RELIEF AGAINST A FIDUCIARY: SCPA §2102 Proceedings

By: Gary B. Freidman, Esq.[1]

Even the most cursory review of SCPA §2102 will cause you to wonder how seven such unrelated proceedings found their way into the same section of the SCPA. The answer is that SCPA §2102 is an amalgam of several sections contained in the former Surrogate's Court Act. This section is broadly entitled "Proceedings for Relief Against a Fiduciary." However, the only thing that these eclectic proceedings have in common is that they are all brought against a fiduciary. As you will see they can be important weapons in an estate practitioner's arsenal.

SCPA §2102 provides:

> A proceeding may be commenced to require a fiduciary:
>
> 1. To supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.
>
> 2. To set apart and turn over exempt property to which a spouse or child is entitled or if it has been lost, injured or disposed of to pay the value thereof or the amount of injury thereto.
>
> 3. After reservation for the payment of the expenses of administration to pay the reasonable funeral expenses of a decedent if there are funds available for such payment.
>
> 4. To pay a claim which has been allowed, to deliver a specific bequest or property to a person entitled thereto or to pay a legacy, distributive share, interest in a trust or a claim for an administration expense, and when a trustee

---

[1] Mr. Freidman is a member of the firm of Greenfield Stein & Senior, LLP. 600 Third Avenue, New York, NY 10016.

is unable to deliver personal property to the person entitled, to pay the value thereof.

5. To pay in advance to any beneficiary of an estate all or part of any beneficial interest to which he is entitled when the property of the estate applicable to the payment of debts, legacies and expenses exceeds by at least one-third the amount of all known claims, legacies having priority and beneficial interests of the same class and the beneficiary needs such payment for his support or education or of his family.

6. To comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate.

7. Pursuant to the provisions of paragraphs (d) and (e) of section 11-1.5 of the estates, powers and trusts law, to pay interest on general dispositions at the legal rate unless the court otherwise directs.

1. To Supply Information:

This subdivision allows a person interested to commence a proceeding against a fiduciary "[t]o supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor."

Use of this subdivision is not limited solely to residuary legatees. As long as you can demonstrate that the information sought is relevant to your interest in the estate, you have standing to make the application. For example, a contingent, unliquidated claimant (i.e., a creditor) of the estate has been held to have standing to obtain an inventory of all of the assets of the estate. Matter of Lefkowitz, NYLJ, December 30, 1998, p. 26, col. 4 (Sur. Ct. Nassau Co. 1998). There, the Court held that the statute's reference to "interest" does not limit its application to a "person interested" within the meaning of

SCPA §103 [39] and that the inquiry is whether the information sought is relevant to the petitioner's interest in the estate. For example, in the case of a residuary beneficiary, information such as appraisals, listings of assets on hand, claims against the estate and similar kinds of information that would be detailed in an account can be obtained. However, in the case of a general legatee or a specific legatee, the entitlement to information will be much narrower in accordance with the beneficiary's interest.

A condition precedent to the commencement of a §2102, subd. 1 proceeding is the making of a written demand on the fiduciary (not counsel) for the information sought. Matter of Kassover, NYLJ, February 11, 1991, p. 28, col. 2 (Sur. Ct. Nassau Co. 1991) ["Having requested information relative to her interest in the estate, and that request having been denied, the petitioner has satisfied the criteria of SCPA 2102(1) to commence this proceeding."]; Matter of Gerstein, NYLJ, August 14, 1995, p. 31, col. 6 (Sur. Ct. Queens Co. 1995) [Surrogate declined to entertain petition where the demand consisted only of an exchange of correspondence between counsel].

In Matter of Lauck, NYLJ, May 28, 1982, p. 15 (Sur. Ct. Nassau Co. 1982), Surrogate Radigan held that the duty to furnish information under this section should be read to embrace information which the fiduciary would be required supply to in an account, relevant to the petitioner's interest. Hence, the fiduciary was required to supply, inter alia, appraisals of estate assets and information concerning a close corporation that the estate controlled. However, where the information sought was part of a prior, concluded final accounting proceeding, the Surrogate may decline to entertain the petition. Matter of Matsis, NYLJ, September 10, 2001, p. 31, col. 2 (Sur. Ct. Queens Co.).

The cases do hold, however, that this section is not intended as a substitute for Article 31 discovery. Relief under SCPA 2102, subd. 1 has been denied where the petitioners acknowledged "that they are seeking discovery for an action they have not yet commenced." Matter of Bohorodzaner, NYLJ, October 16, 2000, p. 34, col. 3. (Cur. Ct. Queens Co.).

The mechanics of a proceeding under this subdivision are simple: a written demand, served upon the fiduciary, for such information. If, after a reasonable period of time the information is not furnished, a petition and an order to show cause should be filed to compel the fiduciary to show cause why the he/she/it should not supply the information requested. Unless the Court directs otherwise, service of process only need be made on the fiduciary. Matter of Bergner, NYLJ, October 18, 2000, p. 33, col. 4 (Sur. Ct. Nassau Co.). The failure of the fiduciary to comply with a court order directing that the information be supplied can be a basis for contempt under SCPA §606, 607-1 and/or suspension or removal of the fiduciary under SCPA §711. Matter of Brown, NYLJ, August 24, 2001, p. 22. col. 6 (Sur. Ct. Westchester Co.).

2. To Set Apart and Turn over Exempt Property:

Subdivision 2 provides a mechanism for a surviving spouse (or children under 21 if there is no spouse) to compel the fiduciary to turn over the exempt property specified in EPTL §5-3.1. This is the section that provides that the spouse or child is entitled to receive the first $15,000 in money or other personalty, furniture, household effects, computer, family bible, car, farm animals and implements and other items as detailed in

§5-3.1. Although the amounts involved are relatively small, in the appropriate case, a subdivision 2 proceeding may serve as useful leverage in negotiations or provide a vehicle to test the validity of the status of a "surviving spouse" either due to ineligibility under EPTL §5-1.2 or due to a waiver of exempt property in a pre-nuptial or separation agreement.

Since the "exempt property" is not considered a part of the estate, it is not subject to the payment of administration expenses (except reasonable funeral expenses, if there are insufficient assets), nor reachable by creditors of the estate. Hence, the family need not wait until the final accounting to receive these assets and such a proceeding will generally be entertained early in the administration of the estate.

An application for the turnover of exempt property should be by petition, which commences a separate proceeding, not by way of motion in an existing probate or other proceeding. Matter of Leopold, NYLJ, June 26, 1995, p. 33, col. 3 (Sur. Ct. Suffolk Co.).

3. Payment of Funeral Expenses:

This subdivision, which provides for the commencement of a proceeding for the payment of funeral expenses, after reservation for the payment of the expenses of administration is fairly straight-forward. Not surprisingly, there is little modern case law construing this subdivision. Any person who has paid the funeral expense may petition for reimbursement (including the director of a funeral home where the bill is unpaid). The petitioner must show that the amount expended was reasonable and that the estate has sufficient assets to pay the other administration expenses (as these expenses have priority

over the payment of funeral expenses – SCPA §1811, subd. 1). Since the petitioner generally is not privy to the size of the estate, it is incumbent on a contesting fiduciary to show that the assets are insufficient. See, generally, Turano and Radigan, New York Estate Administration, [1999 ed.], §12-2 (e).

4. To Compel Payment of a Claim or Legacy:

One of the most frequently used SCPA §2102 proceedings is found in subdivision 4, which authorizes a proceeding to compel a fiduciary:

- to pay a claim that has been allowed, but is unpaid;
- to deliver a specific bequest or property;
- to pay a legacy;
- to pay a distributive share, in intestacy;
- to pay an interest in a trust;
- to pay a claim for an administration expense.

This subdivision should not be confused with Subdivision 5 which concerns *advance payments* upon a showing of need.

This is the proceeding to bring when representing an unpaid beneficiary or unpaid creditor (whose claim has been allowed) where the administration has gone on too long. It is far more efficient than a compulsory accounting proceeding. Although the resolution of a compulsory accounting proceeding is usually not delayed, it will generally be several months later until the accounting is actually filed and a proceeding for its settlement commenced. Using §2102, subd. 4, your proceeding can be before the court much sooner.

A proceeding to compel payment of a legacy or claim is not a vehicle for determining the validity of a rejected claim, for which separate proceedings are set forth in SCPA Article 18; it is for claims that have been allowed, but not paid. Matter of Volkerts, NYLJ, November 7, 2001, p. 22, col. 6 (Sur. Ct. Suffolk Co.).

As a practical matter, you should wait at least 7 months from the date of issuance of letters before bringing this proceeding -- as this is period provided by SCPA §1802 in which a fiduciary acts at his or her peril, viz-a-viz creditors, if a legacy is paid out during this period. In other words, the fiduciary who pays legacies during this period runs the risk of personal liability to creditors if the assets are insufficient and he/she pays out estate assets to the beneficiaries. Matter of Liebowitz, NYLJ, July 19, 1991, p. 28, col. 1 (Sur. Ct. Kings Co.); cf. Matter of Feuer, 212 A.D.2d 870, 622 N.Y.S.2d 619 (3rd Dep't 1995), appeal withdrawn, 85 N.Y.2d 968, 629 N.Y.S.2d 728 (1995); Matter of Freidman, NYLJ, December 12, 1994, p. 34, col. 3 (Sur. Ct. Kings Co.).

A fiduciary opposing such a petition must present something more than speculation that "unspecified, potential tax liabilities may consume the assets of the estate. Matter of Ehmer, 272 A.D.2d 542, 708 N.Y.S.2d 143 (2d Dep't 2000). Where there is some question that other persons interested may be adversely affected by the payment, one Court directed the fiduciary to either pay the legacy or to promptly commence a proceeding for settlement of the account. Matter of Felice, NYLJ, August 23, 2001, p. 25, col. 3 (Sur. Ct. Suffolk Co.).

The Statute of Limitations for a proceeding by a legatee or distributee to compel payment of a legacy or distributive share is six years. Matter of Seaman, 146 Misc.2d 563, 551 N.Y.S.2d 454 (Sur. Ct. Nassau Co. 1990). However, the beneficiary's time to commence the proceeding does not begin to run until the judicial settlement of the fiduciary's account. Id.

The fact that an accounting proceeding is pending is not a bar to the grant of relief under SCPA §2102, Subd. 4. Matter of Abrams, NYLJ, October 7, 1998, p. 26, col. 3 (Sur. Ct. New York Co.). There, trustees delayed the payment, for more than three years, of accrued, undistributed income to the estate of the deceased income beneficiary, because they were concerned with potential objections to their account. The Surrogate, citing the strong policy interest in favor of the prompt settlement of estates, the willingness of the executors of the income beneficiary's estate to execute a refunding agreement and the consent of the current income beneficiaries, directed the payment of all accrued income.

In Matter of Carvel Foundation, NYLJ, July 6, 1999, p. 34, col. 6 (Sur. Ct. Westchester Co.), the Surrogate directed the trustees of a charitable remainder unitrust created by Tom Carvel, which terminated on the death of Mr. Carvel's widow in August 1998, to pay out 90% of the principal to the sole remainder interest, the Carvel Foundation. In order to protect the trustees from possible claims on the final accounting, the Court directed that the remaining 10% be held as a reserve against contingent liabilities. It also required the Carvel Foundation to execute a refunding agreement, obligating the

Foundation to refund to the trustees any amounts determined by the Court to be needed to satisfy any obligations in excess of the 10% reserve fund.

A proceeding under this subdivision has also been used to compel the payment of a sum of money due from a fiduciary pursuant to a stipulation of settlement. Matter of Leopold, NYLJ, November 18, 1998, p. 33, col. 4 (Sur. Ct. Suffolk Co.); Matter of Foris, NYLJ, June 15, 2000, p. 33, col. 1 (Sur. Ct. Nassau Co.) [application to compel an accounting was denied without prejudice to recommencement of a proceeding to enforce a stipulation of settlement where the only relief sought was payment of balance due under stipulation].

In Matter of Cagney, 186 Misc.2d 760, 720 N.Y.S.2d 759 (Sur. Ct. Dutchess Co. 2001), aff'd, 293 A.D.2D 675, 740 N.Y.S.2d 448 (2d Dep't 2002), an SCPA 2102 (4) proceeding was used as a vehicle to test whether the petitioning legatees had by certain actions triggered an in terrorem clause contained in the late actor's wife's will and thereby forfeited their legacies — they did, and the Surrogate's finding was upheld on appeal.

The predecessor of this subdivision (SCA §217) has been used by an accountant employed by an executor to compel payment of his fees as an administration expense. Matter of Musil, 254 App.Div. 765, 4 N.Y.S.2d 577 (2d Dep't 1938) [statute is remedial in nature "to facilitate the payment of obligations where, by reason of controversy and litigation, final accounting is delayed."].

Although attorneys' fees are generally not awarded to the successful petitioner in an SCPA 2102 proceeding, Matter of Felice, NYLJ, August 23, 2001, p. 25,

col. 3 (Sur. Ct. Suffolk Co.)., because the estate as a whole is said not have benefitted from the proceeding, recovery of fees may be had against the fiduciary where his or her conduct constitutes bad faith, gross negligence and/or wanton disregard for the rights of those persons interested in the estate. Where the Court found that fiduciary's actions were designed to cause frustration and expense to the beneficiaries, attorney's fees, in the form of a sanction under 22 N.Y.C.R.R. 130.1, et. seq., were imposed on the fiduciary, personally. Matter of Tupper, NYLJ, September 3, 2002, p. 25, col. 2 (Sur. Ct. Suffolk Co.).

5. To Compel an Advance Payment:

Subdivision 5, which authorizes the Court, under specified circumstances, to direct an advance payment of a beneficial interest in the estate, is perhaps the most litigated SCPA 2102 proceeding. Not only can the Court direct payment before the expiration of the seven month period, but payment can be directed even before a will is admitted to probate.

The requirements are:

- a beneficial interest in the estate;
- the property of the estate for payment of debts, legacies and expenses exceeds by at least one-third the amount of all known claims, legacies having priority and of the same class; and
- the beneficiary needs such payment for his or his family's support or education.

In Matter of Milbank, 49 A.D.2d 848, 374 N.Y.S.2d 105 (1st Dep't 1975), the First Department held that SCPA §2102(5) vests the Surrogate with the discretion to authorize an advance payment against a claimed beneficial interest in an estate, even when the question of spousal status is at issue, provided that the claimant is willing to post a full refunding bond.

One of the most well-known 2102 (5) proceedings involved the estate of the real estate investor, Sol Goldman, whose estate was purported to have been valued at between seven hundred million and one billion dollars. Matter of Goldman, 150 A.D.2d 267, 541 N.Y.S.2d 788 (1st Dep't 1989). The Surrogate had denied Mrs. Goldman's request for an advance payment. Mrs. Goldman claimed her entitlement (a) under the terms of an agreement with the decedent, (b) under the will's marital trust provisions, and (c) under her elective share rights. Her children challenged, inter alia, Mrs. Goldman's status as a surviving spouse. The First Department found that Mrs. Goldman had demonstrated her need for an advance payment to meet her obligations for taxes and legal fees and directed an advance payment of two millions dollars immediately and two million dollars annually thereafter on the condition that she post a full refunding bond.

An advance payment proceeding can be commenced during the pendency of a will contest. In Matter of Weintraub, NYLJ, July 3, 1996, p. 30, col. 2 (Sur. Ct. Bronx Co.), one of decedent's surviving daughters sought an advance payment from her father's estate (valued at $1,500,000) on the ground that she was either entitled to one-third of the estate under the propounded will or one-half of the estate in intestacy. The application was opposed on the ground that additional estate taxes may be owing, the requisite showing

of need was not made and there may another (as of then yet undiscovered) will which might disinherit the petitioner. Surrogate Holzman rejected these arguments and directed the distribution of $250,000, without the necessity for a refunding bond.

In another contested probate proceeding, Matter of Gordon, NYLJ, October 29, 1998, p. 29, col. 4 (Sur. Ct. New York Co.), Surrogate Roth directed the making of an advance payment, without a refunding bond, on behalf of an infant beneficiary (a child of decedent) where no funds were otherwise available for the infant's support and the infant would, under the will, be the income and discretionary principal beneficiary of a $3,000,000 trust.

Where the petitioner's entitlement to a certain minimum amount from the estate is beyond peradventure, a refunding bond will generally not be required. See, e.g., Matter of Castellone, NYLJ, August 8, 2003, p. 24, col. 6 (Sur. Ct. Suffolk Co.). However, if status is in issue as in Milbank or Goldman a full refunding bond or other appropriate security will be required by the Court. See, Matter of Levi, NYLJ, October 17, 1995, p. 33, col. 5 (Sur. Ct. Nassau Co.) [surviving spouse whose status was questioned was permitted to give mortgage on her realty in lieu of a refunding bond].

In Matter of Castellone, NYLJ, August 8, 2003, p. 24, col. 6 (Sur. Ct. Suffolk County) an objectant sought an advance partial distribution to himself and the other residuary beneficiaries in the sum of $75,000 each. Petitioners made the requisite showing of need and sufficiency of assets. In directing the distribution, Surrogate Czygier noted that there were no conceivable circumstances under either intestacy or the probate of any of

the proffered documents where the Petitioner and objecting distributees will not each receive a sum far in excess of $75,000. Hence, no refunding bond was required.

Since it is a virtual certainty that if a beneficiary's entitlement to share in the estate is in question, either because the will is being challenged or status is in issue, a refunding bond will be required, your focus should be on the other remaining elements of the statute. You must establish to the Surrogate's satisfaction that the amount of the estate exceeds by one-third the amount needed to pay debts, administration expenses and legacies that are senior to the petitioner's. Allegations upon information and belief will not be sufficient. Obtain the information from the fiduciary and prepare a chart if it will make your presentation clearer. Of equal importance is demonstrating that the funds are needed for the petitioner's or his family's support or education. This means laying bare your client's financial circumstances. Remember, absent a showing of need the court is powerless to grant any relief. Matter of Siegel, NYLJ, July 11, 2001, p. 25, col. 5 (Sur. Ct. Queens Co.) [petition was denied entertainment where it failed to allege facts upon which Court can make the findings required by this subdivision]; Matter of Shelton, NYLJ, November 7, 2000, p. 27, col. 4 (Sur. Ct. New York Co.) [petition denied where petitioners failed to set forth any evidence of their income or net worth to enable Court to make requisite determination of need].

6. For Direction of the Court When Two or More Fiduciaries Disagree:

This subdivision was broadened in 1993 to allow a person interested in the estate to petition the Court to resolve a dispute between fiduciaries who are unable to

agree with respect to any issue affecting the estate. Formerly, this subdivision only authorized a proceeding where the dispute between the fiduciaries concerned the custody of money or other property of the estate committed to them. It remains to be seen how the broadening of this subdivision will be construed by the Surrogates as there is scant, post-amendment case law. Often disputes arise between co-fiduciaries concerning control and custody of estate records or estate assets, SCPA §2102, subd. 6 provides a vehicle to resolve such disputes, short of the drastic remedy of a removal proceeding.

In Matter of Heim, NYLJ, July 2, 2001, p. 32, col. 5 (Sur. Ct. Suffolk Co.), Surrogate Czygier directed a co-fiduciary to cooperate with the other fiduciary in the administration of the estate, to join in the sale of certain estate realty and to finish the administration of the estate including the payment of creditors. Presumably if the respondent co-fiduciary fails to obey the Court order he or she would be subject to removal under SCPA §711 (3) or held in contempt under SCPA §606. Cf. Matter of Brown, NYLJ, August 24, 2001, p. 22. col. 6 (Sur. Ct. Westchester Co.).

In Matter of Stanley, NYLJ, February 10, 1998, p. 27, col. 1 (Sur. Ct. New York Co.) one of two fiduciaries sought the Court's advice and direction pursuant to this division concerning a dispute with an individual co-fiduciary over the use of estate funds to pay administration expenses[2]. The corporate fiduciary argued that prior to making estate funds available to the individual fiduciary for payment of administration expenses,

[2] The fiduciaries had previously litigated over the issue and the First Department held that each fiduciary is unilaterally empowered (i.e., without the consent of a co-fiduciary -- a several power) to pay administration expenses including reasonable counsel fees and that each fiduciary is entitled to the custody of the assets of the estate or fund. Matter of Schwarz, 240 A.D.2d 268, 660 N.Y.S.2d 107 (1st Dep't 1997).

it may seek the Court's advice and direction. The Surrogate rejected this argument as having previously been determined by the First Department, but noted that the individual's expenditure of estate funds would be reviewed in his accounting. Accordingly, the corporate fiduciary was directed to give the individual fiduciary independent control of estate funds, upon his posting a bond equal in amount to the funds.

An interesting example of how the courts dealt with disputes between fiduciaries when the statute was limited to issues concerning custody of money or other property of the estate is Matter of Jacobs, 127 Misc.2d 992, 487 N.Y.S.2d 992 (Sur. Ct. New York Co. 1985). There, the trustees were vested with discretion as to which charitable organization the remainder should be distributed. In a separate letter of instructions (which we all know is not binding on the fiduciaries), the decedent had made her wishes known. One trustee wanted to honor the decedent's wishes, but the other trustee had a different idea.

Surrogate Roth observed that the power to distribute the fund was a joint power which must be exercised by majority vote or where there is an even number, unanimity is required in the absence of a tie-breaking mechanism in the will. The Court then stated:

> However, neither this statute [EPTL §10-10.7] nor any decision provides any guidance to the problem before the court--how to resolve a dispute between two fiduciaries who hold a joint power. In fact, the deadlock situation between the two trustees presents an issue of first impression in this jurisdiction.

> Except in extraordinary circumstances (citation omitted), the court has no power to direct trustees in whatever manner to exercise a joint power vested in their "sole discretion" by the testatrix. In fact, if such a direction were given by the court and not complied with, the court would have no power to enforce it.

The Court went on to hold that although it lacks the authority to give direction, it may, however, render advice and suggested to the trustees that if it were a trustee, it would respect decedent's request, but that the trustees are not required to follow the Court's advice. However, the Surrogate cautioned the trustees that:

> [i]f the advice is disregarded, the only other alternative to effectuate decedent's clear charitable purpose is for the court to appoint a third trustee, upon nomination by the present trustees, to cast a deciding vote. (citations omitted).

It may well be that post-amendment, the Court may intercede in such a situation and resolve the dispute. However, this runs counter to the long-standing rule that the court will not substitute its business judgment for that of the fiduciaries. See, Turano and Radigan, New York Estate Administration, [1999 ed.], §12-2 (g) ["the court will ordinarily not substitute its judgment for the fiduciaries' on investment of estate funds, timing of payment of a claim, or any other matter of business judgment, but the court may direct that no matter how the funds are invested, the fiduciaries control them jointly."].

A typical pre-amendment example of a §2102, subd. 6 proceeding is provided by Matter of Stubing, 47 Misc.2d 174, 261 N.Y.S.2d 914, (Sur. Ct. Kings Co. 1965). There, one of three co-executors allegedly refused to make the estate's books and records available to the others so that a final account could be prepared. The recalcitrant executor

ignored repeated requests for cooperation and the proceeding ensued. The Surrogate directed that the recalcitrant fiduciary deliver all estate books and records to the Clerk of the Court to permit free access thereto at all times by all three co-fiduciaries and that he cooperate in all respects with the petitioner so that the final accounts of the fiduciaries may be rendered and judicially settled and distribution made. In so holding, the Court observed:

> The primary duties of an estate representative are to settle the estate and distribute the assets (Warren's Heaton on Surrogates' Courts, Vol. 3, § 218). Title of each executor to the books and papers of the deceased is equal. Each is entitled to inspect them and to know for himself just what they contain (Matter of Stein, 33 Misc. 542, 68 N.Y.S. 933) and each has an equal right to custody of the books and papers of a decedent (In re Shearn's Will, Sur., 157 N.Y.S.2d 495; Matter of Eisner, 6 App.Div. 563, 39 N.Y.S. 718).

7. To Pay Interest at the Legal Rate:

In 1985, EPTL §11-1.5[3] was amended to provide that in a proceeding to compel payment of a disposition, the court must impose interest either at the rate specified in the will or, if none, at six percent, beginning seven months after the issuance of letters to the fiduciary. If the Court finds that the delay in payment was unreasonable, interest may be awarded at the rate specified in CPLR §5004 (currently 9%). Subdivision 7 provides the vehicle to compel the award of interest contemplated by the EPTL.

There is a split of authority concerning whether interest is payable on a general legacy, absent the commencement of litigation. In Matter of LaFave, 116 Misc.2d 918, 456 N.Y.S.2d 964 (Sur. Ct. Oswego Co.) the Court held that since the claimant did not make a demand for payment of his distributive share or commence an action to effect distribution the Court will not entertain claims for interest. In contrast, in Matter of Schwartz, 161 Misc. 2d 471, 614 N.Y.S.2d 668 (Sur. Ct. New York Co. 1994), Surrogate Roth allowed interest on the legacy, even though no proceeding had been commenced,

---

[3] In relevant part, EPTL §11-1.5 provides:

"(c) If, after the publication of notice to creditors or the expiration of seven months from the time letters are granted, as the case may be, the personal representative refuses upon demand to pay a disposition or distributive share, the person entitled thereto may maintain an appropriate action or proceeding against such representative. But, for the purpose of computing the time limited for its commencement, the cause of action does not accrue until the personal representative's account is judicially settled.

(d) In any action or proceeding to compel payment of a disposition or distributive share, the interest thereon, if any, shall, in the case of a disposition, be at the rate fixed in the will or, if none is so fixed, in any case at the rate of six percent per annum commencing seven months from the time letters, including preliminary or temporary letters, are granted.

(e) Upon application by any legatees of the general dispositions on notice to the fiduciary, the court, where the delay in payment was unreasonable, may fix interest in the amount set forth in section five thousand four of the civil practice law and rules."

finding that to hold otherwise would encourage litigation. The Surrogate stated that a general legatee should be allowed a share of the income actually earned during administration if his or her payment is delayed and suggested that remedial legislation may be required. See, also, Matter of Fisher, NYLJ, January 21, 2003, p. 34, col. 1 (Sur. Ct. Westchester Co.) , where the Court citing and Schwartz and LaFave, held that a demand for payment is not required to start the accrual of interest on a legacy, but is a condition precedent to commencing a lawsuit against the fiduciary, noting that EPTL § 11-1.5 [d]). clearly states that interest is payable `commencing seven months from the time letters, including preliminary or temporary letters, are granted.' Id.

In Matter of Park-Montgomery, NYLJ, May 19, 1997, p. 33, col. 4 (Sur. Ct. Nassau Co.), Surrogate Radigan interpreted Schwartz not to require the payment of interest in all cases where there is no litigation, but would consider such an award, as a matter of discretion, on a case-by-case basis, dependent on the facts and circumstances. See, also, Matter of Gentry, NYLJ, January 4, 2001, p. 37, col. 6 (Sur. Ct. Nassau Co.) [in the absence of a proceeding to compel payment interest may be imposed in the discretion of the court].

The fact a fiduciary/beneficiary participated in administrative decisions concerning estate assets which contributed to the delay in paying the legacy, does not affect the fiduciary/beneficiary's right to interest at on the legacy from 7 months from the date of letters; however the entitlement to interest at the higher rate of 9% for unreasonable delay would be affected by the extent of participation in such delay, but is a matter

committed to the sound discretion of the Surrogate. Matter of Crea, 27 N.Y.2d 339, 318 N.Y.S.2d 133 (1971)

The payment of interest is applicable to general legacies only and has no application to the payment of specific legacies (i.e., bequests of specified or identified property). EPTL §11-2.1 (d)(2)(A); Matter of Miller, NYLJ, March 24, 1999, p. 32, col. 4 (Sur. Ct. Nassau Co.). Under the statute, specific legatees are entitled to whatever income is earned on the specific property.

This overview of SCPA §2102 should convince you that serious consideration should be given to the use of one of these proceedings before you consider commencing a removal or compulsory accounting proceeding.

Dated: New York, New York
December, 2003