action," CPLR 3101(d)(2) provides a qualified privilege for materials prepared in anticipation of litigation or for trial. The court found that this privilege is limited to materials which are prepared exclusively for litigation, and imposes upon the party seeking to prevent disclosure the burden of proving that the privilege applies. To this extent, when the motive for preparing the materials is mixed, even if a predominant motive is for use in litigation, the privilege does not apply.

In considering whether materials fall within the scope of the privilege, courts have considered the time when the documents were created, the possible uses of the information, and the relationship between the informant and the person to whom the information was provided. Thus, by way of example, the court noted that materials prepared during the investigatory stage of what later becomes a litigation are generally not privileged, as "... reports prepared for the purpose of assisting a party in making the decision to litigate or not are considered to have a mixed purpose,

and therefore must be disclosed..." *Plimpton v. Massachusetts Mut. Life Ins.*, 50 A.D.3d 532, 533 (1st Dept. 2008).

Based upon the foregoing, the court concluded that when non-lawyers hold conversations to explore the facts that ultimately result in litigation, the notes derived from such conversations are not privileged.

Further, the court held that the subject documents were not shielded from discovery pursuant to the three-year/two-year rule. While the objectants argued that the subject notes were prepared after the decedent's death and therefore fell outside the scope of the rule, the court found that because the events described in the notes occurred within the time frame of the rule, they were subject to production.

In re West, NYLJ, Jan. 7, 2013, at 20 (Sur. Ct. New York County)(Sur. Anderson).

Subpoena to Prior Counsel

In *In re Soluri*, a contested probate proceeding pending in the Surrogate's Court, Nassau County, the named executor in the will moved to quash a subpoena duces tecum issued by the objectants to the decedent's prior counsel and for a protective order, on the grounds, inter alia, that the subpoena failed to comply with the notice requirements of CPLR 3101(a)(4), violated the attorney-client privilege, and sought information outside the scope of the three-year/two-rule set forth in Uniform Court Rule 207.27.

As to the issue of notice, the court opined that the provisions of CPLR 3101(a)(4) require that discovery sought from non-parties state the circumstances or reasons such disclosure is sought in order to afford the non-party with information regarding the dispute between the parties, and the opportunity to decide how to respond. The court held that although the decedent's prior attorney was aware of the reasons his testimony and records were sought, the subpoena failed to include the required notice, and was therefore, facially defective and unenforceable.

However, the court found that the information sought by the subpoena was not violative of the attorney-client privilege, and that special

circumstances existed entitling the objectants to the testimony and documents sought. Specifically, the subpoena requested information related to powers of attorney and health care proxies prepared on behalf of the decedent, including whether counsel who prepared the documents represented the decedent or a third party; copies of billing records; the purpose of telephone calls made to counsel's office; and whether counsel had seen the decedent during the period in which the propounded will was executed.

To this extent, the court determined that the attorney-client privilege does not shield the identification of an attorney's client, information as to whether telephone calls were made to request legal services, and an attorney's observations of a client. Moreover, the court held that testimony concerning the preparation of powers of attorney and health care proxies, as well as the reasons why counsel did not prepare the decedent's will, fell within the exception to the attorney-client privilege set forth in CPLR 4503(b). Finally, the court determined that special circumstances existed so as to extend the scope of discovery beyond the three-year/two-year period set forth in Uniform Court Rule 207.27.

Accordingly, the motion to quash the subpoena was granted, with leave to counsel for the objectants to re-serve with the inclusion of the required notice.

In re Soluri, NYLJ, Aug. 23, 2013, at 39 (Sur. Ct. Nassau County).

Personal Income Tax Returns

In a proceeding for removal of the trustee of a testamentary trust before the Surrogate's Court, Richmond County, the respondent moved for a protective order to prevent disclosure of his personal income tax returns for the years he served as a trustee, claiming that they were private and confidential in nature, irrelevant to the issues before the court, and that the petitioner had failed to demonstrate that the information contained in the returns could not be obtained from another source.

Petitioner opposed the motion contending that the information was discoverable due to respondent's status as a fiduciary and the allegations against him centered on his diversion of trust funds into his own accounts and fraud. Petitioner cited case law standing for the proposition that where substantial allegations of fraud and self-dealing on the fiduciary's part are at issue, personal tax returns are discoverable.

The court noted that while there is broad disclosure under Article 31 of the CPLR, there is a long-recognized exception to the general rule which shields an individual's personal income tax returns from disclosure absent a strong showing that the information is indispensable to a party's claims and is unobtainable from other sources. Citing *Matter of Zirinsky*, 26 Misc.3d 625

(Sur. Ct. Nassau County 2009), *Matter of Morrell*, 154 Misc. 356 (Sur Ct Kings County 1935), and *Matter of Romano*, 8 Misc.3d 1010 (Sur. Ct Nassau County 2005), the court recognized that a further exception to this rule exists where the conduct of a fiduciary is at issue.

Accordingly, based on the serious allegations of fiduciary misconduct at issue, and the relevance of the tax returns to both corroborate information and the respondent's credibility, the court held the returns were relevant to the proceeding and ordered that they be produced. Respondent's motion for a protective order was, therefore, denied.

In re Desantis, NYLJ, Jan. 23, 2013, p. 40 (Sur. Ct. Richmond County).

In 'Levine,' the court denied a request by the petitioner for an open commission to take the deposition of non-party witnesses in Florida.

Issuance of Open Commission

In *In re Levine*, the court denied a request by the petitioner for an open commission to take the deposition of non-party witnesses in Florida. Pending before the court was a contested discovery proceeding, in which the executor of the estate sought information from the decedent's surviving spouse regarding, inter alia, certain personal and household effects contained in a Florida home that had been owned by the decedent. The application was opposed by the decedent's spouse.

The court opined that in order to justify the issuance of a commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate that the information sought is material and necessary to the prosecution and defense of claims, and that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or cooperation of the witness either in New York or the other state. Absent such a showing, the moving party has failed to sustain his burden of demonstrating that a commission is necessary or convenient.

Based upon the foregoing, the court held that while the petitioner had demonstrated that the testimony and information sought was relevant, the application was devoid of information concerning the efforts, if any, made by petitioner's counsel to obtain the cooperation and voluntary appearance of the non-party witnesses. Accordingly, the motion for a commission was denied, without prejudice.

In re Levine, NYLJ, April 22, 2013, at 32 (Sur. Ct. Nassau County)

Discovery of Business Records

In a contested accounting proceeding with respect to the trust created under the decedent's will, pending before the Surrogate's Court, New York County, the decedent's surviving spouse, who was a co-trustee, income beneficiary and discretionary principal beneficiary of the trust, sought an order, *inter alia*, limiting the scope of her examination pursuant to SCPA 2211, and compelling the production of documents relating to the decedent's business, the primary asset of the trust estate.

The record revealed that during the course of her SCPA 2211 examination, the decedent's spouse was asked about her conduct as fiduciary, but also about the benefits she received from other testamentary trusts and *inter vivos* trusts having no relationship to her role as trustee. The court held that no authority existed for the proposition that a fiduciary may be questioned in an SCPA 2211 examination about matters entirely unrelated to his or her conduct as a fiduciary.

Although the scope of an SCPA 2211 examination is broad, the court opined that it nevertheless must bear upon the fiduciary's account and the administration of the trust or estate at issue. Further, the fact that Article 31 document discovery was available did not expand the scope of the examination. Accordingly, the court granted the request of the decedent's spouse to limit her examination to questions relating to her accounting and the subject trust of which she was a co-trustee.

With respect to the motion to compel the production of documents, the court directed that information be produced pertaining to the compensation of her co-trustee from the business asset, finding that the information was relevant, and was not ascertainable from other documents that had been produced to date. Further, the court held that documents be produced relating to charitable donations made by the business, including but not limited to the amount of the donation, substantiation for the donation made, and the name of each donee. Finally, despite arguments to the contrary by the spouse's co-trustees, the court held that her motion to compel production in response to her Third Notice of Discovery and Inspection was not premature, and that an affirmation of good faith, otherwise required in the Supreme and County courts, was not a prerequisite to seeking court intervention in the Surrogate's Court on an issue of discovery. Accordingly, the court granted the application of the spouse to the extent of directing the production of documents responsive to her Third Notice of Discovery and Inspection.

In re Modell, NYLJ, Oct. 11, 2013, at 44 (Sur. Ct. New York County) (Sur. Anderson).