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Surrogate's Court Discovery: Recent Cases Illustrate Changes Under Provisions of SCPA

Over the past 10 years, Surrogate's Court judges across the state have made a series of decisions dealing with the discovery proceedings and "reverse" discovery proceedings under the Surrogate's Court Procedure Act (SCPA) that provide valuable guidance on how the statutes are being interpreted and how attorneys should develop strategies on behalf of their clients.

Some cases have involved the guillotine-like defense of the statute of limitations, which can be a clear-cut ending to any proceeding; others have revealed the unexpected breadth and utility of the discovery statutes; still others have provided an insight into the criminal dimensions of discovery proceedings.

SCPA 2103 and 2104 address discovery proceedings generally, and SCPA 2105 deals with discovery proceedings against a fiduciary, which are commonly referred to as "reverse" discovery. SCPA 2103 and 2104 come into play where the fiduciary has collected the assets of the estate and finds, or has reason to believe, that not all of the assets are accounted for. The fiduciary can then bring a discovery proceeding to determine whether any other person has possession of estate assets and/or to take steps to obtain such assets.

The first of two distinct phases under SCPA 2103 is the "inquisitorial phase," which is used when the fiduciary is not sure whether the respondent possesses estate property and wants an examination to seek information. If the court finds reasonable grounds for the examination, it will order the respondent to appear and be examined. The second, or "hearing," phase is used when the fiduciary *knows* that the respondent has estate property. In this case, the court will issue a citation ordering the respondent to show cause why the property should not be delivered to the fiduciary.

The jurisdiction of the Surrogate's Court in discovery proceedings was expanded in 1994 to include real property. Now, a person can discover any and all personal or real property in which the decedent had an interest.

After the expansion of jurisdiction, SCPA 2103, 2104 and 2105 have remained largely the same. Since then, however, they have spawned numerous cases in which the rules were applied in various unique factual settings.

SCPA 2103 and 2104 as Applied

The 2002 case *In re Esposito* involved a dispute over the statute of limitations in discovery proceedings. In an older case addressing the issue, the court in *In re Norstar Trust Co.* applied a three-year statute of limitations, likening the action to one for replevin or conversion. The statute was said to accrue on the date the property was taken.

Esposito, however, covers the situation where the property is taken *after* the decedent's death. When this happens, CPLR 210(c) starts the statute running on either the date letters testamentary are issued or three years after the decedent's death, whichever is earlier. In *Esposito*, the decedent died on October 1, 1997, and the respondent allegedly took the property after the decedent's death. Letters testamentary were granted on May 24, 2001, and the fiduciary began the discovery proceeding on May 30, 2001. The court ultimately found that the petitioner commenced the action in a timely manner, within the three-year statute of limitations. If the property had been taken prior to the decedent's death, as was the case in *Norstar Trust Co*., the action would have been time-barred. Because the property was taken after death, however, the statute started on October 1, 2000, which was three years after the decedent's death; the action was brought within three years of that date.

In re Kulesh confirms that the jurisdiction of the Surrogate's Court also includes the determination and enforcement of contractual rights the decedent had with a third party. There, the decedent had entered into a retirement agreement with a corporation that entitled him to the future proceeds of certain claims the corporation had against third parties. When the claims were liquidated and the corporation refused to pay the estate the proceeds, the fiduciary commenced a discovery proceeding under SCPA 2103 to determine the estate's rights under the agreement and to enforce those rights. The respondent corporation filed a motion to dismiss for failure to state a cause of action, arguing that the purpose of a discovery proceeding was to obtain specific property or money that belongs to the estate and not to determine the decedent's contractual rights against the respondents. The court denied the motion to dismiss, holding that in light of the expansion of the Surrogate's Court's jurisdiction, an SCPA 2103 discovery proceeding was the proper remedy to determine the decedent's rights vis-à-vis the corporation with which he had dealings.

Similar to *Kulesh* is *In re Lambrou*, in which the petitioners commenced a proceeding under SCPA 2103 to compel the respondent, a business associate of the decedent, to be examined, requesting discovery regarding certain real property and information pertaining to the respondent's management of a travel agency they had owned. In granting the petition and allowing discovery into matters such as the respondent's management of the business, the court confirmed the broad scope of the discovery proceeding under SCPA 2103.

A separate issue relating to discovery proceedings was addressed in the 1999 case of *In re Baron*. The question was at what point is a guardian obligated to turn over an incapacitated person's funds when that individual has died. There, the preliminary executor of the deceased incapacitated person's estate sought turnover of the estate assets. The guardian asked for the court's direction as to whether she should retain the assets pending the settlement of her account, despite the preliminary executor's request that the assets be turned over to the estate. The court held that the guardian must turn over the assets to the executor immediately upon the incapacitated person's death, even before the guardian has accounted for them. The court explained that the guardian's authority over the ward's assets terminates upon the ward's death and turnover is, therefore, appropriate at that time.

In re LaFroscia addressed the interplay of SCPA 2103 with criminal procedure. There, after a petition was filed and an inquest held, the court found that the respondent possessed $30,000 belonging to the estate and directed the respondent to pay that sum to the estate, plus interest. At the end of its decision the court noted its concern that the actions of the respondent were criminal in nature. The court, therefore, directed that the clerk of the Surrogate's Court serve a copy of its decision to the district attorney's office for further investigation and whatever action it deemed appropriate.

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SCPA 2105 as Applied

SCPA 2105 allows an interested person to begin a reverse discover proceeding to discover property in the possession of a fiduciary. Only a fiduciary with full letters can be the target of a reverse discovery proceeding, not a preliminary executor. Furthermore, one is not a target of a reverse discovery proceeding who merely happens to be holding estate assets.

These issues were addressed in *In re Dempsey*. The decedent had a life estate in real property located in New York that was to pass his issue upon his death. Upon the decedent's death, the decedent's son became preliminary executor of his estate and in that capacity collected rents from the property. The petitioners, decedent's grandchildren (children of a predeceased son), sought turnover of the rents from the son. The court denied the petition, finding it outside the scope of an ACPA 2105 proceeding. The mere fact that the son was holding the rent did not make him a target of reverse discovery proceeding, and neither did his status as preliminary executor. On this issue, the court asked, "[W]hat would happen to this proceeding, for example, if [the respondent] allowed his preliminary letters to expire? He would then no longer be a fiduciary… and the proceeding would be dismissed automatically."

This case, therefore, begs the question of whether, in all cases, a reverse discovery proceeding against a mere preliminary executor will be entertained by the Surrogate's Court. A broad rule preventing reverse discovery proceedings against preliminary executors, or temporary fiduciaries for that matter, would have to be confirmed by further statutory or case law.

Only a person interested in the estate can bring a reverse discovery proceeding. The court clarified who is entitled to bring such a proceeding in *Tiffany v. Tiffany*. There, a Massachusetts domiciliary had conveyed property located in New York to a lifetime trust and named his daughter trustee. The decedent's son contested the trust and decedent's will in Massachusetts and commenced a reverse discovery proceeding in New York under SCPA 2105. The court held that the son had no personal claim to, or right to immediate possession of, the realty and that those rights depended on the outcome of the Massachusetts proceeding. Only if the trust bequeathing the New York property to the daughter was voided would the son be "interested" in such property. The court, therefore, dismissed the son's proceeding, finding he was not an interested person and lacked status to bring a reverse discovery proceeding.

Finally, *In re Rose* shows how the court can combine and decide together separate proceedings under SCPA 2103 and 2105. In this case, claims were flowing between an estate and another entity. The estate had commenced a discovery proceeding against the decedent's cooperative apartment corporation seeking the stock to the apartment. The corporation in turn commenced a reverse discovery proceeding seeking maintenance arrears on the co-op from the estate and the costs of repairs to the apartment. The court combined the discovery and reverse discovery proceedings and thereby decided all the issues at once.