

## Jury Trials in Surrogate's Court

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Every Surrogate's Court case is a special proceeding for which there is a presumption that no right to a jury trial exists. There is, however, a limited subset of a cases in which a Surrogate's Court proceeding may be tried to a jury. In those instances, practitioners must be aware that Surrogate's Court has its own unique rules and procedures, and that the failure to comply with them may result in the inadvertent waiver of a party's right to a jury trial.

### Right to a Jury Trial in Surrogate's Court

"[T]rial[s] by jury [were] unknown in Surrogate's Court until statutory provisions were made for [them]" *Matter of Santillo*, 103 Misc.2d 937, 938 (Surr. Ct. Erie Cty. 1980) (citing *Potter v. Ricca*, 111 N.Y.S.2d 489 (Sup. Ct. Westchester Cty. 1952)). Today, under SCPA §502(1), a jury trial is available (1) in a probate contest involving controverted questions of fact; (2) in a proceeding concerning the validity of a lifetime trust brought after the death of the grantor where there is a controverted question of fact; and (3) where a party has a constitutional right to a jury trial and duly demands one.

As to the third category of proceedings, jury trials are guaranteed in all civil cases that were entitled to a jury trial at common law or pursuant to statutes that were later "accorded constitutional authority" by certain versions of the New York Constitution (*Matter of*



Courtesy photos

Former Judge C. Raymond Radigan ,left, and Jessica Baquet ,right, of Ruskin Moscou Faltischek.

*Sackler*, 222 A.D.2d 9, 12 (2d Dep't 1996). Ultimately, it is the substance and nature of the claim for relief that determines the right to a jury trial, not the court where the claim is asserted. A jury is available for claims at law, *i.e.*, those claims for which money damages can fully compensate the claimant, but not equitable claims (*In re Amaducci*, 2001 NYLJ LEXIS 4355 (Surr. Ct. Westchester Cty. 2001)).

Applying these precepts, a jury trial is unavailable in Surrogate's Court proceedings to fix attorneys' fees pursuant to SCPA §2110, to suspend or remove a fiduciary under SCPA §711, to resolve a beneficiary's objections to a fiduciary's account, for the construction of a will pursuant to SCPA 1420, or to determine the validity of a spouse's right of election.

On the other hand, a party is entitled to have a jury decide disputed claims of legal malpractice, claims for replevin brought by or against a fiduciary, disputes concerning the validity of claims against an estate that have been rejected by the fiduciary (even when asserted in the context of an accounting proceeding), proceedings for probate of heirship and breach of contract claims (*Sackler*, 222 A.D.2d at 13; *Matter of Schneier*, 74 A.D.2d 22 (4th Dep't 1980); N.Y. SCPA § 1810; N.Y. SCPA § 2113; *Matter of Bringgold*, 204 A.D. 101 (3d Dep't 1923); *Connolly v. Griffin*, 201 A.D.2d 371 (1st Dep't 1994)).

Even when there is no right to a jury trial, under SCPA §502(6), the Surrogate has discretion to submit any issue of fact to an advisory jury, which will issue a non-binding verdict, in accordance with the CPLR. CPLR 4212 permits the empaneling of an advisory

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jury on the motion of any party or on the court's own initiative. The court may confirm or reject all or any part of the verdict on its own initiative or a motion of any party made within 15 days after the verdict is rendered (N.Y. SCPA 502(6)).

The court is also empowered to make new findings without taking additional testimony or to order a new trial.

### **How To Demand a Jury**

The procedure for demanding a jury trial in Surrogate's Court differs from the procedure applicable in Supreme Court. Supreme Court practitioners run the risk of waiving the right to a jury by failing to familiarize themselves with the rules at the outset of a Surrogate's Court case.

In Supreme Court, a jury cannot be demanded until the filing of a note of issue, which does not happen until after discovery is complete (N.Y. CPLR 4102(a)).

The party filing the note of issue simply checks the box for a jury demand and, if she does not, any other party may file a jury demand within 15 days after service of the note of issue.

A party who waits until the filing of a note of issue to demand a jury in a Surrogate's Court case will be met with an unpleasant surprise. Under SCPA §502 (2)(a), a respondent must demand a jury trial in his answer or objections. A petitioner seeking a jury must serve and file her own demand within six days after service upon her of an answer or objections (and, for reasons discussed below, should do so even if her adversary files his own jury demand).

A party seeking a jury must simultaneously pay the required jury fee, which is currently \$150 (N.Y. SCPA §502(3); N.Y. SCPA §2402(9)(i)). Failure to timely file a demand or pay the required fee may result in a waiver of the right to a jury (*Matter of Campbell*, 2000 NYLJ LEXIS 3900, \*1-2 (Surr. Ct. Bronx Cty. 2000)).

The rules differ where a proceeding is transferred to Surrogate's Court from another forum. In such cases, a party who duly demanded a jury in the originating court is deemed to have demanded a jury from the Surrogate's Court (N.Y. SCPA §502 (2)(b)). A party who has not demanded a jury may demand one in his motion to transfer a case to Surrogate's Court so long as the time to do so has not expired. The non-movant may file a jury demand in Surrogate's Court within 10 days after service of the transfer order on him with notice of entry so long as his time to demand a jury has not otherwise lapsed.

Although CPLR 4102 allows the court to relieve a party of the consequences of filing a late jury demand, decisions of the Surrogate's Court tend to deny such relief. The courts follow the rule that a late jury demand may be accepted where there is no prejudice to another party and the failure to timely file the demand was unintentional.

However, were a party unduly delays in seeking to file a late demand, relief will be denied even in the absence of prejudice (*Matter of Marrelli*, 47 Misc.3d 1213(A) (Surr. Ct. Kings Cty. 2015)). Delays of four months or more have been considered too long (See,

e.g., *Matter of Labita*, 19 Misc.3d 1142(A) (Surr. Ct. Nassau Cty. 2008) (18 months); *Matter of Toran*, 1997 NYLJ LEXIS 5415 (Surr. Ct. Nassau Cty. 1997) (six-and-a-half month delay); *Zelvin v. Pagliocca*, 38 A.D.2d 561 (2d Dep't 1969) (four-month delay)).

### Procedural Nuances

A critical distinction between the rules in the Supreme and Surrogate's Court concerns the effect of a party's withdrawal of her jury demand. In Supreme Court, a party who demanded a jury cannot withdraw her demand without the consent of the other parties, regardless of whether those parties demanded a jury themselves (N.Y. CPLR 4102(a)). The practical effect is that a party who failed to demand a jury may nonetheless insist upon one so long as her adversary did.

On the other hand, in Surrogate's Court, a party who demanded a jury may withdraw that demand

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unilaterally. In that case, if her adversary failed to file her own jury demand, the right to a jury is lost, thus underscoring the importance of filing a jury demand regardless of what one's adversary does (N.Y. SCPA § 502(5)(b)).

The right to a jury may also be waived by a party who asserts both equitable and legal claims in her pleading. In such a case, "the court must determine whether the main thrust of the action is for legal damages or for equitable relief" (*DiTomasso v. Plaza Apartments*, 30 Misc. 3d 655 (Surr. Ct. Westchester Cty. 2010)).

Where the relief sought is primarily equitable, the petitioner waives the right to a jury trial on the claims at law.

Thus, if one views having a jury as essential, care must be taken in deciding which claims should be asserted in a given proceeding and/or whether equitable claims can or should be asserted in a separate litigation.

The outcome is different where someone other than the petitioner joins legal and equitable claims in the same proceeding. A counterclaimant who asserts a claim at law does not lose the right to a jury simply because the main claims are equitable in nature—in such a case, it is appropriate to sever the counterclaim and try it to a jury while holding a bench trial on the main claims (*Matter of Schneier*, 74 A.D.2d 22 (4th Dep't 1980)).

Similarly, a party's right to a jury trial is not waived simply because she asserted a claim at law which is later consolidated with another party's claims for equitable relief (*Margesson v. Bank of New York*, 291 A.D.2d 694 (3d Dep't 2002)).

### Conclusion

Whether representing a petitioner or a respondent in Surrogate's Court, counsel must consider the availability of jury trial at the pleading stage. Where a jury is available, a party should strongly consider demanding one at the outset, and immediately paying the required fee, so as not to waive the right. This is especially important given the likelihood that a motion to file a late jury demand will be denied and since a party can unilaterally withdraw that demand later in the litigation if she changes her mind.

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