

SURROGATE'S COURT

Surrogate Sigurdson

MATTER OF EUGENE PAUL KELLY, deceased—This is a contested accounting involving a relatively modest estate. Because of its unusual history the court is of the opinion that it would serve a constructive purpose to retrace the path of this estate since its inception.

The decedent, who expired on April 26, 1972, nominated in his will his attorney, George Sasower, as his executor, who filed a petition to probate the decedent's last will and testament on May 10, 1972. The objections to probate were ultimately settled, the will was admitted to probate on September 9, 1974 and letters testamentary were issued to the petitioner.

On November 13, 1974, a petition to compel the executor to account was filed with the court and citation issued returnable December 8, 1974. It was difficult to serve Sasower, thereby necessitating the issuance of two supplemental citations. The court ultimately issued an order permitting service by substituted service after it became apparent that he was evading service of process. On the return date of the citation, namely March 17, 1975, Sasower defaulted and the court then issued an order dated March 27, 1975, ordering him to account.

Upon his failure to account, an order to show cause was then issued by my predecessor, Judge Aldreth, and made returnable on October 20, 1975, directing petitioner to show cause why he should not be removed as executor and punished for contempt of court because of his failure to obey the court's order of March 27, 1975, directing him to account. At Sasower's request, the said application was adjourned on three separate occasions, and was finally submitted to the court for decision on January 12, 1976. By an order dated March 23, 1976, Sasower was removed as fiduciary and determined to be in contempt of court, but permitting him an additional thirty days from the date thereof to purge himself by filing his account.

Mr. Sasower on April 13, 1976, filed his account as preliminary executor with a petition for its judicial settlement for the period from April 26, 1972, to September 9, 1974. Although the citation was made returnable on June 8, 1976, it was adjourned on a number of occasions and a supplemental citation was then issued returnable July 27, 1976. After an additional adjournment to September 7, 1976, jurisdiction was completed, collection filed and the matter was accordingly placed on the Reserve Trial and Hearing Calendar and scheduled for conference for September 21, 1976. The matter was adjourned on five separate occasions to March 2, 1977.

On March 2, 1977, the guardian ad litem and counsel for a legatee filed objection to his account. The guardian ad litem and the attorney for the legatee had not filed objections sooner in the hope that a conference would result in a settlement of the proceeding.

Incidentally, Doris Sasower, the wife of the petitioner herein, had at the inception of this estate filed a notice of appearance, appearing as attorney for the executor. She was expressly directed by the court to be present for the scheduled court conferences, but has defaulted in appearance for any of the said dates.

On March 23, 1977, the court issued an order appointing the Public Administrator, as temporary administrator, and on April 20, 1977, Sasower who had been previously ordered to turn over to the Public Administrator all books, papers and other property of this estate in his possession and under his control on or before May 5, 1977. On that day the matter was scheduled for trial on June 1, 1977, the parties were ordered to conclude their examinations before trial on May 2, 1977.

Mr. Sasower brought on a series of motions seeking a disqualification of the undersigned, the vacating of prior orders of this court dated March 27, 1975 and March 9, 1976, and an examination before trial of one of the objectors. All of the motions were denied except the application for the examination before trial. The party to be examined before trial, who incurred the loss of a day's wages, appeared for the examination on the scheduled date, but Sasower defaulted in appearance.

In the interim, Sasower then filed appeals to the Appellate Division, of the orders of this court dated March 23, 1977 and April 20, 1977, providing respectively for the appointment of the Public Administrator as temporary administrator and ordering him to turn over the estate's assets to the Public Administrator. The Appellate Division dismissed the said appeals by unanimous decision, dated June 12, 1977. The trial date, at petitioner's request, had been adjourned from June 1, 1977, to June 13, 1977.

On the scheduled date for trial, counsel representing the Public Administrator advised the court that he could not proceed to trial because of Sasower's refusal to comply with the court's order of April 20, 1977, directing him to turn over the assets of the estate to the Public Administrator. When questioned by the court, Sasower informed the court that he would not accede to the court's directive and when he was then advised by the court that he would be held in contempt of court, he relented and assured the court that he would comply and was granted an adjournment to June 22, 1977, for that purpose. He was directed to return on June 22, 1977, to insure his compliance

therewith. On June 22, 1977, he failed to appear, and the court then conducted a hearing and, inereupon determined that he had customarily failed to comply with the court's order to turn over the books, records and assets of the estate to the Public Administrator of Suffolk County. He was adjudged to be in contempt of court, and sentenced to thirty days in the county jail.

Pursuant to a warrant of commitment, he was apprehended by the Sheriff of Suffolk County on June 23, 1977, and brought before the court, whereupon he was given an opportunity to purge himself of the contempt. When he persisted in his refusal to comply with the court's order, he was remanded to the Suffolk County Jail to serve his sentence. On the same day, he procured a writ of habeas corpus from a Justice of the Appellate Division, Second Department, who scheduled the matter for a hearing on the following day, June 24, 1977. In the Suffolk County Supreme Court, the said Appellate Division Justice denied his application for bail. Later, that same day, he applied for and received another writ of habeas corpus from a Suffolk County Supreme Court Justice which contained a provision for bail. In both habeas corpus applications, he alleged that no previous application had been made for the relief requested.

Petitioner was released on bail on the second writ and a hearing was scheduled thereon. The hearing was ultimately conducted by Supreme Court Justice McInerney, who then dismissed the court's contempt order on technical grounds, without prejudice to a renewal of the contempt proceedings.

It is the contention of the undersigned that the said Supreme Court Justice preempted the function of the Appellate Division in choosing to act as an associate court and reviewing the order of the Surrogate, a judge of coordinate jurisdiction. Since a proper and complete record had been, in fact, compiled in the Surrogate's Court, the contemnor's sole recourse was to seek review of the contempt order by the Appellate Division (*People v. Zweig* 22 AD 2d 659, 300 NYS 2d 421; *People v. Clinton* 42 AD 2d 815, 348 NYS 2d 342; *Waterhouse v. Coll* 71 Misc. 2d 600, 328 NYS 2d 941).

As a result of the above decision, Sasower has, with impunity, continued to flout the orders of this court and severely hampered and unduly delayed the resolution of this estate at great harm and expense to the legatees and intact beneficiaries named in the will. He did successfully evade service of further process to adjudge him in contempt of court until served with a new contempt citation by counsel for the Public Administrator on the date the accounting trial was commenced.

In addition to the foregoing, Sasower's inexplicable conduct has affected other courts as well. He caused Justice Bernstein of the Supreme Court, Nassau County, to issue an order to show cause requesting the staying of a warrant of commitment allegedly issued by this court, without first verifying that the warrant of commitment had in fact been issued. The fact of the matter is that the warrant of commitment had not been issued and the order to show cause was consequently dismissed. Sasower then commenced a civil action in the Federal District Court against the undersigned, the Sheriff of Suffolk County, the Assistant Attorney General of the State of New York and other attorneys and individuals involved in this estate. The said action was dismissed by the court, and Sasower then filed an appeal of the order of dismissal with the Second Circuit Court. During the pendency of this appeal, Sasower saw fit to file a second suit, essentially in duplication of the of the action which was dismissed.

On December 13, 1977, the court scheduled this matter for pre-trial conference, and all parties appeared except for Sasower. The court then set the matter down for trial on January 23, 1978, and directed that a final notice be sent to the petitioner advising him of the trial date and its peremptory marking.

On January 23, 1978, all parties appeared for the trial. The issue of the petitioner's failure to comply with the court's order was once again raised, and in response to the court's question as to whether or not he had obeyed the order to turn the assets over to the Public Administrator, the petitioner refused to answer the question, claiming his Fifth Amendment privilege against self-incrimination and requested the opportunity to consult counsel. The court thereupon held in abeyance the question of his contempt of the court's order until the following day, pending his appearance with counsel. In the interim, the accounting trial was commenced and was continued to the following day. Prior to recessing for the day, the court directed Sasower to return the following morning at 9:30 to continue the trial, and to resolve the further question of his contemptuous conduct.

The petitioner failed to appear in court the following day, and a telephone communication was received by the court from the petitioner's wife, an attorney and his former counsel in this estate. She stated that Sasower could not appear because he was in the Appellate Division on another matter, but refused to identify the case or the particular department of the Appellate Division. A member of the court's staff called the First and Second Departments of the Appellate Division, and it was finally determined that Mr. Sasower was arguing a case in the Second Department that morning, and that the counsel of record in the case was the petitioner's wife. The court requested the Clerk of the Appellate Division to direct Sasower to appear at the Surrogate's Court the following day to continue the trial. The court accordingly, adjourned the trial until the next day, and Sasower once again failed to appear on the adjourned date. He called the court in the morning and stated that he would not appear because of other court engagements which he refused to identify. Due to the petitioner's refusal to appear in court, and in the absence of an affidavit of other engagement, the court attempted to continue the trial in his absence.

However, Mr. Sasower's intransigence has made it virtually impossible to adjudicate the issues raised in this litigation. It is imperative that he comply forthwith with the order of the court directing him to turn over the assets and records of this estate to the Public Administrator, and it is equally essential that he bring his accounting up to date as has been directed by the court on numerous occasions.

I have determined that it would not be in the interests of justice for me to pass upon the new contempt application, and I have consequently referred the matter to the Acting Surrogate for his determination. I have further concluded that the resolution of this estate would be facilitated by referring to the Acting Surrogate the instant litigation pertaining to Sasower's intermediate accounting, as well as any and all future proceedings concerning his stewardship of the affairs of this estate.

Mr. Sasower, a member of the bar, has impeded the orderly administration of this estate, and has caused it to incur needless expense. He has willfully and intentionally failed to heed any and all directives of this court, and I would be derelict in my duty if I failed to report his actions to the appropriate tribunal for disciplinary action. Doris Sasower, his wife and his former counsel, should be similarly called upon to explain her extraordinary behavior in this matter.

I am accordingly directing the Chief Clerk to forward a copy of this decision to

the Presiding Justice of the Appellate Division, Second Judicial Department, for such disciplinary action as he may deem appropriate with regard to the conduct of George Sasower and Doris Sasower.

This decision constitutes the order of the court.