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TRUSTS AND ESTATES UPDATE

Expert Analysis

Issues Confronted In Pretrial Discovery

A natural outgrowth of litigation in the Surrogate's Court is pretrial discovery. Examinations before trial, document production, subpoenas, and interrogatories, are but a few of the inquisitorial vehicles available for obtaining information relevant to a proceeding. Incident to non-compliance with any one of these discovery demands is motion practice. This month's article will examine issues pertaining to pretrial discovery, and the role of state and federal courts in overseeing its implementation.

Medical Information

During the course of a contested probate proceeding, the petitioner moved to quash certain HIPAA (Health Insurance Portability and Accountability Act) releases executed by the Public Administrator, or alternatively, to limit the time for which the medical records were sought to a period three years prior to the execution date of the propounded will, and two years thereafter, pursuant to the provisions of UCR 207.27.

The objectant opposed the application, and argued that deviation from the three year/two year rule was appropriate under the circumstances. In support of his contention, the objectant submitted a copy of a report from a psychiatrist, which indicated that after speaking with the decedent he learned that she had a history of depression with numerous hospitalizations, as well as bipolar disorder for which she had been treated with lithium for many years. Additionally, the objectant submitted a statement from the decedent's daughter in which she recalled that her mother was hospitalized due to a psychiatric condition as far back as the 1970s, and continuing through the date of her husband's death in 2004.

Based upon the foregoing, the court concluded that sufficient special circumstances existed for deviating from the time restrictions set forth in the Uniform Court Rule. Moreover, the court opined that the provisions of UCR 207.27 may not be applicable to subpoenas, given the language of the rule which specifically refers to examinations before trial.

In any event, the court concluded that an application to quash a subpoena should only be

By
**Ilene
Sherwyn
Cooper**



granted when it is apparent that the requested information will not uncover information relevant to the subject matter of the proceeding. In view of the fact that the capacity of the decedent to execute the propounded will was a central issue to the pending probate proceeding, the court concluded that the documents sought by the subpoena were appropriate.

The court rejected the movant's argument that the objectant was estopped from raising issues related to the decedent's capacity on the grounds that an Article 81 proceeding instituted on behalf of the decedent had been dismissed after a hearing.

The court in 'Prowley' opined that the nature and degree of any penalty awarded under CPLR 3126 for nondisclosure is a matter of discretion.

Referring to the decision in *In re Gallagher*, NYLJ, Oct. 29, 2007, p. 19 (Sur. Ct. Kings County), the court noted that the standards for finding an individual incompetent for purposes of an Article 81 proceeding differed from those required to execute a will. Thus, the determination of the court in the Article 81 guardianship proceeding did not preclude the objectant from litigating issues related to the decedent's lack of testamentary capacity.

Accordingly, the motion to quash the HIPAA releases and any subpoena related thereto, or alternatively to limit the time frame for discovery, was denied in all respects.

In re Cugini, New York Law Journal, July 29, 2009, p. 36 (Sur. Ct. Richmond County)

Motion for Sanctions

In a contested proceeding instituted, pursuant to SCPA 2110, by the attorney for the former fiduciary

of the estate, the respondents moved for sanctions pursuant to CPLR 3126 based upon petitioner's alleged failure and refusal to provide adequate responses to their Notice of Discovery and Inspection of documents, and for her failure to produce these items at her deposition. In addition, respondents indicated that petitioner failed to execute her deposition transcript, and moved to strike petitioner's Note of Issue. Petitioner cross-moved for an order pursuant to CPLR 3126 as well as based upon respondents' failure to respond to her outstanding discovery request, and for sanctions based upon respondents' alleged frivolous conduct.

The court opined that the nature and degree of any penalty awarded under CPLR 3126 for nondisclosure is a matter of discretion. Sanctions, however, will not be imposed unless it can be demonstrated that a party's failure to disclose is "willful, contumacious or in bad faith." See *Harris v. City of New York*, 211 AD2d 663, 664 (2d Dept. 1995). Based upon this standard, the court held that no such showing had been made by either the petitioner or the respondents. Nevertheless, it found that petitioner had provided respondents with only verbal responses to many of their requests for documents, and therefore, granted respondents' motion to preclude, unless petitioner produced the documents responsive to respondents' Notice and those requested at her deposition by a date certain.

With regard to petitioner's failure to execute her transcript, the court held that the unexecuted copy may be used at trial (CPLR 3116(a)) unless an executed copy was filed with the court, within the time required for the production of documents.

Further, the court denied petitioner's cross-motion for sanctions, finding that petitioner's request for discovery was palpably improper on the grounds that the information sought was confidential in nature and not relevant to the issues underlying the proceeding. Accordingly, the court also denied the motion to strike the petitioner's Note of Issue.

Prowley v. Estate of Wendloyn Lavant Thomas and Zellie Mae Rogers, NYLJ, July 31, 2009, p. 38 (Sur. Ct. New York County) (Sur. Glenn)

Production of Documents

Inadvertent Production of Documents Does Not Waive Attorney-Client Privilege. During the pendency of an action for enforcement of loan guarantees, the plaintiff bank inadvertently produced nine documents, which it subsequently claimed were

ILENE SHERWYN COOPER is a partner with Farrell Fritz, president of the Suffolk County Bar Association and treasurer of the New York State Bar Association Trusts and Estates Law Section.

protected by the attorney-client privilege.

The record revealed that in response to various discovery demands, the bank reviewed more than two million pages of material and produced approximately 250,000 pages. It subsequently learned that nine of these documents, produced to non-party lenders, were privileged. Once it became aware of its error in producing the documents, the bank sought to have them returned, asserting that under the common interest doctrine they were privileged.

The defendants opposed, claiming that the documents were not protected by the common interest doctrine and, moreover, constituted communications in furtherance of a fraud, which could not be protected by a claim of privilege. The defendants further maintained the documents were impermissibly being utilized by the bank as a shield and a sword, and could not be recalled due to the bank's carelessness in production.

With regard to the bank's reliance on the common interest doctrine, the court opined that while generally disclosure of protected communications in the presence of a third party vitiates the confidentiality of the communications, the common interest doctrine precludes a waiver of the privilege concerning confidential communications, when the disclosure is made between parties in the course of an ongoing common enterprise, and intended to further that enterprise. The doctrine, however, will only be applicable when the underlying communications are protected either by the attorney-client privilege or the attorney work product doctrine.

The court held that in order for a party to demonstrate the applicability of the common interest doctrine, it must be shown that (1) the information was shared with a party with whom the disclosing party had a common legal interest, and (2) the statements for which protection is sought were designed to further that interest. Within this context, the bank claimed that the doctrine was applicable to the subject disclosure due to the joint legal strategy it and the non-party lenders were pursuing in the action. The defendants opposed, arguing that the doctrine did not extend to communications between a party or its attorneys and third parties directly, rather than their counsel.

The court found the defendants' argument to be without merit, concluding that it was immaterial that the confidential communications passed from the bank's counsel directly to the non-party lenders, rather than passing to counsel for the lenders. Moreover, the court found that the bank and the non-party lenders were co-lenders of the loan, and shared a common interest in enforcing the defendants' obligations. Additionally, the court found that the communications involved development of legal strategy for obtaining relief against the defendants, and the parties to the communications understood them to be confidential. Accordingly, the court held that the communications fell within the common interest doctrine, and that absent a waiver of the privilege, they could be recalled by the bank.

The defendants next argued that the bank had waived the privilege inasmuch as the communications were in furtherance of a fraud.

The court opined that in order for communications to fall within the crime/fraud exception to the attorney-client privilege, it must be shown that there is probable cause to believe that a fraud or crime has been committed and that the communications in issue were in furtherance of the crime or fraud. Based upon this standard, the court held that the defendants had failed to demonstrate that the crime/fraud exception should be applied as a basis for denying the bank's claim of privilege.

The court also found without merit defendants' contention that the bank was attempting to use the attorney-client privilege as a shield and a sword, by seeking to withhold harmful documents on the grounds of privilege, yet producing related documents that were favorable to its position. The court held that defendants failed to demonstrate that any of the favorable documents that were being produced by the bank were privileged, and thus, there was no basis for reaching the conclusion asserted.

Finally, the court held that the inadvertent production of the documents by the bank did not constitute a waiver of the privilege. In reaching this result, the court emphasized the fact that

The common interest doctrine, said the court in 'Swerdlow,' precludes a waiver of the privilege concerning confidential communications, when the disclosure is made between parties in the course of an ongoing common enterprise, and intended to further that enterprise.

upon learning of the disclosure, the bank promptly attempted to recall the documents. In addition, the court noted that the number of documents in issue was minuscule compared to the number of documents produced and reviewed by the bank. Further, the court relied upon the fact that the parties had executed a protective order in which they expressly agreed that the inadvertent production of a document subject to the attorney-client privilege would be without prejudice to any claim that such material was protected by the attorney-client privilege.

Accordingly, with the exception of two e-mails between the bank and the non-party lender, the bank's motion was granted, the defendants were ordered to return the balance of the disputed documents, and prohibited from using them in discovery or at trial.

HSB Nordbank AG New York Branch v. Swerdlow, NYLJ, July 31, 2009, p. 33 (SDNY)

Time Frame

Expansion of Three-Year/Two-Year Rule Denied in Contested Probate. In a contested probate proceeding, the objectant moved to extend the time frame for discovery beyond the three-year/two-year period set forth in Uniform Court Rule 207.27. Objections to the propounded instrument

were filed by one of the decedent's children alleging fraud, duress and undue influence, as well as irreparable harm and injury if the nominated executor under the propounded instrument was appointed. Objectants also alleged that the nominated executor was incompetent to serve.

Examinations pursuant to SCPA 1404 were held, a notice of discovery and inspection was filed and answered, and depositions of both the petitioner and the objectant were taken. Thereafter, the objectant moved for expansion of the three-year/two-year rule on the grounds that: (1) the petitioner and his wife sold property owned by the decedent during the decedent's lifetime; (2) there was a delay in offering the propounded will for probate; (3) the petitioner exercised a health care proxy resulting in the decedent's death; (4) the petitioner failed to investigate injuries sustained by the decedent while in the hospital, and did not bring a wrongful death action; (5) the propounded will failed to recognize the forced heirship laws of India; (6) the petitioner and his counsel were nonresponsive during the probate proceeding, and were not forthright in their disclosure; and (7) the proposed executor's wife was interceding in the management of the estate.

The court opined that the time period created by the three-year/two-year rule is not rigid and may be extended when special circumstances exist. While allegations of a scheme to defraud or a continuing course of conduct of undue influence may be sufficient to constitute special circumstances, the court held that the reasons set forth by the objectant in support of his application did not justify deviating from the rule. Accordingly, the objectant's motion was denied.

In re Estate of Das, NYLJ, May 1, 2009, p. 31 (Sur. Ct. Nassau County)

Motion to Strike Objections

In a contested probate proceeding, the petitioner moved, inter alia, to dismiss the objections filed by two distributees of the decedent on the grounds that they lacked merit, that her discovery demands had been ignored, and that their counsel lacked the authority to represent them.

The court stated that while actions should be resolved on the merits whenever possible, a court may, in its discretion, strike pleadings or parts thereof as a sanction against a party who "willfully fails to disclose information which the court finds ought to have been disclosed." (CPLR 3126(3)). Within this context, the court found that the willful and contumacious conduct of the objectants could be inferred from their failure to either comply with or object to the petitioner's discovery demands for almost five years, coupled with their failure to oppose the petitioner's motion by offering an excuse for not responding.

Accordingly, petitioner's motion to dismiss the objections of the two distributees was granted.

In re Covo, NYLJ, May 13, 2009, p. 40 (Sur. Ct. New York County)(Sur. Webber)