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Trusts and Estates Law Section Journal

A publication of the Trusts and Estates Law Section of the New York State Bar Association

The Crypto Art Revolution: Fiduciary Access to Digital Art Under EPTL Article 13-A and Beyond

Removal of Executor: Making of a Misleading or False Statement

SCPA 2103 Proceedings—A Fiduciary's Right to Commence a Licensed Fishing Expedition

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Publication of Articles

The *Trusts ans Estates Law Section Journal* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Nicholas G. Moneta (nicholas.moneta@rivkin.com) in Microsoft Word. Please include biographical information.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor-in-Chief or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

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Message From the Section Chair

By Laurence Keiser

The TELS Section is back live (almost ☺)

The spring meeting was held in a hybrid format this year. We had an in-person Executive Committee meeting in the morning, an in-person lunch, and a CLE that was available live at the site or on Zoom. In the evening, we had a live reception for the attendees and any Section members who wished to join. We thank our sponsors and a big thank-you to Kevin Matz and the firm of Arent Fox Schiff for allowing us to use its conference facility.

CLE topics covered included: Planning for crypto-currencies, gender sensitivity in estate planning, ethical issues in litigation, and mediation and how tax issues can affect litigation settlements. In the tax area, we also discussed changes in domicile for tax purposes.

Much thanks to the NYSBA staff and to our program co-chairs, Nicole Clouthier and Jinsoo Ro, for their fantastic work putting the meeting together.

On the heels of our spring meeting, I was delighted to be asked on behalf of the TELS Section to address the Surrogate's Association at its annual meeting in New York City. I described to the surrogates what the Section's goals are for this year, and then we had a serious discussion on matters of joint interest. By the way, many surrogate judges have participated on our Executive Committee, most recently, now retired Judges Radigan and Czygier.

Court merger is back on the agenda. The proposal before the Legislature would consolidate the major trial courts into the Supreme Court. Why is this relevant to us?

Under the proposal, the county, family and surrogate's court will be abolished on Jan. 1, 2025, and their judges will become Supreme Court justices. Supreme Court will acquire their jurisdiction. Without expressing an opinion as to whether this is good or bad, we note that our cases may then be assigned to Supreme Court judges who may not have the expertise or desire to handle a trust or estate case.

Court merger has been on the agenda for many years, as a way to simplify the court structure and to save money. Most recently, it was proposed in 2019, but did not advance (largely due to COVID). It requires a constitutional amendment in order to be enacted. The Legislature would have to pass the bill two years in a row and then the proposal would be presented to New York State voters via referendum.

To maintain the progress on the merger and to provide comments, if appropriate, we have established a Committee on Court Merger, chaired by Susan Accetta.

Rest assured that our Section will continue to monitor this issue and represent the interests of our practitioners in assuring that Surrogate's Court practice will remain close to its present form.

If you have a view or want to express an opinion, please email me at Lkeiser@skpllp.com.

Obviously, court merger is extremely important to the surrogates, and we spent time at the meeting discussing our mutual views. Thank you to Surrogates David Guy (Broome County) and Brandon Sall (Westchester County) for helping to open lines of communication. Also, thank you to past Chair Jennifer Hillman for joining the discussion.

We are also supporting a bill to amend the SCPA to eliminate the requirement of service by personal delivery upon domiciliaries of New York state, to eliminate the requirement of a return receipt when using certain types of service by mail and to provide alternate means of service of process for any persons, whether a domiciliary of New York state or not.

So, now we will go from hybrid to live. Our fall meeting will be in Boston from Sept. 15 to 17. Please put the dates on your calendars and plan to join us. Boston is drivable for virtually everyone in New York state. Come early or stay late and enjoy the city. We are putting together a great program, including eight hours of CLE.

We have also established a new Committee on Mediation (one of the topics at our spring meeting). If a dispute can be mediated, as opposed to litigated, it will save much time and resources. I am pleased to say that Judy Nolfo has agreed to chair this committee. Many courts (mostly downstate) are active in mediation. Statewide, it has been difficult to provide the training for lawyers to become mediators. We hope to remedy that.

I hope you all have a happy and healthy summer, and I hope to see you all in Boston on Sept. 15.

Laurence Keiser

Message From the Editor-in-Chief

By Nicholas G. Moneta

We hope that our members are enjoying a warm and healthy summer! In this volume, Lori A. Sullivan and Christina A. Costa provide a warning to fiduciaries to not make misleading or false statements in court proceedings, or face removal from office; Edward D. Baker addresses the differences between a proper discovery proceeding pursuant to Section 2103 of the Surrogate's Court Procedure Act and a "licensed fishing expedition," and Bryan Bessette discusses how cypto-based art forms (like NFTs) fit within Article 13-A of the Estates, Powers, and Trusts Law.

Nicholas G. Moneta

Thank you to those who have contributed to this volume. We continue to urge Section members to participate in our publication. CLE credits may be obtained. Please consider submitting an article for publication in the *Journal*.

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES

Removal of Executor: Making of a Misleading or False Statement

By Lori A. Sullivan and Christina M. Costa

I. Removal

It is well-settled that a testator's choice of a fiduciary is entitled to great deference;[1] however, a fiduciary may be removed when the grounds set forth in the Surrogate's Court Procedure Act (SCPA) have been clearly established.[2] Additionally, a hearing on removal is not necessary when undisputed facts or concessions are within the court's knowledge.[3]

Pursuant to SCPA 719(10), a court may suspend or revoke letters without process where any of the facts provided for in SCPA 711 are brought to the attention of the court.[4]

SCPA 711 includes the following grounds for suspension or revocation of letters:

> 1. Where the respondent was, when letters were issued to him, or has since become ineligible or disqualified to act as fiduciary and the grounds of the objection did not exist or the objection was not taken by the petitioner or a person whom he represents before the letters were granted.
>
> * * *
>
> 8. Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

SCPA 707(1)(e) provides as follows: "one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office" shall be ineligible to receive letters.[5] The "addition of the language in SCPA 707(1)(e) of one 'who is otherwise unfit for the execution of the office,' was intended to 'clarify the standard to be employed by the Surrogate in denying letters to one otherwise authorized to receive such letters and to expand the possible basis in which denial of letters might be grounded.'"[6] This article focuses primarily on the "dishonesty" aspect of SCPA 707(1)(e).

II. Making a False Statement

Courts have consistently found that the making of a false statement on a petition for procuring letters justifies a revocation of letters, irrespective of whether the misstatements were intentional. A lack of candor and disingenuousness have been found sufficient to revoke letters.

In *Matter of Grant*, the New York County Surrogate *sua sponte* suspended the letters issued to the preliminary executor who was an attorney and also the draftsperson of the will.[7] The objectants in *Matter of Grant* alleged that the attorney-fiduciary exerted undue influence on the testator. During his SCPA 1404 examination, the attorney-fiduciary testified that the decedent told him that he wanted to give him a bequest in his will. The attorney did not refrain from drafting the will, but rather suggested that the bequest instead be given to the attorney's life partner.[8] After the decedent died, the probate petition filed and verified by the attorney-draftsperson listed a Manhattan address for the attorney and an upstate address for his life partner. The court, upon learning about this misrepresentation on the probate petition, found that this was "an attempt to obscure their relationship in order to avoid a Putnam hearing."[9]

In *Matter of Miller*, the decedent's brother commenced a proceeding to vacate the court's decree admitting the will to probate, which had been offered to probate by the attorney-executor, who was also the draftsperson.[10] The decedent's brother claimed that his waiver and consent had been obtained through misrepresentation, fraud, coercion, dishonesty and/or mistake attributed to the actions of the attorney-executor. The will bequeathed the decedent's entire estate in trust and gave the attorney-executor the absolute discretion to distribute the estate to whomever he wished without any expressed obligation to apply the funds to charitable uses. The attorney-executor took the position on the probate petition that the bequest was charitable. The court, however, pointed out that the will could be interpreted to include the attorney-executor as a permissible recipient of a distribution. The court went on to state that the probate petition filed by the attorney-executor failed to disclose his beneficial interest in the estate and, in fact, failed to identify the bequest at all. The court reasoned as follows:

> Consequently, the matter proceeded to decree without inquiry by the court, without any proof submitted to explain the circumstances surrounding the bequest, and without notice to the Attorney General as would be required for a charitable

> bequest under EPTL 8-1.1(f). Further, the waiver and consent was executed without the petitioner having been informed of the legal consequences of the bequest to the attorney-draftsman.
>
> Contrary to the assertions of the respondent, the residuary bequest, wherein the respondent stands to derive a substantial benefit, triggers an inference of undue influence. Matter of Putnam, 257 NY 140 (1931). While the procedural requirements imposed by the courts to eliminate the inference of undue influence are not uniform, see Matter of Rothberg, 148 Misc. 2d 703 (Surr. Ct. Bronx Co. 1990), at a minimum this court requires the submission of an affidavit by the attorney-beneficiary describing his relationship to the decedent and explaining the circumstances which prompted the decedent to make such a bequest.
>
> The need for additional proof explaining the circumstances which gave rise to the bequest exists irrespective of the filing of objections and should be submitted at the time the probate petition is filed or soon thereafter. In addition, this court requires that, to be effective, the waiver and consent must indicate that it was executed with full disclosure of the bequest to the attorney and with full knowledge of the legal consequences of the bequest and a statement that the consenting party is relinquishing any right to contest the bequest to the attorney.
>
> The above requirements were not complied with herein. Consequently, the probate decree is defective in that it was based upon material omissions and factual inaccuracies. The waiver and consent is ineffective to bind the petitioner as it was procured without the required disclosures. On the basis of the above, vacatur is warranted. The petitioner has satisfied all of the elements necessary for the court to vacate its decree. SCPA 209(1); Matter of Frutiger, 29 NY2d 143 (1971). To that end, the court rejects the respondent's argument that the petitioner has failed to demonstrate a reasonable probability of success. The Putnam issue and the consequent obligation imposed upon the attorney to explain the reasons for the bequest clearly satisfied this requirement.[11]

Likewise, in *Matter of Wagner*, the Second Department reversed an order of the Surrogate's Court that denied an application to revoke letters on the grounds of improvidence, drunkenness and the false suggestion of a material fact.[12] The fiduciary stated that he had properly served citation upon the petitioner, who was seeking to revoke the fiduciary's letters. The court held that this was a false suggestion of a material fact because the fiduciary had mailed the citation to the wrong address, when if he had used proper diligence, he could have ascertained the petitioner's correct address.[13] Therefore, the court held that the letters were obtained by the false suggestion of a material fact and revoked the letters.

A similar situation was presented in *Matter of Raythen*.[14] The decedent in *Raythen* was survived by three children, and two of the children were issued letters testamentary. When both executors died, a grandchild petitioned for letters of administration c.t.a., on the grounds that the estate at the time consisted of unadministered personal property in the amount of $4,000, and letters issued. The surrogate revoked the letters, finding that there was no unadministered property as the petitioner falsely alleged in the petition. The Second Department affirmed the decree of the surrogate as follows:

> [T]here was a false suggestion of a material fact made to the surrogate, within the intendment of the statute. The petition does not contain any statement that was affirmatively false, but it omitted materials facts which would have made it apparent to the surrogate that in view of the deaths, successions and the identity of the donees, executors, beneficiaries, heirs or next of kin, the power of sale had been absorbed as matter of law. It is the falseness of the suggestion above that moves the court to revocation, in that there was no ground for its act, and hence, it is immaterial whether the petitioner moved in honest mistaking or with evil intent.[15]

Likewise, before the court in *Matter of Aragona*, was an application for revocation of preliminary letters.[16] In *Aragona*, the preliminary executor failed to disclose the existence of a cause of action for personal injury on the probate petition. The court found that this was an omission of a material fact and held that it was in the best interest of the estate to revoke the preliminary executor's letters.[17]

In *Matter of Young*, a creditor commenced a proceeding for revocation of letters of administration that had issued to the decedent's nephew on the basis that the nephew's petition included a false allegation.[18] The court found that the creditor lacked standing to bring a proceeding for revocation of letters; however, the court, on its own, conclud-

ed that pursuant to SCPA 719, the court could revoke, suspend or modify letters where any of the facts provided in SCPA 711 are brought to the court's attention. SCPA 711(4) provides for the revocation of a fiduciary's letters where "the grant of his letters was obtained by a false suggestion of a material fact." The court pointed out that "[a] fiduciary who misstates a material fact in his petition for letters is subject to removal regardless of whether the material misrepresentation was made in good or bad faith."[19] The court found that the nephew's petition included a false statement as to kinship, and even though there was no intent by the nephew to deceive, the court revoked his letters.

Similarly, in *Matter of Brannick*, the petitioner made a series of false statements, which caused the court to question her fitness to serve as fiduciary.[20] The petitioner listed herself on the death certificate as the decedent's only distributee. Thereafter, on the probate petition, she omitted all of the decedent's non-resident alien maternal relatives, failed to disclose that one of the distributees was under a disability and listed her own address for one of the distributees. The court stated as follows:

> The misstatements and obfuscations of . . . [petitioner] and her attorney fall far short of what a court is entitled to expect from fiduciaries and their counsel . . . making intentional misstatements of material fact supports revocation of a fiduciary's letters . . . and similarly supports a determination of not to award letters in the first instance . . . . Apart from removal on that ground . . . petitioner's failure to respond in a forthright manner to the court's questions . . . demonstrate a want of understanding sufficient to deny letters . . . . In short, petitioner's conduct has not only impugned her integrity, it has interfered with orderly estate administration and caused the estate to incur otherwise unnecessary legal fees. This conduct falls far short of that required to [sic] of a fiduciary.[21]

The court also noted that the "[i]ntentional submission of an invalid waiver and consent, a fraud on the court, would yet be another ground upon which to deny letters."[22]

In addition, in *Matter of Rosen-Rosenberg*, the petitioner stated in her petition that the decedent was a citizen of the United States.[23] She later testified, contrary to what was asserted in the petition, that the decedent was not a citizen of the United States, but was in fact a diplomat from another country, and that both she and the decedent were present

in the United States on diplomatic visas. The court found that the allegations in the petition constituted false suggestions of material facts and revoked her letters.[24]

In *Matter of Decaro*, the court found that the petition contained a false suggestion of material fact and revoked the fiduciary's letters.[25] The petitioner there failed to disclose to the court the existence of an agreement relevant to her status in the proceeding. The court noted that:

> The purpose of [SCPA 711(A)] is not to punish the fiduciary for the misrepresentation, but to protect the estate, and could result in the removal of a fiduciary who materially underestimates estate assets . . . , or who misrepresents his relationship to the decedent . . . , or his status as a sole distribute . . . . The court has also held that outright misstatements are not essential for removal; disingenuous and lack of candor suffice . . . . A false statement of material fact includes even a misstatement made in good faith . . . .[26]

In *Matter of Daggett*, the Second Department affirmed the decree of the Surrogate's Court revoking letters of guardianship because "the undisputed proof establishe[d] that the petition upon which the appellant was originally appointed contained false suggestion of material facts . . . ."[27] The court noted that "[t]his is so even if the erroneous statements were innocently made."[28]

In *Matter of Kemper*, the fiduciary failed to advise the court that he was a convicted felon.[29] The court noted that the conviction occurred in the late 1960s, a certificate of relief issued in 1985 and the decedent and most, if not all, of the estate beneficiaries were aware of the conviction. Nevertheless, the court found that the fiduciary exhibited a lack of candor and disingenuousness and revoked his letters. The court stated as follows:

> What concerns the court is not merely the existence of these convictions, but respondent fiduciary's failure to advise the court of the existence of the convictions, as well as the Certificate of Relief from Disabilities, until faced with a proceeding for his removal as fiduciary. Indeed, it would be a fair statement that, had petitioner not discovered the convictions on her own and brought them to the court's attention, there is no indication that respondent would have come forward with this information. Case law supports the theory that a false suggestion of material fact includes even a misstatement made in good faith . . . . Indeed, outright misstatements are not necessary, disingenuousness and lack of candor suffice . . . .[30]

In *Matter of Shonts*, the petitioner stated that she had made a diligent search and inquiry for a will and had not found any will or any information concerning the existence of a will.[31] Based upon her petition, the court issued letters of temporary administration to the petitioner. Two days after the court issued letters of temporary administration to the petitioner, a will was produced. The court said, "[r]ead in the light of subsequent developments, the petition . . . seems disingenuous and argumentative."[32] Accordingly, the court revoked the letters.

In *Matter of Ansciombe*, the infant's grandmother received letters of guardianship. The grandmother's petition stated that the infant lived with her, but in fact, the infant lived with her great-grandmother.[33] The court held that it was "unnecessary to review petitioner's other allegations . . . . [Petitioner's] application for letters of guardianship of the property was obtained by false suggestion of a material fact" and her letters were revoked pursuant to SCPA 711(4).[34]

Likewise, in *Matter of Rosado*, the petitioner's letters were revoked based upon a false statement.[35] In her verified petition, the petitioner stated that no other proceeding had been commenced for appointment of a guardian. In fact, another proceeding had been commenced in the Supreme Court. This Court held that whether or not the petitioner "fully comprehend[ed] her obligation to reveal the existence of the Supreme Court action" was irrelevant because "unintentional false statements of material fact equally support revocation of a fiduciary's letters."[36]

In *Raysor v. Gabbey*, letters of guardianship were issued to the petitioner based upon a petition that failed to include the unwed father of the infant.[37] The petitioner advised the court that she did not include the infant's father because at the time the petition was filed there had been no finding on the issue of paternity. The court stated that the false suggestion referred to in SCPA 711 may be a false statement honestly made or it may consist simply of a lack of candor.[38] The court found that the petitioner exhibited a lack of candor and revoked the letters.

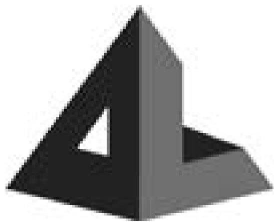
In *Matter of Blaukopf*, before the court was a motion to revoke letters testamentary issued to the decedent's caregiver, the nominated executor under the will.[39] The revocation of letters was based, in part, on a false statement in the petition regarding a confidential relationship. The caregiver filed an initial petition for probate dated Sept. 21, 2007. In response to paragraph 8(a), the caregiver indicated that she had a "confidential relationship" with the decedent.

The petition also stated that the decedent had no distributees. Thereafter, the caretaker filed an amended petition on April 18, 2008. In response to question 8(a), as to whether any beneficiary under the will had a confidential relationship with the decedent, the caretaker checked the box next to the word "None."

The court in *Blaukopf* stated it was troubled by the fact that the caregiver checked the box "None" on the amended petition, and that her disingenuousness, together with other troubling facts on the record, warranted vacating the letters testamentary previously issued to the caregiver. The Surrogate's Court noted that "[h]ad this question been answered accurately by . . . . [the Petitioner], the Court might have scheduled a hearing prior to the issuance of full letters . . . ."[40] The court, relying on *Matter of Grant*, also noted that "[w]here facts were obscured by a party wishing to avoid a *Putnam* hearing, the court, *sua sponte*, suspended preliminary letters testamentary . . . .".[41] The Second Department upheld the decision of the surrogate, finding that "the petitioner filed a total of three different petitions for probate and letters testamentary wherein she made several conflicting statements."[42]

In *Matter of Lewis*, the petitioner contended that the respondent's letters should be revoked due to his false statements of material fact in the administration petition.[43] The court noted that the respondent failed to list a distributee on the petition but pointed out that the distributee did not have priority to letters over the respondent. Irrespective of whether that failure alone was sufficient to revoke letters, the court held that the respondent's letters must be revoked for the following reasons:

> Here, even assuming, arguendo, that a good faith failure to list a person as a distributee in an administration petition does not automatically result in the revocation of letters in every instance, the respondent's letters must be revoked for the following reasons: (1) the respondent does not claim that he was unaware of the existence of the petitioner and, instead, blames the failure to include the petitioner as a distributee on an inadvertent mistake on the part of his former attorney (an allegation which has not been supported by an affidavit from that attorney) and his own carelessness in failing to read the petition; (2) the respondent concedes that his application for letters of administration failed to include a parcel of real property owned by the decedent and himself as tenants in



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common; (3) the respondent, in support of his application for letters, submitted an affidavit from the decedent's brother, which the respondent also alleges that he did not read, in which the brother made the same "mistake" as the respondent's former attorney, to wit, omitting the petitioner as a distributee; and (4) the respondent's failure to list the petitioner as the decedent's child in his administration petition deprived her of the opportunity to oppose his application in a proceeding in which no presumption would exist that either of them was entitled to priority in receiving letters (see SCPA 1001[1]).[44]

In *Matter of Menitskiy*,[45] the court refused to issue letters to the nominated executor and required an evidentiary hearing on his fitness to serve because of misrepresentations he made in sworn statements to the court.

As the above cases show, a petitioner should be sure to review and check any petition verified by him or her for accuracy before signing the verification. A best practices approach would be for the attorney and the petitioner to review the petition together. Failure to check the accuracy of the petition may provide a potential adversary an opportunity to seek revocation that could have been easily avoided.

Lori A. Sullivan is counsel in the Trusts & Estates Group of Seward & Kissel LLP. Sullivan practices in the areas of estate planning, estate administration and estate litigation, including contested probate proceedings, contested accounting proceedings, discovery proceedings, inter vivos trust litigation and will construction proceedings.

Christina M. Costa is an associate in the Trusts & Estates Group of Seward & Kissel LLP, where her practice focuses in the areas of estate planning, estate administration and estate litigation.

Endnotes

1 *Duke*, 87 N.Y.2d 465 (1996).

2 *Id.*

3 *Id.*

4 SCPA § 719(10).

5 *Id.* § 707(1)(e).

6 *Rad*, 162 Misc. 2d 229, 231 (Sur. Ct., N.Y. Co. 1994).

7 2007 N.Y. Misc. Lexis 3707 (Sur. Ct., N.Y. Co. 2007).

8 N.Y. Rules of Prof'l Conduct, R. 1.8(c)(2) provides that an attorney shall not prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

9 *Grant*, N.Y.L.J., May 4, 2007, at 31, col. 4 (Sur. Ct., N.Y. Co.).

10 *Miller*, N.Y.L.J., Aug. 8, 1994, p. 29, col. 4 (Sur. Ct., Kings Co.).

11 *Id.*

12 266 A.D. 791 (2d Dep't 1943).

13 *Id.*

14 115 A.D. 644 (2d Dep't 1906).

15 *Id.* at 646. (internal citations omitted).

16 13 Misc. 3d 1221(A) (Sur. Ct., Nassau Co. 2006).

17 *Id.*

18 2013 N.Y. Misc. LEXIS 587 (Sur. Ct., Nassau Co. 2013).

19 *Id.* at 8. (internal citations omitted).

20 N.Y.L.J., Sept. 1, 1998, p. 26, col. 2 (Sur. Ct., New York Co.).

21 *Id.* (Internal citations omitted).

22 *Id.*

23 N.Y.L.J., Jan. 28, 1997, p. 29, col. 4 (Sur. Ct., Queens Co.).

24 *Id.*

25 N.Y.L.J., Dec. 23, 1998, p. 36, col. 3 (Sur. Ct., Westchester Co.).

26 *Id.* (internal citations omitted).

27 262 A.D. 867 (2d Dep't 1941).

28 *Id.* (internal citations omitted).

29 N.Y.L.J., Sep. 21, 2017, p. 29, col. 5 (Sur. Ct., Suffolk Co.).

30 *Id.* (internal citations omitted).

31 229 N.Y. 374 (1920).

32 *Id.* at 381.

33 N.Y.L.J., Aug. 22, 1991, p. 24, col. 3 (Sur. Ct., New York Co.).

34 *Id.*

35 2007 N.Y. Misc. LEXIS 8423 (Sur. Ct., New York Co. 2007).

36 *Id.* at 7. (internal citations omitted).

37 57 A.D.2d 437 (4th Dep't 1977).

38 *Id.* at 443–44.

39 23 Misc. 3d 1103(A) (Sur. Ct., Nassau Co. 2009).

40 *Id.* (internal citations omitted).

41 *Id.* (internal citations omitted).

42 *Blaukopf*, 73 A.D.3d 1040, 1041 (2d Dep't 2010).

43 17 Misc. 3d 1133(A) (Sur. Ct., Bronx Co. 2007).

44 *Id.* at 40.

45 2009 N.Y. Misc. LEXIS 6500 (Sur. Ct., Nassau Co. 2009).

SCPA 2103 Proceedings—A Fiduciary's Right To Commence a Licensed Fishing Expedition

By Edward D. Baker

A discovery proceeding pursuant to SCPA 2103[1] may be commenced by any legal representative of an estate, including a preliminary executor or a temporary administrator. An estate fiduciary has a duty to collect and preserve estate assets for the benefit of the beneficiaries of an estate. To this extent, when the fiduciary knows, or has reason to believe, that assets of the estate have been misappropriated, or that someone has information about, or has a disputed claim to estate assets, a 2103 proceeding should be considered.

A SCPA 2103 proceeding has two phases. The first phase is the inquisitorial phase, which is the discovery portion of the proceeding. In essence, the fiduciary is asking the court for permission to examine, under oath, an individual, for the purposes of determining whether that individual has information relating to the existence or whereabouts of estate assets. If the court finds reasonable grounds for the examination, it will order that a respondent, or respondents, appear and subject themselves to examination. In this regard, SCPA 2103 is very broad in scope and has been likened to a licensed fishing expedition as a fiduciary need not have concrete evidence to commence the 2103 proceeding. Indeed, the proceeding may be instituted against any person having "possession or control" or "knowledge or information" about any property, or the proceeds or value thereof, which should be paid to the fiduciary.[2]

SCPA 2103[3] provides that a fiduciary may present to the court

> a petition showing on knowledge or information and belief that any property as defined in 103 or the proceeds or value thereof which should be paid or delivered to him is (a) in the possession or control of a person who withholds it from him, whether possession or control was obtained prior to creation of the estate or subsequent thereto, or (b) within the knowledge or information of a person who refuses to impart knowledge or information he may have concerning it or to disclose any other fact which will aid the petitioner in making discovery of the property, or (c) he has reason to believe, in the possession or control of a person described in subparagraph (a) of this subdivision or within the knowledge or information of a person described in subparagraph (b) of this subdivision and praying that an inquiry be had respecting it and that the respondent be ordered to attend and be examined accordingly and to deliver the property if in his control.

However, despite the broad latitude and liberal standards set forth by the statute, there are limits to a fiduciary's inquiry. New York courts have made clear that they will not grant a fiduciary unfettered power in commencing a discovery proceeding. Significantly, there are a number of decisions holding that unless a petition for SCPA 2103 discovery seeks specific property or money that is in the possession or knowledge of a respondent, or with reasonable likelihood is in the possession or knowledge of the respondent, the proceeding must be dismissed.

However, this was not always the case. Indeed, in years past, courts had a much more expansive view of the threshold requirements for commencement of an SCPA 2103 proceeding. For example, in *Matter of Mantia*,[4] former Surrogate Radigan described the scope of a SCPA 2103 examination as "quite broad," explaining that because

> the believed owner of the assets is deceased and cannot be called upon to provide aid in establishing his estate's right to possession of these assets, the courts tend to give broader inquiry than what might be allowed in other kinds of proceedings brought in the Surrogate's Court. Surrogate Radigan, quoting *Matter of Rosencrantz*, 5 Misc 2d 308 (Sur Ct, Kings County 1956), described the allowable area of inquiry as a "fishing expedition," a term identifying a type of inquiry that is usually unnecessarily intrusive.

Similarly, in *Matter of Fialkoff*,[5] Surrogate Kelly, in describing a 2103 discovery proceeding, held that

> the inquisitorial stage anticipates that the pleadings will be non-specific and the petitioner is not required to set forth allegations sufficient to sustain a cause of action but only those that justify an inquiry. The petitioner should be allowed the broadest latitude in deposing a respondent to obtain

> information to aid the fiduciary in administering the estate and determining whether recovery of assets should be pursued.

Surrogate Kelly added that the petition may be stated upon information and belief and that the allegations only need show that any property or the proceeds or value thereof which should be paid or delivered to the fiduciary are in the possession or control of a person who is withholding it or within the knowledge or information of a person who refuses to tell the fiduciary where it is.

In *Matter of Boccia*,[6] the court noted that the inquisitorial stage of a discovery proceeding is a licensed fishing expedition by the executor and that at that stage the fiduciary is not required to set forth allegations to sustain a cause of action, only those which justify an inquiry. This is because a fiduciary who may know little or nothing about the decedent's affairs should have an opportunity to assist in the recovery of estate assets or to administer the estate. The courts tend to entertain this proceeding liberally when the information sought relates to estate assets or their value because it helps the fiduciary perform his or her duty to marshal assets.

The foregoing cases, along with many others like them, set a dangerous precedent of permitting fiduciaries to engage in licensed fishing expeditions based solely on pure conjecture that a decedent may have maintained an ownership interest in property that may be in possession of a respondent.

Within this context, the Appellate Division, First Department, in *Matter of Perelman*,[7] addressed the parameters of a SCPA 2103 discovery proceeding. In *Perelman*, the executor commenced a proceeding seeking information and the turnover of the decedent's interest in various family businesses that were allegedly misappropriated prior to her death. The respondents moved to dismiss the petition arguing that the petitioner's claims were barred by documentary evidence, and on the basis of the statute of limitations, *res judicata*, and collateral estoppel. Petitioner maintained that he had a fiduciary duty to pursue the claim and that SCPA 2103 has been broadly construed as to allow a "fishing expedition" in order to assist the fiduciary in recovering property or administering an estate. Respondents maintained that while discovery pursuant to SCPA 2103 is often labeled a fishing expedition, the authorities did not consider it to be a fishing expedition with an unlimited license.

In an opinion and order, dated Feb. 15, 2015, the Surrogate's Court denied the motion to dismiss. On appeal, the Appellate Division, First Department unanimously reversed the order of the Surrogate's Court and granted respondents' motion. Critically, the court held that the petitioner "failed to demonstrate the existence of any specific personal property or money which belongs to the estate, or even a reasonable likelihood that such specific property or money might exist." In doing so, the court dismissed the notion that a fiduciary seeking discovery has the authority to engage in an unfettered fishing expedition.

Despite the fact that SCPA 2103 discovery proceedings are often referred to as licensed fishing expeditions, it is clear from the First Department's decision in *Matter of Perelman*, that unless a SCPA 2103 petition lists specific property that is in the possession or knowledge of a respondent, or the petitioner reasonably believes is in the possession or control or within the knowledge or information of a respondent, the proceeding may be subject to dismissal.

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Endnotes

1 SPCA § 2103.

2 *Id.*

3 *Id.*

4 1997 WL 34851768 (Sur. Ct., Nassau Co.).

5 45 Misc. 3d 1205(A) (Sur. Ct., Queens Co. 2014).

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The Crypto Art Revolution: Fiduciary Access to Digital Art Under EPTL Article 13-A and Beyond

By Bryan Bessette

Since the 1980s, nearly all aspects of our lives, from socializing to financial transactions, have increasingly become digitized—so too, now, has our art.

One form of digital art in particular, Non-Fungible Tokens, commonly referred to as NFTs, has been around since approximately 2014, but its growth in popularity—as well as in value—over the past year evidences a shift in how we view and value art.[1] For instance, in March 2021, NFTs received a frenzy of media attention for the $69.3 million sale of the NFT *Everydays* by the artist Mike "Beeple" Winkelman in a joint venture between world-renowned auction house Christie's and NFT platform MakersPlace.[2] While the *Everydays* sale is far from the norm, and a price-correction in the NFT marketplace occurred in the spring of 2021, NFTs appear to be growing in popularity, and the number of NFT artists and collectors have actually increased on many platforms since the correction.[3]

This recent increased interest in digital art highlights the need to plan for fiduciary access to digital assets in the event of death or incapacitation. In 2016, the New York State Legislature acknowledged the need for fiduciaries to "gain access to, manage, distribute and copy or delete digital assets"[4] by enacting Article 13-A of the Estate, Powers and Trusts Law (EPTL).[5] Article 13-A, titled Administration of Digital Assets, provides a comprehensive framework of rules concerning how owners can utilize advanced directives relating to their digital assets, as well as procedural rules for fiduciaries to gain access to the digital assets of a decedent or incapacitated person.[6] In light of the increased investment in NFTs over the past year, it is imperative to determine how these crypto-based art forms fit within Article 13-A.

NFTs are defined as "digital asset[s] that represent real-world objects like art," which are given unique, verifiable identifying codes on cryptocurrency blockchains, most commonly the Ethereum blockchain ERC-721.[7] Unlike cryptocurrencies, NFTs, as the name suggests, are non-fungible, in that they are given unique coding that is recorded on the blockchain.[8] NFTs are created through a process called "minting," which consists of "publishing a unique instance of [an] ERC-721 token on the blockchain"[9] through what are known as "smart contracts," "contracts expressed as a piece of code that are designed to carry out a set of instructions."[10] Smart contracts "assign ownership and manage the transferability of the NFT[]."[11] As with traditional artforms, it is precisely the non-replicability of the token that allows the owner and all others to verify the code's uniqueness, much like a valuable painting may be verified as an original, authentic work of a famous painter. However, given the digital nature of NFTs, storage necessarily differs significantly from storing a traditional art piece. The majority of "NFT smart contracts are based on the Ethereum" blockchain; therefore, "the code," or token URI, "for each smart contract is stored on the blockchain."[12] Alternatively, NFT owners may, for security reasons, choose to store their token entirely offline in a device known as a hardware wallet.[13]

But there is still more to an NFT than simply its unique token—namely, the associated digital art. Although the art (the visual media such as a JPEG image) can be stored on the blockchain with the token URI, "the content *associated* with the smart contract is [generally] stored somewhere else."[14] Such off-chain storage of the associated art is common, especially for large files, due to the high cost associated with storing the content on the blockchain.[15] Art stored off-chain may be accessed through a number of methods, including through a crypto software wallet that allows users to access the art through a third-party data repository.[16] Another common means of accessing the visual art is through an InterPlanetary File System (IPFS), a peer-to-peer file sharing system where users can "pin" their digital artwork, which is identified through a unique content identifier known as a CID.[17] As the foregoing suggests, it is the unique token that drives the NFT's value, not the content associated with the token—which the NFT owners will likely not obtain exclusive ownership or access over, such as in the case of a digitally generated picture that remains stored on a URL created by the artist/creator of the work.[18]

Estate planners and fiduciaries alike are well served to have a basic understanding of the nature of these assets, and that an NFT owner will have not only their secured cryptocurrency account but will likely also use additional secured accounts for storing tokens and/or accessing the associated content. Such comprehension is vital because, as with any art form, a decedent's or incapacitated person's NFTs could be among their most valuable assets and, therefore, critical to the administration of an estate.

Further, as with all digital assets, fiduciaries may run into significant obstacles when they attempt to access and marshal a decedent's or incapacitated person's NFTs. Primarily cryptocurrency websites place a premium on security and utilize password protection, encryption, and may even recommend the use of multi-factor authentication or physical hardware security keys to protect individual accounts.[19] Additionally, federal and state privacy laws prohibit unauthorized disclosure of a user's digital assets to third parties.[20] Notably, many cryptocurrency platforms, including Ethereum, are based outside of the United States and are subject to international and foreign data security laws.[21] Moreover, in contemplation of such privacy laws, cryptocurrency platforms utilize privacy policies that prohibit disclosure to unauthorized third parties.[22]

Given the complexity of the online footprint associated with NFTs, as well as the sheer novelty of these assets, it is necessary to explore how NFTs will be treated under EPTL Article 13-A. Section 13-A(1) defines "digital assets" as "an electronic record in which an individual has a right or interest."[23] Notably, the term "digital assets" expressly excludes "an underlying asset . . . unless the underlying asset . . . is itself an electronic record."[24] With NFTs, the secured crypto accounts (and crypto-wallets used to store and transfer cryptocurrency and NFTs) associated with the unique token will be considered "digital assets" under Article 13-A, as they constitute electronic records in which the owner has rights and interests.[25] Further, because the unique token—"the underlying asset"—"is itself an electronic record" in which the owner has rights and interests, it appears that the NFT itself will fall into Article 13-A's exception and also be considered a "digital asset."[26] As discussed further below, Article 13-A draws an important distinction between "electronic communications," as defined under federal privacy law, and other digital assets.[27]

Further, § 13-A-2.2 allows an owner of a digital asset to utilize a custodian's online tool to provide express consent to disclose to a designated third party "some or all of the user's digital assets."[28] The use of an online tool offers an alternative to conventional legal documents, such as a will, that could become outdated in the event that passwords or authentication methods change. In the absence of an online tool or at the user's election, a user may authorize a fiduciary's access to some or all of their digital assets through traditional legal documents, including a will, trust, or power of attorney.[29] The user's authorization directive provided through an online tool or through a conventional legal document trumps any contrary provision in a custodian's terms of service agreement.[30] Having awareness of § 13-A-2.2 is critical for NFT owners and fiduciaries, as many cryptocurrency sites, such as Ethereum,[31] as well as IPFS sites,[32] afford users the ability to authorize the custodian to disclose information to third-parties via an online tool. It is similarly important for NFT owners and fiduciaries that Article 13-A provides, as a default rule, that in the event that a user elects to use both an online tool *and* a conventional legal document, "[i]f the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record."[33] Thus, NFT owners and estate planners must take care to ensure that, in the event an NFT owner utilizes an online tool, they understand the terms associated therewith, particularly, whether and to what extent an online tool allows for modification or deletion of directives pertaining to third-party authorization. Particularly, if an NFT owner decides to use both an online tool and a conventional legal document, estate planners should be aware that changes to the online tool may unknowingly impact an NFT owner's testamentary intent should they make changes to third-party authorization directives after they execute a will. Therefore, while some may choose to take a belt-and-suspenders approach by utilizing both online tools and conventional testamentary documents, this may not necessarily be without risk if subsequent modifications via an online tool could complicate fiduciary access down the road.

Article 13-A also accounts for situations in which NFT owners fail to use an online tool or provide for fiduciary access to digital assets in a traditional legal planning document. Specifically, Article 13-A provides a default procedure that allows the fiduciary to acquire access, excluding the content of electronic communications, by providing certain documents and information.[34] Under § 13-A-3.2, a fiduciary may gain access to a decedent's digital assets even if the decedent did not utilize an online tool or provide directives in their will, "[u]nless the user prohibited disclosure of digital assets or the court directs otherwise," and provided that the fiduciary provides a custodian with the following: "a written request for disclosure in physical or electronic form"; "a copy of the death certificate of the user"; "a certified copy of the letter of appointment of the [fiduciary] or a small-estate affidavit or court order."[35] Further, the fiduciary must provide the following additional items *if requested* by a custodian: "a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account"; "evidence linking the account to the user"; and/or "an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate."[36] Alternatively, a custodian may require a fiduciary to provide "a finding by the court that: the user had a specific account with the custodian," or that "disclosure of the user's digital assets is reasonably necessary for administration of the estate."[37] By contrast, under § 13-A-3.1, which governs

the disclosure of content of electronic communications, the user's consent or a court order directing disclosure is required.[38]

Although no court decision has yet dealt with the specific issue of fiduciary access to NFTs, one recent New York County Surrogate's Court decision, *Matter of Scandalios*, may be instructive.[39] In *Matter of Scandalios*, the decedent died unexpectedly at 45 years old, leaving personal property and the residue of his estate to the petitioner, his spouse and executor.[40] "No provision in [the] decedent's will expressly authorize[d] the executor to access [the] decedent's digital assets and [the] petitioner point[ed] to no documents authorizing such access."[41] Similarly, the petitioner did not proffer proof of the "decedent's use of any online tool granting his personal representative to access his digital property."[42] The petitioner commenced a turnover proceeding pursuant to SCPA 2103 seeking an order directing Apple, Inc. to disclose the decedent's digital assets—the decedent's photographs stored in an iTunes and/or iCloud account—after Apple's Digital Estate team informed the petitioner that he would need a court order to "access and obtain control of" the photographs.[43] The court considered the proof in support of the petition, including that, based on the petitioner's personal knowledge, the decedent was the user of an Apple account, "the ID for which [wa]s either of the two email accounts provided by [the] petitioner."[44] The court noted that Article 13-A distinguishes digital assets from "[e]lectronic communication[s]," as defined under federal privacy law.[45] The court observed that "[t]his distinction is significant in that disclosure of electronic communications, unlike disclosure of other digital assets, requires proof of a user's consent or a court order."[46] The court held that, because photographs contained in the decedent's Apple account were not electronic communications, "EPTL 13-A-3.2 mandate[d] disclosure of" the photographs and "no lawful consent [wa]s required . . . under the Stored Communications Act . . . or EPTL Article 13-A . . . ."[47] The court determined that the decedent was the owner of the Apple account, identified by his two email accounts, and issued an order pursuant to Section 13-A-3.2(d)(4).[48]

Consequently, it would not appear that NFTs would be treated as communications.[49] Rather, it seems likely that NFTs would be treated the same as the digital photos stored in the decedent's Apple account in *Matter of Scandalios*, which would be disclosable pursuant to EPTL 13-A-3.2 pursuant to court order even if a decedent had not used an online tool or provided consent for authorization for third-party disclosure in a conventional legal document. However, as that case demonstrates, considerable time and effort may be required to pursue a drawn-out proceeding to obtain a court order when an order would likely be more quickly obtained if the fiduciary had proof of the decedent's advanced directives pertaining to his or her digital assets. On balance, however, submission of a court order is always an option for a fiduciary seeking to gain disclosure from a custodian under Section 13-A-3.2(c) and may, in fact, expedite the disclosure process. Further, if a fiduciary is not a close family member, such as the spouse in *Matter of Scandalios*, one can imagine that even IDs and usernames, including email addresses, might not be readily available or even known. In addition, even if the decedent in *Matter of Scandalios* had used an online tool to authorize his executor to access his Apple account(s), there is no guarantee that all companies have a service like Apple's "Digital Estate" team, or that cryptocurrency and/or other companies providing NFT access services have the resources to maintain infrastructure and support systems to readily provide such information to a fiduciary. Accordingly, estate planners might advise clients to maintain a log of the online tools they use that they and/or a fiduciary can keep in the event of death or incapacitation. It may also be advisable that NFT owners go a step further and utilize other forms of technology, such as password vaults and encryption key management systems, to store updated passcodes and other security keys, and ensure a fiduciary has access to such accounts. This type of centralized storage is especially appealing where, as in the case of NFTs, multiple accounts that implement different and often numerous security devices are likely to be maintained. Use of such technology could provide fiduciaries with simplified access to sensitive private account information and allow fiduciaries to streamline the administration of NFTs in the event of death or incapacitation.

In sum, Article 13-A provides ample guidelines for planning for fiduciary access to a decedent's or incapacitated person's NFTs, as well as default rules that allow access to these digital assets in the event that an owner has not planned for fiduciary access. However, as with nearly all statutory schemes, Article 13-A is not all encompassing, and without proper planning, accessing and administering a decedent's or incapacitated person's valuable crypto-art may still be costly in both time and resources if focused planning measures are not taken.

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Endnotes

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3. *Are NFTs Really Over?*, *supra* note 2.
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5. *Id.* (explaining that EPTL Article 13-A was modeled "largely on . . . the Uniform Law Commission['s] RUFADAA (Revised Uniform Fiduciary Access to Digital Assets Act).
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18. *See* Jacob Kastrenakes, *Your Million-Dollar FT Can Break Tomorrow If You're Not Careful—Without maintenance, an NFT's art could disappear*, The Verge (Mar. 25, 2021), https://www.theverge.com/2021/3/25/22349242/nft-metadata-explained-art-crypto-urls-links-ipfs.
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20. *See* Electronic Computer Privacy Act (18 U.S.C. §§ 2510, *et seq.* (1986); Stored Communications Act 18 U.S.C. §§ 2701–11 (2002); Computer Fraud and Abuse Act 18 U.S.C. § 1030 (2012); N.Y. Penal Code § 156.00 (McKinney 2006) ("A person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization.").
21. *See* Privacy Policy, Ethereum (updated May 26 2021) ("As the operator of the Websites, we take the protection of your personal data very seriously. We collect, process and use your personal data in accordance with this privacy policy and in compliance with the Swiss Federal Act on Data Protection . . ., the Swiss Ordinance to the Federal Act on Data Protection . . . and the General European Data Protection Regulation . . . ."), https://ethereum.org/en/privacy-policy/.
22. *See, e.g.*, *id.* ("With the exception of the provider of our website, we do not make your personal data available to third parties unless you have expressly consented to it, if we are legally obligated to, or if this is necessary to enforce our rights concerning a contractual relationship.").
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24. *Id.*
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36. *Id.* 13-A-3.2(d)(1)-(3).
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40. *See Matter of Scandalios*, 2019 WL 266570, at *1.
41. *Id.* at *2.
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43. *Id. at* *1 n*.2.*
44. *Id. at* *2.
45. *Id.* 13-A-1(k); 18 U.S.C. § 2510(12).
46. *Id.* (*citing* EPTL 13-A-3.1); *see* EPTL 13-A-3.2.
47. *Id.* (parenthesis omitted).
48. *See id.*
49. In contrast, the RUFADAA describes electronic communications to include such things as "email, text messages, instant messages, and any other electronic communication between private parties." RUFADAA (2015) Section 2, comment, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=112ab648-b257-97f2-48c2-61fe109a0b33&forceDialog=0.

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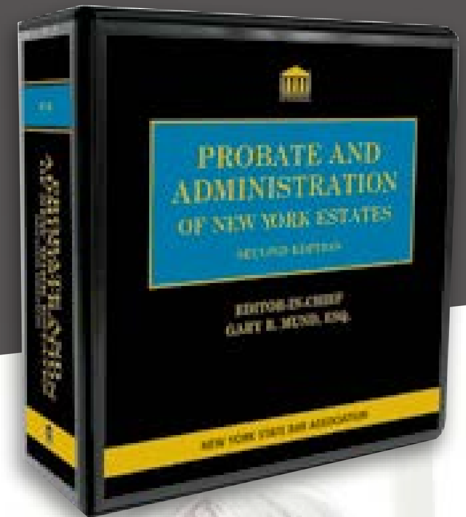

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State of Estates

By Paul S. Forster

I have it on good authority that as you read this, summer has arrived. Whether you are in the mountains or on the beach, or neither, to keep the mental gears turning lest they seize up in a surrender to enjoyment, we present some interesting cases involving:

- a complaint being determined to state a claim for legal malpractice wherein it was alleged that the attorney defendants negligently failed to plan for the distribution of the decedent's assets in accordance with her instructions because her assets ended up passing by way of Totten Trusts known to defendants, and not under the instruments prepared by the defendants for the decedent;
- an attempt to change the beneficiary designation on a certificate of deposit by letter, rather than by way of the bank's form, being found ineffective;
- an attorney being required to provide his client's financial information in his possession in response to a subpoena;
- the survival of a claim for loss of sepulcher against a motion to dismiss, where it was discovered at the last moment that the body about to be buried wasn't that of the decedent;
- the inadequacy of a "self-proving" affidavit submitted to the court in connection with a probate in that it failed to establish strict compliance with the specific strictures of the pertinent Covid Executive Order;
- the rejection of a compromise application for failure to set forth a factual basis to support the adequacy of the settlement, the allocation as between personal injuries and pain and suffering, and wrongful death, the services rendered, and the attorney disbursements;
- the necessity of strict compliance with the provisions of the "heirs property" partition statute;
- the subject matter jurisdiction of the Surrogate's Court under SCPA 2110, despite a failure to comply with 22 N.Y.C.R.R. 137 mandatory fee dispute resolution procedures;
- the existence of a cause of action against a nursing home on behalf of an estate for the death of a resident in addition to the action for personal injuries and conscious pain and suffering, and separate and apart from, and supplemental to, an action on behalf of distributees for wrongful death;
- the denial of a motion to amend objections to an accounting on the ground that the movant failed to comply with the procedural requirements of CPLR 3025(b) by failing to include the proposed amended objections clearly showing the changes or additions to be made; and
- the inability of an estate representative to act *pro se* in matters involving claims brought against an estate.

Complaint Stated a Claim For Legal Malpractice Wherein It Was Alleged That the Attorney Defendants Negligently Failed To Plan for the Distribution of the Decedent's Assets in Accordance With Her Instructions Because Her Assets Passed by Way of Totten Trusts Known to Defendants, and Not Under the Instruments Prepared by the Defendants for the Decedent

The decedent retained the legal services of the defendants for estate planning purposes. At the time, the decedent owned, among other things, two bank accounts held in trust for the decedent's sons, Frederick and Peter. The decedent allegedly informed the defendants that upon her death, she did not want Peter to receive any of her assets, and that she wanted $1,000 of her assets to go to her sister-in-law's daughter and her remaining assets to go to Frederick. The decedent executed a will prepared by the defendants, which, among other things, nominated Frederick as executor, and provided that all of the decedent's probate estate pour-over into an irrevocable trust, also drafted by defendants.

On that same day, the decedent executed the irrevocable trust, which appointed Frederick as sole trustee, and provided that after the decedent's death, Frederick as trustee should distribute the remaining trust property to himself outright, free of trust. The irrevocable trust stated that the decedent was specifically disinheriting Peter and his descendants.

After the decedent died, Frederick was appointed executor of the decedent's estate and commenced an action alleging, *inter alia*, that the defendants provided negligent legal advice to the decedent with regard to her estate planning. Frederick alleged, *inter alia*, that prior to the decedent's death, the decedent and he had informed the defendants that the decedent had two bank accounts maintained at Apple Bank which, collectively, contained almost $600,000, and that these accounts were Totten

Trusts. Frederick alleged that the defendants prepared an estate plan for the decedent that did not reflect her wishes because the proceeds of the Totten Trusts did not pass through the decedent's estate, were not made part of the irrevocable trust upon her death and were distributed to both Frederick and Peter.

Frederick also alleged, *inter alia*, that the defendants negligently failed to plan for the distribution of the decedent's assets in accordance with her instructions, to investigate and conduct due diligence concerning the nature of the Totten Trusts, and to ensure that the decedent had terminated the Totten Trusts prior to her death. Frederick alleged that but for the defendant's negligence, the irrevocable trust would have received a distribution of all of the assets of the decedent with the exception of the $1,000 bequest to the decedent's sister-in-law's daughter. The defendants moved, *inter alia*, for summary judgment dismissing the complaint, which was granted, the court stating that defendants had demonstrated that any alleged malpractice did not cause the estate to sustain actual and ascertainable damages. The plaintiff appealed.

HOLDING: The Supreme Court was reversed. The Appellate Division stated that to succeed on a motion for summary judgment dismissing a legal malpractice action, a defendant must present evidence in admissible form establishing that at least one of the essential elements of legal malpractice cannot be satisfied, those elements being that (1) the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and (2) the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages. The Appellate Division added that the causation element required a showing that the injured party would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. The Appellate Division opined that a defendant must affirmatively demonstrate the absence of one of the elements of legal malpractice, rather than merely pointing out gaps in the plaintiff's proof. The Appellate Division held that the Supreme Court should have denied that branch of the defendants' motion that was for summary judgment dismissing the complaint in that the defendants had failed to submit sufficient evidence establishing, *prima facie*, that they exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. The Appellate Division added that the Supreme Court erred in determining that the defendants established, *prima facie*, that the decedent's estate did not sustain actual and ascertainable damage as a result of the defendants' alleged negligence in failing to advise the decedent to revoke the Totten Trusts prior to her death. *Schmidt v. Burner*, 2022 N.Y. Slip Op. 01191 (2d Dep't 2022).

Attempt to Change the Beneficiary Designation on a Certificate of Deposit by Letter, Rather Than by Way of the Bank's Form, Ineffective

The decedent opened a certificate of deposit savings account and designated her nephew as the beneficiary on the account. Three years later the bank received a letter requesting a change of beneficiary on the account from the nephew to a friend of the decedent. Upon receiving the letter, the bank mailed to the decedent its forms in order to change the beneficiary. The forms were not returned prior to the decedent's death. The bank commenced a stakeholder's interpleader action pursuant to CPLR 1006, alleging that it was subject to conflicting claims to the funds in the account. In her answer, the decedent's friend asserted counterclaims against the plaintiff to recover damages for breach of contract and negligence, and a cross claim against the nephew for a judgment declaring that the decedent intended that she be designated the beneficiary of the account. Following discovery, the bank moved for summary judgment on the complaint and dismissing the counterclaims asserted against it. The nephew cross-moved for summary judgment directing the bank to release the funds in the account to him and dismissing the cross claim asserted against him. The Supreme Court granted the bank's motion and the nephew's cross motion, and the friend appealed.

HOLDING: The Supreme Court was affirmed. The Appellate Division held that the bank had established, *prima facie*, its entitlement to judgment as a matter of law on the complaint and dismissing the counterclaims asserted against it. The Appellate Division stated that the bank had demonstrated that it was a neutral stakeholder with no interest in the funds in the account, and that it properly had dispensed with its contractual obligations and duties to the decedent account holder, negating any inference of a breach of contract or negligence. The Appellate Division held further that the decedent's friend lacked standing to assert such claims since she was not a third-party beneficiary to any agreement between the bank and the decedent. The Appellate Division also found that the nephew had established, *prima facie*, his entitlement to judgment as a matter of law directing the bank to release the funds in the account to him as beneficiary, and had established, *prima facie*, his entitlement to judgment as a matter of law dismissing, as academic, the cross claim asserted against him by the decedent's friend. The Appellate Division ruled that in opposition, the decedent's friend had failed to raise a triable issue of fact, as against either the bank or the nephew. Accordingly, the Appellate Division ruled that the Supreme Court properly had granted the bank's motion for summary judgment on the complaint and dismissing the counterclaims asserted against it, and properly had granted the nephew's cross motion for summary judgment direct-

ing the release of the subject funds to him and dismissing the cross claim asserted against him. *New York Commercial Bank v. Jacobs*, 200 A.D.3d 991 (2d Dep't 2021).

Compare this case to *Werther v. Werther*, 199 A.D.3d 546 (1st Dep't 2021). In that case, a year before the decedent's death, using a POA, the attorney-in-fact executed a change of beneficiary form for the decedent's IRA. The form was not submitted by the attorney-in-fact to the brokerage firm until more than a year later, and until after the decedent's death. The Supreme Court ruled the change effective, which was affirmed by the Appellate Division.

Attorney Required To Provide His Client's Financial Information in His Possession in Response to a Subpoena

The plaintiff obtained several judgments against the defendant. Pursuant to CPLR 5224, defendant's counsel was served with information subpoenas but did not answer them at all. Plaintiff sought documents from the attorney to assist in the enforcement of the judgments and sought information about the defendant's assets, bank accounts and any asset transfers. The attorney asserted that the interactions with the named defendant had been limited strictly to legal advice, legal consultations and legal work involving litigation. Plaintiff filed a motion seeking contempt, and the attorney filed a motion seeking a protective order asserting he need not disclose any information since all information was protected by the attorney-client privilege.

HOLDING: The court stated that third-party subpoenas may be served whenever the information sought is material and necessary on any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The court added that so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty, and that disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action. To vacate or quash a third-party subpoena, the court opined, the respondent must establish that the information is utterly irrelevant or the futility of the process to uncover anything legitimate is inevitable or obvious. The court noted that absent special circumstances, retainer agreements, a client's identity, invoices, and the payment of fees are not subject to the attorney-client privilege. The court added that any communication that does not have any direct relevance to any legal advice is collateral and not privileged, and that a client cannot assert the attorney-client privilege as to documents in the lawyer's possession if they were not prepared for litigation or for the purpose of seeking or imparting legal advice and they are not otherwise subject to a privilege against disclosure.

In the court's view, the mere circumstance that the documents were revealed in confidence to a lawyer does not of itself transform the papers into privileged communications. The court noted further that the information sought pursuant to an information subpoena is commonly found in either bank or other financial records and in documents submitted to governmental agencies. The court stated that litigants cannot funnel records and documents into the hands of attorneys and then claim privilege. The court held that the information sought pursuant to the information subpoenas was not legal advice and was not protected by the attorney-client privilege. The court denied the attorney's cross-motion seeking a protective order and gave the attorney 20 days to respond to the information subpoenas. The plaintiff's motion for contempt was held in abeyance pending the attorney's response. *HK Capital LLC v. Rise Dev. Partners LLC,* 2022 N.Y. Slip Op. 50024 (Sup. Ct., Kings Co. Jan. 6, 2022) (Ruchelsman, J.).

A Claim for Loss of Sepulcher Survives a Motion To Dismiss, Where It Was Discovered at the Last Moment That the Body About to Be Buried Wasn't That of the Decedent

A rabbi, an employee of one of the defendants, presided over three funerals on the day in question, including the funeral intended for the decedent, which was the third funeral. After the rabbi concluded the reading intended for the decedent at the graveside, the plaintiff allegedly noticed that the casket had a sticker with a name on it that did not match the name of her father, the decedent. The plaintiff asked the rabbi to open the casket to confirm that the body inside was that of the decedent. The rabbi opened the casket and there was a woman's body inside. The plaintiff asked the rabbi where the decedent was, and the rabbi said he did not know. The casket from the second funeral that had occurred earlier that day was disinterred. When that casket was opened, the plaintiff identified the body as her father's. The plaintiff chose to have her father buried in the grave originally intended for him, and the rabbi performed a second funeral service for the decedent. The plaintiff sued to recover damages, *inter alia*, for violation of the common-law right of sepulcher. Defendants moved for summary judgment dismissing the complaint, which was denied by the Supreme Court, and defendants appealed.

HOLDING: The Supreme Court was affirmed. The Appellate Division ruled that the appellants failed to establish, *prima facie*, that the plaintiff did not have a claim for loss of sepulcher. The Appellate Division held that viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, during the funeral service and burial intended for the decedent, the plaintiff became aware that the decedent's body was not in the casket and the

decedent's body was not located for some period of time. Accordingly, the Appellate Division found that the appellants had failed to establish, *prima facie*, that their alleged actions or inactions did not interfere with the plaintiff's possession of the decedent's body and her right to find solace and comfort in the ritual of burial. *Gutnick v. Hebrew Free Burial Society for the Poor of the City of Brooklyn*, 198 A.D.3d 880 (2d Dep't 2021).

'Self-Proving' Affidavit Submitted to the Court In Connection With a Probate Inadequate in That It Failed To Establish Strict Compliance With the Specific Strictures of the Pertinent COVID-19 Executive Order

The decedent's brother petitioned to probate an attorney-drawn and supervised instrument purporting to be the will of the decedent. The decedent's sole distributee, his mother, executed a waiver and consent in favor of its admission. The court took the opportunity of the case to set its standard for the adequacy of affidavits submitted with instruments executed under the auspices of New York Executive Order 202.14, which, for the brief period of April 7, 2020, to June 25, 2021, permitted the remote execution of wills. The court noted that the order, occasioned by the extraordinary circumstances surrounding the then-emerging COVID-19 pandemic, did not replace the formal execution requirements of EPTL 3-2.1, but rather, authorized the use of audio-visual technology to satisfy the presence requirements contained in the statute. The court stated that the Statute of Wills requires the testator to sign the will in the presence of at least two attesting witnesses (or acknowledge testator's signature to each attesting witness); to declare to the attesting witnesses that the instrument signed is testator's last will and testament (the so-called "publication" requirement); that the witnesses, within 30 days, both attest the testator's signature was affixed or acknowledged in their presence; and that the witnesses, at the request of the testator, sign their names and affix their addresses at the end of the will.

The court opined that in the pre-pandemic world the above requirements, which contemplated physical presence and in-person interaction, were not considered onerous, much less potentially hazardous to one's health. The court added that will execution ceremonies of the not-so-distant past routinely were carried out in law office conference rooms, cramped offices, small kitchens, and even hospital wards without the slightest thought given to the proximity of the participants or the potential exposure to viral disease. The court added that any mention of the adequacy of the air filtration system, the availability of masks or hand sanitizer, or of a concern regarding a participant's sneeze or cough potentially exposing others present to microbes would have—at a minimum—raised eyebrows. No longer.

The court opined that with the public's aversion to personal interaction increasing in tandem with its demand for estate planning, the remote witnessing provision provided a welcome respite to in-person execution ceremonies, permitting New York residents to engage in increasingly relevant end-of-life planning in a manner consistent with social distancing guidelines. The court mused that good intentions aside, however, virtual witnessing was not without its own inconveniences. The court pointed out that according to the order, the presence requirements incident to the act of witnessing could only be virtually satisfied provided the following conditions were met: (1) the testator had to be either personally known to the attesting witnesses *or* must present valid photo identification to the witnesses during the video conference; (2) the video conference must allow for direct interaction between the testator, witnesses, and if applicable, the supervising attorney (no prerecorded videos); and (3) the witnesses must receive a legible copy of the signature page(s) the same day the papers are signed.

The court noted that in addition to the foregoing conditions, the order included provisions whereby the attesting witnesses might sign the transmitted copy of the signature page(s) and transmit them back to the testator and further provided that the witnesses might repeat the witnessing of the original signature page(s) as of the date of execution provided that they were presented with the original signature pages *and* the electronically witnessed copies within 30 days of the remote execution ceremony. In the court's view, while not required at the time of execution by statute or by the order, best practice considerations plainly included the execution and annexation to the instrument of a contemporaneous "self-proving affidavit" whereby the attesting witnesses swore to such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint, pursuant to SCPA 1406.

Although the instrument before the court appeared to contain such a contemporaneous affidavit from the attesting witnesses, the court found that the affidavit failed to establish all of the facts necessary to prove the validity of the will's execution pursuant to the order under which it was authorized. The court pointed out that the affidavit was deficient in that it stated that the attesting witnesses were "acquainted" with the testator. The court stated that in the past, such language had proven adequate for traditional in-person executions (which oftentimes utilized institutional witnesses who had just met the testator, such as law firm employees). The court pointed out, however,

that the order specifically requires that the testator either be personally known to the witnesses, or, that the testator display valid photo identification to the witnesses during the ceremony. In the court's view, the term "personally known" obviates the need for the testator to produce any proof of identification to the witnesses whatsoever, but that it implies a quantum of familiarity between the attesting witnesses and the testator that goes beyond that of "acquaintance." The court held that a mere introduction to a law firm paralegal or so-called "friend of a friend" does not satisfy a standard that allows for the dispensation of confirmatory photo identification.

The court concluded that as the affidavit annexed to the propounded instrument only recited that the witnesses were "acquainted" with the testator and was otherwise silent regarding whether the testator produced valid photo identification during the execution ceremony, it was insufficient to demonstrate compliance with the order. The court also found the affidavit to be deficient in that it did not state that the audio-visual technology referenced was in working order and allowed for direct interaction between the testator and the witnesses in real time, and, significantly, did not indicate that a legible copy of the signature page was transmitted to the witnesses on the same day that the witnesses observed the signing. The court noted that the affidavit nebulously stated that the decedent "thereafter" scanned and emailed the signature page to the witnesses. In the court's view, when presented with an affidavit intended to conclusively establish the genuineness of a testamentary instrument, it should not have to resort to surmise or presumptions, holding that the affidavit should clearly spell out that the transmittal of the signature pages occurred on the same date that the instrument was signed.

The court found of additional interest that it had been presented with an original instrument bearing the original signatures of the testator *and* both attesting witnesses. The court found it clear that the witnesses were, at some point, apparently presented with the original instrument, and that it was re-signed pursuant to the permissive provisions of the order. The court noted that compliance with the order required the presentation to the witnesses of both the original signature pages and the electronically witnessed copies within 30 days of the remote execution ceremony, but that the affidavit annexed to the will did not even address the apparent re-signing of the original by the witnesses. In the court's view, as the SCPA is explicit in that before admitting a will to probate the court must inquire particularly into all of the facts and must be satisfied with the genuineness of the will and the validity of its execution, the court would be hard pressed to find the offered instrument, which bore original ink signatures of the testator and each attesting witness, passed muster in the absence of proof of how such document even came into existence.

Lastly, the court pointed out that other facts furnished by petitioner indicated that there were counterparts of the offered instrument that had not been filed with the court. The court held that where, as in the case at bar, a will was executed in duplicates, all duplicates must be provided to the court, not for the purpose of admitting each separately, but rather, to provide assurance that the instrument was not revoked and that each contained the complete will of the testator. The court concluded that while mindful that the overriding intent of the order was to provide an avenue of relief and accommodation for the bar and public in the midst of a pandemic, a corresponding adaptation of the standards employed by the court in assessing the validity of such instruments was unnecessary, and the expectation that submission of affidavits establishing strict compliance with the specific strictures of the order could not be considered onerous. Accordingly, the admission of the proffered instrument was held in abeyance pending review by the court of supplemental affidavits from the attesting witnesses addressing all of the requirements set forth in the remote witnessing order, affidavit(s) detailing the apparent re-signing by the witnesses of the testator's original signature page, including the creation and chain of custody of said original, and the production of all signed counterparts of the offered instrument. *Holmgren*, 2022 N.Y. Slip Op. 22049 (Surr. Ct., Queens Co. Feb. 23, 2022) (Kelly, S.).

Compromise Application Rejected for Failure To Set Forth a Factual Basis To Support the Adequacy of the Settlement, the Allocation as Between Personal Injuries and Pain and Suffering, and Wrongful Death, the Services Rendered, and the Attorney Disbursements

A petition was filed to compromise, and to allocate and distribute the proceeds of, a wrongful death/personal injury action. The underlying action alleged that the decedent suffered injuries, including a fractured hip, in a fall at a nursing home and that some 20 days later following surgery she died. The petition also requested approval of attorney fees for both the attorney who prosecuted the lawsuit and for the "estate attorney" who filed the compromise petition. The compromise petition requested that a settlement be approved in the amount of $140,000, which it asserted was "fair and reasonable." The decedent was 76 years of age at the time of the accident. The decedent apparently fell as a result of which she sustained a fractured hip and "complications (from) multiple blunt forces" which included surgery at some point in her stay. When the surgery took place after the accident was not clear. The papers did not state how the decedent fell or contain any explanation of

the alleged negligence of the defendant. The decedent was survived by three children, all adults. A son post-deceased, survived by a spouse and three children. No part of the settlement was proposed to be distributed to him, or to his survivors. The attorney who prosecuted the action submitted an Affirmation of Services requesting a fee of one-third the recovery ($46,666.66). Among the services rendered were "investigating the incident," and "conducting discovery" and "negotiating liens." He also requested "disbursements" which included expenditures for "research," "medicare resolution fees," a "retainer fee paid to estate attorney," "interest" on "advanced disbursements," and "deposition fees." The "estate" attorney requested a fee of $6,500.

HOLDING: The surrogate rejected the papers. The court stated that given the lack of medical records that would allow the court to assess the decedent's pain and suffering, and that no information was provided concerning the decedent's health at the time she died, it was unable to determine whether in fact the settlement amount was fair and reasonable. The court also found that the lack of medical records also was fatal to the request that the entire settlement be allocated to wrongful death. The court noted that the petition justified that allocation based on the "expert affirmation" of a physician, who opined that following her fall and subsequent surgery, the decedent "did not have full awareness of the pain caused by her fall and hip fracture" and that she "had little understanding of any pain and/or suffering associated with his (sic) fractured hip."

The court found those statements, entirely conclusory and not based on any facts set forth in the affirmation, meaningless. The court noted that hospital records chart hour to hour a patient's responses to pain, to commands, and to treatment, and required the records to be produced in order for it to be able to determine whether the decedent experienced any pain and suffering as a result of the "complications (from) multiple blunt forces." The court also found questionable the claim that the defendant was willing to pay $140,000 on the pecuniary loss claim, in that the adult children presumably no longer were dependent on the decedent for financial support. Accordingly, the court denied the allocation of 100% to wrongful death and required a hearing as to the appropriate allocation and distribution.

Regarding the attorney fees, the court noted that the retainer was signed, and the one-third contingent fee agreed to, before the plaintiff was awarded letters of administration. The court concluded that, therefore, she had no authority to bind the estate to the terms of the retainer agreement, and the court was not bound to honor it. The court added that in any event, the Surrogate's Court retains ultimate discretion over the setting of attorney fees, even where there is a retainer agreement. Nonetheless, the court approved the fee inasmuch as counsel had commenced the action and performed discovery, subject to a detailed recitation of the services performed, the basis for the settlement amount and how counsel's efforts produced the settlement. Lacking that, the court retained the discretion to reduce the fee. However, the court reduced disbursements. The court stated that estate fees to compromise the action and distribute the proceeds are ordinarily included in the one-third contingent fee, and in any event the retainer agreement made no mention of the added expense. The court disallowed the interest charge in the absence of a showing that the same was agreed to by the client, that the money came out of a line of credit and that the amount charged was actual interest.

The medical resolution fee also was disallowed by the court, which stated that the attorney indicated that his own time went into negotiating the lien. Similarly, the court rejected the "medicare resolution fee," stating that such a fee is integral to the settlement of the underlying action and was not mentioned in the retainer agreement. The court also did not allow reimbursement for the "research fee" stating that research is what an attorney does when he takes on a case. Regarding the "estate attorney fee" requested in the amount of $6,500, the court stated that the affirmation in support related that 20 hours were spent preparing the petition and supporting papers, without any itemization of where the time was spent. In the court's view, a customary fee for time spent in preparing a petition for allocation and distribution was $2,500, which it approved, but to be paid out of the one-third contingency fee. The court also disallowed the request of the "estate attorney" for $485 in disbursements without an itemization. Accordingly, the plaintiff was directed to file an amended petition that included the records of the decedent's hospital stay, a more detailed recitation as to the reasonableness of the settlement [including an explanation of the negligence and a discussion of the pain and suffering (or lack thereof) sustained by the decedent], and a detailed recitation of the services provided by both plaintiff's counsel and the "estate attorney." The court also directed that on the return date of the petition the children of the decedent's post deceased son were to appear virtually. *Byrnes v. St. John's Home*, 2021 N.Y. Slip Op. 51273 (Surr. Ct., Monroe Co. Sept. 28, 2021) (Ciaccio, S.).

It does not appear from the decision whether the underlying suit contained a claim under Public Health Law § 2801-d on behalf of the estate for the decedent's death.

It is likely that the attempt to allocate the entire settlement to wrongful death was to avoid any portion of the recovery going to the family of the post-deceased son, who would be entitled to share in intestacy any portion of the

recovery allocated for the decedent's personal injuries and conscious pain and suffering which would pass through the decedent's estate, and to avoid the claims of a creditor against the estate.

The Necessity of Strict Compliance With the Provisions of the 'Heirs Property' Partition Statute

Plaintiff, co-owner of certain real property, brought a partition action seeking partition and division of the subject property between the parties in accordance with their respective rights and interests, or in the alternative the sale of the property and division of the proceeds in the event that partition could not be made without great prejudice to the parties. The matter had been referred to a referee who issued a report. Plaintiff moved to confirm the report and defendant cross moved to reject the report.

HOLDING: The court noted that the action was commenced subsequent to the Dec. 6, 2019, effective date of the Partition of Heirs Property Act, RPAPL § 993, making the provisions of that act controlling. The court stated that "Heirs Property" under the act is defined as real property held in tenancy in common, which satisfies all of the following requirements as of the filing of a partition action:

(i) there is no agreement in a record binding all of the co-tenants which governs the partition of the property;

(ii) any of the co-tenants acquired title from a relative, whether living or deceased; and

(iii) any of the following applies:

A. twenty percent or more of the interests are held by co-tenants who are relatives;

B. twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased;

C. twenty percent or more of the co-tenants are relatives of each other; or

D. any co-tenant who acquired title from a relative resides in the property.

That court added that under the statute, in any partition action the court must determine, after notice, whether the property is heirs property, and if so, determined the property must be apportioned in accordance with the statute. The court noted further that it was required to hold a settlement conference for the purpose of holding settlement discussions pertaining to the rights and obligations of the parties with respect to the subject property. The court found that these provisions were mandatory and had not been complied with. Accordingly, plaintiff's motion to confirm the report of the referee was denied, and defendant's cross motion to reject the report of the referee was granted to the extent of setting the matters down for a settlement conference. *Masbeth Place Corp. v. Walcott-Francis*, 2022 N.Y. Slip Op. 50040 (Sup. Ct., Bronx Co. Jan. 26, 2022) (Armstrong, J.).

Brief briefs

1. In a SCPA 2110 proceeding, the surrogate held that failure to comply with the 22 N.Y.C.R.R. § 137 mandatory fee dispute resolution procedures did not deprive the court of subject matter jurisdiction over the fee dispute. *Hart*, N.Y.L.J. Feb. 1, 2022, p.17, c.3 (Surr. Ct., Rockland Co. (Cornell, S.).

2. Defendants contended that the Supreme Court committed reversible error in interpreting Public Health Law 2801-d to include death of a nursing home patient as an injury for which damages might be recovered by the estate. The Appellate Division held that the express language of the statute provides that a nursing home facility is liable to a patient for injuries suffered as a result of the deprivation of a right or benefit conferred by any contract, statute or regulation, expressly defining injury to include death of a patient. *Hauser v. Fort Hudson Nursing Center, Inc.*, 202 A.D.3d 45 (3d Dep't 2021). The existence of this cause of action on behalf of an estate for the death of a nursing home resident, in addition to the action for personal injuries and conscious pain and suffering, and separate and apart from, and supplemental to, an action on behalf of distributees for wrongful death, does not seem to be widely known.

3. The Surrogate's Court did not err in denying that branch of a motion which was for leave to amend objections in an accounting proceeding on the ground that the movant failed to comply with the procedural requirements of CPLR 3025(b) by failing to include the proposed amended objections clearly showing the changes or additions to be made. *Demetriou*, 2021 N.Y. Slip Op. 04353 (2d Dep't 2021). This requirement was added to the statute effective Jan. 1, 2012, and many attorneys admitted before then seem not to be aware of its strictures. Although initially loosely enforced, most courts now seem to require strict compliance.

4. In matters involving claims brought against an estate, estate representatives cannot act *pro se* because their own individual liberty or property interests are not involved. *Alaina Simone Incorporated, et al. v. Waverly Madden, etc., et. al.*, 2021 N.Y. Slip Op. 07497 (1st Dep't 2021).

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Case Notes—New York Supreme and Surrogate's Court Decisions

By Ilene Sherwyn Cooper

Common Law Marriage

Before the Surrogate's Court, Orange County, in *Matter of Rogers,* was a proceeding for letters of administration in which the threshold issue was whether the petitioner was the decedent's common law spouse. Objections were filed by the decedent's only child, who filed a cross-petition in which he claimed to be the decedent's sole distributee.

The record at the trial of the matter revealed that the petitioner and the decedent met each other in the mid-1970s. While they developed a friendship over the years, as time progressed, they entered into a committed relationship, travelled together, extensively, and purchased a house together as tenants in common, where they lived for approximately 10 years prior to the decedent's death. The documentary evidence indicated that the decedent's death certificate reported that she was unmarried at the time of her death, and her obituary made no mention of a spouse surviving her. Moreover, while the petitioner maintained that the title to their home was mistakenly taken as tenants in common, the court noted that no steps were taken by him to reform the deed. Indeed, it appeared that the decedent never held herself out as married on any of her employment records, retirement records, insurance records, banking records/accounts or tax filings, nor did she hold any other assets or property jointly with the petitioner.

Further, although the petitioner testified that he had traveled with the decedent to Washington, D.C., in or around May 2008, where they held themselves out to be husband and wife and had cohabitated by checking into a hotel, petitioner could not specifically recall where he and the decedent stayed in Washington, D.C., or the duration of their visit. Moreover, the testimony of witnesses suggested that the petitioner's overnight stays were in Maryland, rather than Washington, D.C., and was contradictory as to whether the petitioner and the decedent had presented themselves as married. To this extent, the court observed that petitioner could not confirm that he and the decedent had exchanged words of marriage, or had entered a written agreement of marriage.

The court opined that proof of a common law marriage in Washington, D.C. requires a showing of (1) an express mutual agreement signifying a present intent by the parties to marry, followed by (2) cohabitation in Washington, D.C. Within this context, the court concluded that petitioner had failed to satisfy his burden of establishing that he and the decedent had entered a common law marriage prior to her death. Indeed, the court found that neither the actions of the parties while in Washington D.C., nor their conduct while in New York, supported petitioner's claim that he and the decedent agreed to, and did, live their lives as husband and wife.

Accordingly, the petitioner's request for letters of administration was denied, and letters of administration were issued to the decedent's child and sole distributee.

***Rogers,* N.Y.L.J., Jan. 7, 2022, at p. 17 (Sur. Ct., Orange Co.).**

Decanting

In *Matter of Seliger,* the Surrogate's Court, Westchester County, addressed the propriety of an independent trustee's attempt to decant the marital trust created under the decedent's will to a new *inter vivos* trust (appointed trust) created by the decedent's children from a former marriage. The appointed trust, of which the children were also trustees, provided for the decedent's spouse during her lifetime, and upon her death, in further trust for the benefit of the decedent's issue, or if none, for a foundation. The marital trust also provided for the decedent's spouse during her lifetime, and provided the trustees with "absolute discretion for any reason whatsoever" to invade the principal thereof for the spouse's benefit, even if such invasion(s) resulted in its termination. Additionally, the trust provided that if the trustees sold the artwork that constituted the principal of the trust, the net proceeds of any such sale were to be distributed to the decedent's spouse. The trustees of the marital trust were the decedent's spouse and an independent trustee.

Following admission of the decedent's will to probate, the decedent's spouse took possession of his artwork, which was to be used to fund the marital trust. When she refused to turn same over to the independent trustee, he executed a document pursuant to which he purportedly invaded the principal of the marital trust and distributed same to the appointed trust. When the decedent's spouse persisted in her refusal to relinquish control over the assets to them, the trustees of the appointed trust instituted an SCPA 2103 discovery proceeding against her seeking an order directing her to turn over the artwork. The decedent's spouse answered the petition, and moved to dismiss the application alleging, *inter alia*, that the attempt by the independent trustee and the decedent's children to decant the marital trust to the appointed trust was null and void *ab initio* because it failed to comply with EPTL 10-6.6. In addition, she claimed that the purported decanting was not in her best interests.

Because the spouse's motion was filed subsequent to her filing an answer to the petition, the court treated it as one for summary judgment.

The court opined that decanting by a trustee who has absolute discretion to invade the principal of a trust is governed by EPTL 10-6.6(b), while decanting by a trustee with limited discretion to invade the principal of a trust is governed by EPTL 10-6.6(c). Within this context, the court analyzed the arguments raised by the decedent's spouse, who, in pertinent, asserted that the marital trust did not give the independent trustee unlimited or absolute discretion to make distributions of principal because it required him to distribute to her the net proceeds from the sale of any of the subject artwork. Thus, she contended that the independent trustee's ability to decant was governed by EPTL 10-6.6(c), which required the appointed trust to contain the same language as the marital trust. Since the language of the two trusts was not the same, the independent trustee's attempt to decant was void. Further, the spouse maintained that the purported decanting was in violation of the independent trustee's fiduciary duties, and that he was prohibited from unilaterally decanting the marital trust into the appointed trust without seeking judicial approval.

Based on the definition of "unlimited discretion" as set forth in EPTL 10-6.6(s)(9), the court rejected the spouse's argument regarding the independent trustee's discretionary power to decant, and held that the provisions of the appointed trust were not required to be the same as those of the marital trust. Moreover, the court rejected the contention that court approval was required for the decanting. Rather, the court found, in accordance with the provisions of EPTL 10-6.6(b) and (c) that the authorized trustee was not required to seek judicial approval of a decanting, but that the statute was permissive in its terms.

Nevertheless, because the court was not able to determine whether the independent trustee acted in breach of the fiduciary duty required of him pursuant to EPTL 10-6.6(h), the court directed the spouse, pursuant to EPTL 10-6.6 (j)(5), to compel the trustee to account for the exercise of his power to decant.

***Seliger,* N.Y.L.J., Dec. 27. 2021, at p. 17 (Sur. Ct., Westchester Co.).**

Probate Affirmed

In *Matter of Kotsones,* the Court of Appeals affirmed an order of the Appellate Division, Fourth Department, which reversed an order of the Surrogate's Court, Steuben County, denying probate to the probate instrument and invalidating certain lifetime transactions of the decedent on the grounds of undue influence.

The decedent died, testate, survived by a son and a daughter. The decedent's daughter and her son (the petitioners) sought probate of a purported will of the decedent, and objections thereto were filed by the decedent's son. The son also filed a petition seeking to invalidate a lifetime trust and certain real estate transactions entered by the decedent, alleging, *inter alia,* that the propounded will and lifetime transactions were the result of undue influence perpetrated by the petitioners. After a nonjury trial, the Surrogate's Court sustained the son's claims and the petitioners appealed.

The Appellate Division reversed, finding that the Surrogate's Court erred in concluding that a confidential relationship existed between the petitioners and the decedent, which triggered an inference of undue influence. The court observed that proof of a confidential relationship required a showing of inequality between the parties, or that one party exercised a controlling influence over the other. To this extent, although the record established that the petitioners held a position of trust with the decedent, and that the decedent's daughter assisted her with her finances and was named as her attorney-in-fact, it also demonstrated that the decedent was actively and personally involved in managing her real estate and estate plan. Under such circumstances, the court found that the decedent's son had failed to sustain his burden of proving that the relationship between the petitioners and the decedent was of such an unequal nature as to give rise to an inference of undue influence.

Moreover, the Appellate Division held that the Surrogate's Court erred in finding undue influence, notwithstanding the absence of a confidential relationship. The

court concluded that although the record demonstrated that the petitioners wanted to benefit from the decedent's estate, and that her daughter facilitated the execution of the propounded will and lifetime transactions, it failed to establish that the decedent's free will was overcome. To the contrary, the court noted that the decedent had informed her attorney that she did not want the petitioner to have any further power over her affairs, and worked with her attorney in revising her estate plan in order to exclude him. Indeed, the decedent's attorney testified that he never prepared a document that the decedent did not personally authorize, and the testimony of other non-party witnesses confirmed that the decedent, albeit with the assistance of her daughter, made independent decisions regarding her personal and financial matters.

Accordingly, the court dismissed the petition of the decedent's son and granted the application to admit the will to probate.

In a Memorandum Opinion, the Court of Appeals affirmed the order of the Appellate court, concluding, *inter alia*, that the Appellate Division applied the correct standards for determining whether a confidential relationship existed or whether undue influence was exercised.

Kotsones, **37 N.Y.3d 1154 (N.Y. 2022).**

Summary Judgment

In a contested probate proceeding before the Surrogate's Court, Bronx County, in *Bux,* was a motion for summary judgment by the petitioner, the decedent's son, dismissing the objections to probate filed by another son, on the grounds that he failed to comply with a so-ordered discovery stipulation, and that no triable issues of fact existed with respect to the validity of the propounded instrument. The objectant opposed and filed a cross-motion requesting dismissal of the probate proceeding and sanctions, on the grounds that the petitioner had failed to comply with discovery demands and schedule SCPA 1404 examinations, or in the alternative a so-ordered discovery schedule directing the proponent to pay the costs of the SCPA 1404 examinations.

The record revealed that the court had issued a discovery order providing for SCPA 1404 examinations and the filing of objections thereafter. Nevertheless, at a compliance conference, counsel for the objectant indicated that SCPA 1404 examinations had not yet been held because the proponent had failed to respond to his discovery demands or to produce the attesting witnesses or attorney-draftsperson for their examinations. Despite the foregoing, objections to probate were filed alleging lack of due execution, lack of testamentary capacity, fraud, undue influence, duress, and that the decedent failed to understand its terms.

In response, the proponent alleged that despite two prior discovery orders scheduling SCPA 1404 examinations, the objectant, who was, at one point acting *pro se*, failed to schedule same. Moreover, the proponent claimed that the drafting attorney and witnesses were not under his control, and that as such, he had no duty to produce them. The proponent thus requested that the objectant be precluded from seeking additional discovery and that the will be admitted to probate.

In support of his cross-motion, objectant requested that the proponent be directed to respond to his document demand, inasmuch as he had access to the requested documents, as preliminary executor, and that the proponent be required to produce the attesting witnesses for examination. Further, in opposition to the motion for summary judgment, the objectant contended that the decedent executed his will one week prior to his death in a nursing home, while being administered pain-killing drugs, which disposed of real property that he no longer owned.

The proponent replied relying on the presumption of due execution that exists from an attorney-supervised will. Moreover, he argued that although the decedent was terminally ill and confused when admitted to the nursing home, his cognitive facilities improved and he was lucid in the days prior to the execution of the propounded instrument. Moreover, proponent argued that the affidavits of the attesting witnesses created a presumption of testamentary capacity and was prima facie evidence of the facts therein stated.

Upon review of the record, the court held that significant issues of fact existed regarding the issue of testamentary capacity, and further, that it was premature to assess the remaining objections given the paucity of document production by the proponent and the absence of SCPA 1404 examination transcripts. In this regard, the court noted that the record demonstrated numerous unanswered requests for document production and scheduling of SCPA 1404 examinations, and opined that while the attesting witnesses may refuse to appear absent a judicial subpoena, it was proponent's responsibility to produce them. Further, the court found it incredible that the proponent, who allegedly worked with the decedent, held his power of attorney and health care proxy, and, as aforesaid, was issued preliminary letters, did not possess or could not obtain the demanded documents.

Accordingly, petitioner's motion for summary judgment was denied, without prejudice, and objectant's cross-motion seeking compliance with discovery was granted to the

extent set forth in the decision, including but not limited to a direction that the proponent pay for the costs of the examinations of two of the attesting witnesses.

***Bux,* N.Y.L.J., Dec. 13, 2021, at p. 20 (Sur. Ct., Bronx Co.).**

Supplemental SCPA 1404 Examination

In *Seidelman,* the Surrogate's Court, Westchester County, was confronted with a motion by the objectants in a contested probate proceeding to compel the petitioner to produce documents and to appear, together with an associate, for continued SCPA 1404 examinations. The documents in issue included communications with the decedent, the decedent's financial advisor, and/or the decedent's accountant, diaries and/or calendars referencing meetings, phone calls, or other communications with the decedent, the financial advisor, and/or the accountant, time records of the petitioner referencing work performed for the decedent, and certain electronic files.

The decedent was survived by his daughter and a grandson, both of whom had filed objections to probate. Pursuant to the pertinent provisions of his will, the decedent bequeathed certain tangible personal property to his daughter, and directed that his net residuary estate be paid over to an inter vivos trust. The instrument nominated the petitioner, who was the attorney draftsperson thereof, as the executor of the estate. The petitioner and his associate served as attesting witnesses to its execution.

In his affidavit in opposition, the petitioner indicated that he turned over to the objectants all the responsive documents in his possession and control, and that no other responsive documents existed in his files. In view thereof, the court denied that branch of objectants motion as moot, opining that a party cannot be compelled to produce documents that are not in his or her possession or control, and should not be required to create documents in order to comply with a discovery demand. However, the court held that to the extent that the petitioner failed to turn over any additional relevant documents in his possession, he would be precluded from offering them into evidence at trial, or some other appropriate remedy would be entertained.

As for the request for a continued examination of the petitioner and his associate, the court observed that a further examination of witnesses pursuant to SCPA 1404 is not readily granted. Nevertheless, in view of petitioner's failure to produce responsive documents prior to his and his associate's initial examinations, the court concluded that a supplemental examination was appropriate, but limited its scope to any documents that the petitioner failed to turn over to the objectants prior to the first examinations, any alleged inconsistencies between those documents and the documents previously produced, and the recordkeeping and note-keeping policies of petitioner's firm, generally, and specific to the matter.

***Seidelman,* N.Y.L.J., Dec. 20, 2021, at p. 17 (Sur. Ct., Westchester Co.).**

Vacatur of Decree/ Fees of Former Fiduciary

Before the Surrogate's Court, Ulster County, in *Linich,* was a contested accounting proceeding in which the executor of the decedent's estate objected to the payment of the legal fees, disbursements, and commissions requested by the former fiduciary.

The decedent died testate with a will dated in July 2015, naming his business agent as his sole beneficiary and executor. The probate of that instrument was contested by the decedent's niece, who was the proponent of an earlier instrument, dated March 11, 2011. The 2011 instrument was offered for probate in several submissions ending in May 2017, in which the decedent's niece affirmed at the time that there was no other testamentary instrument later in date. Because the court was not informed of the later will, the sole beneficiary thereof was never cited or made a party to the proceeding for probate of the earlier instrument, and the decedent's niece was appointed executor of his estate.

Thereafter, when she sought to recover certain of the decedent's assets in the possession of his business agent, he filed a request for probate of the July 2015 instrument. That petition was ultimately granted, the letters testamentary previously issued to the decedent's niece were revoked, and she was directed to account.

In support of his objections to the accounting, the objectant argued that the decedent's niece had propounded the earlier will in bad faith, and obtained its probate through a false suggestion of a material fact, pursuant to SCPA 711(2), 711(4) and 2302(3)(a).

The court opined that it had the inherent power to vacate its own order if it was obtained by means of a material misrepresentation. In reviewing the record in this regard, the court noted that in her petition for probate, the decedent's niece averred, upon information and belief, that there was no testamentary instrument later in date to the instrument offered for probate. Nevertheless, she subsequently acknowledged, under oath, that she was aware that the decedent was considering replacing the 2011 will, and that it had been the topic of multiple emails between her, the decedent, and the objectant over the years prior to the decedent's death. Indeed, the objectant confirmed that he had spoken with the decedent about his 2015 will, and stated

that the decedent had informed him that he had discussed the instrument with his niece, who subsequently curtailed her weekly visits with him. Further, it appeared that following the decedent's death, his niece was informed by the objectant that he was the executor of the decedent's estate.

Based on this and other information gleaned from the record, the court found that the decedent's niece was possessed of sufficient information to form a belief that the decedent had signed a later will, and that she intentionally withheld this information at the time she offered the earlier will for probate. In view thereof, the court denied her commissions.

With respect to the legal fees sought, the court held that legal fees would be allowed only to the extent they benefited the estate. To this extent, the court denied fees incurred by the decedent's niece in probating the earlier will, but found that the fees incurred by her in a discovery proceeding that led to the probate of the later will, and in the accounting proceeding, which was considered a necessary step in the administration of the estate, were compensable, and fixed them accordingly.

Linich, **N.Y.L.J., Dec. 20, 2021, at p. 17 (Sur. Ct., Ulster Co.).**

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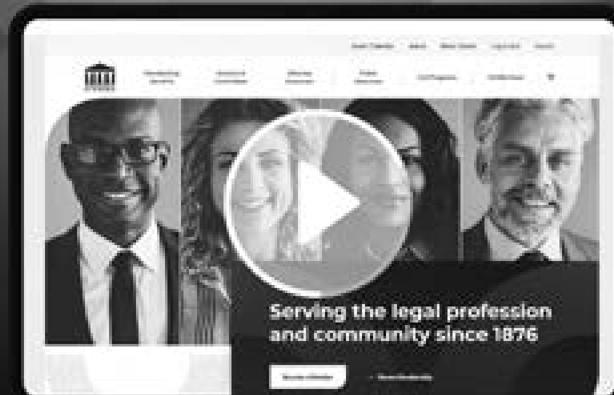

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Florida Update

By David Pratt, Hayley Sukienik and David A. Lappin

DECISIONS OF INTEREST

Absent Evidence of Contrary Intent, Title Taken by Married Couple in Home Is Taken as Tenants by the Entirety

The Third District Court of Appeal reversed a final order granting summary administration of the estate of Eleida Ramos. The facts are as follows:

Eleida Ramos (wife) and Pedro Ramos (husband) were married in 1975. They purchased a home in Homestead, Florida (residence) in 2013. The deed to the residence identifies the parties as "Pedro Pablo Ramos and Eleida Farro Ramos; whose post office address is 14545 SW 293rd Street, Homestead, Florida 33032; hereafter called the grantee." Wife died in 2016 and husband died in 2020. Kenia Exposito (Kenia), wife's daughter from a previous marriage, as personal representative of wife's estate, filed a petition for summary administration seeking the residence as the sole asset. Kenia attached wife's will, dated in 2012 before she lived at the residence, which devised "my share of the primary residence to my daughter, Kenia Elena Exposito, if she survives me." Appellant, Maritza Ramos, as personal representative of husband's estate, objected to Kenia's petition, arguing that wife's estate has no interest in the residence because the deed conveyed the property to husband and wife as tenants by the entireties. Therefore, when wife died, her undivided one-half interest passed to husband, and when he died, the entire interest in the residence passed to his estate.

Kenia argued that because the deed contained no express language to indicate an estate by the entireties, it should be assumed to be owned as tenants-in-common, such that wife's one-half interest in the residence passes to her estate upon her death. The trial court sided with Kenia and granted her summary judgment for wife's estate.

On appeal, the court relied on prior case law in support of the notion that absent language in the deed to the contrary, title is presumed to be taken as tenants by the entireties, as "a husband and wife are 'but one person in law.'"[1] *American Central Insurance Company v. Whitlock*,[2] held that in the case of real property, the owners do not need to be described as husband and wife in the deed and their marital relationship does not need to be referred to in order to establish a tenancy by the entireties. *Beal Bank, SSB v. Almand & Assocs.*,[3] upheld this ruling, stating that where real property is acquired specifically in the name of a husband and wife it is considered to be a "rule of construction that a tenancy by the entireties is created." "A conveyance to spouses as husband and wife creates an estate by the entireties in the absence of express language showing contrary intent."[4]

The court found Kenia's argument to be without merit, finding nothing in the 2013 deed to indicate that husband and wife did not intend to take title to the residence as tenants by the entireties. Therefore, the court reversed the summary administration order and held that by operation of the principle of tenancy by the entireties, when wife died, her one-half interest in the residence passed to husband, and upon husband's death, the residence passed to husband's estate.

***Estate of Ramos*, So.3d, 2021 WL 4561365 (Fla. 3d DCA Oct. 6, 2021).**

Surviving Spouse Does Not Need a Court Order To File a Late Elective-Share Claim

The Second District Court of Appeal reversed an order denying a surviving spouse her petition for extension of time to make an elective share election and sustaining objections to her election by the personal representative of her deceased husband's estate, and the trustees and beneficiaries of the decedent's trust, finding that the surviving spouse was entitled to make three petitions under Florida law asking for an extension of the elective share filing deadline. The facts are as follows:

Mary Jo Futch (Mary Jo) is the surviving spouse of Alvin Futch (decedent), who died in April 2019. Personal Representative Tom J. Haney filed a petition for administration and was appointed as personal representative of

the estate in July 2019, and the notice of administration was filed on Aug. 14, 2019. Mary Jo filed a petition for extension of time for three months to make the election for her elective share on Jan. 6, 2020 (first petition), stating that she needed time to review documents related to the calculation of the elective share. On April 7, 2020, one day before the expiration of the first petition, Mary Jo filed a second petition (second petition), this time on the basis that the COVID-19 emergency had "limited her ability to travel, meet with counsel, sign documents, and otherwise take action necessary to protect her interests in this case." Mary Jo further alleged that she was not able to participate in telephone or video conferencing that would be required to attend hearings and consult with counsel. She petitioned for a two-month extension, or until the court resumed in-person probate proceedings. On June 9, 2020, Mary Jo obtained new counsel and filed a third petition (third petition) and on June 10, 2020, Mary Jo filed the election to take her elective share.

There is no indication that any of the interested parties filed objections to Mary Jo's petitions. However, the personal representative, the trustees of decedent's trust, and the beneficiaries subsequently filed objections to Mary Jo's election. The trial court denied the third petition and sustained the objections "on the grounds that [Mary Jo's] Election to Take Elective Share was untimely filed." On appeal, Mary Jo relies on Florida Statutes 732.2135. Florida Statutes 732.2135(4) states that "a petition for an extension of time for making the election or for approval to make the election shall toll the time for making the election." Because her election was filed while her timely petitions were pending, Mary Jo contends that this tolled the time to make the election and, therefore, her election was itself timely filed. Pursuant to Florida Statutes 732.2135(1), the surviving spouse is required to file the election within six months after the date of service of the notice of administration. However, under Florida Statutes 732.2135(2), the surviving spouse may petition the court for an extension, and, if granted, such petition will "toll the time for making the election," in accordance with subsection (4).

The court agreed with Mary Jo, stating that "the statutory language is clear." The court concluded (1) Mary Jo filed each petition before expiration of the prior petition, which continued to toll the time allotted to her to make the elective share election, and (2) because the petitions were timely, her election was itself timely made. Florida Statutes 732.2135 does not limit the amount of petitions for extension a surviving spouse may seek, it does not prevent the filing of a subsequent petition seeking additional time, and does not require a hearing or ruling on the petition in order for time to be tolled. The trial court may grant an extension for good cause shown and, thereafter, the election must be filed within the time allowed by the extension under subsection (2) of the statute. However, the court reconciles subsection (2) of the statute with subsection (4) by stating that "the trial court is not required to grant a petition for extension before the time is tolled; such a reading would render meaningless the tolling provision in subsection (4)." The court held that because Mary Jo's election was filed during the tolling period, her election was timely, and thus reversed the order and remanded for further proceedings.

When the language of the statute is clear and unambiguous, the court will not resort to statutory interpretation and construction; "the statute must be given its plain and obvious meaning."[5] Florida has a strong public policy of protecting the surviving spouse's interests, which the court cites in support of its conclusion, and seems to guide the court in its reading of the statute.[6]

***Futch v. Haney*, So.3d, 2021 WL 4760131 (Fla. 2d DCA Oct. 13, 2021).**

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Endnotes

1. *Mitchell v. Mitchell*, 344 B.R. 171, 174 (Bkrtcy. M.D. Fla. 2006) (quoting *Winchester v. Wells*, 265 F.2d 405, 407 (5th Cir. 1959)).
2. 165 So. 380 (Fla. 1936).
3. 780 So. 2d 45, 54 (Fla. 2001).
4. *Estate of Suggs*, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981) (citing *Losey v. Losey*, 221 So. 2d 417 (Fla. 1969)).
5. *Rollins v. Pizzarelli*, 761 So. 2d 294, 297 (Fla. 2000) (quoting *Modder v. Am. Nat'l Life Ins. Co.*, 688 So. 2d 330, 333 (Fla. 1997).
6. *See Via v. Putnam*, 656 So. 2d 460, 462 (Fla. 1995) (recognizing that the elective share statutes "suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective share") (quoting *Putnam v. Via*, 7 638 So. 2d 981, 984 (Fla. 2d DCA 1994)); *Velde v. Velde*, 867 So. 2d 501, 507 (Fla. 4th DCA 2004) (noting "Florida's strong public policy favoring protection of the surviving spouse").

Section Committees and Chairs

The Trusts and Estates Law Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

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PUBLICATIONS

Power of Attorney Form: 2021 Update

New York State recently reformed the Statutory Short Form Power of Attorney for purposes of financial and estate planning, effective June 13, 2021. The changes are designed to simplify the POA form, allow for substantially compliant language as opposed to exact wording, provide safe-harbor provision for good-faith acceptance of an acknowledged POA, and allow sanctions for those who unreasonably refuse to accept a valid POA.

LexisNexis® NYSBA's Automated Power of Attorney Form (2021)

- This version is a fully automated document-assembly drafting system, powered by HotDocs®.
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- Suggested language for permissible modifications is included within this program for ease of use.
- Frequently Asked Questions are provided to assist with the user experience along with an introduction articulating basic guidance for the form.

* NYSBA Member: $70.00
* Non-Member: $99.00

* One-year subscription fee. Annual renewals by LexisNexis®.

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- This version of the New York State Statutory Power of Attorney is formatted using Microsoft Word.
- Users simply utilize the tab key to enter information into the fields included.
- Suggested language for permissible modifications is provided in a separate document and may be copied and pasted into the Power of Attorney form.
- Frequently Asked Questions are provided to assist with the user experience along with an introduction articulating basic guidance for the form.

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