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TRUSTS AND ESTATES UPDATE

Expert Analysis

# Article 31 in Surrogate's Court: The Road to Discovery

The past several months have seen significant decisions concerning Article 31 discovery in the Surrogate's Court. Addressed to such issues as electronic discovery, the costs of document production, the costs of document production, and digital assets. These opinions are discussed below.

By **Ilene Sherwyn Cooper**

## Discovery by Electronic Means Examined

The issue of discovery by electronic means is not frequently the subject of Surrogate's Court practice. In Richmond County, however, the court was confronted with two applications seeking such relief. One such decision was rendered in *In re Frizziola*, N.Y.L.J., Sept. 16, 2019, at 22 (Sur. Ct. Richmond County), in which the petitioner moved to conduct the SCPA 1404 examinations of the attorney-draftsperson and the witness to the will electronically, pursuant to the provisions of CPLR 3113(d). See also *In re Grunwald,* N.Y.L.J., 2019 NY Misc. LEXIS 5348 (Sur. Ct. Richmond County).

It appeared that the attorney-draftsperson resided in Colorado, but maintained a practice in New York. Petitioner also confirmed that the witness to the will resided in Florida with no remaining business or personal connection to New York. Neither the attorney-draftsperson nor the witness consented to voluntarily appearing in New York for their examinations, but both were willing to be examined by electronic means. In her supporting affirmation, petitioner affirmed that the attorney-draftsperson had a busy practice in Colorado, and small children at home, and that therefore travel for a deposition in New York would be an undue hardship. The attorney-draftsperson also submitted an affirmation, indicating that a deposition in New York would be a tremendous burden and expense, and stating that his testimony would be no different from the information he had supplied therein, i.e. that he recalled drafting the will and the pour over trust of the decedent.

Respondent opposed the application, alleging that the evidence failed to establish the threshold requirement of undue hardship. More specifically, the respondent alleged that the only undue hardship to the witness was purportedly attributable to his age and geographic distance. As for the attorney-draftsperson, the respondent pointed out that he was registered as a member of the New York Bar and as such was subject to the jurisdiction of the court.

The provisions of CPLR 3113(d) authorize the parties to an action or proceeding to stipulate to conducting a deposition by telephone or other remote electronic means. Nevertheless, the court noted that a unilateral request for such

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a deposition will only be granted where it is shown that an undue hardship would result by holding the deposition in the jurisdiction where the action is pending. A showing of mere inconvenience is not enough.

In view of the foregoing, the court denied the petitioner's application finding that because the attorney-draftsperson maintained a license to practice and an office in New York, he would not be faced with undue hardship by traveling to New York to be deposed. Further, the court held that absent the parties' consent, the deposition of the witness would have to take place in Florida, unless he was willing to travel to New York for this purpose. The costs of the examinations were directed to be borne by the petitioner, while the costs of travel were to be borne by the individual parties.

### The Costs of Document Production

In *In re Elghanayan*, N.Y.L.J., Sept. 25, 2019, at 24 (Sur. Ct. Queens County), non-parties moved, pursuant to CPLR 3122(d), to compel the respondents to defray the reasonable production expenses, including attorney fees, incurred in responding to a subpoena duces tecum in the pending contested trustees' accounting proceeding and a related proceeding. In response to the subpoena, the movants had collected and reviewed approximately 19,000 electronically stored documents. Of these, the movants deemed 11,650 to be responsive and non-privileged. These were provided to the attorney for the trustees for their review in advance of being produced. Thereafter, respondents were advised by movants' counsel of the completion of the document review, and the costs incurred in connection with the production for which payment was sought. The costs included the expense for retrieving and reproducing the documents, but also the legal fees, amounting to approximately $92,000, that had been incurred by movants in the process. Respondents' attorneys agreed to pay for the reproduction costs, but opposed paying for movants' legal fees.

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The court observed that CPLR 3122(d) provides for the "reasonable production expenses" of a non-party to be defrayed by the party seeking discovery. The rationale for this rule is lodged in the notion that a non-party should not be burdened with shouldering the costs of litigation to which the non-party is unrelated. Although the term "reasonable production expenses" was undefined, the court opined that logically, the costs of actual copying or reproducing documents, as well as labor related costs in the search, retrieval, and production of documents, and in the case of e-discovery, the charges of an e-discovery professional, should be considered within the scope of compensable expenses under the statute.

As to the issue of whether the non-parties legal fees should be included, the respondents argued that the non-parties should bear the cost of their own legal fees, since they had a business relationship with the fiduciaries, and thus were not the typical innocent bystander to the pending accounting proceeding. Moreover, the respondents contended that the fees sought were excessive, and that they had never been informed that legal fees would be sought in addition to reproduction costs. The movants argued that regardless of their business relationship with the fiduciaries, they were still non-parties in the accounting proceeding, and should be treated as such insofar as the issue of production costs were concerned. Additionally, they claimed that the breadth of the subpoenas, which the respondents had refused to limit, required a review of 20,000 documents, and an assessment by their counsel as to whether they were responsive, and not otherwise privileged.

Recognizing that there was a dearth of Surrogate's Court opinions on the issue, the court found the rules of the Federal courts and Commercial Parts

of Nassau County and New York City to be instructive. Additionally, the court considered the case law cited by the movants in support of their position that legal fees were recoverable. In view thereof, the court noted that no showing had been made in any of the papers as to why the information sought from the non-parties could not otherwise be obtained from the fiduciaries, or the records of the fiduciaries were inadequate. Further, the court remarked that in many cases, the costs of counsel's review of documents for privilege and relevance were borne by the producing party.

Accordingly, upon due consideration of the foregoing, the breadth of the subpoenas demands, the failure to reach an agreement on the scope of the subpoenas, the non-parties relationship with the fiduciaries in the management of the trust, and the respondents lack of prior notice that reimbursement for legal fees would be sought, the court directed that in addition to the expense incurred for the electronic discovery vendor, the movants were to be reimbursed the sum of $40,000 for reasonable legal fees and expenses.

## Limited Discovery of Digital Assets Authorized

In *In re Murray*, N.Y.L.J., Oct. 7, 2019, at 27 (Sur. Ct. Suffolk County), the court considered an unopposed application by a co-administrator of the decedent's estate for access to the account the decedent maintained with Apple, Inc. The decedent's sole distributees at death were his parents, both of whom were appointed fiduciaries of his estate.

The petitioner alleged that at the time of his death, the decedent was the user of an Apple iPhone 7, that she was the owner of the phone, and that the decedent had permission to utilize the device, and that he did so, exclusively. Further, petitioner alleged that she was of the good faith belief that the data within the phone contained information in the form of telephone records, voice messages and text messages received and sent by the decedent which would assist in determining the source of drugs obtained by him, and that this information was reasonably necessary for the administration of the decedent's estate. Thus, petitioner sought disclosure of the data and electronic communications via access to the decedent's Apple ID. According to petitioner, no state or federal law prohibited the requested disclosure, and that Apple had agreed to provide the requested access upon the issuance of an appropriate court order.

Although no one had appeared in opposition to the relief requested by the petitioner, the court nevertheless recognized, as did her predecessor, that an application for unfettered access to a deceased user's digital assets involves a delicate balance between a decedent's right to privacy and a fiduciary's duty to marshal assets.

Within this context, the court opined that while it was not unsympathetic to the concerns of the petitioner, and her desire to determine the identities of the individuals she believed were, in part, responsible for the death of her son, the petitioner had not established a sufficient nexus between the information requested and the administration of the decedent's estate.

Accordingly, noting the distinction between content and non-content based disclosure with respect to a deceased user, and that the decedent did not prohibit disclosure of his non-content based digital assets, the court directed Apple Inc. to disclose to petitioner solely the non-content based information contained on the decedent's cellphone; to wit, a catalogue of electronic communications sent or received by the decedent and digital assets associated with decedent's Apple ID, other than the contents of the electronic communications.