

Understanding the Scope of the “3-2 Rule” in Probate Proceedings

By Michael J. Berger, Esq.

Surrogate’s Court litigation is a niche practice area that requires practitioners to be aware of the interplay between several sets of rules that regulate pre-trial discovery, namely, the CPLR, SCPA, and the Uniform Rules for the Surrogate’s Court. As one example, while the SCPA generally adopts the full breadth of discovery permitted under Article 31 of the CPLR, when it comes to examinations before trial commenced under SCPA 1404 in connection with the probate of a decedent’s last will and testament, Section 207.27 of the Uniform Rules (the so-called “3-2 Rule”) places a major limitation on the scope of discovery that would ordinarily be permitted under Article 31 in many other Surrogate’s Court proceedings.

What is the “3-2 Rule”?

Section 207.27 of the Uniform Rules provides as follows: “In any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of article 31 of CPLR. Except upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent’s death, whichever is the shorter period.”

In other words, if the instrument being offered for probate is dated May 30, 2015 and the testator passed away on June 1, 2020, the 3-2 Rule provides that discovery in a probate proceeding is limited to the time period beginning May 30, 2012 (i.e., three years before the date the instrument was purportedly executed) and ending May 30, 2017 (i.e., two years after the date the instrument was purportedly executed). This limitation on discovery has been described as “pragmatic rule designed to prevent the costs and bur-

dens of a runaway inquisition” in the context of a probate proceeding. *Matter of Das*, 2009 N.Y. Misc. LEXIS 2411 (Sur. Ct., New York County).

When is the “3-2 Rule” Applicable?

Notwithstanding the plain language of 207.27, courts have interpreted the 3-2 Rule to not only limit the scope of SCPA 1404 examinations, but to limit all disclosure devices utilized in a probate proceeding, regardless of whether objections have or have not yet been filed. See *Matter of Eckert*, 60 Misc. 3d 1007 (Sur. Ct., Queens County 2018); *Matter of Yagoda*, 38 Misc. 3d 1218(A) (Sur. Ct., Nassau County 2013); *Matter of Roma*, 2006 N.Y. Misc. LEXIS 5650 (Sur. Ct., Suffolk County, Czygier, J.). Thus, the 3-2 Rule could potentially limit the scope of discovery sought via examinations before trial, interrogatories, and subpoenas duces tecum at any stage of the probate proceeding absent a showing of “special circumstances” to justify expanding the scope of disclosure.

What Constitutes “Special Circumstances” to Warrant the Expansion of the Three-Year/Two-Year Discovery Period?

It is well-settled that “[t]he determination of whether to expand the time period set forth in [3-2 Rule] is within the discretion of the court.” *Matter of Duzhansky*, 153 A.D.3d 819 (2d Dept 2017). Such an expansion of discovery has been permitted in cases where there are allegations of a scheme of fraud or a continuing course of conduct or undue influence or if there is an in terrorem clause in the propounded instrument. See *Matter of Eckert*, 60 Misc. 3d 1007 (Sur. Ct., Queens County 2018) (citing *Matter of Du Bray*, 132 A.D.2d 914 (3d Dept 1987); *Matter of Nigro*, 2004 NY Misc. LEXIS 3258 (Sur. Ct., Nassau County 2004)). “The rationale for permitting an extension in these situations is the circumstantial nature of the evidence usually

involved in a scheme of fraud or undue influence, and also to permit a beneficiary to obtain sufficient information before making a decision to risk triggering an in terrorem clause.” *Matter of Eckert*, supra.

It is worth noting that while such special circumstances have been deemed to include allegations of a scheme of fraud or a continuing course of conduct or undue influence, “unsupported conjecture” and mere speculation of an alleged scheme is not enough to warrant the expansion of the timeframe allowed under the 3-2 Rule. *Matter of Roma*, supra. Indeed, such allegations must be evidenced by facts. *Id.* Thus, the court’s analysis is very fact-specific and a determination to expand the scope of the 3-2 Rule will be made on a case-by-case basis.

Conclusion

Although CPLR 3101 provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,” practitioners should familiarize themselves with Section 207.27 of the Uniform Rules for the Surrogate’s Court to understand the limitations placed on such discovery in the context of a probate proceeding. 📌



Michael J. Berger, Esq.

Associate at Moritt Hock & Hamroff LLP

Michael J. Berger concentrates his practice in complex trusts and estates litigation, sophisticated estate planning, and estate administration. Michael also serves as a court-appointed Guardian ad Litem for minors and intellectually disabled individuals in contested probate and guardianship proceedings.