

## TRUSTS AND ESTATES UPDATE

## Expert Analysis

# A New Year Begins: Fiduciary Fees, SCPA 1404 Examinations and More

As the year 2021 came to an end, and working remotely and virtual court appearances remained the norm, the Surrogate's and Appellate Courts steadfastly continued to render decisions of interest impacting the field of trusts and estates. With the beginning of 2022 upon us, we consider the opinions that rounded out 2021, and those that opened the pages of the New Year.

**Decree of Probate Vacated; Fees of Former Fiduciary Partially Allowed.** Before the Surrogate's Court, Ulster County, in *In re Linich*, NYLJ, Dec. 20, 2021, at 17, was a contested accounting proceeding in which the executor of the decedent's estate objected to the payment of the legal fees, disbursements, and commissions requested by the former fiduciary.

The decedent died testate with a will dated in July, 2015, naming his business agent as his sole

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beneficiary and executor. The probate of that instrument was contested by the decedent's niece, who was the proponent of an earlier instrument, dated March 11, 2011.

The 2011 instrument was offered for probate in several submissions ending in May 2017, in which the decedent's niece affirmed at the time that there was no other testamentary instrument later in date. Because the court was not informed of the later will, the sole beneficiary thereof was never cited or made a party to the proceeding for probate of the earlier instrument, and the decedent's niece was appointed executor of his estate.

Thereafter, when she sought to recover certain of the decedent's assets in the possession of his business agent, he filed a request for

probate of the July 2015 instrument. That petition was ultimately granted, the letters testamentary previously issued to the decedent's niece were revoked, and she was directed to account.

In support of his objections to the accounting, the objectant argued that the decedent's niece had propped the earlier will in bad faith, and obtained its probate through a false suggestion of a material fact, pursuant to SCPA 711(2), 711 (4) and 2302(3)(a).

The court opined that it had the inherent power to vacate its own order if it was obtained by means of a material misrepresentation. In reviewing the record in this regard, the court noted that in her petition for probate, the decedent's niece averred, upon information and belief, that there was no testamentary instrument later in date to the instrument offered for probate.

Nevertheless, she subsequently acknowledged, under oath, that she was aware that the decedent was considering replacing the 2011 will, and that it had been the topic of multiple e-mails between her, the

decedent, and the objectant over the years prior to the decedent's death.

Indeed, the objectant confirmed that he had spoken with the decedent about his 2015 will, and stated that the decedent had informed him that he had discussed the instrument with his niece, who subsequently curtailed her weekly visits with him. Further, it appeared that following the decedent's death, his niece was informed by the objectant that he was the executor of the decedent's estate.

Based on this and other information gleaned from the record, the court found that the decedent's niece was possessed of sufficient information to form a belief that the decedent had signed a later will, and that she intentionally withheld this information at the time she offered the earlier will for probate. In view thereof, the court denied her commissions.

With respect to the legal fees sought, the court held that legal fees would be allowed only to the extent they benefitted the estate. To this extent, the court denied fees incurred by the decedent's niece in probating the earlier will, but found that the fees incurred by her in a discovery proceeding that led to the probate of the later will, and in the accounting proceeding, which was considered a necessary step in the administration of the estate, were compensable, and fixed them accordingly.

**Supplemental SCPA 1404 Examination Directed.** In *In re Seidelman*,

NYLJ, Dec. 20, 2021, at 17, the Surrogate's Court, Westchester County, was confronted with a motion by the objectants in a contested probate proceeding to compel the petitioner to produce documents and to appear, together with an associate, for continued SCPA 1404 examinations. The documents in issue included communications with the decedent, the decedent's financial

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advisor, and/or the decedent's accountant, diaries and/or calendars referencing meetings, phone calls, or other communications with the decedent, the financial advisor, and/or the accountant, time records of the petitioner referencing work performed for the decedent, and certain electronic files.

The decedent was survived by his daughter and a grandson, both of whom had filed objections to probate. Pursuant to the pertinent provisions of his will, the decedent bequeathed certain tangible personal property to his daughter, and directed that his net residuary estate be paid over to an inter vivos trust. The instrument nominated the petitioner, who was the attorney draftsman thereof, as the executor of the estate. The petitioner and his associate served as attesting witnesses to its execution.

In his affidavit in opposition, the petitioner indicated that he turned over to the objectants all the responsive documents in his possession and control, and that no other responsive documents existed in his files. In view thereof, the court denied that branch of objectants motion as moot, opining that a party cannot be compelled to produce documents that are not in his/her possession or control, and should not be required to create documents in order to comply with a discovery demand. However, the court held that to the extent that the petitioner failed to turn over any additional relevant documents in his possession, he would be precluded from offering them into evidence at trial, or some other appropriate remedy would be entertained.

As for the request for a continued examination of the petitioner and his associate, the court observed that a further examination of witnesses pursuant to SCPA 1404 is not readily granted. Nevertheless, in view of petitioner's failure to produce responsive documents prior to his and his associate's initial examinations, the court concluded that a supplemental examination was appropriate, but limited its scope to any documents that the petitioner failed to turn over to the objectants prior to the first examinations, any alleged inconsistencies between those documents and the documents previously produced, and the recordkeeping and notekeeping policies of petitioner's firm, generally, and specific to the matter.

**Court of Appeals Affirms Probate of Propounded Instrument.**

In *In re Kotsones*, 2022 N.Y. Slip Op. 00112, the Court of Appeals affirmed an order of the Appellate Division, Fourth Department, which reversed an order of the Surrogate's Court, Steuben County, denying probate to the probate instrument and invalidating certain lifetime transactions of the decedent on the grounds of undue influence.

The decedent died, testate, survived by a son and a daughter. The decedent's daughter and her son (herein "the petitioners") sought probate of a purported will of the decedent, and objections thereto were filed by the decedent's son. The son also filed a petition seeing to invalidate a lifetime trust and certain real estate transactions entered by the decedent, alleging, inter alia, that the propounded will and lifetime transactions were the result of undue influence perpetrated by the petitioners. After a nonjury trial, the Surrogate's Court sustained the son's claims and the petitioners appealed.

The Appellate Division reversed finding that the Surrogate's Court erred in concluding that a confidential relationship existed between the petitioners and the decedent, which triggered an inference of undue influence. The court observed that proof of a confidential relationship required a showing of inequality between the parties, or that one party exercised a controlling influence over the other.

To this extent, although the record established that the petitioners held

a position of trust with the decedent, and that the decedent's daughter assisted her with her finances and was named as her attorney-in-fact, it also demonstrated that the decedent was actively and personally involved in managing her real estate and estate plan.

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Moreover, the Appellate Division held that the Surrogate's Court erred in finding undue influence notwithstanding the absence of a confidential relationship. The court concluded that although the record demonstrated that the petitioners wanted to benefit from the decedent's estate, and that her daughter facilitated the execution of the propounded will and lifetime transactions, it failed to establish that the decedent's free will was overcome.

To the contrary, the court noted that the decedent had informed her attorney that she did not want the

petitioner to have any further power over her affairs, and worked with her attorney in revising her estate plan in order to exclude him. Indeed, the decedent's attorney testified that he never prepared a document that the decedent did not personally authorize, and the testimony of other non-party witnesses confirmed that the decedent, albeit with the assistance of her daughter, made independent decisions regarding her personal and financial matters.

Accordingly, the court dismissed the petition of the decedent's son and granted the application to admit the will to probate.

In a memorandum opinion, the Court of Appeals affirmed the order of the Appellate court, concluding, inter alia, that the Appellate Division applied the correct standards for determining whether a confidential relationship existed or whether undue influence was exercised.