

## **Surrogate's Court Structure, History, Jurisdiction**

***by Hon. C. Raymond Radigan and Adam J. Gottlieb, Esq.***

The beginnings of the Surrogate's Court in the State of New York followed the Ecclesiastical Court features of England wherein the function of handling estates was by the governors acting mainly as administrators.

It eventually became necessary for the governors to appoint substitutes or surrogates to handle probate matters. Gradually more and more jurisdiction was given to the Surrogate's Courts even with the power to preside over jury trials that primarily dealt with probate and discovery proceedings.

As a result of the Constitution of 1894, the Court emerged as a Constitutional Court but whose jurisdiction was statutorily provided. In 1961 the voters approved a new New York State Constitution, which not only continued the Surrogate's Court, but specifically provided that that Court would have jurisdiction over all questions arising in connection with the affairs of a decedent, guardianship of property of minors and any additional jurisdiction that the Legislature sought to delegate to the Surrogate's Court that was not exclusively given to the State Supreme Court.

Over time, the Legislature expanded the surrogate's jurisdiction (See SCPA §§209 and 1701 and Article 17A), among other provisions, to include guardianship of the person of infants, adoption proceedings, concurrent jurisdiction with the Supreme Court over inter vivos trusts and common trust funds, limited jurisdiction under Mental Hygiene Law, Article 81, dealing with proceedings concerning guardianship of incapacitated persons, guardianship for mentally retarded and those suffering from learning disabilities, disputes between living persons in certain instances, such as in discovery and reverse

discovery proceedings as set forth in Article 21 of SCPA, among others.

There is a Surrogate's Court in each of the 62 counties of the state, with a surrogate in each county except for New York and Kings, where there are two.

### **Surrogate's Court Structure**

The structure of the Surrogate's Court is somewhat similar throughout the state. In the larger counties there are several departments within the court. Much of the Surrogate's Court work is administrative and does not involve litigation. Only a small fraction, less than 2 percent, of all proceedings in the Surrogate's Court involves more than administrative processing requiring the services of the legal department. Typically, in the larger counties, the chief clerk, under the direction of the surrogate, supervises the administration of the following departments (or comparables thereto): probate, administration, accounting, guardianship, small estates, miscellaneous, adoption, certificates and records. Under the supervision of the surrogate, the chief court attorney handles the law department dealing with court litigation concerning trials, hearings, motions, orders, decrees, drafting of proposed decisions, conferencing, supervising disclosure, counseling department heads and attorneys over the myriad number of legal issues that may arise within the court.

The surrogate presides over the court and the administrative and legal staffs, including the processing of will probate and administration proceedings, accountings, small estates, over 57 different types of miscellaneous proceedings, various guardianship proceedings and adoptions. He or she also presides over jury trials, bench trials and hearings.

All jury trials are conducted by the surrogate. As to nonjury trials, generally all of the major matters are heard and presided over by the surrogate. With the larger counties, the surrogate's staff very often includes several court

attorneys in the law department as well as attorneys serving in some of the administrative departments.

Because of the heavy volume of work in the larger counties, in order to stay current and provide for the efficient administration of estates, the surrogate may delegate to others the responsibility for supervising disclosure, preside over certain trials and hearings, and in certain instances, supervise the administration of trusts and estates.

### **Referees**

Under Article 5 of SCPA, the surrogate is empowered to appoint referees. Referees are outside attorneys admitted in New York or such attorneys on the court's staff. Occasionally, the surrogate will have a matter that is complicated requiring supervision of discovery afforded under SCPA and Article 31 of CPLR, may require a hearing taking up possibly several weeks or months and/or require intensive negotiations in an attempt to arrive at a settlement. For the court and its staff to devote all of the time it would require to handle such a matter, it may cause a disruption in the efficient and orderly administration of other matters that must be attended to by the court and staff.

In upstate counties, surrogates may also serve as Family Court and/or County Court judges with large workloads. In those extraordinary circumstances, the court may call upon a retired surrogate or retired judge of another court, or a learned practitioner knowledgeable in the intricacies of complicated estate matters before the court, to act as referee to supervise disclosure, to hear and report or hear and determine issues or to mediate a dispute. Under SCPA §506 the court is authorized to appoint a retired judge or a practitioner to hear and report. That statute does not provide for the appointment of a referee to supervise disclosure or to mediate a dispute, or to hear and determine. Utilizing the provisions of SCPA §§102 and 202, the court can utilize the provisions of CPLR dealing with the appointment of

referees to supervise disclosure or to hear and determine. See *Matter of Koepfel*, Oct. 25, 2007 NYLJ 37, (col.6) (Glen, S., Sur.Ct., New York County).

Under CPLR §3104 (b), the court can approve a stipulation naming a retired judge or an attorney to act as a referee to supervise disclosure. The stipulation will include the payment of the referee's fees. Under CPLR §3104 , the referee has all of the powers of the court in supervising disclosure other than to judge one in contempt. The determinations made by the referee are subject to review by the court.

Under CPLR §4301 , the surrogate can appoint a referee to determine issues and the appointee has all of the powers that court would have in performing like functions but may not hold one in contempt.

Pursuant to CPLR §4311, an order will provide that the referee is to determine the entire action or as to specific issues, to report issues, perform particular acts or to receive and report evidence only. It may specify or limit the powers of the referee and the time of the filing of his or her report and fix a time and place for the hearing.

If the court is going to appoint a referee to supervise disclosure or to hear and report, unless the situation is extraordinary as outlined above, the court usually will appoint a staff attorney. Many surrogate's courts have standing orders appointing certain staff attorneys as referees for the purposes of supervising disclosure and conducting pretrial conferences. Some court attorney's titles include the word 'referee.'

If the court determines it wishes to assign a matter to a referee, it can utilize the procedures set forth under SCPA §506 (6) for staff attorneys to hear and report. To use this subsection, the court must obtain the consent of all attorneys. As a practical matter, unless there are serious issues raised as to why a matter should not be referred to a referee, attorneys usually

consent if the court requests that a staff attorney hear and report. If the attorneys do not consent, and if the court is convinced that the services of a referee are necessary, the court has the power to appoint outside retired judges and practicing New York attorneys to hear and report without the consent of the parties or the attorneys as provided for under SCPA §506 (1).

On the consent of the attorneys, the court can designate the chief clerk or any other clerk of the court who is an attorney, or a court attorney assigned to the court to take the testimony as long as the matter is not a proceeding where a right to a jury trial exists. Generally speaking, jury trials in surrogate's practice involve probate and inter vivos trust validity proceedings and discovery proceedings. Some surrogates would not appoint a court staff attorney in probate or discovery proceedings because one would be entitled to a jury trial as a matter of right. Some surrogates take the position that if a jury is not demanded or is waived, then there is no longer a right to a jury trial and the court could appoint a staff court attorney to hear and report. However, in those instances, the surrogate would usually only assign a staff attorney to hear and report on a preliminary matter concerning such proceeding, such as a Putnam hearing, status hearings, and the like. The surrogate usually would not appoint a staff attorney to hear and report on a full probate, inter vivos trust, or discovery proceeding.

It is interesting to note that under SCPA §506 (1), the court cannot appoint a referee where a Constitutional right to jury trial exists and is demanded, thus it would appear where a jury trial is not demanded, a referee could be appointed under that section even if it involves a probate, inter vivos trust, or discovery proceeding. It is not clear as to whether or not the legislators intended to treat such circumstances differently under §506 (1), vis ? vis §506 (6). However, again it would be extremely rare for a surrogate, in any event, to appoint a referee to conduct a full probate, inter vivos trust, or discovery proceeding by a referee under either subsection.

A referee appointed under §506 (6) can be appointed to report to the court

on the facts or upon a specific question of fact, or upon the law and the facts. The provision goes on to provide for procedures for the preparation of the report and questions dealing with confirming or objecting to the report. In most instances, the submission of the report is not made. The referee merely hears the matter assigned. Under §506 (6)(c), the attorneys almost always consent to the waiver of the submission of the report by the referee. The transcript of the hearing is made and filed with the court. The matter is then submitted for decision, just like in any matter that was heard by the surrogate. That usually would entail the submission of briefs and replies and then the matter submitted to the law department for the surrogate's ultimate determination of the issues. Unlike retired judges and attorneys appointed as referees, staff attorneys are not compensated for their services, as such services are provided for as the usual services afforded by that employee to the court. However, if disbursements are incurred, such as travel, lodging or meals away from the court, the staff attorneys are reimbursed as directed by the court either out of the estate or from any of the parties appearing.

## **Receivers**

The surrogate is also empowered to appoint receivers pursuant to SCPA §102 . Under CPLR §6401 (a), upon motion of a party, the court may appoint a temporary receiver where there is danger that the property of a trust and estate would be removed from the state, or lost, materially injured or destroyed. Under subsection (b) the court can authorize the receiver to take and hold real and personal property, commence suits, collect and sell debts or claims. Upon such conditions and for such purposes as the court directs, the receiver may appoint counsel if authorized by the court.

Pursuant to CPLR §6402 , the receiver is to take an oath that he or she will faithfully and fairly discharge the trust committed to him or her and file any bond directed by the court.

Under SCPA §209 (10), the surrogate has all the powers that the Supreme Court has in like actions and proceedings that are commenced in the Surrogate's Court. Accordingly, when estate assets are in jeopardy, the surrogate will appoint a receiver pursuant to CPLR §6401 (a).

The Surrogate's Court may find a danger of loss or material injury where mismanagement of an ongoing business threatens the interests of an estate or trust while a proceeding is pending. For example, in *Matter of Sakow*, Nov. 26, 1999 NYLJ, 30, (col.6) (Holtzman, S., Sur. Ct. Bronx county), *aff'd*, *In re Sakow*, 280 AD2d 378, 721 NYS2d 34 (1st Dept. 2001) , the court appointed a temporary receiver to manage properties in the control of a fiduciary who had 'no intention of operating the properties for the benefit of the movants [i.e., the beneficiaries of the estate in which such properties belong] pending a final disposition of the issues,' *Id.*, at 31. Furthermore, as noted by the surrogate, when a fiduciary had 'done nothing but lose money on these properties over the years' such appointment can be made. *Id.*, at 31. See also *Estate of Levine*, June 11, 2001 NYLJ, 33 (col. 4) (Fusco, S., Sur. Ct. Richmond County). A temporary receiver was appointed to manage a copying and printing business whose assets had been misappropriated. *Estate of Capolino*, July 26, 2000 NYLJ, 33, (col. 4) (Pagones, S., Sur. Ct. Dutchess County). A temporary receiver was appointed to manage properties that an administrator mismanaged.

Moreover, even without evidence of wrongdoing, the Surrogate's Court has found a risk of material injury where fiduciaries cannot agree on the proper management of a trust or estate assets. See *Kiperman v. Steinberg*, Dec. 13, 1995 NYLJ, 31, (col. 5) (Radigan, S., Sur. Ct. Nassau County), *aff'd*, 234 AD2d 518, 651 NYS2d 176 (2d Dept. 1996) . Where a temporary receiver was appointed where the 'paralysis' of partners to a partnership that owned real property had placed such property at risk of being lost.... In *Matter of United Lubavitcher Yeshivoh*, Sept. 3, 1997 NYLJ, 25 (col. 2) (Feinberg, S., Sur. Ct. Kings County) a temporary receiver was appointed to manage a school which was the residuary legatee of a decedent's will but which was

rendered insolvent by the inability of co-executors to reach an agreement that would allow the school to open in time for school year. In *Matter of Estate of Sobol*, Nov. 20, 2003 NYLJ, 28, (col. 4) (Preminger, S., Sur. Ct. New York County), a temporary receiver was appointed to manage business of estate where the parties were unable 'to work together in devising a framework with the common goal of keeping decedent's business afloat pending a resolution of the issues raised in the proceeding.'

## **Conclusion**

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The Surrogate's Court is empowered by the constitution and legislative authority, assisted by its staff and those appointed, to provide expeditious and efficient administration of trusts and estates.

[C. Raymond Radigan](#) is a former surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek. He is also chairman of the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act. [Adam J. Gottlieb](#) is of counsel to Ruskin Moscou in the trusts and estates department.