

SURROGATE'S COURT DISCOVERY PROCEEDINGS

Submitted By:
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The Fiduciary's Arsenal: Litigating Discovery Proceedings

by Angelo M. Grasso
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I. The Statutory Framework

- A. SCPA §2103
- B. SCPA §2104
- C. SCPA §2105
- D. SCPA §2102(1)
- E. SCPA §§702(9) and 902

II. The Inquisitorial Phase

- A. The Necessity of a Fiduciary
 - SCPA §2103(1): Only a fiduciary may bring an S CPA §2103 proceeding.
 - When a fiduciary will not commence a §2103 proceeding, a person may obtain limited letters for the purpose of doing so.
 - Limited Letters under S CPA §702(9) and §902
 - Any fiduciary can bring a §2103 proceeding, including a minority of fiduciaries.
 - Not all of the fiduciaries need to sign a §2103 petition, but all are necessary parties. (*Matter of Rutherford*, 161 Misc. 622, 293 N.Y.S. 515 [Sur. Ct. New York Co. 1936])
 - Fiduciary may maintain a discovery proceeding against a co-fiduciary. (*Matter of Hare*, 123 Misc. 2d 266, 473 N.Y.S.2d 334 [Sur. Ct. Nassau Co. 1986])
 - A trustee of a testamentary trust or inter vivos trust may commence an S CPA §2103 proceeding.
 - An out of state fiduciary may need to obtain ancillary letters under S CPA Article 16 to commence a proceeding.

- It is not a given that a fiduciary with ancillary letters will be able to commence an SCPA §2103 proceeding in New York unless there is a sufficient nexus with New York State. (*Matter of Obregon*, 91 N.Y.2d 591, 673 N.Y.S.2d 972 (1998))

B. The Property Sought

- SCPA §2103(2) sets forth the property that can be sought:

Any and all personal or real property in which decedent had any interest, including choses in action, money deposited and all property rights of the depositor consequent on the deposit of money by a decedent, grantor or fiduciary or for his account with any authorized banking organization in respect of which the depositary claims no beneficial interest other than its proper costs, fees or expenses.

- *Matter of Elmezzi*, 124 A.D.3d 886, 3 N.Y.S.3d 62 (2nd Dep’t 2015)
- Bank accounts
 - *Matter of Sothmayd*, 59 A.D.2d 956, 399 N.Y.S.2d 382 (3d Dep’t 1977)
 - *Matter of Dziadzio*, 31 Misc. 2d 125, 225 N.Y.S.2d 283 [Sur. Ct. Westchester Co. 1977])
- Real property
 - SCPA §2103(2)
 - Out of state property: *Matter of Kaufman*, 45 Misc. 3d 1207(A), 3 N.Y.S.3d 285 [Sur. Ct. Nassau Co. 2014]
- Contract claims
 - *Matter of Young*, 80 Misc. 2d 937, 365 N.Y.S.2d 695 [Sur. Ct. New York Co. 1975]
- Life insurance proceeds
 - *Matter of Robles*, 72 Misc. 2d 554, 339 N.Y.S.2d 171 [Sur. Ct. Orange Co. 1977]

- Shareholder agreements
 - *Matter of Breitman*, 114 Misc. 2d 248, 450 N.Y.S.2d 985 [Sur. Ct. New York Co. 1982]
- Property obtained by fraud or undue influence
 - *Matter of Finkle*, 90 Misc. 2d 550, 395 N.Y.S.2d 343 [Sur. Ct. New York Co. 1977]
- Valuation of certain assets
 - *Matter of Granowitz*, 150 A.D.2d 446, 541 N.Y.S.2d 55 (2d Dep’t 1989)
 - *Matter of Laflin*, 128 Misc. 2d 348, 490 N.Y.S.2d 102 [Sur. Ct. Nassau Co. 1985]

C. The Targets of the Inquisitorial Phase

- SCPA §2103(1): proceeding may be instituted against any person having possession, control, knowledge, or information about money or other personal proceeds
- Someone in possession of estate property
- Someone with actual knowledge about potential estate property
 - Family members
 - Beneficiaries
 - Accountants
 - Attorneys
 - Financial advisors
- Someone who *might* have knowledge or information about potential estate property

D. The Mechanics of Commencing a Proceeding

- Verified Petition
- Identity of decedent and property in question

- Facts supporting position that Respondent has property/knowledge about property
- Petition does not have to state a cause of action; may simply ask for information concerning the estate
- Allegations may be general and conclusory but must give a sufficient basis to warrant inquiry
 - *Matter of Lowe*, 148 Misc. 107, 265 N.Y.S. 240 [Sur. Ct. Westchester Co. 1933]
 - Court may deny entertainment (SCPA §2101(b))
- Seek one of three outcomes:
 - Examine as to estate property
 - Examine as to estate property and seek turnover
 - Skip the inquiry and demand turnover
- Can use a supporting affidavit with petition

E. Conducting the Inquiry

- If the petition seeks inquiry and the respondent is in New York, order to attend is issued; if it seeks turnover, citation is issued.
 - Order to attend is functional equivalent of a subpoena; must be served personally with the witness fee. SCPA §2103(5); CPLR 8001; *Matter of Mirsky*, 145 Misc. 2d 438, 546 N.Y.S.2d 951 [Sur. Ct. Bronx Co. 1989].
 - If the respondent is outside New York, then a citation issues (*Matter of Conway*, N.Y.L.J., March 26, 1999, p. 36, col. 5 [Sur. Ct. Westchester Co.])
- May apply for a TRO and/or Preliminary Injunction when unique property is at issue. (*Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 561 N.Y.S.2d 566 (1st Dep't 1990); *Matter of Bernfeld*, 46 Misc. 3d 1228(A), 9 N.Y.S.3d 592 [Sur. Ct. Nassau Co. 2015])
- Respondent's next move:

- Make a fruitless motion to dismiss (*Matter of Marko*, 56 Misc. 2d 138, 287 N.Y.S.2d 776 [Sur. Ct. New York Co. 1968])
 - Appear and be examined
 - File an answer and: (i) generally address the allegations in the petition, (ii) claim title to the property, or (iii) admit possession but not claim title
- CPLR Article 31 discovery?
 - Yes: *Matter of Eshagian* 48 Misc. 3d 920, 15 N.Y.S.3d 560 [Sur. Ct. Queens Co. 2015])
 - No: *Matter of Treibt*, N.Y.L.J., August 8, 1994, p. 31, col. 2 [Sur. Ct. Nassau Co.].
- Conduct of inquiry
 - Open court examination
 - Respondent does not get to ask petitioner anything
 - CPLR 4519 and hearsay rules do not apply
 - No second bite at the apple (*Matter of Gregory*, N.Y.L.J., January 9, 1991, p. 27, col. 6 [Sur. Ct. Nassau Co.])
- Synthesis: *Matter of Fialkoff*, 45 Misc. 3d 1205(A), 998 N.Y.S.2d 306 [Sur. Ct. Queens Co. 2014]

III. The Turnover Phase

A. Passing on the Inquisitorial Phase

- Early discovery versus later discovery
- Causes of action:
 - Breach of contract
 - Breach of fiduciary duty
 - Constructive trust
 - Conversion

- Fraud
- Replevin

B. Conversion to the Turnover Phase

- Filing a new/amended petition to add causes of action
- Demanding an answer from the respondent(s)
- Filing an answer - assert title or possession of property but no title

C. Discovery

- CPLR Article 31 discovery
- No hard and fast rules for time period limitations akin to the 3/2 rule
- Respondent now can conduct discovery

IV. Common Issues & Burdens of Proof

A. Gifts

- Respondent has burden of proof of showing each of the three elements - donative intent, delivery and acceptance - by clear and convincing evidence.
 - *Gruen v. Gruen*, 68 N.Y.2d 48, 53, 505 N.Y.S.2d 849, 852 (1986)
 - *Shybunko v. Geodesic Homes, Inc.*, 695 A.D.3d 581, 883 N.Y.S.2d 596 (2d Dep’t 2009)
 - *Matter of Giacalone*, 143 A.D.2d 749, 533 N.Y.S.2d 457 (2d Dep’t 1988))
- Donative intent: present transfer versus intent to make a future gift
- Delivery: donee must surrender possession and control (symbolic delivery)
- Acceptance: generally presumed

B. Bank Accounts

- Banking Law §675: rebuttable presumption that account is held as joint owner with right of survivorship when survivorship words appear

on signature card. Burden then shifts to show fraud, mistake or undue influence by clear and convincing evidence

- *Matter of Stalter*, 270 A.D.2d 594, 703 N.Y.S.2d 600 (3d Dep’t 2000)
- *Matter of Butta*, 192 Misc. 2d 614, 746 N.Y.S.2d 586 [Sur. Ct. Bronx Co. 2002]
- Absent a signature card, EPTL §6-2.2 applies unless can establish a joint tenancy with right of survivorship under common law
- Presumptions can be overcome with clear and convincing evidence that the account was opened for the convenience of the depositor and not for survivorship rights.
 - Proof: decedent made all the deposits, funds were solely used for decedent’s benefit during his lifetime, decedent exercised complete control over the account, confidential relationship
- Whether joint tenant withdrew/used funds from bank account in excess of his or her moiety. (*Matter of Mullen*, 268 A.D.2d 313, 314, 702 N.Y.S.2d 35, 37 [1st Dep’t 2000])

C. Confidential Relationships

- Confidential relationships change the burden: (case in materials)
- Confidential relationships as a matter of law: relationships that are automatically confidential in nature
 - Relationships: doctors, lawyers, nurses, clergy, guardians, trustees, attorneys-in-fact
 - Sample cases: *Matter of Boatwright*, 114 A.D.3d 856, 980 N.Y.S.2d 554 (2d Dep’t 2014); *Matter of Estabrook*, N.Y.L.J. September 17, 2013, p. 27, col. 5 [Sur. Ct. Suffolk Co.]; *Matter of Hoerter*, 15 Misc. 3d 1101(A), 836 N.Y.S.2d 499 [Sur. Ct. Nassau Co. 2007]
- Confidential relationships as a matter of fact: existence of disparate power of one party over another where one party is in a position of weakness, dependence, or trust. (*Matter of Napoleon*, N.Y.L.J., November 2, 2011, p. 38 [Sur. Ct. Suffolk Co.])
 - Relationships: accountants and financial advisors.

- Sample cases: *Cordovi v. Karnbad*, 214 A.D.2d 476, 625 N.Y.S.2d 519 [1st Dep’t 1995]; *Matter of Katz*, 15 Misc. 3d 1104(A), 910 N.Y.S.2d 762 [Sur. Ct. New York Co. 2007]
- Family members are not automatically in a confidential relationship. *Matter of Graeve*, 113 A.D.3d 983, 979 N.Y.S.2d 197 (3d Dep’t 2014)

D. Statute of Limitations

- Statute of limitations only applies once shift to turnover phase
- Critical issues - carefully choose the cause of action and watch for the accrual date
 - Replevin: 3 years (CPLR 214; *In re Estate of McLaughlin*, 78 A.D.3d 1304, 910 N.Y.S.2d 252 (3d Dep’t 2010))
 - Breach of fiduciary duty: 6 years from when fiduciary openly repudiates his responsibilities or renders an account. (*Matter of Sbuttoni*, N.Y.L.J., January 26, 2004, p. 33, col. 4 [Sur. Ct. Westchester Co.])
 - Constructive trust: 6 years. (*Matter of Lederer*, 225 A.D.2d 395, 641 N.Y.S.2d 3 (1st Dep’t 1996))
 - Fraud: 6 years or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it. (CPLR 213(8))
- Accrual: *Matter of Trombley*, 2016 WL 1165329 (4th Dep’t Mar. 25, 2016)
- 1-year toll of statute after Decedent dies (CPLR 210)
 - Note: statute will not toll if distributee does not get letters of administration within the statutory period to file an action. (*Public Administrator of Kings Cty. v. Canada Dry Bottling Co.*, 16 A.D.3d 397, 790 N.Y.S.2d 711 (2d Dep’t 2005))

E. Burden of Proof

- Petitioner bears the initial burden of showing the Estate’s entitlement to the property in question

- *Dwyer v. Valchovic*, 2016 WL 818755 (3d Dep’t Mar. 3, 2016)
- Respondent denies possession of the property, Petitioner bears the burden of proof. (*Matter of Rabinowitz*, 5 Misc. 2d 803, 159 N.Y.S.2d 492 [Sur. Ct. Nassau Co. 1957])
- Respondent’s burden to prove gift by clear and convincing evidence. (*Matter of Gruen, supra*)
- Petitioner bears the burden of proof of showing undue influence.

V. Estate Planning to Avoid Discovery Proceedings

A. Best Practices

- Know who your client is!
 - Potential conflicts of interest representing multiple family members
 - Ethical issues when planning or doing asset transfers
 - Why are you doing a transfer? Medicaid? Taxes? Familial succession?
- Family members: *Matter of Rodman*, 116 A.D.3d 422, 984 N.Y.S.2d 7 (1st Dep’t 2015)
- Gifts versus loans
 - Proof requirements on a loan (*Matter of Appleby*, N.Y.L.J., September 12, 2011, p. 32 [Sur. Ct. New York Co.])
- Constructive delivery issues (*Matter of Szabo*, 10 N.Y.2d 94, 217 N.Y.S.2d 593 (1961))
- Using the power of attorney and gift rider
- Patterns of Gift Giving
 - *Matter of Still*, N.Y.L.J., January 13, 1998, p. 30 (Sur. Ct. Suffolk Co.)
 - *Matter of Goldsmith*, N.Y.L.J., June 16, 1999 (Sur. Ct. New York Co.)

B. Capacity Issues

- Testamentary Capacity
 - EPTL §3-1.1: “Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property.”
 - Less mental capacity needed to execute a will than any other instrument or for any other legal act. (*Matter of Coddington*, 281 App. Div. 143, 118 N.Y.S.2d 525 (3d Dep’t 1952))
 - Three elements for testamentary capacity (*Matter of Kumstar*, 66 N.Y.2d 691, 496 N.Y.S.2d 414 (1985)):
 - Scope and meaning of the provisions of the will;
 - Nature, extent and condition of property; and
 - The natural objects of her bounty.
- Capacity to Appoint an Attorney-in-Fact
 - GOL §5-1501(2)(c) defines capacity as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”
 - *Umscheid v. Simnache*, 106 A.D.2d 380 (2d Dep’t 1984): Same as capacity to enter into a contract.
 - Power attorney is void if person lacked capacity when he signed the power of attorney to understand and comprehend the nature of the transaction or was unable to control his conduct. (*Wright v. Stam*, 37 Misc. 3d 1212(A), 964 N.Y.S.2d 63 [Sur. Ct. Kings Co. 2010]).

C. The Dead Man’s Statute

- CPLR 4519
- Importance of independent, disinterested witnesses
- Putting everything in writing

- *Matter of Loew*, 48 Misc. 3d 1211(A), 18 N.Y.S.3d 579 [Sur. Ct. Nassau Co. 2015]
 - EPTL §3-1.1: “Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property.”
 -

VI. The Reverse Discovery Proceeding

A. The SCPA §2105 Proceeding

- One-step summary proceeding intended to dispose of issues in advance of an accounting: no inquisitorial phase
- Person must have an interest in the property in question
- Respondent must be a fiduciary with full letters
- Petition contents:
 - Must show fiduciary acquired title to property and basis for petitioner's right to property; seeking return
 - Do not need to cite other people interested in the estate - only necessary parties are the petitioner and the fiduciary
 - Draft carefully - much more subject to dismissal at the pleading stage
 - Order to Show Cause or Citation

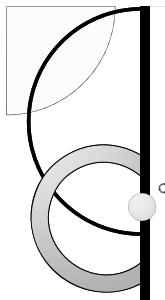
B. Responding to a Petition

- Motion to dismiss?
- File an answer akin to a convention Supreme Court litigation
- Raise affirmative defenses - statute of frauds, statute of limitations, res judicata

C. Discovery and Trial

- CPLR Article 31 discovery ensues, including document discovery, depositions, subpoenas

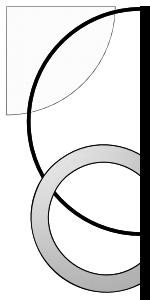
- Right to jury trial depends on whether claims are primarily rooted in law or equity
- SCPA §2105 proceedings are akin to replevin, hence petitioner ordinarily has burden to prove she has title to and right to immediate possession of property in question by a preponderance of the evidence.
 - *Matter of Vannini*, 141 N.Y.S.2d 493 [Sur. Ct. Suffolk Co. 1955]
 - *Matter of Monplaisir*, 62 N.Y.S.2d 320 [Sur. Ct. New York Co. 1946]
- When the petitioner claims that she received the property in question by an alleged gift, the appropriate standard is clear and convincing evidence.
 - *Matter of Rivara*, 9 Misc. 3d 1102(A), 806 N.Y.S.2d 448 [Sur. Ct. Nassau Co. 2005]



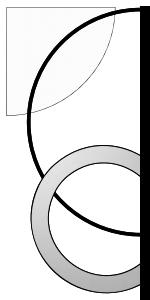
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October 2016



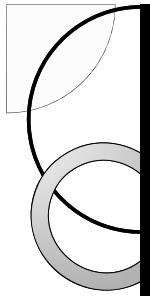


What's Your Goal?

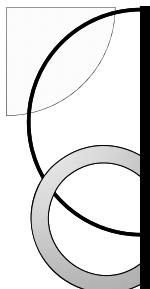
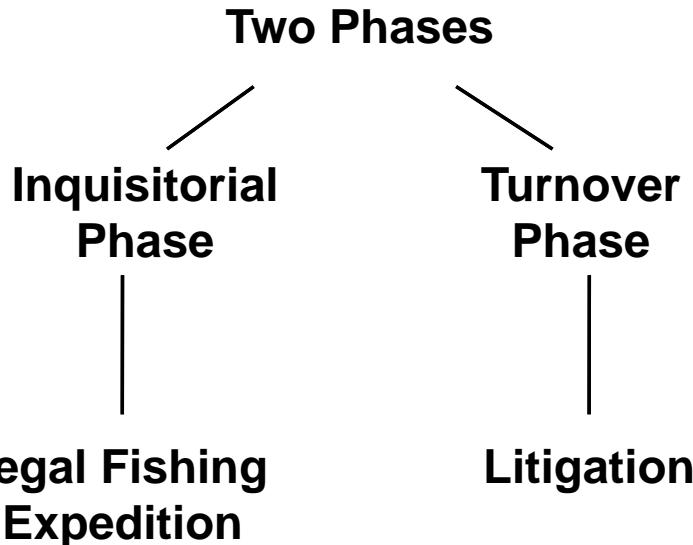


Statutory Framework

- SCPA §2103 – discovery proceedings
- SCPA §2104 – turnover and trial
- SCPA §2105 – reverse discovery proceedings
- SCPA §2102(1) – seeking information from a fiduciary

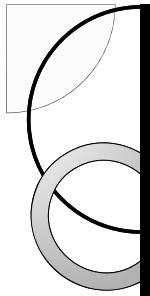


Turnover Proceedings



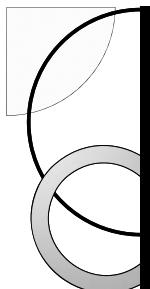
The Inquisitorial Phase

- SCPA 2103(1): only a fiduciary may commence a proceeding
 - Any type of fiduciary – executor, administrator, temporary administrator, preliminary executor, trustee
 - Limited Letters under SCPA §702(9)
 - Out of state fiduciary needs to obtain ancillary letters
 - Sufficient nexus required: *Matter of Obregon*, 91 N.Y.2d 591, 673 N.Y.S.2d 972 (1998)



The Inquisitorial Phase

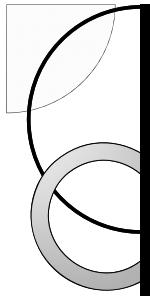
- Only one fiduciary needed to commence a proceeding
 - *Matter of Rutherford*, 161 Misc. 622, 293 N.Y.S. 515 (Sur. Ct. New York Co. 1936)
- Can bring a proceeding against a co-fiduciary
 - *Matter of Hare*, 123 Misc. 2d 266, 473 N.Y.S.2d 333 (Sur. Ct. Nassau Co. 1986)



Property Sought

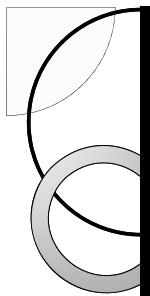
Any and all personal or real property in which decedent had any interest, including choses in action, money deposited and all property rights of the depositor consequent on the deposit of money by a decedent, grantor or fiduciary or for his account with any authorized banking organization in respect of which the depository claims no beneficial interest other than its proper costs, fees or expenses.

SCPA §2103(2)



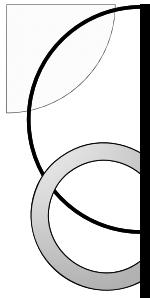
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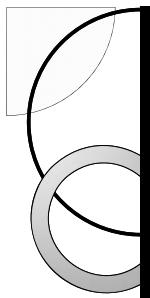
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- Property obtained by undue influence
 - *Matter of Finkle*, 90 Misc. 2d 550, 395 N.Y.S.2d 343 (Sur. Ct. New York Co.



Valuation of Assets

The purpose of SCPA 2103 is to provide a vehicle through which the fiduciary can obtain information needed to determine the assets of the estate or the value thereof, as well as to effectuate a return of the property to the fiduciary... A substantial purpose of the discovery sought is to ascertain through documentary evidence whether the parties intended the agreements to be binding or understated the value of the shares of corporate stock to perpetrate a fraud on third parties.

Matter of Granowitz, 150 A.D.2d 446, 541 N.Y.S.2d 55 (2d Dep't 1989)



Valuation of Assets

The purpose of the current statute (as well as its predecessor) is to provide a vehicle through which the fiduciary can obtain information needed to determine the assets of the estate or the value of the assets of the estate, as well as to effectuate a return of the property to the fiduciary. The statute would embrace a situation, such as the case at bar, where the fiduciary seeks information in order to complete tax returns and finalize the administration of the estate.

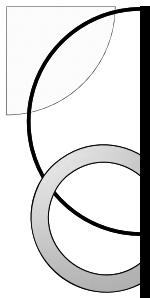
Matter of Laflin, 128 Misc. 2d 348, 490 N.Y.S.2d (Sur. Ct. Nassau Co. 1985)



- Person with property
- Family members
- Attorneys
- Accountants
- Financial Advisors
- Using rank speculation

Petition Contents

- Decedent & property in question
- Facts that support allegation that Respondent(s) have property/knowledge
- Allegations may be general and conclusory
 - *Matter of Lowe*, 148 Misc. 107, 265 N.Y.S. 240 (Sur. Ct. Westchester Co. 1933)
 - SCPA §2101(b)



Three Outcomes

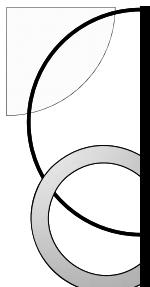
Inquiry



Both

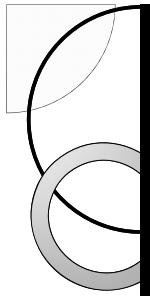


Turnover



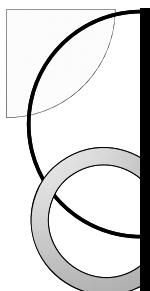
Inquiry

- Order to Attend
 - Only if Respondent is in New York
 - Serve like a subpoena
- TRO/Preliminary Injunction
 - Usual factors: probability of success on the merits, danger of irreparable harm, balance of equities
 - Unique property: *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 561 N.Y.S.2d 566 (1st Dep't 1990)



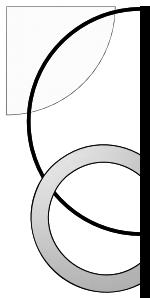
The Response

- Default
- Move to dismiss
 - *Matter of Marko*, 56 Misc. 2d 138, 287 N.Y.S.2d 776 (Sur. Ct. New York Co. 1968)
- Appear and not file an answer
- File an answer
 - Generally address the allegations
 - Claim title to the property
 - Admit possession of the property but not claim title



Inquisitorial Phase Discovery

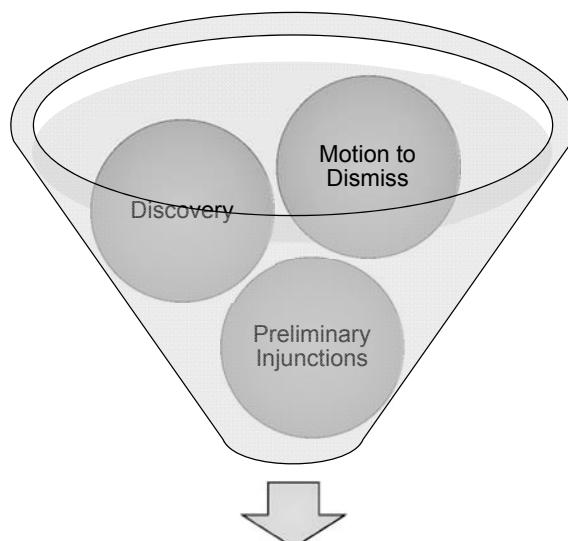
- Broad latitude to allow fiduciary to inquire concerning *anything* that might be property of the Estate
- No CPLR 4519/hearsay objections
- One-way discovery
- No second chance at discovery without demonstrating good cause
 - *Matter of Gregory*, N.Y.L.J., Jan. 9, 1991, p. 27, col. 6 (Sur. Ct. Nassau Co.)



Document Discovery?

- **No:** *Matter of Treibt*, N.Y.L.J., Aug. 8, 1994, p. 31, col. 2 (Sur. Ct. Nassau Co.)
- *"Inasmuch as the first phrase consists of an examination, the resort to Article 31 disclosure devices is inappropriate at this juncture... Where, however, respondent interposes an answer as was done here, the proceeding enters the hearing or trial phase in which the issues created by service of the responsive pleading can be heard."*
- **Yes:** *Matter of Eshaghian*, 48 Misc. 3d 920, 15 N.Y.S.3d 560 (Sur. Ct. Queens Co. 2015)
"As this is a discovery proceeding in which petitioners are attempting to obtain information, there does not seem to be a logical basis to allow an inquiry of oral information held by respondent but not of documentary information the same witness possesses."

Synthesis



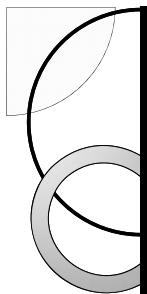
45 Misc. 3d 1205(A), 998 N.Y.S.2d 306 (Sur. Ct. Queens Co. 2014)



vs.

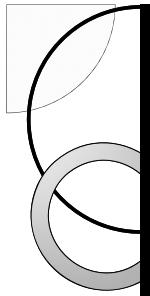


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Limited Letters

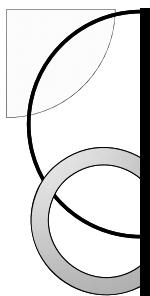
- Date of death: March 9, 2013
 - Intestacy, two distributees
 - Limited Letters: May 20, 2013
- SCPA 702(8) and 702(9)
 - (8): To represent the estate in a transaction in which the fiduciary could not or should not act in his or her fiduciary interest because of conflict of interest
 - (9): To commence or maintain any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a proceeding



Limited Letters

“Necessary Party”

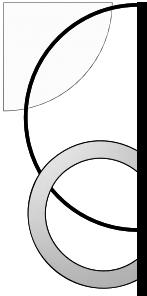
1. Distributee.
2. Beneficiary under propounded will.
3. Guardian/representative of beneficiary or distributee.
4. A stakeholder, e.g., a financial institution in possession of assets that may belong to the Estate.



Limited Letters?

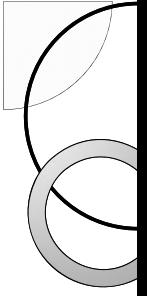
Fiduciary refuses to bring §2103 proceeding.

- Fiduciary would have to sue herself, spouse or child.
- Fiduciary has a conflict of interest, such as having a business interest with Estate property.
- Statute of limitations is in danger of running.
- Property is in danger of being expended or leaving state and fiduciary is not acting diligently enough.
- Fiduciary just refuses to act.



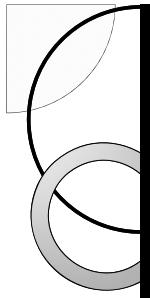
Procedure

- Petition against Morgan Stanley
 - Inquiry and turnover of various bank accounts
 - Inquiry conducted
- Petition amended in 2014
 - Add individual defendants, seeking inquiry
 - Seek turnover of T.O.D. account
 - Order to Show Cause issued with a TRO on Morgan Stanley T.O.D. account
- Response: filed an answer and “cross-motion”



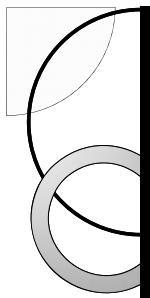
“Cross-Motion”

1. Failure to state a claim (3211(a)(7))
2. Declaring Respondents owner of T.O.D. account
3. Vacate TRO
4. Hearing on Preliminary Injunction and undertaking
5. Direct Petitioner to post bond
6. Direct Petitioner to advise Respondents about estate tax returns
7. Discovery schedule
8. Referee to supervise disclosure
9. Sanctions



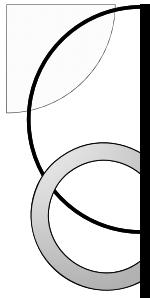
Motion to Dismiss

- Failed to plead fraud and undue influence with particularity
- Failed to plead elements of lack of capacity to give notice of the claim



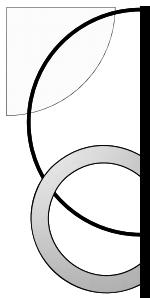
Motion to Dismiss

“The moving papers herein demonstrate a fundamental misunderstanding of the purpose of an SCPA 2103 proceeding...This proceeding is an information-gathering vehicle for a fiduciary attempting to garner information as to potential estate assets...Petitioner is not required to set forth allegations sufficient to sustain a cause of action but only those that justify an inquiry.”



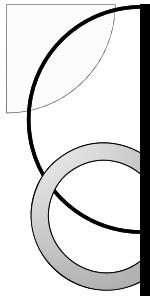
Motion to Dismiss

- “In general discovery proceedings should not be dismissed without adequate opportunity for the full development of the facts.” (citing *Matter of Granowitz*, 150 A.D.2d 445 (2d Dep’t 1989)
- “The heightened pleading requirements of CPLR 3016 do not necessarily apply in Surrogate’s Court since the controlling provision in the SCPA only requires that pleadings be sufficiently particular to give the court and parties notice of the claim. (SCPA 302(2))”



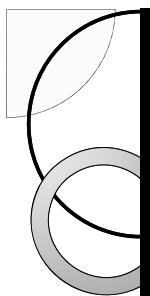
Motion for Summary Judgment

- Based on affidavits of respondents and transcript from Morgan Stanley EBT
 - Hearsay & Dead Man’s Statute in support of a motion for summary judgment
 - CPLR 3212(f) as no depositions of respondents yet
 - Failed to affirmatively plead ownership of T.O.D. account in answer



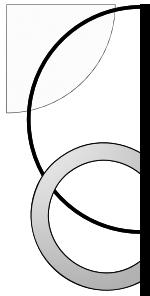
TRO/PI/Bond

- “In an SCPA 2103 proceeding, the court will typically grant a temporary restraining order when there is disputed property in the respondent’s possession if such is necessary to maintain the status quo pending trial.”
- Respondents are entitled to hearing on PI and undertaking
- No bond – SCPA 805 only applies to administrators, administrators CTA and temporary administrators but *not* limited administrators



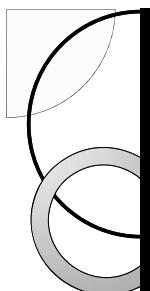
SCPA §2102(1)

A proceeding may be commenced to require a fiduciary to supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.



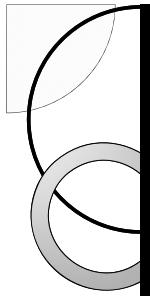
SCPA §2102(1)

- Critical first step: the beneficiary must make a written demand for the information sought upon the beneficiary herself, not her attorneys.
 - *Matter of Gerstein*, N.Y.L.J., Aug. 14, 1995, p. 31, col. 6 (Sur. Ct. Queens Co.)
- Reasonable period of time needs to elapse
- If information not furnished, submit a verified petition and citation/Order to Show Cause



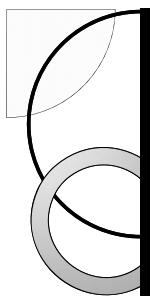
SCPA §2102(1)

- Need to demonstrate that the information you seek is relevant to *your* interest in the estate
 - Well beyond the definition of a “person interested” under SCPA 103(39). (*Matter of Lefkowitz*, N.Y.L.J., Dec. 30, 1998, p. 26, col. 4 [Sur. Ct. Nassau Co.])
 - Residuary beneficiary – anything in an accounting
 - Specific legatee – in line with your interest
- Can come before an accounting proceeding but not contemporaneously
 - *Matter of Matsis*, N.Y.L.J., Sep. 10, 2001, p. 31, col. 2 (Sur. Ct. Queens Co.)
- Not a trojan horse for Article 31 discovery



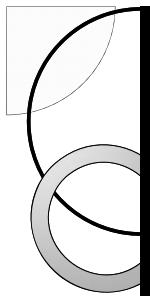
Matter of Fialkoff

- Seeking information concerning the status of estate tax returns
- “Relief pursuant to SCPA 2102(1) must be initiated by petition, which, in turn, must be entertained by the court...The requested relief is not relevant to this SCPA 2103 proceeding and any claims concerning the apportionment of tax liability are properly raised at the time of the judicial settlement of the account.”



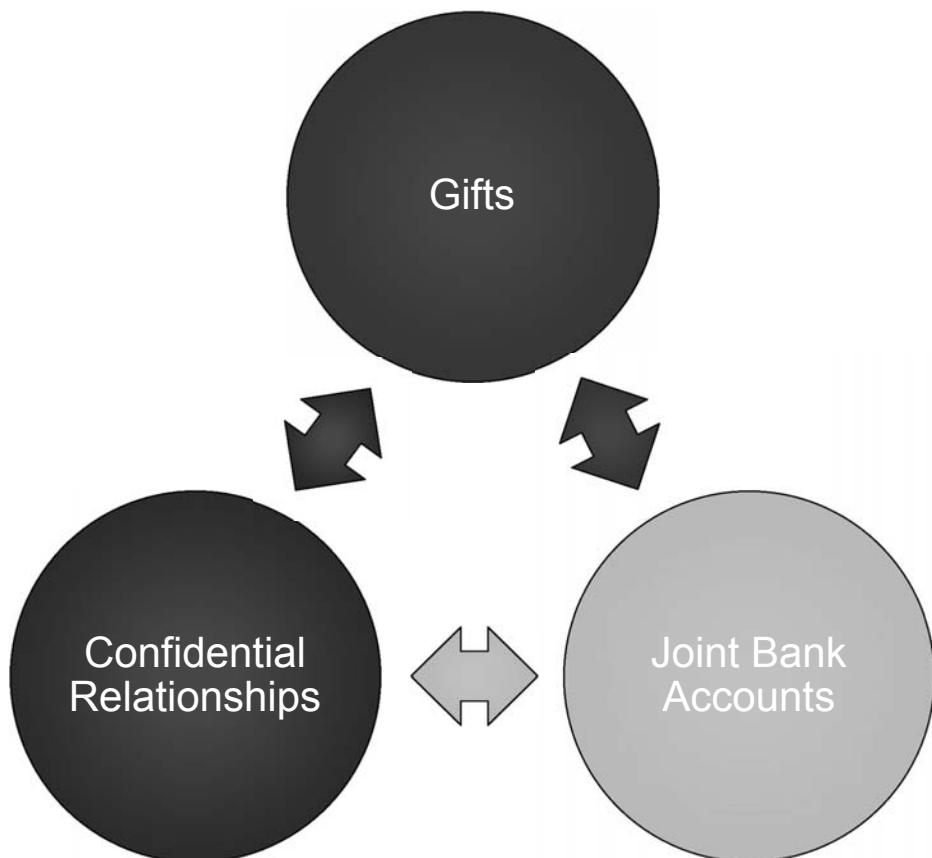
Matter of Fialkoff

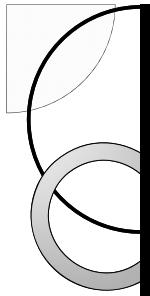
- ~~Set a discovery schedule~~
- ~~Appointment of a referee/JHO~~
 - “Waste of limited judicial resources”
- ~~Payment of funeral expenses~~
 - No bill included
- ~~Sanctions 22 N.Y.C.R.R. §130.1.1(a)~~



The Turnover Phase

- Skip the inquisitorial phase?
 - Upside: CPLR discovery prior to deposition, avoid statute of limitations
 - Downside: difficulty in drafting pleadings, no knowledge as to identity of parties
 - No choice if respondent is out of state
- Draft a new pleading?
- Demanding an answer
- CPLR Article 31 discovery

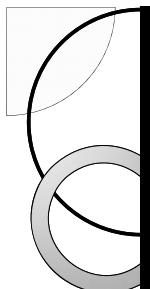




Confidential Relationships

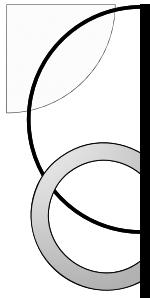
Burdens of Proof

- Petitioner has initial burden of showing Estate's entitlement (*Dwyer v. Valchovic*, 2016 WL 818755 (3d Dep't Mar. 3, 2016))
 - If Respondent denies possession, Petitioner's burden to show she has it (*Matter of Rabinowitz*, 5 Misc. 2d 803, 159 N.Y.S.2d 492 (Sur. Ct. Nassau Co. 1957))
- Claim of gift – Respondent's burden to show gift by clear and convincing evidence (*Gruen v. Gruen*, 68 N.Y.2d 48 (1986))



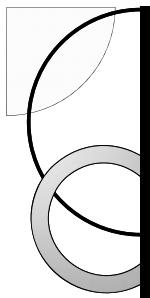
Confidential Relationships

- “Where a confidential relationship exists between two parties to a transaction such that they were dealing on unequal terms due to one party's weakness, dependence or trust justifiably reposed upon the other and unfair advantage is rendered probable, the burden of proof with respect to allegations of undue influence will be shifted to the stronger party to show, by clear and convincing evidence, that no undue influence was used.”
 - *Matter of Nealon*, 104 A.D.3d 1088, 962 N.Y.S.2d 481 (3d Dep't 2013)



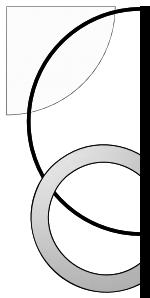
Confidential Relationships

- Person seeking to set aside gift bears the burden of showing the existence of a confidential relationship. *Prievo v. Urbaniak*, 64 A.D.3d 1240, 882 N.Y.S.2d 796 (4th Dep’t 2009)
- Key for Petitioner – have Respondent deemed as in confidential relationship as a matter of fact
- Confidential relationship as a matter of law: attorneys, attorneys-in-fact, guardians, trustees, doctors, clergy



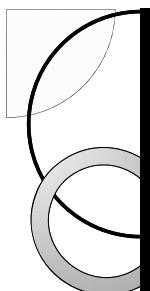
Confidential Relationships

- Confidential relationship as a matter of fact: accountants, financial advisors, others
- Key dynamic: existence of disparate power of one party over another where one party is in a position of weakness, dependence or trust
- “Parties stand on unequal footing, one trusting to the fidelity of the other and thus not guarded as he or she would be in the usual arm’s-length transaction.”
 - *Matter of Greenspan*, N.Y.L.J., July 22, 2010, p. 32, col. 4 (Sur. Ct. New York Co.)



Confidential Relationships

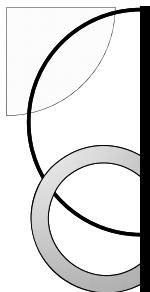
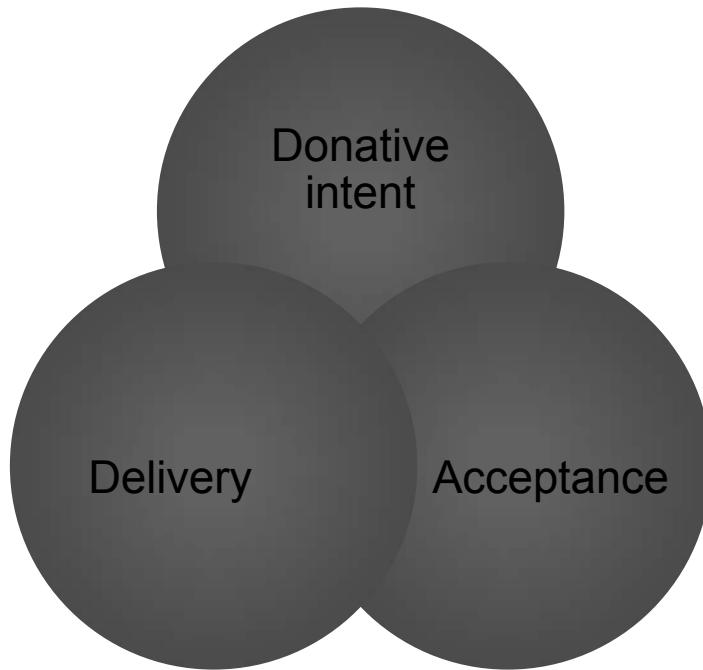
- Family members – not confidential as a matter of law, and possibly not as a matter of fact
- “The existence of a family relationship does not, per se, create a presumption of undue influence; there must be evidence of other facts and circumstances showing inequality or controlling influence.”
 - *Matter of Graeve*, 113 A.D.3d 983, 979 N.Y.S.2d 197 (3d Dep’t 2014)



Confidential Relationships

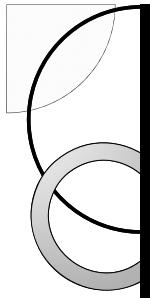


Gifts



Donative Intent

- Intent to make a present transfer
 - Intent to make a future gift is not sufficient
- “The test is whether decedent intended the gift to have no effect until after her death or whether she intended it to transfer some present interest.”
 - *Matter of Watson*, 11 A.D.3d 943, 782 N.Y.S.2d 316 (4th Dep't 2004)
- Capacity
- Undue influence



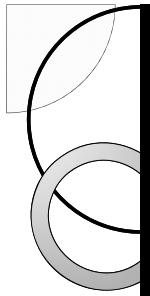
Delivery

- Donor must divest herself of possession and control of the subject property
- Delivery to an agent – permissible, but it has to be the donee's agent.
- Constructive Delivery
 - Delivery requirement may be “tailored to suit the circumstances of the case.” *Matter of Szabo*, 10 N.Y.2d 94, 217 N.Y.S.2d 593, 176 N.E.2d 395 (1961).
 - Donee still must prove that donor relinquished ownership and control of property

Other Gift Issues

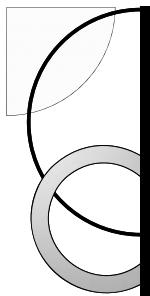
- Acceptance – generally presumed
- Incomplete gifts
- Confidential relationships
- Proof issues – CPLR 4519





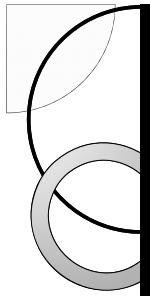
Bank Accounts

- Banking Law §675 – rebuttable presumption that account is held as JTWROS when survivorship words appear on signature card.
 - Burden of proof then shifts to show by clear and convincing evidence fraud, mistake or undue influence
- Can also overcome with clear and convincing evidence of convenience account
 - Decedent made all deposits, funds solely used for Decedent's benefit, confidential



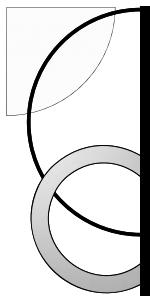
Bank Accounts

- Failure of signature card to contain survivorship language moves it to tenancy in common (EPTL §6-2.2)
- Can still prove JTWROS under common law
- *Matter of Butta* (192 Misc. 2d 614, 746 N.Y.S.2d 586 (Sur. Ct. Bronx Co. 2002)): proving JTWROS without the proper language in the signature card
 - Testimony from the bank officer that opened the account, clear recollection of sequence of events



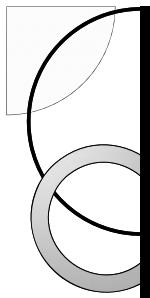
Bank Accounts

- **Moiety:** When money is held in a joint account, “each joint tenant has the right, during the lifetime of both tenants, to alienate his own one-half interest.”
 - *Gotte v. Long Island Trust Co.*, 133 A.D.2d 212, 215, 518 N.Y.S.2d 991, 994 (2d Dep’t 1991)
- Even when one tenant is the sole donor of the money, once such a moiety comes into existence, it cannot be canceled unilaterally.
 - *Kleinhera v. Heller*, 38 N.Y. 836 (1976)



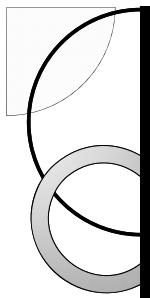
Bank Accounts

- When a party withdraws more than their one-half interest in a joint account, it “results in an extinguishment of the right of survivorship to the other half-interest of the other joint tenant.”
 - *Matter of Mullen*, 268 A.D.2d 313, 314, 702 N.Y.S.2d 35, 37 (1st Dep’t 2000)
 - Claim survives upon death – can be brought in a SCPA §2103 proceeding or an accounting proceeding



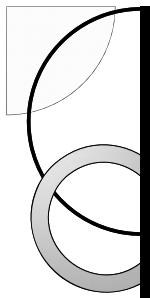
Practitioners' Notes

- Never forget who is your client
- Did you put it in writing?
- Loans and gifts differentiated
- Did you put it in writing?
- Capacity of the client
- Did you put it in writing?
- Role of the Dead Man's Statute
- **DID YOU PUT IT IN WRITING?**



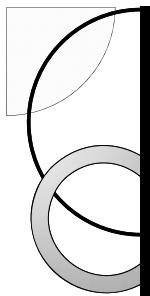
Reverse Discovery Proceeding

- **SCPA §2105:** summary proceeding to dispose of issues pre-accounting
 - SCPA §2102(1)
- Person must have an interest in the subject property
- Respondent must be a fiduciary with **full letters**
 - Contrast: SCPA §2103 for any fiduciary
- No inquisitorial phase



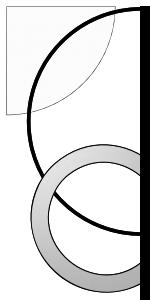
Reverse Discovery Proceeding

- Petition must demonstrate:
 - How the fiduciary acquired title to property
 - Basis for petitioner's right to the property
 - Prayer for relief seeking the return
- Do **not** need to involve each and every person interested in the estate
- Plead carefully - subject to dismissal at the pre-answer stage
- TRO/Preliminary Injunction



Reverse Discovery Proceeding

- File an answer
- Raise the standard affirmative defenses (statute of limitations, statute of frauds, equitable defenses)
- Conventional CPLR 31 discovery
- Jury trial? Depends if claim is rooted in law or equity
 - Be sure to timely demand a jury (SCPA §502)
- Burden of Proof: Petitioner must show by a preponderance of the evidence that she has title and right to immediate possession of property in question
 - If Petitioner alleges the right originates from a gift, clear and convincing standard



Conclusion



