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TRUSTS AND ESTATES UPDATE

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Recurring Points of Controversy

My July column in the New York Law Journal reported on Surrogate's Court decisions that addressed the subject of fiduciary removal and/or eligibility. Since the writing of that column, opinions continue to be rendered with respect to this all-too-frequent fodder for litigation, shedding light, as before, on the criteria invoked in the decision-making process.

In addition to the question of a fiduciary's ability to serve, the summer months also found Surrogates confronted with such recurring issues as the timeliness of objections to probate and the attorney-client privilege.

Finally, on the legislative front, the field of trusts and estates saw some significant developments affecting litigation and administration.

Fiduciary Removal and/or Eligibility

In *In re Estate of Anderson*, NYLJ, July 10, 2007, p.23 (Sur. Ct. Dutchess County), the residuary legatees under the decedent's will instituted separate proceedings requesting, inter alia, that the letters testamentary issued to the named executor under the instrument be revoked. The record revealed that prior to his appointment as fiduciary, the named executor pleaded guilty in the U.S. district court to one misdemeanor count of unlawfully receiving a portion of real estate settlement charges in violation of the Real Estate Settlement Practices Act. The Magistrate ordered the fiduciary to pay a fine and mandatory surcharge, but did not sentence him to any jail time or probation.

The court said that pursuant to the provisions of SCPA 707, a person is ineligible to receive letters if he is convicted of a crime constituting a felony under New York law. The court held that the crime for which the fiduciary pleaded guilty had no New York counterpart, and thus, was not a crime in New York so as to justify the fiduciary's removal.

The court further said that an individual may be found ineligible to serve as fiduciary if he does not possess the qualifications required by reason of dishonesty. To demonstrate dishonesty, it must be demonstrated that the nominated fiduciary has engaged in a pattern of financial



wrongdoing that poses a genuine, serious risk to the proper administration of the estate. Within these parameters, the court concluded that the fiduciary's misdemeanor conviction, although related to financial matters, did not constitute dishonesty sufficient to disqualify him. In particular, the court noted that the misdemeanor at issue was victimless, that the fiduciary was not ordered to serve any jail time or probation, and was not directed to pay restitution.

Accordingly, the court dismissed the proceedings.

Following the decision in *In re Estate of Anderson*, the court in *In re Estate of Walsh*, NYLJ, July 26, 2007, p. 29 (Sur. Ct. Richmond County) reached a similar result. Before the court was an application by the decedent's son requesting probate of the decedent's will, and the issuance to him of administration cta (*cum testamento annexo*, technically it means "with the will annexed") for the purpose of instituting a discovery proceeding against his sister.

The respondent filed objections to the issuance of letters to the petitioner, and requested, instead, that letters of administration cta issue to the public administrator, on the grounds that the petitioner was ineligible to serve by reason of dishonesty. Specifically, respondent alleged that the petitioner failed to offer the decedent's will for probate, although he had it in his possession, because it was to his financial advantage to bring an administration proceeding.

In denying the relief requested by the petitioner, the court held that dishonesty within the scope of the provisions of SCPA 707, defining eligibility of a fiduciary, relates to money matters, and requires proof that appointment of the individual seeking

letters would place the funds of the estate at risk. Based upon the proof presented, the court concluded that the respondent had failed to raise even a suspicion that the funds of the estate would be in jeopardy under the petitioner's stewardship. The court held that the mere allegation that the petitioner had failed to offer the decedent's will for probate, though in his possession, did not suffice to disqualify him from serving as fiduciary on the grounds of dishonesty.

Accordingly, the decedent's will was admitted to probate, and letters of administration cta issued to the petitioner.

As compared to the opinions in *Anderson* and *Walsh*, the court in *In re Estate of Hargrow*, NYLJ, Aug. 7, 2007, p. 35 (Sur. Ct. Bronx County), revoked the letters testamentary that had issued to the decedent's spouse based on her concessions that she had commingled the assets of the estate with her own, that she no longer wanted to assume the daily management of the estate due to ill health and age, and that she had failed to maintain the estate books and records, as well as allegations that she had distributed estate property to a person who was not a beneficiary under the will and had allowed estate property to be rented at below market rentals. Although the executrix disputed that she had undervalued the property rentals and offered to reimburse the estate for any improper distributions, the court concluded that her letters should be revoked.

With regard to the issue of the spouse's successor, the court held that the objectant's request to be appointed was premature as she was not the nominated successor fiduciary named in the decedent's will. Moreover, the court said that even if the named successor failed to qualify, the objectant might not be an appropriate successor given the hostility between her and the decedent's spouse, and the fact that her appointment could place her in a position of conflict with the estate by reason of her having to collect past due rents from herself.

Leave to File Late Objections

The past month has seen decisions in which the Surrogate's Court, in the exercise of discretion, has granted leave to file late objections to probate.

In *In re Estate of Foresto*, NYLJ, July 23, 2007, p. 37 (Sur. Ct. Suffolk County), the court granted the movant leave to file objections to probate despite the fact that the time to file objections had expired. Upon the initial return date of citation, objections to probate had been filed by two other parties,

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but not the movant, albeit jurisdiction had been obtained over the movant. Thereafter, an earlier will of the deceased was filed with the court and supplemental citation issued. Prior to the return date of supplemental citation, the movant sought to file objections.

The court said that the right to file objections is a substantial right that should not be lightly disregarded, particularly when the validity of a will is at issue. This is in keeping with the court's paramount duty to insure that the propounded instrument is indeed the last will of the decedent, and as such, to thoroughly evaluate any objections or potential objections.

In support of his application, the movant claimed that he never received a copy of the propounded instrument at his residence in Italy. However, once learning of the underlying proceeding, the record revealed that the movant retained counsel, who sought to file objections on his behalf, alleging lack of testamentary capacity, lack of due execution, fraud and undue influence. These objections were returned as untimely.

The petitioner claimed that the movant had failed to explain his seven-month delay in filing objections, or to demonstrate the likelihood of success of his claims. In response, the movant submitted the transcript of a hearing concerning the appointment of an article 81 guardian for the decedent wherein the court found, *inter alia*, that the decedent suffered from certain functional limitations that would cause him to be confused and disoriented at times, and impaired his ability to care for his personal and financial needs. Additionally, the record revealed that although the petitioner for probate was named as guardian of the decedent's person, she was removed as one of his attorneys-in-fact.

Based on the foregoing and in view of the fact that the litigated probate proceeding had just commenced, the court, in the exercise of discretion granted the movant leave to file his objections to probate.

In *In re Estate of McMullen*, NYLJ, July 23, 2007, p. 38 (Sur. Ct. Suffolk County), the court authorized late filing of objections to probate, but denied the movant's request to vacate his default in a discovery proceeding.

The record in the probate proceeding revealed that prior to the time for filing objections, after the completion of 1404 examinations, counsel for the movant sought to file objections to the issuance of letters testamentary to the petitioner, but not to the probate of the propounded will. These objections were returned, although they were served on petitioner's counsel. Thereafter, the objections were revised, served once again on petitioner's counsel, and submitted to the court for filing. They were returned at this point for being untimely.

In regard to the discovery proceeding, the record revealed that the movant was served by petitioner with an order to show cause for discovery that was returnable Aug. 1, 2006. The matter was adjourned on that date to Aug. 22, 2006. The movant was duly served in the proceeding but failed to appear or file a responsive pleading. Although movant claimed he submitted an affidavit in opposition to the order to show cause, no such affidavit was on file with the court.

In view of the foregoing, the court held that in the probate proceeding the movant had timely filed objections to probate, and served same on

petitioner's counsel, but that the objections had not been filed with the court for technical reasons related to the standing of some, albeit not all, of the parties. Given the court's duty to insure the validity of the will admitted to probate, in the exercise of discretion, the motion was granted.

On the other hand, with respect to the discovery proceeding, the court held that the movant had failed to provide a reasonable excuse for his default, and failed to establish that he would have a meritorious claim if he were permitted to answer. Accordingly, the movant's application to vacate his default in the discovery proceeding was denied.

The Attorney-Client Privilege

The attorney-client privilege has frequently been examined by courts and commentators in a number of contexts. Recent opinions follow suit, evaluating claims of privilege in an agency relationship and as between the fiduciary of an estate and counsel.

In a proceeding to determine the validity of a claim, the petitioners moved for an order directing the estate executors to produce all documents, recordings and transcripts of telephone calls. The estate responded by contending that the items were protected by the attorney-client privilege and not discoverable. In response, the movants alleged that the presence and participation in the conferences and calls of a co-executor's spouse deprived the estate of a claim of privilege.

The court said that the right to file objections is a substantial right that should not be lightly disregarded, particularly when the validity of a will is at issue. This is in keeping with the court's paramount duty to insure that the propounded instrument is indeed the last will of the decedent.

Citing *Stroh v. General Motors, Inc.*, 213 AD2d 267 (1st Dept. 1995) and *In re Nigro*, NYLJ, Oct. 5, 2004, p. 20, the court disagreed, finding that the co-executor's spouse served as her agent at the subject meetings and conference calls relative to what the court described as a very sizeable estate of approximately \$130 million.

With respect to the movants' request for communications between the executors and their attorneys in the presence of the estate accountants, the court held that communications between an attorney and client in the presence of an accountant as well as independent communications between the client and accountant are protected by the attorney-client privilege under certain circumstances. The court found, nevertheless, that while the executors made a plausible argument in support of the confidentiality of the records sought, they had simply done so in a footnote contained in their memorandum of law, rather than through an affidavit by a person with knowledge of the facts.

Accordingly, given the sums at stake, the court granted the executors additional time to submit their arguments relative to this issue in proper form.

In re Estate of Sosnow, NYLJ, July 13, 2007, p. 23 (Sur. Ct. Nassau County)

Before the court in *In re Estate of Darretta*, NYLJ, July 23, 2007, p. 37 (Sur. Ct. Suffolk County) was an application by the attorney for the petitioner in an underlying accounting proceeding for a protective order quashing a subpoena that had been issued to him by objectant's counsel. The subpoena requests the appearance of counsel at a deposition as well as the production thereof of various estate records. The movant claimed that the subpoena was improper, vague, sought disclosure of material protected by the attorney-client privilege, and was unnecessary as objectant's counsel had already examined the petitioner and the opportunity at that time to obtain the disclosure sought.

Objectant's counsel argued that the provisions of CPLR 4502(a)(2)(A) require disclosure, and that in any event, upon the revocation of the petitioner's letter testamentary, the attorney-client relationship between the petitioner and counsel ceased.

The court held that objectant's reliance upon CPLR 4503(a)(2)(A) was misplaced in that the statute was actually intended to prevent access to privileged communications between the fiduciary of an estate and the fiduciary's counsel, despite the fact that a fiduciary relationship exists between the fiduciary and beneficiary of the estate. Moreover, the court opined that once the privilege attaches it becomes permanent, and thus continues even after a fiduciary is removed.

Additionally, the court noted that because the attorney was a nonparty witness, the objectant was required to show special circumstances for the disclosure sought other than by claiming relevancy. The court held that such circumstances exist when, for example, it is shown that the subpoenaed information cannot be obtained through another source. Based upon this criteria, the court found that the objectant failed to make the requisite showing of need and accordingly, the movant's motion to quash the subpoena was granted.

Legislative Highlights

On the legislative front, SCPA 2211 was amended in order to authorize pre-objection document discovery in an accounting proceeding. In addition, the provisions of SCPA 2307-a were amended in order to extend the disclosure provisions to a nominated executor who is an employee of the attorney-draftsperson or an affiliated attorney, and to require that the testator be informed that any person, including the testator's spouse, child, friend or associate, is eligible to serve as an executor. Finally, the amendments made in 2004 respecting the model disclosure form were incorporated into the substantive provisions of the statute.