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TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Subpoenas

During the course of a contested probate proceeding, the petitioner moved to quash certain HIPAA 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 1970's that continued 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 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. Referring to the decision in *In re Gallagher*, NYLJ, 10/29/07, 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, NYLJ, 7/29/09, p. 36 (Sur. Ct. Richmond County)(Sur. Gigante).

Three Year/Two Year Rule

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



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instrument were filed by one of the decedent's children alleging fraud, duress and undue influence, irreparable harm and injury if the nominated executor under the propounded instrument was appointed, and incompetence of the nominated executor 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 3 year/2 year rule on the grounds that:

the petitioner and his wife sold property owned by the decedent during the decedent's lifetime; there was a delay in offering the propounded will for probate; the petitioner exercised a health care proxy resulting in the decedent's death; the petitioner failed to investigate injuries sustained by the decedent while in the hospital, and did not bring a wrongful death action; the propounded will failed to recognize the forced heirship laws of India; the petitioner and his counsel were nonresponsive during the probate proceeding, and were not forthright in their disclosure; and the proposed executor's wife was interceding in the management of the estate.

The court opined that the time period created by 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, 5/1/09, p. 31 (Sur. Ct. Nassau County)(Sur. Riordan).

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 have 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, 5/13/09, p. 40 (Sur. Ct. New York County)(Sur. Webber).

Note: Ilene Sherwyn Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is President of the Suffolk County Bar Association and a member of the Advisory Committee of the Suffolk Academy of Law.