

SCPA § 201: Statute Permits Jurisdiction Over an Eviction Proceeding Related to the Administration of the Decedent's Estate, but Does Not Confer Jurisdiction Over Tenants' Claims of Malicious Prosecution and Abuse of Process Against Executor

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Recommended Citation

Goldberg, Zachary S. (1983) "SCPA § 201: Statute Permits Jurisdiction Over an Eviction Proceeding Related to the Administration of the Decedent's Estate, but Does Not Confer Jurisdiction Over Tenants' Claims of Malicious Prosecution and Abuse of Process Against Executor," *St. John's Law Review*: Vol. 57 : No. 4 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss4/10>

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court's decision was consonant with the legislature's intent in refusing to exempt an entire class of individuals from the protection of section 235-b simply because the landlord is the City of New York.⁶⁴

Marie B. Darienzo

SURROGATE'S COURT PROCEDURE ACT

SCPA § 201: Statute permits jurisdiction over an eviction proceeding related to the administration of the decedent's estate, but does not confer jurisdiction over tenants' claims of malicious prosecution and abuse of process against executor

The jurisdiction of the surrogate's court is established by Article VI, Section 12 of the New York State Constitution.⁶⁵ This constitutional grant has been augmented by the enactment of Section 201 of the Surrogate's Court Procedure Act (SCPA),⁶⁶ which allows

Rivercross Tenant's Corp., 107 Misc. 2d 135, 138-39, 438 N.Y.S.2d 164, 167 (Sup. Ct. App. T. 1st Dep't 1981); 111 East 88th Partners v. Simon, 106 Misc. 2d 693, 695, 434 N.Y.S.2d 886, 888 (N.Y.C. Civ. Ct. N.Y. County 1980); *supra* note 40.

⁶⁴ See Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1447 n.18 (1974); *supra* notes 54-59 and accompanying text. In affording tenants of state-owned property the same legal remedies as private-sector tenants, the California Court of Appeal in *Hubbs v. People ex rel. Department Pub. Works*, 36 Cal. App. 3d 1005, 112 Cal. Rptr. 172 (1974), stated:

In actuality the state . . . is functioning as a landlord Plaintiffs, as tenants, are entitled to pursue the legal remedies normally available to tenants. In the absence of a specific statute so declaring or agreement so specifying plaintiffs, as tenants, do not lose any of their rights merely because their landlord happens to be the State of California.

Id. at 1009, 112 Cal. Rptr. at 175.

⁶⁵ Article VI, Section 12 of the New York State Constitution provides, in pertinent part:

The Surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.

N.Y. CONST. art. VI, § 12(d). Notably, this provision confers limited jurisdiction directly upon surrogates' courts without the need for statutory implementation. Midonick, *Bicentennial Reflections on Expanding Jurisdiction of Surrogates*, 31 REC. A.B. CTRY N.Y. 335, 342 (1976). Pursuant to former constitutional provisions, surrogates' courts were granted jurisdiction solely by legislative enactment: "Surrogates' courts shall have the jurisdiction, legal and equitable, and powers now established by law until otherwise provided by the legislature." N.Y. CONST. OF 1925, art. VI, § 13; N.Y. CONST. OF 1894, art. VI, § 15.

⁶⁶ SCPA § 201, entitled "General jurisdiction of the surrogate's court," provides:

the surrogate's court to adjudicate claims incidental to the administration of estates by extending jurisdiction to "all matters relating to estates and the affairs of decedents."⁶⁷ The issue as to whether the surrogate's court has subject-matter jurisdiction over an eviction proceeding was previously unsettled in New York.⁶⁸ Recently, in *In re Estate of Piccione*,⁶⁹ the Court of Appeals recognized surrogate's court jurisdiction over an eviction proceeding commenced by executors against holdover tenants to recover estate property, but held that the court did not have jurisdiction to adjudicate an action for malicious prosecution and abuse of process

1. The court has, is granted and shall continue to be vested with all the jurisdiction conferred upon it by the Constitution of the State of New York, and all other authority and jurisdiction now or hereafter conferred upon the court by any general or special statute or provision of law, including this act.

2. This and any grant of jurisdiction to the court shall be deemed an affirmative exercise of the legislative power under § 12(e) of article VI of the Constitution and shall in all instances be deemed to include and confer upon the court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred.

3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

SCPA § 201 (McKinney Supp. 1982-1983).

⁶⁷ *Id.* § 201(3). The new SCPA was intended to provide the surrogate's court with effective procedures for handling the many proceedings within its jurisdiction. Hildreth, *The New SCPA—Aspects of Practice Relating to Jurisdiction, Proceedings, Appearances and Protection of Persons Under Disability*, 34 BROOKLYN L. REV. 359, 359 (1968). The intention of the drafters was to preserve all subject-matter jurisdiction already conferred upon the surrogate's court, SCPA § 201, commentary at 43 (McKinney 1967), and to simplify, codify, and modernize the practice in the surrogate's court, Memorandum of the Temporary State Commission on Estates, reprinted in [1966] N.Y. Laws 2768 (McKinney). The drafters of the SCPA envisioned the consolidation of all matters relating to decedents' estates in a single forum. *In re Estate of Vanderbilt*, 109 Misc. 2d 914, 918, 441 N.Y.S.2d 153, 157 (Sur. Ct. Suffolk County 1981).

⁶⁸ Compare *In re Estate of Lacon*, 58 Misc. 2d 869, 869, 296 N.Y.S.2d 711, 714 (Sur. Ct. Westchester County 1968) (jurisdiction upheld under SCPA section 201 (3)) and *In re Estate of Burstein*, 153 Misc. 515, 519, 275 N.Y.S. 601, 606-07 (Sur. Ct. Kings County 1934) (jurisdiction upheld under Surrogate's Court Act section 205) with *In re Estate of Henry*, 48 Misc. 2d 320, 321, 264 N.Y.S.2d 715, 716 (Sur. Ct. Westchester County 1965) (jurisdiction denied under SCPA section 201) and *In re Estate of Desotelle*, 143 Misc. 732, 737, 258 N.Y.S. 119, 125 (Sur. Ct. Clinton County 1932) (jurisdiction denied under Surrogate's Court Act section 205).

⁶⁹ 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669 (1982).

brought against the executors by the holdover tenants.⁷⁰

In *Piccione*, an estate asset of improved realty had been leased by the decedent to All Craft Metals, Inc. (ACM).⁷¹ Having arranged a contract for the sale of the property conditioned upon the tenants' departure,⁷² the executors notified the assignees of ACM, Fire Burglary Instruments, Inc. (FBI), and its subsidiary, All Craft Finishing, Inc. (ACF), that the premises should be vacated upon the expiration of the lease term.⁷³ After unsuccessfully attempting to effect the tenants' departure, the executors commenced an eviction proceeding in the Surrogate's Court, Nassau County, to prevent the cancellation of the contract of sale by the purchaser.⁷⁴ The court, in rejecting the tenants' jurisdictional challenge, issued an order directing the tenants to vacate,⁷⁵ but the Appellate Divi-

⁷⁰ *Id.* at 290-91, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674.

⁷¹ *Id.* at 283, 442 N.E.2d at 1181, 456 N.Y.S.2d at 670.

⁷² *Id.* The purchasers reserved the right to cancel the contract of sale after a specified date if the premises were not vacated by the tenants. *See id.* at 284, 442 N.E.2d at 1181, 456 N.Y.S.2d at 670.

⁷³ *Id.*

⁷⁴ *See supra* note 72. The tenant's refusal to depart precipitated the commencement of an action by the executors in the District Court of Nassau County. 57 N.Y.2d at 284, 442 N.E.2d at 1181, 456 N.Y.S.2d at 670. Relief was later sought in the surrogate's court after the district court dismissed the petition on the grounds that the notice given the tenants by the executors was technically deficient under section 232-b of the Real Property Law. *Id.* Section 232-b of the Real Property Law provides:

A monthly tenancy or tenancy from month to month . . . may be terminated by the landlord . . . upon his notifying the [tenant] at least one month before the expiration of the term of his election to terminate

RPL § 232-b (McKinney 1968). The executors, by allowing the tenants to remain in possession and by accepting rent after the term of the lease had expired, created a tenancy from month to month. 106 Misc. 2d at 901-02, 432 N.Y.S.2d at 843; *see* RPL § 232-c (McKinney 1968).

⁷⁵ *In re Estate of Piccione*, 106 Misc. 2d 899, 902, 432 N.Y.S.2d 842, 843 (Sur. Ct. Nassau County 1980), *rev'd*, 85 App. Div. 2d 604, 444 N.Y.S.2d 690 (2d Dep't 1981), *rev'd*, 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669 (1982). The defendant-tenants argued that the courts listed in RPAPL 701 had exclusive jurisdiction in actions brought to recover possession of real property and therefore the absence of the surrogate's court among those listed precluded its exercise of jurisdiction. *Id.* at 899, 432 N.Y.S.2d at 842. Section 701 of the Real Property Actions and Proceedings Law states:

A special proceeding to recover real property may be maintained in a county court, the court of a police justice of the village, a justice court, a court of civil jurisdiction in a city, or a district court.

RPAPL § 701(1) (1979).

The surrogate's court observed that although the supreme court is not among the courts listed in the RPAPL, it has concurrent jurisdiction in such matters, "by virtue of its unlimited general jurisdiction," which is conferred by the constitution. 106 Misc. 2d at 899, 432 N.Y.S.2d at 842; *see* N.Y. Consr. art. VI, § 7. The court reasoned that a surrogate's court is in an analogous position; since the constitution grants it jurisdiction over all actions and

sion, Second Department reversed, holding that the surrogate's court lacked the requisite subject-matter jurisdiction over the proceeding.⁷⁶ As to the tenants' claim alleging malicious prosecution and abuse of process on the part of the executors, the appellate division, in a separate decision, reversed a supreme court order removing the claims to the surrogate's court, holding that the claims were independent matters outside surrogate's court's jurisdiction.⁷⁷

On appeal, the Court of Appeals reversed the denial of jurisdiction over the eviction proceeding, but affirmed the appellate division's decision concerning the malicious prosecution and abuse of process claims.⁷⁸ With respect to the eviction proceeding, the Court recognized that the jurisdiction of the surrogate's court to issue orders related to the administration of an estate has expanded in order to facilitate "a full, equitable and complete disposition of the matter."⁷⁹ Reasoning that the eviction was essential in order to wind up the administration of the estate, Judge Fuchsberg, writing for a unanimous Court,⁸⁰ held that the proper forum for the claim

proceedings which relate to the affairs of decedents, *see supra* note 66, and constitutional provisions cannot be limited by statute, "its exclusion from RPAPL 701 (subd. 1) is of no consequence to its exercise of jurisdiction over a proceeding to recover possession of real property which relates to the affairs of a decedent". 106 Misc. 2d at 900, 432 N.Y.S.2d at 842.

⁷⁶ 85 App. Div. 2d at 605, 444 N.Y.S.2d at 690. The appellate division noted that not all actions brought by an executor in his fiduciary capacity are necessarily within the surrogate's court jurisdiction. *Id.* Finding that the eviction proceeding constituted "an independent controversy between living persons," the court held the matter to be "outside the subject matter jurisdiction of the Surrogate's Court." *Id.* (citation omitted).

⁷⁷ *Fire Burglary Instruments, Inc. v. Piccione*, 85 App. Div. 2d 594, 594, 444 N.Y.S.2d 707, 708 (2d Dep't 1981), *aff'd sub. nom. In re Estate of Piccione*, 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669 (1982). The appellate division also reversed a decision by the surrogate's court to take cognizance of an action in the nature of a discovery proceeding brought by executors to ascertain and recover damages incurred by the estate as a result of the tenants' failure to leave the premises at the conclusion of the lease term. *In re Estate of Piccione*, 85 App. Div. 2d 604, 605, 444 N.Y.S.2d 687, 688 (2d Dep't 1981), *rev'g*, 108 Misc. 2d 255, 437 N.Y.S.2d 546 (Sur. Ct. Nassau County), *appeal dismissed*, 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669 (1982).

⁷⁸ 57 N.Y.2d at 290-91, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674. Although the appellate division had found that the surrogate's court did not have jurisdiction over the proceeding, 85 App. Div. 2d at 606, 444 N.Y.S.2d at 688, the Court of Appeals did not rule on this jurisdictional issue since "the appeal [was] from an order which does not determine the proceeding within the meaning of the State Constitution." 57 N.Y.2d at 286-87, 442 N.E.2d at 1183, 456 N.Y.S.2d at 672.

⁷⁹ 57 N.Y.2d at 288, 442 N.E.2d at 1184, 456 N.Y.S.2d at 673 (quoting Surrogates Court Act § 40 (1920) (current version at SCPA § 201 (McKinney Supp. 1982-1983)).

⁸⁰ Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler, and Meyer concurred in the opinion authored by Judge Fuchsberg.

was the surrogate's court, where the proceeds of the realty sale ultimately would be distributed.⁸¹

Reaching the tenants' claim for malicious prosecution and abuse of process, the Court initially noted that such actions are brought against an executor in his individual rather than his fiduciary capacity.⁸² The Court determined that such a claim does not relate to the decedent's affairs or the administration of his estate, and held that the actions should not be consolidated with those which were appropriate for adjudication in the surrogate's court.⁸³

It is submitted that the *Piccione* decision properly balances the competing policies of preventing fragmented litigation⁸⁴ and containing claims which may be adjudicated in the surrogate's court.⁸⁵ It appears that the eviction of tenants to accomplish the

⁸¹ 57 N.Y.2d at 290, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674. The Court noted that Article VI, Section 12 of the New York State Constitution renders unnecessary "the need for specific statutory authorization for a particular proceeding" when a claim brought in surrogate's court relates to the administration of an estate. *Id.* at 288, 442 N.E.2d at 1184, 456 N.Y.S.2d at 673; *see supra* note 65. Judge Fuchsberg reiterated the holding in *In re Estate of Young*, 80 Misc. 2d 973, 365 N.Y.S.2d 695 (Sur. Ct. N.Y. County 1975), which stressed that surrogate's courts should be accorded jurisdiction over all matters except those which do not have any bearing on the administration of an estate. 57 N.Y.2d at 288, 442 N.E.2d at 1184, 456 N.Y.S.2d at 673. Considering the need for the eviction proceeding in order to wind up estate matters, the Court concluded, that "it can hardly be said that this controversy 'in no way affects the affairs of the decedent or the administration of the estate.'" *Id.* at 290, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674 (quoting *In re Estate of Young*, 80 Misc. 2d 937, 939, 365 N.Y.S.2d 695, 698 (Sur. Ct. N.Y. County 1975)).

⁸² 57 N.Y.2d at 291, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674; *see infra* note 86. The Court took note that the surrogate's court, while recognizing that the claim for malicious prosecution and abuse of process was not brought against the executors in their fiduciary capacity, "was not prepared to say that the conduct on which the complaint was based was not in furtherance of the administration of the decedent's estate." 57 N.Y.2d at 286, 442 N.E.2d at 1183, 456 N.Y.S.2d at 672. The Court, however, emphasized "the long-established general principle that an executor who has committed such an act, even in the course of the administration of the estate, is liable therefore in an individual rather than a representative capacity." *Id.* at 291, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674.

⁸³ 57 N.Y.2d at 291, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674.

⁸⁴ *See In re Estate of Young*, 80 Misc. 2d 937, 938, 365 N.Y.S.2d 695, 697-98 (Sur. Ct. N.Y. County 1975); *In re Estate of Rothko*, 69 Misc. 2d 752, 756, 330 N.Y.S.2d 915, 919-20 (Sur. Ct. N.Y. County 1972); 1966 Legis. Doc. No. 19, at 62. "The jurisdiction and powers of the surrogate's court have been condensed, with the language of the constitution utilized to insure that the court may determine all matters affecting the estates of decedents and make a complete disposition and thus avoid multiplicity of suits." 1966 Legis. Doc. No. 19, at 62. The history of the surrogate's court "militates against the fragmentation of suits that results when there is a requirement that parties seek relief in a case dealing with a decedent's estate in another forum." *In re Estate of Rothko*, 69 Misc. 2d at 756, 330 N.Y.S.2d at 919.

⁸⁵ It is the policy of the surrogate's courts to accept jurisdiction over a matter only if such will "not delay the administration of an estate." Radigan, *'Piccione' Ruling Makes*

sale of estate property clearly constituted a matter "relating to" estate affairs; since the action was brought by the executors acting in a fiduciary capacity,⁸⁶ the claim involved an estate asset,⁸⁷ and the proceeding was necessary to complete the administration of the

Clear Surrogate's Court Jurisdiction, N.Y.L.J., Feb. 7, 1983, at 7, col. 1. Rules have been developed to insure that claims which may interfere with the swift disposition of estates are not transferred to the surrogate's courts from other fora. *Id.*; see [1982] 22 N.Y.C.R.R. § 1830.31; cf. 1 B. BUTLER, *NEW YORK SURROGATE LAW AND PRACTICE* § 317, at 338 (1950) (it is the policy of the courts of general jurisdiction not to take cognizance of matters "which are within the power of disposal of Surrogates' Courts").

Indeed, in 1956, the Temporary Commission on the Courts prepared a comprehensive study on the alleviation of calendar congestion and delays, in order to improve and expedite the administration of justice and procedures in the courts. 1956 Report of the Temporary Commission on the Courts, reprinted in [1956] N.Y. Laws 1405 (McKinney) [hereinafter cited as 1956 Report]. The Commission recommended a reorganization and simplification of the structure of the courts in order to eliminate jurisdictional problems, maximize the utilization of "full-time judicial manpower," and assure that "cases will be properly divided among the various levels of trial courts and not be so heavily concentrated in one . . ." *Id.* at 1414. Surrogate's court calendars are usually kept up to date. Radigan, *supra*, at 7, col. 1. The surrogate's courts are known for their specialized expertise and have been characterized as "perhaps the most efficient Courts of original jurisdiction in the State." Committee Report, *The Proposed Merger of the Surrogate's Courts*, 29 REC. A.B. CTRY N.Y. 81, 81 (1974). For these reasons, proposals to merge the surrogate's courts into the generally backlogged supreme court have been criticized. See *id.* at 81-84.

⁸⁶ See 57 N.Y.2d at 290, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674. Surrogate's courts traditionally have exercised jurisdiction over claims brought by or against an executor acting in his fiduciary capacity. See *Maki v. Estate of Ziehm*, 55 App. Div. 2d 454, 455, 391 N.Y.S.2d 705, 708 (3d Dep't 1977); *In re Estate of Rothko*, 69 Misc. 2d 752, 753, 758, 330 N.Y.S.2d 915, 916, 921 (Sur. Ct. N.Y. County 1972); *In re Estate of Koestler*, 59 Misc. 2d 993, 993-94, 301 N.Y.S.2d 300, 302 (Sur. Ct. N.Y. County 1969). In *Maki*, the petitioner asserted a claim against the executor of the decedent's estate in his fiduciary capacity to recover assets of a corporation which allegedly had been misappropriated by the decedent and thereby became part of the estate upon his death. 55 App. Div. 2d at 455, 391 N.Y.S.2d at 707. The appellate division upheld the surrogate's court's exercise of jurisdiction stating: "In any claim against the estate 'we see subject matter jurisdiction generously expanded.'" *Id.* at 456, 391 N.Y.S.2d at 708 (quoting SCPA § 301, commentary at 305 (McKinney 1967)).

⁸⁷ See, e.g., *Dunham v. Dunham*, 40 App. Div. 2d 912, 913, 337 N.Y.S.2d 728, 731 (3d Dep't 1972); *Estate of Breitman*, 114 Misc. 2d 248, 250, 450 N.Y.S.2d 985, 986-87 (Sur. Ct. N.Y. County 1982); *In re Estate of Ryan*, 63 Misc. 2d 415, 415-17, 311 N.Y.S.2d 719, 720-22 (Sur. Ct. Erie County 1970); *In re Will of MacElroy*, 58 Misc. 2d 93, 95-96, 294 N.Y.S.2d 766, 768 (Sur. Ct. Nassau County 1968); 10 J. COX, J. ARENSON, & S. MEDINA, *NEW YORK CIVIL PRACTICE-SCPA* ¶ 201.01, at 2-14 (1979). "[I]t would be error . . . to eliminate . . . jurisdiction by the Surrogate's Court over contract claims by estates, since such claims are cases 'relating to the affairs of decedents.'" *In re Estate of Young*, 80 Misc. 2d 937, 939, 365 N.Y.S.2d 695, 698 (Sur. Ct. N.Y. County 1975). In *Dunham*, the appellate division affirmed the supreme court's refusal to exercise jurisdiction over an action to determine rights under a stockholder's agreement entered into by a decedent, holding that the surrogate had properly retained jurisdiction over the matter since it related to the affairs of a decedent. 40 App. Div. 2d at 913, 337 N.Y.S.2d at 731.

estate.⁸⁸ In granting jurisdiction based upon consideration of these factors, the Court properly subordinated the interest in limiting the types of claims which may be adjudicated in surrogate's court to the goal of preventing the fragmentation of estate-related proceedings.⁸⁹ Although the *Piccione* decision has been perceived as

⁸⁸ See *In re Estate of Hoffman*, 98 Misc. 2d 732, 734, 414 N.Y.S.2d 863, 865 (Sur. Ct. Albany County 1979); *In re Estate of Chodikoff*, 54 Misc. 2d 785, 788, 283 N.Y.S.2d 555, 559 (Sur. Ct. Rensselaer County 1967). In *Chodikoff*, the surrogate's court exercised jurisdiction over a proceeding to determine an attorney's allowance for services, rendered in connection with a construction proceeding which had been before the court, to accomplish "the ultimate winding up of the estate." 54 Misc. 2d at 788, 283 N.Y.S.2d at 559. Indeed, courts have held that some proceedings are so intertwined with estate administration that the proper handling of estate matters compels their disposition in surrogate's courts. See, e.g., *In re Estate of Fornason*, 88 Misc. 2d 736, 739, 389 N.Y.S.2d 1003, 1004 (Sur. Ct. Nassau County 1976); *Estate of Zalaznick*, 84 Misc. 2d 715, 718-19, 375 N.Y.S.2d 522, 526 (Sur. Ct. Bronx County 1975); *In re Estate of Carter*, 69 Misc. 2d 630, 634, 331 N.Y.S.2d 257, 262 (Sur. Ct. N.Y. County 1972). In *Fornason*, the decedent had executed a will and trust agreement whereby the petitioner was to be trustee, during the decedent's lifetime, of a trust which "poured over" to the decedent's estate upon his death. 88 Misc. 2d at 739, 389 N.Y.S.2d at 1005. The petitioner was also to be executor of the decedent's estate. *Id.* The court found that the claim concerning the *inter vivos* trust agreement bore sufficient relation to the decedent's affairs, by virtue of the identity of the parties involved. See *id.* at 739-40, 389 N.Y.S.2d at 1005.

In *Carter*, an action was brought in the form of a petition for letters of administration by a petitioner who alleged to be the lawful spouse of the decedent. 69 Misc. 2d at 634, 331 N.Y.S.2d at 262. The surrogate's court held that it had jurisdiction to determine the validity of an out-of-state divorce, reasoning that the claim was related to the decedent's estate because it was so interwoven with the claim for the granting of the letters of administration. See *id.*

It should be noted that section 209 of the SCPA specifically grants the surrogate's court "incidental powers as are necessary to carry into effect all powers expressly conferred. . . ." SCPA § 209(9) (McKinney 1967). Indeed, prior to the enactment of the present pertinent constitutional and statutory provisions, the surrogate's court had exercised jurisdiction over matters usually tried in the supreme court when the determination of the issue was incidental to a proceeding normally before the surrogate's court. 1 G. MARKUSON, WARREN'S HEATON ON SURROGATE'S COURTS § 35, ¶ 1(g), at 5-227 to -229 (O. Warren ed. 6th ed. 1982); see, e.g., *In re Estate of Sturmer*, 277 App. Div. 503, 510, 101 N.Y.S.2d 25, 33 (4th Dep't 1950), *rev'd on other grounds*, 303 N.Y. 98, 100 N.E.2d 155 (1951). But see *In re Estate of Kolhopp*, 142 N.Y.S.2d 244, 245 (Sur. Ct. Queens County 1955). Moreover, permitting the surrogate to exercise jurisdiction in such matters is in harmony with the intent of the legislature in affording a constitutional basis for the surrogate's court exercise of jurisdiction. See 1956 Report, *supra* note 85.

⁸⁹ It is submitted that the factors present in *Piccione* compel the conclusion that the eviction proceeding was within the surrogate's jurisdiction. With respect to the fiduciary character of the executor, see 57 N.Y.2d at 283-84, 442 N.E.2d at 1181, 456 N.Y.S.2d at 670; *supra* note 86 and accompanying text, it should be noted that the primary duty of an executor is to settle and distribute the estate of the decedent, which includes the liquidation of property, 27 CARMODY-WAIT 2d § 157:2, at 7 (1981). Thus, the executor must reduce such assets to possession. *In re Estate of Kaufman*, 83 Misc. 2d 846, 848, 374 N.Y.S.2d 244, 246 (Sur. Ct. N.Y. County 1973); *In re Estate of Chisholm*, 148 Misc. 158, 159, 264 N.Y.S. 352,

clarifying surrogates' jurisdiction, it is suggested that the Court could have formulated more definite guidelines to be followed by the surrogate's court in determining whether a matter "relat[ed] to the estate and the affairs of a decedent."⁹⁰

In addition, the Court's refusal to allow jurisdiction over the malicious prosecution and abuse of process claims appears sound because such an action, brought against the executor in his individual capacity, neither involves estate assets nor facilitates the settlement of the estate.⁹¹ It is submitted that this determination furthers the policy of limiting surrogate's court jurisdiction, without undercutting the goal of consolidation of estate proceedings.⁹²

Zachary S. Goldberg

353 (Sur. Ct. Kings County 1933). Indeed, the failure of the executor to perform his fiduciary duty may result in the imposition of liability. See *In re Estate of Levine*, 26 Misc. 2d 307, 310, 203 N.Y.S.2d 643, 648 (Sur. Ct. N.Y. County 1960); 27 CARMODY-WAIT 2d § 158:29, at 164 (1981). Moreover, the claim clearly involves an asset of the decedent's estate, see 57 N.Y.2d at 283-84, 442 N.E.2d at 1181, 456 N.Y.S.2d at 670-71; *supra* note 87 and accompanying text, and the administration of the estate could not be completed before resolution of the claim to evict the tenants. See 57 N.Y.2d at 290, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674; *supra* note 88. Thus, it seems clear that sufficient indicia existed for the court to conclude that the eviction proceeding was a matter "relating to" the administration of an estate. See SCPA § 201(3) (McKinney Supp. 1981-1982).

⁹⁰ See SCPA § 201(3) (McKinney Supp. 1981-1982). The Surrogate of Nassau County has stated that "[a]s a result of *Piccione*, the law now is clear that if a matter relates to the affairs of a decedent or the administration of an estate, the Surrogate's Court will have jurisdiction." Radigan, *supra* note 85, at 6, col. 6. However, it is suggested that the absence of clearly delineated guidelines concerning when a matter relates to a decedent's affairs renders the *Piccione* decision less than definitive as to the jurisdiction of the surrogate's court. Indeed, Surrogate Radigan has noted that "there is still a cloud over the jurisdiction question as it related to third-party practice." *Id.* at 7, col. 1.

⁹¹ See 57 N.Y.2d at 291, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674. In affirming the appellate division's decision concerning the action for malicious prosecution and abuse of process, the Court found, "at least in the present context, it cannot be said to relate to either the affairs of the decedent or the administration of his estate." *Id.*

It is submitted that the Court was correct in its determination, since the claim possessed none of the characteristics of a matter "relating to" estate administration. See *supra* notes 86-88 and accompanying text. When a claim is not brought against an executor in his fiduciary capacity, and neither involves estate assets nor furthers estate settlement, see *In re Estate of Lainez*, 79 App. Div. 2d 78, 80, 435 N.Y.S.2d 798, 799-800 (2d Dep't), *aff'd*, 55 N.Y.2d 657, 431 N.E.2d 303, 446 N.Y.S.2d 942 (1981); *In re Estate of Jemzura*, 65 App. Div. 2d 656, 656-57, 409 N.Y.S.2d 445, 446-48 (3d Dep't 1978), it is suggested that surrogate's court jurisdiction should not be exercised.

⁹² The intent of the legislature was to concentrate jurisdiction in the surrogate's court over matters that affect the affairs of decedents in order to avoid delay and expense. *In re Estate of Rothko*, 69 Misc. 2d 752, 757, 330 N.Y.S.2d 915, 920 (Sur. Ct. N.Y. County 1972). It is submitted that the exercise of jurisdiction by the surrogate's court over the malicious prosecution action, since unrelated to the decedent's estate, 57 N.Y.2d at 291, 442 N.E.2d at 1185, 456 N.Y.S.2d at 674, would not expedite the winding up of the decedent's estate but,

UNIFORM COMMERCIAL CODE

Article 2—Sales

N.Y.U.C.C. § 2-318: In an action for personal injuries based upon breach of an implied warranty of a product sold after 1975, privacy between plaintiff and a third-party defendant-manufacturer is not required

Section 2-318 of the New York Uniform Commercial Code⁹³ (N.Y.U.C.C.) extends the protection of a seller's warranty of merchantability to "any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."⁹⁴ Despite the

on the contrary, would cause delay by burdening the court with an extraneous claim.

⁹³ N.Y.U.C.C. § 2-318 (McKinney 1964 & Supp. 1982).

⁹⁴ *Id.*; see Cochran, *Emerging Products Liability under Section 2-318 of the Uniform Commercial Code: A Survey*, 29 Bus. Law. 925, 939-45 (1974) (survey of section 2-318 as codified in all states except Louisiana and Utah). The Uniform Commercial Code (U.C.C.) was enacted in New York in 1962, ch. 553, [1962] N.Y. Laws 2580 (codified as amended at N.Y.U.C.C. §§ 1-101 to 13-105 (McKinney 1964 & Supp. 1982)), and became effective in 1964, N.Y.U.C.C. § 13-105 (McKinney Supp. 1982); see Memorandum of the Association of the Bar of the City of New York Committee on Uniform State Laws, *reprinted in* [1962] N.Y. LEGIS. ANN. 20-21; see also Governor's Memorandum on Approval of ch. 553, N.Y. Laws (Apr. 18, 1962), *reprinted in* [1962] N.Y. LEGIS. ANN. 352-54; Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992, 992-94 (1962) (listing modifications facilitating enactment of the U.C.C. in New York). Section 2-318 as originally enacted limited both implied and express warranty protection to

any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

N.Y.U.C.C. § 2-318 (McKinney 1964). In 1966, the draftsmen of the U.C.C. provided two additional versions of section 2-318 for possible adoption by the states. REPORT NO. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, 1 U.L.A. XXXIV (1976). Compare U.C.C. § 2-318 alternative A (1978) with N.Y.U.C.C. § 2-318 (McKinney 1964). Comment 3 to section 2-318 of the U.C.C. notes that alternative A "is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." U.C.C. § 2-318 comment 3 (1978).

In 1975, New York replaced alternative A with a slightly modified version of alternative B. Act of Aug. 9, 1975, ch. 774, § 1 [1975] N.Y. Laws 1208 (McKinney) (amending N.Y.U.C.C. § 2-318 (McKinney 1964)). Compare N.Y.U.C.C. § 2-318 (McKinney 1964) with N.Y.U.C.C. § 2-318 (McKinney Supp. 1982) and U.C.C. § 2-318 alternative B (1978). The amendment, intended for jurisdictions that do not permit strict products liability actions, U.C.C. § 2-318 comment 3 (1978), extended warranty protection beyond the household of the purchaser to any foreseeable user, see Memorandum of Assemblyman Leonard Silverman, *reprinted in* [1975] N.Y. LEGIS. ANN. 110. The protected class of beneficiaries now includes persons not in the distributive chain (horizontal protection), and purchasers remote from the manufacturer or distributor (vertical protection). Special Project, *Article*