

TRUSTS AND ESTATES

By Ilene Sherwyn Cooper

Attesting witness/beneficiary

In an uncontested probate proceeding, the petitioner requested a determination that the bequests under Articles Fourth and Fifth of the propounded instrument were unaffected by the fact that employees of the beneficiaries were utilized as attesting witnesses.

Pursuant to the provisions of Article Fourth of his will, the decedent bequeathed \$150,000 to the Peconic Landing Community Fund for the unrestricted use by the Fund Directors. In Article Fifth of the instrument, the decedent bequeathed \$100,000 to the Peconic Landing Employees Appreciation Fund. All three witnesses to the will were employees of Peconic Landing at the time of its execution.

In support of the relief requested, the petitioner submitted documents to the court, including, *inter alia*, the Peconic Landing Resident Handbook, from which it appeared that all three witnesses under the will could benefit from the beneficial disposition to the Appreciation Fund. Accordingly, based upon the provisions of EPTL 3-3.2, the court held the bequest to the fund was void.

***In re Altstedter*, N.Y.L.J., Jan. 19, 2013, at p. 29 (Sur. Ct. Suffolk County).**

Discovery of personal income tax returns

In a proceeding for removal of the trustee of a testamentary trust, the respondent moved for a protective order to prevent disclosure of his personal

income tax returns for the years he served as a trustee, claiming that they were private and confidential in nature, irrelevant to the issues before the court, and that the petitioner had failed to demonstrate that the information contained in the returns

could not be obtained from another source. Petitioner opposed the motion contending that the information was discoverable due to respondent's status as a fiduciary and the allegations against him centered on his diversion of trust funds into his own accounts and fraud. Petitioner cited case law standing for the proposition that where substantial allegations of fraud and self-dealing on the fiduciary's part are at issue, personal tax returns are discoverable.

The court noted that while there is broad disclosure under Article 31 of the CPLR, there is a long recognized exception to the general rule which shields an individual's personal income tax returns from disclosure absent a strong showing that the information is indispensable to a party's claims and is unobtainable from other sources. Citing *Matter of Zirinsky*, 26 Misc3d 625 (Sur. Ct. Nassau County 2009), *Matter of Morrell*, 154 Misc 356 (Sur Ct Kings County 1935), and *Matter of Romano*, 8 Misc.3d 1010 (Sur. Ct Nassau County 2005), the court recognized that a further exception to this rule exists where the conduct of a fiduciary is at issue.



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Accordingly, based on the serious allegations of fiduciary misconduct at issue, and the relevance of the tax returns to both corroborate information and the respondent's credibility, the court held the returns were relevant to the proceeding and ordered that they be produced. Respondent's motion for a protective order was, therefore, denied.

***In re Desantis*, N.Y.L.J., Jan. 23, 2013, p. 40 (Sur. Ct. Richmond County).**

Sealing of court records

In *In re Rubin*, the Surrogate's Court, New York County (Sur. Glen) addressed an application to redact certain information submitted to the court four years ago within the context of a proceeding, since discontinued, to recover artwork claimed to be an asset of the decedent's estate. The proposed redactions generally included financial information, inventories of artwork, insurance documents, and descriptions of jewelry, furniture and other personal property. In support of the application, the movant alleged that inclusion of the foregoing information as part of the public record would cause the assets to be at risk.

The court opined that the right of public access to court records is recognized by common and statutory law. Furthermore, pursuant to the Uniform Rules of the Trial Courts, 216.1(a), court records shall not be sealed, either in

whole or in part, except upon a written finding of good cause. The burden of proving good cause is upon the movant, and requires a showing of a legitimate need and a particularized risk of harm. The fact that the record in a Surrogate's Court proceeding may contain personal and financial information is not in and of itself sufficient to establish a basis for sealing a file. Nevertheless, the court noted that financial information will be sealed when copies of personal income tax returns or the social security numbers of a litigant are at issue.

With respect to the pending application, the court found it significant that the movant waited over four years to assert the confidentiality of the subject pleadings. Moreover, the court found that the movant's claim that the assets were at risk failed to show any particularized risk of harm.

Accordingly, the court denied the motion except to the extent of those portions of the record which contained movant's social security number, and the social security number of her daughter.

***In re Rubin*, N.Y.L.J., Jan. 7, 2013, at 22 (Sur. Ct. New York County)(Sur. Glen).**

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 immediate past-Chair of the New York State Bar Association Trusts and Estates Law Section, a past-President of the Suffolk County Bar Association, and a member of its Board of Directors.