

Discovery Under the Surrogate's Court Procedure Act: a Primer

Often when the issue of a discovery proceeding is raised in either a will contest, accounting contest or related litigated estate matter, the initial reaction by the attorney is to assume that reference is being made to the discovery and disclosure permitted by Article 31 of the Civil Practice Law and Rules. While the attorney would be correct in believing that the provisions of Article 31 of the CPLR and other laws relevant to practice and procedure apply in the Surrogate's Court, a discovery proceeding in the Surrogate's Court, as many attorneys have learned the hard way, is a beast of a different color.

The purpose of this article is to acclimate the general practitioner with some of the intricacies of Sections 2103 and 2104 of the Surrogate's Court Procedure Act (SCPA) relevant to a discovery proceeding and to briefly touch upon what is commonly referred to as a reverse discovery proceeding permitted by Section 2105 of the SCPA.

Purpose of a Discovery Proceeding

The fiduciary of an estate is statutorily obligated to take immediate action to collect on behalf of the estate all of the assets belonging to the decedent. However, the fiduciary may be uncertain as to whether or not he or she has obtained possession of all assets belonging to the decedent. The fiduciary will often have first-hand knowledge or be privy to information that property presently in the possession of others (the respondent) may, in fact, have belonged to the decedent on the date of his death. The issue facing the fiduciary is what steps can he or she undertake to obtain the information necessary to determine whether the property in the possession of others belongs to the decedent's estate and how to obtain a Court adjunction of title to said property.

It has been our experience, particularly in a Will contest where the fiduciary knows that property has been transferred by the decedent during the period where the decedent's testamentary capacity is in question or during the period that the alleged undue influence or fraud was practiced, that the fiduciary must utilize the provisions of Section 2103 and 2104 of the SCPA to either, 1) ascertain who has possession of said property, or 2) if it is known who has the possession to have a Court adjudication of title to the property if title is contested.

Commencement of a Discovery Proceeding

Section 2103(1) of the SCPA permits a fiduciary to present a petition to the Court which has jurisdiction over the estate stating upon knowledge or information and belief that personal property as defined or the proceeds or value thereof which should be paid to him (the fiduciary) is either:

- (a) In the possession or control of a person who withholds it from him, whether the 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

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- (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.

The petition may be accompanied by an affidavit or other written evidence to support it.

The property that could be the subject of a discovery proceeding includes any and all personal or real property in which the decedent had any interest. The statutory inclusion of real property as property that is discoverable became effective on January 1, 1994. Property which the decedent had any interest in is defined to include a chose in action, money deposited and all property rights of the depositor consequent on the deposit of money by a decedent, grantor or fiduciary or for his account.

If the Surrogate's Court, upon review of the petition, is satisfied that there are reasonable grounds for examining the respondent, it will make an order to that effect. However, if the petition does not seek an inquiry or examination of the respondent but seeks that property be delivered to the fiduciary the Surrogate's Court will issue a citation to the person allegedly in control or possession of the property ordering him to show cause why he should not deliver the property, its proceeds or value to the fiduciary of the estate.

Thus, the discovery proceeding has two separate and distinct stages:

- (a) The "inquisitorial stage" which is utilized when the fiduciary is not sure whether or not the respondent is in possession or control of estate property and wants to examine him to find out. If the Court finds that reasonable grounds for the examination exist in its discretion it can order the respondent to appear and be examined; and
- (b) The "hearing stage" which is utilized when the fiduciary knows that the respondent has possession or control of property which the fiduciary believes belongs to the estate. During this stage, the Court will issue a citation to the person allegedly having possession of the property ordering him or her to show cause why the property, its proceeds or value should not be delivered to the fiduciary.

Deciding whether to proceed under the inquisitorial phase or hearing phase of the discovery proceeding is the most important decision the fiduciary who has decided to commence a discovery proceeding will have to make. Its ramifications are immediately discernable. For example, the Court in *Matter of Lukas* held that the respondent during the inquisitorial stage of a discovery proceeding would not be permitted to disclosure and production of documents under Section 3120 of the CPLR. The Court opined that a discovery proceeding during the inquisitorial stage is akin to an examination before trial. Until the Petitioner has established a *prima facie* case for the recovery of the property and the proceeding continued beyond the examination of the respondent, discovery and production of documents permitted under CPLR 3120 should be restricted as in those cases involving the use of discovery prior to an examination before trial. The Court further opined that if the proceeding continues

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beyond the examination of the respondent, it would then be appropriate for the respondent to have available the disclosure permitted by Section 3120 of the CPLR regarding disclosure and the production of documents.

Perhaps most illustrative of the differing paths a discovery proceeding will travel is to the different methods of process required to obtain jurisdiction over the respondent when either the inquisitorial stage or hearing stage is pursued.

In *Estate of Mirsky*, the Court commented that it has found that many attorneys are unaware that the discovery proceeding will proceed on differing paths depending upon which method of process provided for in Section 2103(3) of the SCPA is selected. The Court stated that when the petition contains a request for an inquiry or deposition of the respondent, the respondent is to be served with an order to appear to be examined. However, if the petition states that petitioner is aware that the property is in the possession or control of the respondent, a citation, not an order, is issued to the respondent ordering the respondent to show cause why the property should not be delivered to the petitioner.

In *Mirsky*, the petitioner requested that an inquiry be made about funds allegedly in possession of the respondent which belonged to the decedent. Based upon this request the Court entered an order requesting the respondent to appear before the Court and be examined. The Court order further provided that the respondent be personally served with a copy of the order and supporting papers and that the witness be paid a subpoena fee. The respondent was personally served and paid the witness fee. However, the respondent failed to appear before the Court on the date set forth in the order. The petitioner acting upon the default moved for an inquest. Subsequently, an attorney made a limited appearance on behalf of the respondent and argued that the Court could not grant any relief against the respondent because the respondent was not served with the order in New York.

The respondent, citing *Matter of Marko*, argued that a discovery proceeding which is commenced by an order to attend and be examined is in the nature of a specialized subpoena and that the fact that Section 2103(5) requires that a witness fee be paid substantiates this. In *Mirsky*, the Court held that although a subpoena may be served under appropriate circumstances within New York by substituted service, Judiciary Law Section 2-b(1) provides that the issuance of a subpoena requires the "attendance of a person found in the state to testify." Thus, the *Mirsky* Court denied the Petitioner's request for an inquest citing *Siemens & Halske, GmbH v. Gres*, for the proposition that long-arm jurisdiction was inapplicable to the service of a subpoena and that the out-of-state service of a subpoena is void. The petitioner in *Mirsky* was permitted to serve a citation upon respondent directing her to show cause why she should not deliver the property allegedly belonging to the decedent to the petitioner. For all practical purposes when dealing with an out-of-state respondent the petitioner should move directly into the hearing stage of the discovery proceeding.

Factors to Consider in Commencing an SCPA Section 2103 Proceeding

An important consideration for the attorney deciding whether to pursue either the inquisitorial or hearing phase of a discovery proceeding is the impact of Section 4159 of the C.P.L.R., commonly

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known as the Dead Man Statute. Section 4519 prohibits an interested party from giving testimony as to transactions with the decedent.

In the *Matter of the Estate of Christy B. Detweiler*, the applicability of CPLR 4519 to a discovery proceeding was addressed. The Court, citing *Lalor v. Duff*, reaffirmed that the protection of Section 4519 of the CPLR is not available during the inquisitorial phase of a Section 2103 discovery proceeding. However, if the discovery proceeding “judicially metamorphoses” into a trial on the merits of title, then the protection of CPLR 4519 will be available upon timely objection being made. The Court in *Detweiler* analogized the evidence developed in the inquisitorial phase of a discovery proceeding to evidence adduced at an examination before trial. Thus, the Court held the evidence produced during the inquisitorial phase was not before the Court on the trial phase, unless it was specifically made a part of the trial proceedings. The Court stated that this could be done by either again presenting the non-objectionable testimony from the inquisitorial phase in evidence during the trial on the merits of title. The restrictions created by Section 4519 of the CPLR are an important consideration for the attorney preparing for a discovery proceeding. The limitations it will place on the testimony proffered during a hearing on the merits of title will be significant.

Another important consideration for the attorney commencing a Section 2103 discovery proceeding is the statute of limitations. A Section 2103 proceeding has been likened to a conversion or replevin action which has a three year statute of limitations. In *Matter of Norstar Trust Company*, the Appellate Division, Fourth Department held that in the absence of any allegation of fraud or other bad faith conduct on the part of the respondent the three year statute of limitations for a replevin or conversion action applied.

In *Norstar*, during the period of October 4, 1977 to November 20, 1980, various transfers of personal property and money were made by the decedent to the respondent/appellant. The petitioner alleged that it had become aware of the facts and circumstances concerning the alleged transfers of money and property from the decedent in March of 1982. The petitioner had received letters testamentary on July 9, 1982. The Court held that the Section 2103 discovery proceeding having been commenced four years later was time barred.

Finally, the attorney should be cognizant of the fact that the subject matter jurisdiction of the Surrogate's Court has been broadened in recent years. A significant portion of this expansion has occurred through legislative enactment. Section 12 of Article VI of the Constitution of the State of New York provides that the jurisdiction of the Surrogate's Court extends to “all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings thereunder or pertaining thereto.” The Surrogate's Court in *Matter of Rothko*, interpreted Article VI as to include any matter relating to the affairs of a decedent.

Matter of Piccione best illustrates the expansive reading given to the subject matter of jurisdiction of the Surrogate's Court. In *Piccione*, the executors of an estate commenced a proceeding for damages arising out of a contract to lease real property which later became an asset of the decedent's estate. The Nassau County Surrogate held that the Surrogate's Court had jurisdiction to

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determine the matter in controversy as it unquestionably affects the administration of an estate. The Court cited a variety of recent decisions that broadly interpreted the subject matter jurisdiction of the Court particularly in discovery proceedings. For example, in *Matter of Ryan*, the Court held that the jurisdiction of the Surrogate's Court extended to the interpretation of contracts for the sale of securities.

On January 1, 1994, the definition of "property" in Section 2103(2) of the SCPA was amended to include any and all real property in which the decedent had any interest. Thus by legislative enactment the broad subject matter jurisdiction of the Surrogate's Court has been further expanded.

Inquiry, Trial and Decree under Section 2104 of the SCPA

Section 2104 of the SCPA creates the procedural parameters for what will transpire once the Surrogate's Court has issued an order that there exist reasonable grounds for examining the respondent and if title to the property in question has been established by the petitioner. Upon the return date of the order, irrespective of whether or not the respondent has submitted an answer, the petitioner is permitted to examine the respondent with respect to the allegations delineated in the petition. This allows the petitioner to question the respondent as to the whereabouts of assets that the petitioner believes should be part of the decedent's estate.

In *Matter of Coon's Estate*, the Court held that pursuant to Section 2104(1) of the SCPA, if the respondent claims title to any of the property in question, the respondent must then file a verified answer. Once the verified answer has been filed and served, the Surrogate's Court must then place the matter on the calendar for a trial with respect to any issues of the title.

In *Matter of Nutrizio*, the Court held that, once the respondent has answered and raised an issue as to the legal title of the property in question and the Surrogate is satisfied that there exists a bona fide issue of legal title, then the constitutional right of a trial by jury exists and the party's motion for such a jury trial should at once be granted.

If the respondent merely asserts a general denial of the allegations in the petition and does not allege title to or the right to possession of any of the property in question, then the discovery proceeding will continue as if no answer were filed. The failure of the respondent to answer is not considered a default; the petitioner still has the burden of proving his or her title to the property and the right to possession of it.

Pursuant to Section 2104(4), once the petitioner has established that he or she is entitled to possession of any property, the Court will enter a decree direction delivery of the property or, if the property has been disposed of or diverted, the decree may direct the payment of the proceeds or the value of the property or may impress a trust upon the proceeds or make any determination which the Supreme Court might decree in following trust property or funds. Section 2104(4) grants the Surrogate's Court authority to fashion the appropriate relief once the petitioner has established title to or the right to possession of the property in question.

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Finally, Section 2104(6) of the SCPA, provides that the protection afforded by Section 4519 of the CPLR (Dead Man Statute) is not waived upon a trial of the issues if during the inquisitorial phase of a 2103 proceeding the respondent is questioned as to any transactions or communications between himself and the decedent.

Reverse Discovery Proceeding-Section 2105 of the SCPA

We have at length reviewed the means by which the fiduciary of an estate can discover whether or not the decedent's property is in the possession of others and recover said property which he believes rightfully belongs to the decedent's estate. Briefly, Section 2105(1) of the SCPA permits *any person* having any claim to property or the proceeds thereof which are allegedly in the possession or under the control of the fiduciary of an estate to present a petition to the Court showing facts and praying that the fiduciary be required to show cause why he should not deliver the property or the proceeds thereof. Only the fiduciary is required to be served with process, thus, any person commencing a reverse discovery proceeding is not required to cite all of the beneficiaries or parties interested in the estate.

Like a 2103 proceeding, once the fiduciary raises an issue to title of the property in question, the parties are entitled to a jury trial of said issue of title or possession of property.

Conclusion

As the above stated illustrates a discovery proceeding commenced pursuant to Section 2103 and 2104 of the SCPA is fraught with many different procedural rules that an attorney would not normally associate with discovery and disclosure permitted pursuant to Article 31 of the CPLR. The practitioner embarking upon commencing a 2103 proceeding should carefully review the relevant statutory provisions and case law.