COURT OF APPEALS OVERTURNS ITSELF IN *HYDE* AND APPROVES ALLOCATING ESTATE'S ATTORNEY'S FEES AGAINST OBJECTING BENEFICIARIES IF LITIGATION AGAINST ESTATE IS VEXATIOUS.

By Gary E. Bashian, Esq.*

The New York Court of Appeals, on June 29, 2010, resurrected what it has deemed was the original intent of SCPA § 2110, which governs the fixing and determining of attorney's fees for services rendered to a fiduciary, devisee, legatee, or interested party, for legal services rendered to a fiduciary by an attorney in Estate matters. *In the Matter of Hyde,*[i] the Court considered if a fiduciary's legal fees, which the Estate is obligated to pay, could be allocated to a particular beneficiary who filed objections in an accounting proceeding, or if such fees must be paid by the Estate as a whole, and thus all beneficiaries share in the cost equally.

In *Hyde*, several beneficiaries of two Trusts, one testamentary and the other inter vivos, filed Objections to the Trustee's accountings, attempted to deny the Trustees their commissions, and also sought to surcharge the Trustees for an alleged failure to diversify the assets of the Trusts.

The non objecting beneficiaries of the Trust subsequently filed an Acknowledgement attesting that they were not objectors in the action, filed motions seeking reimbursement of past counsel fees advanced in defense of the objectants' claims, and moved that future Trustee's counsel fees be paid from the objectants' shares.

Both the Trial Court and the Appellate Division, Third Department, refused to allow the allocation of fees to the objecting beneficiaries' shares citing the *Matter of Dillon,*[ii] a 1971 Court of Appeals case. The non objecting beneficiaries invoked the Pro Tanto rule, which the *Hyde* Court of Appeals described as a court-made rule which "dictates that the beneficiaries who did not file objections to a fiduciary's conduct are not entitled to share in the surcharge that accrues to the estate or trust when the other beneficiaries file successful objections. The rule sought to prevent non-objecting beneficiaries from being

rewarded for their quiescence while their co-beneficiaries defend the estate assets."[iii] However, the rule also meant that the "non-objecting beneficiaries had not stood to gain from the success"[iv] of the objectant.

In *Hyde*, the Court of Appeals overturned 39 years of law, and itself, and agreed with the non objecting beneficiaries' position that they should not have to share in the costly legal fees incurred as residuary beneficiaries because the "actions of the objecting party did not effect a benefit to the estate and bordered on the vexatious."[v] The *Hyde* Court's decision overturned its own 1971 *Matter of Dillon*[vi] holding which ruled that such allocations were not in the discretion of the trial Courts pursuant to SCPA § 2110.

One would naturally wonder what caused the Court to change its mind. Since 1971, pursuant to *Dillon*, all the lower Courts have ruled that SCPA § 2110 does not allow for the payment of legal fees incurred by a party in an action against a fiduciary to be charged against their individual share alone; ie: that the legal fees of a fiduciary are not chargeable against a beneficiary personally for bringing an action, but must be shared by all of the beneficiaries of an Estate or Trust.

The *Dillon* Court offered little explanation for why SCPA § 2110 should not be read to allow the allocation of legal fees to a particular party. This has been frustrating to many practitioners since the language of SCPA § 2110 does not compel the Court to allocate fees on a pro rata basis. On the contrary, on its face, SCPA § 2110 states, in pertinent part, the following:

> "The court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary…"[vii] and that "…the court may direct payment therefor from the estate generally or from the funds in the hands of the fiduciary belonging to the legatee, devisee, distributee, or person interested."[viii]

In *Dillon*, the Court of Appeals simply rejected a plain reading, stating simply that SCPA § 2110 "does not authorize payment for legal services rendered a party to be charged against the share of other individual parties."[ix]

In the *Matter of Hyde*, the Court of Appeals ruled that a plain reading of SCPA § 2110 places "discretion in the hands of the Trial Courts to allocate expenses when ordering that fiduciaries be indemnified by an estate for attorney's fees."[x] The *Hyde* Court gave a simple explanation that "Because we find this construction is more faithful to the statute, our precedents prior to *Dillon*, and fairness, we choose to restore the plain meaning of SCPA 2110 (2)."[xi]

The *Hyde* Court noted that *Dillon* "seems guided by the common law American rule," which "requires all parties to a controversy -- the victors and the vanquished – to pay their own incidents of litigation."[xii] However, according the *Hyde* court, *Dillon* missed two important points when interpreting SCPA § 2110 in such a way: 1) *Dillon* departed from a plain reading of the statute which "on its face…provides the Court with discretion" when determining compensation for attorneys; and 2) "*Dillon* did not focus on the considerations of fairness."[xiii]

Indeed, prior to *Dillon*, the allocation of legal fees between beneficiaries where claims were made against fiduciaries took a more equitable approach. In 1911, the New York Court of Appeals decided *In Re Ungrich,*[xiv] which involved a petition by a life tenant to compel payment by the trustees from his father's testamentary Trust. The cost to the Trust to defend against the claim was in excess of the life tenant's income payment. Needless to say, the non objecting beneficiaries were not content to absorb the defense costs, and appealed up to the Court of Appeals for a determination of what part, if any, of such expenditures should be charged against the life tenant, and what part against the corpus of the Estate. The *Ungrich* Court held that "If these expenses were rendered necessary by the unwarranted action of the life tenant, they should not all be charged against the corpus of the estate, but should, in part or whole, be charged against the life tenant, whose act had occasioned the expenses."[xv]

Some 39 years later, relying in the *Ungrich* decision, the Appellate Division, First Department, allocated legal costs to specific beneficiaries as opposed to the corpus in the case *In re Bishop's Will.*[xvi] The *Bishop* Court considered if the legal expenses for defending a Trust fund "should be allocated to the

principal of the trust or to the income of the life beneficiaries who brought the action."[xvii] The Appellate Division ruled that an allocation of fees was appropriate in the instant action against the fiduciaries, as it was merely "an attempt by indirection to attack the settlement" that had previously been agreed to between the objectant and the Estate of a previous beneficiary. As these claims against the Estate "were so reckless and lacking in merit"[xviii] it was entirely warranted to allocate the legal expenses incurred by the Estate against the income beneficiary's share who brought the action.

Central to the *Hyde* decision's fairness approach, is a new test intended to guide the lower Courts when making the determination about the allocation of attorney's fees pursuant to SCPA § 2110. The Hyde Court stated that the Surrogate's Courts "should undertake a multi-factored assessment of the sources from which the fees are to be paid. These factors, none of which should be determinative, may include:

(1) whether the objecting beneficiary acted solely in his or her interest or in the common interest of the estate;

(2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding;

(3) the extent of an individual beneficiary's participation in the proceeding;

(4) the good or bad faith of the objecting beneficiary;

(5) whether there was justifiable doubt regarding the fiduciary's conduct;

(6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and

(7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally."[xix]

Now, with this more equitable, and frankly more accurate, reading of SCPA § 2110, coupled with the newly articulated balancing test, the trial Court's discretion to order attorneys fees to be paid out of an individual beneficiary's income share who is the bad faith cause of the expense to a Trust or Estate is

clear. Objectants, fiduciaries, and practitioners must all look closely at this decision and consider its implications, especially the objectant whose "actions border on the vexatious." [xx]

* Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section.

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[i] In the Matter of Hyde, 2010 NY Slip Op 05676, 2010
[ii] Matter of Dillon, 28 N.Y. 2d 597, 319 N.Y.S. 2d 850, 1971
[iii] Hyde, 2010 NY Slip Op 05676, footnote 2
[iv] Ibid., at 1
[v] Ibid., at 4
[vi] Dillon, 28 N.Y. 2d 597
[vii] SCPA § 2110 (1)

[viii] SCPA § 2110 (2)
[ix] Dillon 8 N.Y.2d 597, 599

[x] Hyde, 2010 NY Slip Op 05676, 5
[xi] Ibid., at 5
[xii] Ibid., at 3
[xiii] Ibid., at 3

[xiv] In Re Ungrich, 201 N.Y. 415, 1911
[xv] Ibid., at 419-420
[xvi] In Re Bishop's Will, 27 A.D. 108, 98 N.Y.S. 2d 69, 1950
[xvii] Ibid., at 110
[xviii] Ibid., at 116
[xix] Hyde, 2010 NY Slip Op 05676, 5
[xx] Ibid., at 3