New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Web address: http://www.nylj.com

VOLUME 240—NO. 9 MONDAY, JULY 14, 2008 ALM



BY ILENE SHERWYN COOPER

# *Statute of Limitations, Eligibility and Disclosure*

The onset of summer has seen rising temperatures and a steady flow of productivity by the courts throughout the state as they continue to render opinions significant to the practice of trusts and estates. Attorney-fiduciary disclosure, fiduciary eligibility, and discovery are but a sampling of the issues confronted over the past two months, which will serve as the focus of this month's column.

## Disclosure Under SCPA 2307-a

In an uncontested probate proceeding, the court was confronted with the issue of whether the acknowledgement of disclosure submitted by the nominated attorney-fiduciary was in compliance with the dictates of SCPA 2307-a.

In support of his appointment, the petitioner submitted an acknowledgement executed by the decedent. The court noted that while the statements contained in the acknowledgment did not comply with the current requirements of SCPA 2307-a, they did appear to comport with those required by the statute at the time the acknowledgment was executed. Citing *Matter of Griffin*, 16 Misc3d 295, the court recognized that the acknowledgment was sufficient, despite its failure to comply with the statute effective on the decedent's date of death.

Nevertheless, the court noted that an essential element missing from the acknowledgment was the signature of the witness to the instrument. In an effort to cure this defect, the petitioner submitted an affidavit from the attorney who supervised the execution of the propounded will, who alleged that he witnessed the execution of the acknowledgment of disclosure along with the other two attesting witnesses. An affidavit of one of the attesting witnesses was also submitted, which alleged that she observed the decedent execute the disclosure statement.

The court said that while substantial compliance with the model disclosure provided by the statute will entitle an attorney-fiduciary to full commissions, omission of any of the material requirements of the acknowledgment will deprive an attorney-

fiduciary of the full statutory rate. To this extent, the court held that inasmuch as both model statements included in the statute contained a line for the witness' signature, the signature was a substantial component of the statutory requirement that could not be overlooked. Since the statute failed to provide any remedy for failure to include the signature of the witness to the statement, the court found, under the circumstances, that the petitioner could not utilize the affidavits of witnesses obtained post-mortem to rectify the omission, and that his commissions should be reduced to one-half.

***In re Estate of Wrobleski,* NYLJ, June 4, 2008, p. 41 (Surr. Ct. Kings County) (Surr. Johnson).**

## Eligibility of Named Fiduciary

Reported below are two decisions that addressed the eligibility of a named fiduciary under a propounded will. In the first decision, the court denied the issuance of preliminary letters testamentary to the named executor; in the second, the named executor was disqualified from serving.

In *In re Estate of Lurie*, application was made by the three executors named in the propounded will for preliminary letters testamentary.

The record revealed that shortly before the execution of the propounded instrument, the decedent, an artist, suffered from one or more strokes. The record further revealed that soon after the propounded instrument was signed, the decedent suffered a massive stroke which left him completely aphasic. Thereafter, he was confined to various hospitals and nursing homes.

Approximately six months before the decedent's death on Jan. 7, 2008, an action was commenced in Supreme Court on the testator's behalf, by Ms. Stein, an owner of an art gallery, purportedly in her capacity as decedent's attorney-in-fact. Ms. Stein alleged that the decedent had revoked a prior power of attorney that had been given to the attorney-draftsman of his will, on the grounds that he had mishandled the decedent's assets, and had refused to attend to his bills for medical and rehabilitative care. She stated that the decedent's mental faculties had not been affected by his stroke, and that her power of attorney had been fully read and explained to the decedent, and had been signed in the presence of a psychiatrist, who attested to the decedent's understanding of the document.

The attorney-draftsman disputed the validity of Ms. Stein's power of attorney, and denied that his own power had been revoked. He also claimed that Ms. Stein had assets of the decedent which she refused to turn over to him and had harassed decedent with daily telephone calls and visits. He also rejected the allegations against him of misconduct.

The Supreme Court litigation was ultimately resolved pursuant to an agreement, which, the surrogate found contained numerous and generous financial provisions for the benefit of Ms. Stein and the attorney-draftsman at the expense of the testator, including but not limited to provisions for payment of tens of thousands of dollars in legal fees for unspecified services performed by the attorney-draftsman, and the appointment of Ms. Stein as co-executor of the decedent's estate.

The testator died several days after the execution of the agreement, with an estate of approximately $30 million, and only one known distributee. The court noted that although the testator had made it clear to the attorney-draftsman that he wanted his estate to pass free of estate taxes, the propounded instrument as drafted failed to qualify for the charitable deduction contemplated by the decedent.

Pursuant to the pertinent provisions of the instrument, the named executors were the attorney-draftsman, and two other individuals, one of whom predeceased the testator, and the second, who held an interest in and managed real estate in which the testator's estate was a minority shareholder. The successor named in the instrument was the attorney-draftsman's wife. The instrument directed

**Ilene Sherwyn Cooper** *is a partner with the Uniondale firm of Farrell Fritz PC. In addition, she is a member-at-large of the New York State Bar Association Trusts and Estates Law Section.*

that the executors retain the attorney-draftsman as their attorney, and the attorney-draftsman and his wife were authorized to appoint a co- or a successor executor. Finally, contrary to law, the executors were authorized by law to pay themselves commissions without prior court approval.

The will left the decedent's entire estate to a Lichtenstein foundation allegedly created by the testator, with the direction that it pay $400 per month to a friend of the decedent for life. The instrument further provided that in the event the foundation was at least partially funded within a year from the executors' qualification, the residue of the estate would pass, in the discretion of the executors, to individuals and or organizations assisting Jewish settlers.

The record revealed that the estate was in need of the appointment of a preliminary fiduciary. However, based upon what it described as the troubling issues created by the circumstances, the court concluded that none of the named executors in the will should be appointed to serve in that capacity. In pertinent part, the court questioned the validity of the propounded instrument, and found that the Supreme Court action raised serious questions regarding the qualifications of the attorney-draftsman and Ms. Stein, whom the attorney-draftsman had designated to serve as a third fiduciary. Moreover, while the court noted that the testator's business partner, the second named fiduciary, was not implicated in the preparation of the will, given the facts surrounding the instrument, his appointment would have to be conditioned upon the posting of a bond, which would impose a significant expense to the estate. Additionally, and importantly, the court noted that his ability to manage the large and complex estate left by the decedent had not been established.

Accordingly, based upon the foregoing, the court held that the best interests of the estate required the appointment of a corporate fiduciary as temporary administrator, and appointed the Bank of New York to serve in such capacity.

***In re Estate of Lurie,*** **NYLJ, June 4, 2008, p. 40 (Surr. Ct. New York County) (Surr. Roth)**

•••••••••••••●●●•••••••••••••

In *In re Estate of Isaacson,* each of the named co-executors in the decedent's will, a nephew of the decedent, who was an attorney, and a distant relative of the decedent through marriage, who was also the attorney-draftsman of the instrument, objected to each others appointment.

Pursuant to the pertinent pro-visions of the propounded instrument, the decedent devised and bequeathed his residuary estate in four equal shares: one, for the benefit of his sister, and three for the benefit of the living issue of each of his predeceased siblings. In addition to his will, the decedent executed a durable power of attorney naming his nephew as his attorney-in-fact.

The record revealed that prior to his death, the decedent was admitted to various medical facilities, where he remained until his demise. During this period, his nephew requested and received from the attorney-draftsman the original power of attorney in which he was named as the decedent's attorney-in-fact, and thereupon utilized same to transfer over $500,000 from the decedent's accounts into joint accounts in his name and the decedent's. Thereafter, three checks amounting to $30,000 were drawn by the nephew from the account made payable to his father, his brother and his sister-in-law. Despite arguments by the nephew to the contrary, the court found that the actions taken by him, as the decedent's attorney-in-fact, were detrimental to the decedent and his estate, and demonstrated improvidence and a want of understanding. Most particularly, as to the joint account, the court found nothing in the record to substantiate any intention by the decedent to diminish his estate for his nephew's benefit or to benefit his nephew with the bulk of his assets. Rather, as evidenced by the propounded will, the court found that the decedent desired to divide his estate equally among his sister and the issue of his predeceased siblings.

*The court said that while substantial compliance with the model disclosure provided by the statute will entitle an attorney-fiduciary to full commissions, omission of any material requirements of the acknowledgment will deprive an attorney-fiduciary of the full statutory rate.*

Further, the court was concerned by statements by a nonlawyer/employee of the nephew's law firm, who testified at the hearing of the matter respecting alleged violations of the Code of Professional Responsibility committed by the nephew in sharing legal fees with him in cases he recommended to the firm.

Insofar as the attorney-draftsman's eligibility was concerned, the nephew alleged that he was unfit to serve due to alleged misstatements made in the change of address form filed with the Post Office in order to have the decedent's mail forwarded to the nephew's law firm. The court held that the misstatements were of no consequence to counsel's qualification to serve, and that his actions to preserve the decedent's mail demonstrated that he was acting responsibly.

Based upon the foregoing, the court disqualified the decedent's nephew from serving as executor of the decedent's estate pursuant to SCPA 707(1)(e), and the objections to the appointment of the attorney-draftsman were dismissed.

***In re Estate of Isaacson,*** **NYLJ, June 23, 2008, p. 35 (Surr. Ct/ Kings County) (Surr. Torres).**

## Compulsory Accounting

• ***Statute of Limitations Held No Defense to a Compulsory Accounting.*** In a proceeding pursuant to SCPA 2205, the Appellate Division, Second Department affirmed an Order of the Surrogate's Court, Rockland County, which granted the petition and directed the accounting be filed.

The record revealed that the decedent died a resident of Germany in 1998. About a week after the decedent's death, a relative of the decedent on her husband's side withdrew more than 1.2 million Swiss francs from her overseas bank account pursuant to a power of attorney, which, according to its terms, remained in force after the decedent's death. Thereafter, the attorney-in-fact petitioned the foreign tribunal in Germany to have he and his brother declared the beneficiaries of the decedent's estate. That claim was rejected by the German courts, and the petitioner was found to be the decedent's closest living heir.

Thereafter, the attorney-in-fact died and letters testamentary were issued to his three children in March 2001. In February 2005, the petitioner submitted a claim to the fiduciaries seeking recovery of the funds withdrawn from the decedent's account. In April 2006, petitioner commenced a compulsory accounting proceeding alleging that she was a creditor of the estate. The fiduciaries opposed on the grounds that the proceeding was time-barred, and that as such, the petitioner was not a creditor of the estate with standing to compel an accounting.

The surrogate rejected the fiduciaries' position, and an appeal was taken. The Appellate Division affirmed, holding that while the three year statute of limitation for conversion normally runs from the date the alleged conversion takes place, where possession is originally lawful, a conversion does not occur until the owner makes a demand for the return of the property and the person in possession refuses to return it. Finding that there was no evidence to indicate that the attorney-in-fact's original withdrawal of funds was unlawful, and nothing in the record indicate that a demand or a refusal to return the funds was ever made before February 2005, the court concluded that appellants had failed to establish that petitioner's cause of action had accrued prior to February 2005 and was time-barred.

***In re Estate of Rausman,*** **50 AD3d 909 (2d Dept. 2008).**

## Subpoenas

• ***Subpoenas Issued to Opposing Counsel Quashed.*** In *In re Estate of Cavallo,* the court granted a protective order and quashed subpoenas issued by petitioner to objectants' counsel. Petitioner claimed that counsel possessed evidence regarding the mental capacity of the decedent, which was both material and relevant to the probate of his will. Nevertheless, the court held that public policy mandated that counsel not be compelled to testify. Further, the court found that petitioner had failed to demonstrate that no other means existed to obtain the information allegedly in the possession of opposing counsel, and that granting petitioner's request could place the objectants in the untenable position of having to defend a motion to disqualify their attorneys, whom had represented them for over seven years.

***In re Estate of Cavallo,*** **NYLJ, May 16, 2008, p. 25 (Surr. Ct. Richmond County) (Surr. Gigante).**