

## TRUSTS AND ESTATES LAW

## Expert Analysis

# Anatomy of a Probate Contest, Part IV: Objections in a Probate Proceeding

**T**his article is the fourth 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 discussed SCPA 1404 examinations, or examinations of the attorney draftsman and witnesses to a will that has been offered for probate. This article will discuss the filing of objections to probate, and will also explore discovery issues that may arise during a contested probate proceeding.

Objections are due within 10 days after the conclusion of 1404 examinations, unless another date is stipulated by the parties or

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approved by the court. Practitioners may consider entering into a stipulation whereby objections are

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required to be filed within 10 days after receipt of the transcript of the 1404 examinations by the potential objectant's attorney; this provides the attorney with enough time to thoroughly review the testimony and determine whether to object.

SCPA 1410 sets forth who may file objections to probate of an alleged will, including "any person whose

interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate," except that objections may not be filed by an individual whose only interest would be in the commissions he or she would have received as a fiduciary nominated in a prior instrument, without authorization from the court for "good cause shown." In addition, if a distributee receives his or her distributive share under EPTL 4-1.1 outright, objections may not typically be filed.

"Good cause" pursuant to SCPA 1410 depends on the particular circumstances of the matter. See, e.g., *Matter of Marks*, 142 Misc.2d 733 (Sur. Ct. New York County 1989) (granting motion of trustees for permission to file objections and noting that a fiduciary's potential interest in filing objections "does not arise because of their right to compensation but because of their obligation to protect testator's intention as expressed in a valid will"); *Matter of Doyle*, N.Y.L.J., Feb. 14, 1990,

at 22, col. 5 (New York County). To determine whether “good cause” has been demonstrated, the court will consider allegations of fraud, undue influence and lack of testamentary capacity, supported by some evidence; the nature of the relationship between the testator and the replaced fiduciary; and the nominated fiduciary’s ability to assist the court in satisfying itself of the validity of the will. *Marks*, 142 Misc.2d at 736-37.

Once standing has been established, objections are filed and issue is joined. Objections commonly concern the validity of the will; the executor’s standing and fitness to serve as such; the testator’s capacity, and allegations of fraud and undue influence. The attorney filing the objections must consider whether a jury trial should be requested, pursuant to SCPA 502. The proponent’s attorney must also consider filing a demand for jury trial upon the filing of objections, which must be served and filed within six days after service of the objections. Unlike Supreme Court practice, one party cannot rely upon the other party’s jury demand, because a jury demand may be withdrawn without the consent of the other party. Therefore, one who wants a jury trial but did not request one, will not be entitled to a jury trial if the demand made

by the other party is withdrawn.

If objections are filed, citation pursuant to SCPA 1411 must issue to any other interested parties who are adversely affected by the filing of objections, who have not already appeared or been served with process. For example, legatees who received notice of probate must be served with process pursuant to SCPA 1411, as their interest in the instrument will be affected if the will is denied probate. The 1411 citation may be served by any party in interest, and all proceedings are stayed until jurisdiction is complete. On the return date of the 1411 citation, the proponent’s attorney should appear to determine whether any additional parties wish to appear in the proceeding to defend their interests.

Discovery disputes may arise prior to and after the filing of objections. Prior to the filing of objections, discovery is limited to that permitted pursuant to SCPA 1404, including document discovery and 1404 examinations. Pre-objection document discovery may include requests for the estate planning file related to the proffered instrument (see CPLR 4503(b)), or other pertinent documents germane to the testator’s capacity, the validity of the will, and potential fraud or undue influence. Before filing objections, one must consider if it will trigger an in terrorem clause.

After issue is joined, and after additional parties appear pursuant to SCPA 1411, the parties have the opportunity to conduct broad discovery afforded under Article 31 of the CPLR, although this may be circumscribed by Uniform Rule 207.27 (see below). In many instances, the parties will conduct non-party depositions, serve notices to admit, and utilize like devices. Hospital records, business records and other materials may be subpoenaed. Hospital records are usually returnable at the Surrogate’s Court, where the court will review the records and determine the extent of disclosure.

Practitioners must be aware of Rule 207.27, concerning the scope of disclosure in a contested probate proceeding. Rule 207.27 provides that, absent a showing of special circumstances, disclosure is limited to the period three years prior to the date of the propounded instrument and two years thereafter, or to the date of the decedent’s death, whichever is the shorter period. What constitutes “special circumstances” is dependent upon the particular facts of a proceeding.

Stay tuned for the next and final article in this series, which will address the ins and outs of a contested probate jury trial.