

TRUSTS AND ESTATES LAW

Expert Analysis

Anatomy of a Probate Contest Part 3: SCPA 1404 Examinations

This article is the third in a series of articles concerning contested probate proceedings in the Surrogate's Court. We are hopeful that this series will provide practitioners with a resource concerning each stage of a probate contest.

The last article left off on the return date of citation after jurisdiction has been marked complete. If anyone who has been served with the citation appears on the return date, individually or by counsel, the court will inquire at the calendar call what position that individual takes concerning the probate of the will.

At this time, a litigant has the opportunity to file a responsive pleading, or seek pre-objection discovery pursuant to SCPA 1404.

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In most instances where there is a dispute (or potential dispute), an attorney may appear and ask to conduct an examination pursu-

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ant to SCPA 1404. This provision provides a unique opportunity for an individual to depose the attesting witnesses to a will, as well as the attorney-drafter before issue has been joined and objections filed. In addition to deposition

testimony, the statute directs that the party conducting the examination shall have all of the rights granted under Article 31 of the CPLR with respect to document discovery.

During SCPA 1404 discovery, the time period for discovery is generally limited by the three-two rule, or the time period three years prior to the execution of the will, and two years subsequent to the execution or the death or the testator—whichever is sooner. 22 NYCRR 207.27. This scope may be expanded upon a showing of “special circumstances.” *Id.* Additional discovery can be sought after objections are filed, but SCPA 1404 essentially permits litigants to conduct a fishing expedition before drafting their objections. As several courts have pointed out, the three-year two-year rule “is a pragmatic rule designed to prevent the costs and burdens of a ‘runaway inquisition’” See, e.g., *In re Po Jun Chin*, 55 Misc.3d 109 (Sur. Ct. Queens Cnty. 2017).

Sometimes there is no dispute, and the parties have filed Waivers of Process: Consents to Probate, but there is an individual who is interested in the proceeding who is under a disability. This may include minors, incapacitated adults, incarcerated individuals, as well as individuals whose identities and whereabouts are unknown. In these instances, even though all of the other parties have consented to the petition, a guardian ad litem may be appointed. A guardian ad litem is an attorney appointed by the Surrogate to protect the rights and interests of the individual with a disability. It is then up to the guardian ad litem to ask for formal or informal examinations of attesting witnesses, seek necessary discovery and possibly file objections.

Very often on the return date, especially in the larger Surrogate's Courts when there is a potential for contest, the court will immediately assign a member of the law department of the court to supervise disclosure. The court will fix a date for the examinations which pursuant to court rules are generally held at the courthouse. 22 NYCRR 207.28. Because SCPA 1404 examinations are quasi-hearings, the court prefers to have those examinations supervised so that rulings can be

made in the moment, rather than subsequent applications. That is more time efficient. In addition, the original will cannot be moved from the Court to a different deposition location. In some of the smaller counties the Surrogates may choose to preside over the examinations. In the larger counties, very often a law assistant is available to make rulings as the examination progresses. When warranted, the Surrogate may make the rulings if requested by counsel, but in most instances, the law assistants are familiar with the Surrogate's practice and are capable and authorized to make rulings.

The estate pays for the SCPA 1404 examinations which occur before objections. This includes examination of the first two attesting witnesses within New York state who are competent and able to testify, or if no witness within the state is competent and able to testify, the out of state witness who resides closest to the county in which the probate proceedings are pending. The estate covers costs including the costs of the stenographer and one copy of the transcripts of the examinations for the court and any guardians ad litem. The costs of all other examinations, including subsequent examinations of the witnesses allowed under SCPA 1404

are governed by article 31 of the CPLR. Similarly, the costs relative to all examinations conducted after objections are filed are governed by article 31 of the CPLR. All costs related to document discovery are covered by the article 31 of the CPLR whether before or after objections have been filed.

While SCPA 1404 generally only allows an individual to examine two of the attesting witnesses and the attorney draftsman, special rules apply if there is a no contest or in terrorem clause. Because of the potentially drastic effects of an in terrorem clause, the potential deponents under SCPA 1404(4) is expanded to also include the proponent of the will, the nominated executors under the will, as well as "upon application to the court based upon special circumstances any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will." See EPTL 3-3.5 as well as *Matter of Singer*, 13 N.Y.3d 447 (2009) for a cautionary tale on this issue. While this significantly expands the number of potential deponents, it is possible that one of the individuals could have many roles. For example, it is conceivable that an attorney could be the attesting witness,

attorney-drafter, the nominated executor and the proponent of the will. In that case, there would only be an examination of that attorney and the other attesting witness.

Most trust and estates practitioners at the time of execution of the will obtain SCPA 1406 affidavits of the attesting witnesses. Prior to the work of the Bennett Commission in the mid 1960's, often attesting witnesses had to come to court even in uncontested probate proceedings to be examined by a clerk of the court concerning the capacity of the testator, due execution and any possible fraud or undue influence. The Bennett Commission established a procedure where testators as part of their estate plan could obtain at the time of the execution of the will the information that the court in prior practice required by a court appearance and examination. Now, attesting witnesses generally do not have to appear in court concerning the probate of a will unless there is a contest. An SCPA 1406 self-proving affidavit includes the necessary statements to assist the court in probating a will.

As a practical matter, often times a trust and estate attorney will use an employee as a witness to the will for a client. These employees may witness hundreds of wills, and find it hard

to recall the specifics of a particular will execution. By executing an SCPA 1406 affidavit, the witness can state that they executed the affidavit at the time of the will execution when the circumstances were fresh in their mind, and they believe the statements there were true when they signed the affidavit because they would only sign a truthful affidavit.

The SCPA 1406 affidavit provides a prima facie case for due

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execution as well as some other tangential aspects of capacity and undue influence. Armed with the 1406 affidavit and other proof, such as attestation clauses in wills, the proponent will be able to establish a prima facie case concerning the two issues over which the proponent has the burden of proof, testamentary capacity and due execution.

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1404 examinations, or at such time as the parties stipulate or the court directs. Often the parties agree that objections will be filed 10 days after receipt of the SCPA 1404 transcript.

This article is intended to provide some practical insights into the SCPA 1404 process and procedure, and not the information sought in the examination. How to utilize the information obtained in the SCPA 1404 process—which will guide litigants in drafting objections and other discovery goals—will be addressed in future articles concerning the drafting and filing of objections, discovery and summary judgment motions.