



Examination of the Fiduciary in Queens County Surrogate's Court

BY: SCOTT G. KAUFMAN*

As Trust and Estate's practitioners we are often posed with our client's complaint that the Last Will and Testament of the decedent is not valid and/or that the client was not provided for in the will. In order to assist in determining whether the client has sufficient grounds to file objections to the Last Will and Testament, the attorney may utilize SCPA 1404 before or after the filing of formal objections. Conducting the examination of the attesting witness pursuant to SCPA 1404 allows for a respondent to ascertain the viability of objections as well as the ability to frame objections.



Scott G. Kaufman

Similarly, Trust and Estate practitioners are often presented with a complaint from a client that they were a beneficiary under a Last Will and Testament and that they did not receive their fair share or what they were supposed to receive from the estate. In order to assist the client with determining whether there is any validity to their assertion that may warrant the filing of formal objections to the accounting of a fiduciary, the attorney may demand an examination of the fiduciary pursuant to SCPA 2211. SCPA 2211 states that "the fiduciary may be examined under oath by any party to the proceeding, whether before or after filing objections, if any, to the account as to any matter relating to his/her administration of the estate." Similar to SCPA 1404 the SCPA 2211 examination may take place either before or after the filing of objections (SCPA 2211 (2)).

In the examination, the fiduciary is to be examined as to all matters concerning the accounting. The examination can be utilized to ascertain whether or not the accounting should have included assets in the estate. The books and records of the fiduciary can be inspected and questions can be presented which will reveal whether the fiduciary acted prudently. (Matter of Sheir, NYLJ January 24, 1979, at 26 col 3 Sur. Ct. NY County). Additionally, it can be determined if the decedent left alleged testamentary substitutes which can be found to be part of the estate. The Court thereafter can order that property or assets be turned over to the estate. (In re Will of Wojnowski, 136 Misc. 2d 401, 518 N.Y.S.2d 587, Sur. Ct Monroe county 1987).

On the return date of the citation, the respondent to the accounting will either have filed objections, (In the Estate of Mann, 41 A.D. 2d 861, 342 N.Y.S.2d 617, 3rd Dept 1973) "Generally speaking in an accounting proceeding, the objections should be filed on the return date of the citation"; or have ten days from the return date to file the objections, (22 NYCRR 207.41 states that "on any accounting by an executor, administrator, temporary administrator, trustee, any creditor or any party interested may file objections thereto in writing in such time as shall be allowed by the Surrogate").

If an examination is requested, the Court will set down a date for the examinations to be held. 22 NYCRR 207.28 provides that the examination is an official court proceeding and will be held at the court house before the official Court reporter. (See 22 NYCRR 207.28(a) "all examinations . . . should be conducted on reasonable notice to all attorneys, guardians ad litem, and parties entitled under SCPA 302(3). Unless the Court otherwise directs, all examinations . . . shall be held at the court house.") The examination itself is similar to a 1404 exam as it is a hearing more than it is a deposition. The Court in the case of In re Fiddle, 13 Misc. 3d 827, 823 N.Y.S.2d 859 (Sur. Ct. Sullivan County 2006) stated that a 1404 hearing is not a hearing in the evidentiary sense. It is an examination pursuant to SCPA 1404 and 22 NYCRR 207.27 and therefore witnesses must be produced before the Court, the examinations must be conducted at the courthouse and the examination must be supervised by the Surrogate. The same is true for the SCPA 2211 examination.

In Queens County Surrogate's Court the official court reporter is an electronic recording device. The device is either a tape machine or a newer recording device that records on CD-Rom or a computer hard drive. In most instances the Court will make available a conference room on the 7th floor of Supreme Court building or the jury room in Surrogate's Court if there is not a jury trial in progress. Tapes are available in the Miscellaneous Department and must be returned upon the completion of the examination. The tapes can be subsequently transcribed. The

Continued On Page 11

QVLP Attorney Honored by State Bar

BY MARK WELIKY*

On Monday, May 2nd a special ceremony and luncheon was held at the home of the New York State Bar Association (NYSBA) in Albany. The purpose of the event was to honor the recipients of the NYSBA President's Pro Bono Service Awards for the year 2011. The honoree for the Eleventh Judicial District (Queens County) was Ned Kassman, a volunteer lawyer at the CLARO-Queens Consumer Debt Clinic. CLARO-Queens, a service provided by our pro bono program, the Queens Volunteer Lawyers Project (QVLP) in partnership with the St. John's University School of Law, assists pro se litigants with cases in Queens Civil Court. To date CLARO-Queens has assisted over 2,500 visitors to the clinic.

The NYSBA President's Pro Bono Service Awards recognize attorneys who provide civil legal services, without compensation, to the poor and/or disadvantaged in their communities. These lawyers uphold the highest traditions of our profession and respond to the noblest of our ethical precepts by helping to assure that the poor have access to justice. NYSBA President Stephen P. Younger and NYSBA President-Elect Vincent E. Doyle III presided over the awards ceremony and Hon. Jonathan Lippman, Chief Judge of the State of New York, presented Law Day remarks to the attendees.

Our award winner, Ned Kassman, has been an important member of our volunteer attorney panel for CLARO. Ned has not only been an omnipresent volunteer at CLARO but has also served as a mentor for lawyers volunteering for the first time at the clinic. In addition to the many consultations he has provided at the clinic, Ned has taken on a number of cases that required many hours of research and document preparation outside of the clinic. He has been successful in defending pro se litigants against Motions for Summary Judgment and has helped in vacating numerous default judgments.

The Queens County Bar Association and the Queens Volunteer Lawyers Project salute our award winner Ned Kassman and all of the other pro bono attorneys who continue to provide invaluable service to our community.

*Mark Weliky is the Pro Bono Coordinator for the Queens County Bar Association.

What do three of these Jubilarians have in common?

They are also Past Presidents!

(See Page 8-9)



Chanwoo Lee, Michael Dikman, Francis J. Kilkelly, Sheldon Lobel, George J. Nashak, Jr., Paul Pavlides, Edward H. Rosenthal, Hon. Bernard Strauss and Hon. Hazel C. Strauss

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THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:

The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

June 2011

Monday, June 13 Juvenile Justice Committee Seminar
Wednesday, June 15 Article 81/Guardianship Training for Laypersons
5:30 - 8:00 pm

September 2011

Monday, September 5 Labor Day, Office Closed
Monday, September 12 Annual Golf Outing

CLE Dates to be Announced

Elder Lawyer's Assistance
Surrogate's Court, Estates & Trusts

NEW MEMBERS

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NECROLOGY

Hon. Vincent F. Naro

Hon. Robert A. Ross

NOTICE OF MEETING

A joint, well attended meeting of the Surrogate's Court, Estates and Trusts Committee and The Elderly and Disabled Committee was held on April 27 at the Bar Association. Special guests were Surrogate Peter J. Kelly and Chief Clerk Margaret M. Gribbon.

The meeting was comprised primarily as a convivial meet and greet between the guests and members of the bar. In a brief, formal component

of the meeting, Judge Kelly discussed the recent personnel changes, and his practical approaches to two common scenarios, adjournments and compromise actions. Chief Clerk Gribbon also discussed personnel changes, and the advent of electronic filing in this Court, of which she was instrumental in establishing. Many thanks to our friends for their interest in the concerns of attorneys.

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EDITOR'S MESSAGE

9-11-01 and Osama Bin Laden's Death

**To: President Barack Obama
Vice President Joe Biden**

Dear Barack and Joe,

I came within 20 minutes of dying on 9-11-01.

I rarely talk about it. The memory is too painful.

I am a New York City courthouse lawyer. I have argued hundreds of cases in the New York metropolitan area courthouses over the past 35 years.

On the morning of 9-11-01, I was driving to the Staten Island courthouse from my home in Westchester County. I was late because I had driven my son to high school that morning, as I usually did in 2001. He had overslept.

I was driving quickly down the West Side Highway headed for the Battery Tunnel to Brooklyn and on to Staten Island. As I approached 42nd Street, I saw the World Trade Center surrounded by billowing black smoke. I turned around. I never made it to the Staten Island courthouse that day. Fortunately, no default was taken, and an adjournment was granted.

Had I been 20 minutes earlier, as planned, I would have been at Ground Zero at the moment of impact. The West Side Highway is immediately adjacent to Ground Zero. The falling debris would have crushed my car with me in it. Photos of the damaged Twin Towers showed dozens of crushed cars all around it.

I am a third generation New Yorker. I was born and raised within blocks of the World Trade Center. My first job after law school was as a New York State Assistant Attorney General stationed at the World Trade Center.

Although I did not die on 9-11-01, a part of me was lost that day. My home town was built and maintained in part by the efforts of my parents and grandparents. It was bombed on 9-11-01 using two civilian air-



Paul E. Kerson

Continued On Page 9

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PRESIDENT'S MESSAGE

It's hard for me to believe that a full year has passed since I took the oath to accept the position of President of the Queens County Bar Association.

I was the third woman...

Only the second person of color to serve...And the first Asian-American to ever hold this position.

And now we have Richie Gutierrez, our first Hispanic president.

After 134 years of existence, the Queens County Bar is suddenly changing very fast.

I am very proud of some of the changes this past year.

For one thing, we are now on Facebook.

For another, we've worked hard to bring our Continuing Legal Education into alignment with the needs of our members.

Another thing that I'm very proud of is the effort we've made to create a strategic plan for QCBA.

Because the one-year term of President begins just before summer,

it's really more like a nine-month term. That makes it hard to create continuity, and to develop ongoing projects.

That is why we asked the American Bar Association to join us for an all-day planning session. Based on the questionnaires that you filled out, we discussed a 4-to-5 year plan that Richie and subsequent presidents will be able to follow...

To improve on the weaknesses of QCBA...

and better meet your needs.

The most satisfying part of my term as a President was the opportunity to meet and work with our members of QCBA as well as our colleagues in the legal profession.

That's why I want to thank all of you, our Executive Officers and Board of Managers for your support.

Every year, the officers and man-



Chanwoo Lee

agers strive to improve the service we provide to all of you, our members.

I also want to personally thank our dedicated committee chairs. QCBA could not exist without the leadership of these members, whose work helps maintain continuity and progress toward our goals, even as officers and managers change.

I would also like to recognize and thank Mark Weliky, Executive Director of the Queens Volunteer Lawyers Project, and his staff and volunteer lawyers. They have done an excellent job of saving homes for many residents of Queens County.

Our Association... the residents of Queens County... and the entire legal community have benefited from the participation of these dedicated members.

Finally, I want to thank our

Executive Director, Arthur Terranova... as well as Janice Ruiz... Sasha Khan... and Shakema Oakley for their support in the past year.

I'm going to close with a familiar plea:

Our Association's growth is your growth!

Please become an *active* participant, and ask your friends to join!

If I have learned anything this past year... it's that QCBA is more important — and more exciting — than I could ever have imagined.

Richie, I wish you all the best in your coming year as President!

Finally, congratulations to Honorable Joseph A. Grosso, Acting Supreme Court Justice, who retired from the court system. We will miss you and wish you the very best as you begin a new and, we hope, exciting chapter in your life!

Very truly yours,

- Chanwoo Lee
President

Remembering Michael Jay

Saturday...

Dear Anita,

I just learned of Michael's heart attack late yesterday. I am so sorry that I cannot be there for the service, or I would be offering to deliver these remarks myself. If you feel they are not appropriate, then just pass them along to the family, especially the kids. If you care to, please read them. Thank you, Stephen Singer

My friendship with Michael Jay goes back almost 40 years. I was there when he was a criminal defense lawyer, still telling tales about his carefree, Hippie days riding across country, all alone, on his motorcycle, sporting a ponytail and sleeping outdoors. I was there when he switched sides and became an Assistant District Attorney. He was equally good on both sides of the "aisle" and loved the practice of criminal law. I was there through the Joan Carey period ... forever a taboo subject I hasten to add...I was there when he decided to venture into the world of civil practice ... probably a mistake, but we all make them...and when he became a matrimonial/real estate lawyer.

In fact, Michael represented me in my own divorce case and he closed on several properties which I owned, so that I was both a client and a close friend. We both had offices on the second floor of the Silver Tower Building in Kew Gardens for as long as I can remember. I was his, down the hall, buddy and we shared lunch-

es together all these years, whenever we could spare the time...I would come looking for him, he would come looking for me...often, it was to have a sounding board for the problems that vexed him that day. We grew quite close, Michael and me, and I became his confidant and partial advisor during his own sad divorce.

We spent leisure time together as well. My trips up to Vermont with him were very special and I will always remember sharing a beer or two on the back porch of his double wide, watching the beavers through his binoculars or when we would fish for trout while standing in the stream that ran through his property, the six pack just below the water, keeping cold on those hot days. The long drives there and back gave us plenty of time to exchange philosophies and personal thoughts. I got to know the Michael Jay who was so special, along the way.

He loved a great many people and was not afraid to show it. He was a gentle giant of a man who did not hesitate to give another man a kiss or a hug if he wanted to show his affection. I was fortunate enough to be the recipient of those affectionate hugs and kisses on many an occasion...and I loved him back. Mike never had a mean thing to say about anyone ... except possibly Harold...and that was on your behalf Anita... He was especially crazy about your children, and



Steve Singer

of course, when he was fortunate enough to have his own, he was the nuttiest father ever.

I would be corralled and compelled to listen to stories about his kids ad infinitum...even helping Benjamin with one of his school

projects on one occasion. As Mike would say, "Children don't come with a playbook!" I only hope that I am doing the right thing." I would assure him that he was...he had uncommonly good common sense about child rearing and an endless amount of patience for both of them, equally due to his maturity and his boundless love for them. He never ceased bragging about his children, who he loved more than life itself...they should always know that.

Michael was the most loyal and dedicated friend anyone could ever ask for. When he bought his suite on the second floor, he designed it himself, furnished it himself and hung his Dad's paintings on every available wall space. He was so proud of his accomplishment. He ensconced his two close friends in that office to share the space with him. Cindy Reese and Brent Blackburg (Blackie to everyone)...I danced alongside Michael at Cindy's wedding. I went with him to Blackie's funeral. Both of them long gone now, both too soon,

just like Michael...how ironic that all three of them died so young...all three so beloved by so many. Michael collected wonderful friends by careful selection and his office ... when those three Musketeers were together ... was a happy, busy ... but wondrous place...entering there was like going to no other law office...there was friendship and warmth and free advice and great conversation at every turn. I miss all three of them so much.

At the end, when real estate was no longer a great device for making a living, his office was quiet ... I would attend there for those occasional lunches and we would get lost in wonderful conversations that would sometimes go on for hours...I loved spending time with him. I can only offer this. The most important thing for Michael would be to say two things to his children and that would be... (1) never forget me...I will always be out there somewhere watching over you ... (2) make me proud, not only of your personal accomplishments, but because you become "good people" in your own right. He was a man of peace, of love for many and especially cherished a select few. I consider myself sooooo fortunate that I counted myself in that group. It was a privilege knowing him...

I will not forget you Michael...

With much love...

Steve Singer

Marital Quiz

BY GEORGE J. NASHAK JR. *

Question #1 - Does an appeal lie from an order denying leave to reargue?

Your answer -

Question #2 - Does prohibition against double counting apply to distribution of parties' tangible income-producing business?

Your answer -

Question #3 - Is a life insurance policy on wife's parents, with defendant wife as beneficiary, purchased during the marriage and premiums were paid, in part, with marital funds, marital property?

Your answer -

Question #4 - May the court suspend child support payments, if the non-custodial parent established that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent?

Your answer -

Question #5 - Husband prior to commencement began taking classes necessary to earn Bachelor of Science and Doctorate degree in physical therapy. Twenty-one months after the wife's commencement of an action for divorce the husband was awarded both degrees. Is the wife entitled to equitable distribution of a portion of the husband's enhanced earnings?

Your answer -

Question #6 - Can child support payments be waived prospectively, before the obligation to make such payments has accrued?

Your Answer -

Question #7 - Can the court set aside the child support provisions of a stipulation of settlement which was incorporated but not merged into the judgment of divorce, upon the motion of one of the parties?

Your answer -

Questions #8 - If a pending action was commenced prior to the "no-fault" legislation, may the defendant start a new action on "no-fault" grounds?

Your answer -

Question #9 - Are motions to enforce the terms of a stipulation of settlement subject to a statute of limitation?

Your answer -

Question #10 - Is an action to enforce a distributive award in matrimonial action governed by the six-year statute of limitations?

Your answer -

**Editor's Note:* Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a member of the firm of Ramo Nashak Brown & Garibaldi LLP

ANSWERS APPEAR ON PAGE 11

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- Sometimes you have to probe a little deeper.
- But the writer is always in there.
- And every lawyer always has something to write about.
- All he needs is a case. Put struts under a case and you have a brief. Take out the note of urgency and you have an article.
- Articles are what this Bulletin wants to publish. Articles by our own members.
- You, our members, can and should write them for us. You need not polish them up. We will take your article, trim the corners, unsplit the infinitives and groom the subordinate clauses.
- You will have the “by-line.” We will do the editing.
- You have the article in you or in your files. Get it to us NOW. We will do the rest.
- We need your articles!

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COOPERMAN, Arthur J. 115-23 Grosvenor Road, Kew Gardens, NY 11418-3477, 347-628-2649

KALINA, Paul J. Address stays the same. Office number has changed to 718-441-4483

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We apologize for an error in the 2011 QCBA Annual Dinner Journal. In the ad from Big Apple Abstract Corp. the middle initial of our new President-Elect Joseph Risi, Jr. was misprinted as “F” instead of “J” - the ad copy submitted to us by Big Apple had Mr. Risi’s correct middle initial.

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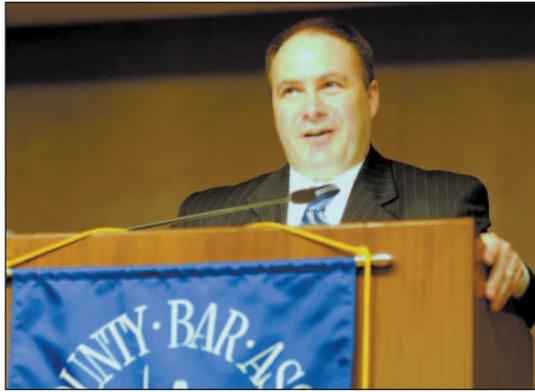


CORNER

Judiciary, Past Presidents and Golden Jubilaruion Night April 11, 2011



NYSBA Vincent E. Doyle, III, Guest Speaker



Joseph Carola, III, Chair of the Program Committee



Leslie Nizin congratulating Samuel Freed on being nominated for the Academy of Law Award.



Joseph Carola presenting Guy Vitacco, Jr. with his Past President's Scroll.



Chanwoo Lee shaking hands with Steven S. Orlow (08-09). Standing to the right of Mr. Orlow are David L. Cohen (07-08), George J. Nashak, Jr. (05-06), Guy R. Vitacco, Jr. (09-10), Hon. Sidney F. Strauss (90-91), Joseph A. Baum (92-93) and Edward H. Rosenthal (02-03). Sitting down are Leslie S. Nizin (00-01), Howard D. Stave (82-83), Wallace L. Leinhardt (77-78), Michael Dikman (78-79), David N. Adler (88-89) and Paul S. Goldstein (94-95)



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PHOTO



CORNER

Judiciary, Past Presidents and Golden Jubilaruion Night April 11, 2011



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Ted Gorycki, John Marotta, Gerry Chiariello and Marilyn Harbater.



Violet Samuels, Dominic Villioni, Hon. Margaret Parisi-McGowan, Howard Stave, June Briese and Rich Lazarus.



Hon. Sy Boyers, Hon. Randall Eng, Vincent Doyle, Chanwoo Lee, WallyLeinhardt, Seymour James and Tom Principe.



Sheldon Lobel, Hon. Sid Strauss and Ted Lobel.

Photos by Walter Karling

Diana C. Gianturco

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Of the letter of the law-
Insightful, and able
To note an argument's flaw,

Yet readily flexible
And willing to bend,
And find a way
A dilemma to mend.

A man of great faith-
To wonderful family devoted,
All his achievements
Must be noted

As we wish him well
On life's future journey-
He's won the respect
Of every attorney.

Thus, till that last page
Is finally complete,
We wish him good health
And a life of joy, replete!

With Respect,
Bob Sparrow



Bob Sparrow

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BY-ARNOLD H. RAGANO, ESQ.-

Rosy-Cheek, just recently fested
A legal career I coveted then-
The trials I pursued were fiery tested
Of invidious traps I did not ken-

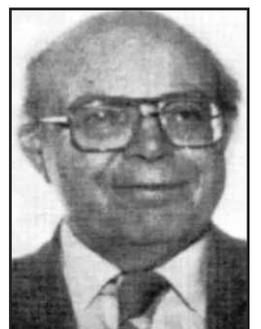
The tortuous labyrinths I disavowed
Twisted arguments that freely flow-
Intellects pounding logic still unbowed
Each party bombastic, skills to hoe-

Our profession once was glorified
The Law for adventurous souls to cast-
Its ship of state with wind-tossed mast
Sailing still, billowing sails held fast-

Unfettered clear its clarion calls
With raucous hyperbole misspent
Shining lucre ingeniously enthralls
Is touted in terms irreverent-

The advertising rage of lawyers
Tinged with shameless unflinching booty-
How do we milk the sacred cow
To garner more of the tutti frutti?

Is this the lofty goal inspired
With which our mind was once so fired?
God bless our erstwhile enlightening ambition
Imprinted with its untamished mission.



Arnold H. Ragano

The Jury Clerk

BY JOSEPH F. DEFELICE*

She's looking all around,
yes, the Clerk looks around,
the jurors come,
the jurors go,
and the Clerk looks around,

They come from here
they come from there,
and the Clerk steers them round,

She calls their names,
and spells them out,
she lines them up
and sits them down,
yes, the Clerk looks around

She swears them in and
sends them round
she even sometimes writes things down,
yes, the Clerk looks around

Yes, some are tall
and some are short,
some are fat
and some are slim,
some walk fast
and some are slow,
some are white,
some are black,
some are old
and some are not,
but the Clerk looks around

Yet, all around the jurors march,
over here
and over there,
and the Clerk looks around

Some, they read
and some do sleep,
some are smart
and some are not,
but the Clerk steers them round

She orders here
she orders there,
she tells them where to go,
cause this is actually
the Clerk's own show



Joseph DeFelice

Editor's Note: Joseph F. DeFelice is a solo practitioner in Queens County practicing Criminal and Immigration law.

9-11-01 and Osama Bin Laden's Death

Continued From Page 2

liners as deadly weapons. This was an Act of War. Nearly 3000 of my neighbors were lost, and many injured.

I am very grateful that the U.S. Government arranged the killing of the hate-filled mastermind of the bombing of my home town. I am especially grateful that this was done with two bullets from the rifle of a U.S. Navy serviceman. Osama Bin Laden won't be masterminding any mass murders again.

I am even more grateful that you arranged to seize his computer disks, hard drives, thumb drives, DVDs, computers, cell phones and paper records. Our Armed Forces can use this intelligence to eliminate or imprison additional individuals who seek to harm our

country with further Acts of War. All of this information would have been destroyed had you elected to use bombs rather than helicopters and rifles.

You did not just end the threat of Osama Bin Laden on May 1, 2011. By seizing Al Qaeda's records at their headquarters, you turned the corner on the "War on Terror". Our Armed Forces can now finally accurately determine exactly who is the Enemy, and hunt down each and every one.

I am very grateful that no ordinary Pakistani on his way to work was killed with my tax dollars. I am thankful that you chose not to drop any bombs on any innocent Pakistanis in order to terminate Osama Bin Laden's continued threats.

For the first time since 9-11-01, I am deeply proud of the U.S. Government, and of the decisions you made in this matter.

I just wanted you to know.

-PAUL KERSON

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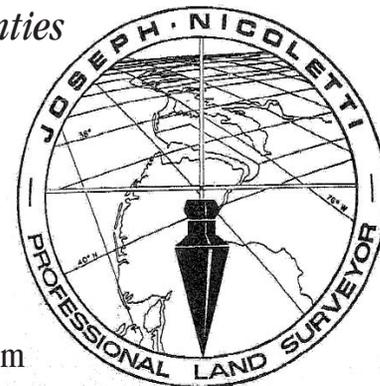
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THE CULTURE CORNER

BY HOWARD L. WIEDER

FROG & PEACH THEATRE COMPANY'S PRODUCTION OF WILLIAM SHAKESPEARE'S "TWELFTH NIGHT"

THE FROG & PEACH THEATRE COMPANY'S entertaining production of William Shakespeare's "**TWELFTH NIGHT**," directed by **LYNNEA BENSON**, is being presented at The West End Theatre (the Church of St. Paul and St. Andrew), 263 West 86th Street (between West End Avenue and Broadway), in Manhattan's Upper West Side. Performances run through Sunday, May 15.

William Shakespeare's "**TWELFTH NIGHT**," one of his greatest comedies concerns a brother and sister Viola and Sebastian, who are not only very close but look a great deal alike. When they're shipwrecked off the coast of Illyria, they both think the other dead. When Viola lands in this foreign country she dresses as a boy and adopts the name Cesario, becoming a trusted friend and confidante to the Count Orsino. Orsino is madly in love with the lady Olivia, who is in mourning due to her brother's recent death, which she uses as an excuse to avoid seeing the Count, whom she does not love. He sends Cesario to do his wooing, and Olivia falls in love with the disguised maiden. Things get more complicated when a moronic nobleman, Sir Andrew Aguecheek, and a self important servant, Malvolio, get caught up in the schemes of Olivia's cousin, the fun loving Sir Toby, who orchestrates a clever prank to make Malvolio think Olivia is madly in love with him. The happy confusion mounts when Sebastian arrives in Illyria, alive and well, perplexed to find strangers calling themselves his friend.

Director **LYNNEA BENSON** has directed over two dozen Shakespeare productions for Frog Peach including: As You Like It (with Emmy winner Camryn Grimes); Richard III; Hamlet (with Austin Pendleton as Claudius and The Ghost); Richard II (with Mr. Pendleton as Richard); Macbeth with Jason Kushner in the title role; The Merchant of Venice; and King John (with Oscar nominee Catalina Sandino Moreno as Blanche). Ms. Benson is also Artistic Producer and co founder of Frog & Peach.

The cast of "**TWELFTH NIGHT**" has many talented and memorable performances. **JANE CORTNEY** was electric as Viola, at turns, both strong and vulnerable. **BRANDO BONIVER** exuded great charm as Sebastian. **JONATHAN MARBELLI** was hilarious as Toby Belch, and has a voice that can be heard 20 blocks away. The entire ensemble cast was well-cast and talented. In addition to the aforementioned actors, the cast "**TWELFTH NIGHT**" included: Matthew Bayer (Captain/Priest), Collin Blackard (Valentine), Michael Broadhurst (Sir Andrew), Lenny Ciotti (Malvolio), Kyla D'Souza (Curio), Peter Forde (Delbert), Eric Dysart (Feste), Erick Gonzalez (Orsino), Mark Sage Hamilton (Antonio), Steve Mazzoccone (Fabian), Monte Nummi (Bartok), Amy Frances Quint (Olivia), and Leah Reddy (Maria).

The set design is by Peter Adams, the costumes are by Jessa Raye Court, and the choreography is by Tom Knutsen, and the combat design, including sword fighting, is by Marcua Watson. Ted Zurkowski composed music for the production. Alexandra

Rubin is Associate Producer. The production stage manager is Blair Hotchner.

Frog & Peach Theatre Company (www.frogandpeachtheatre.org), co founded by Ted Zurkowski and Lynnea Benson - - both Actors Studio alumni - - is dedicated to staging Shakespeare's plays crafted for modern audiences (under two and a half hours) and in keeping with this approach enjoyable for audiences of all ages.

Again, the show runs through Sunday, May 15. All tickets will be \$18.00. The box office number for tickets is 212 868 4444 or www.smarttix.com.

HOW AND WHY I ROBBED MY FIRST CHEESE STORE

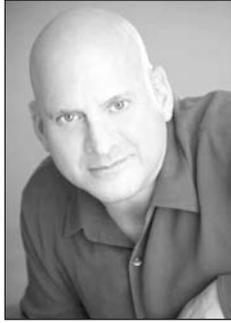
La MaMa E.T.C. [Experimental Theatre Company] will present the World Premiere of **HOW AND WHY I ROBBED MY FIRST CHEESE STORE** by **MIKE GORMAN**. Directed by **DAVE BENNETT**, **HOW AND WHY I ROBBED MY FIRST CHEESE STORE** features video, photography, cheese, and a life size taxi-dermy horse. Previews begin May 19. Opening night is slated for Thursday, May 26.

In **HOW AND WHY I ROBBED MY FIRST CHEESE STORE**, a homeless playwright turns the tables on the patronizing Artistic Director of a downtown theater. Can he pull off what will inevitably become a potent Page Six story headline, if not the most absurd heist of all time?

Produced by The Forty Hour Club, the production features costumes by Obie Award winner Gabriel Berry, sets by Donald Eastman, sound by Obie Award winner Tim Schellenbaum and an installation by Gregory de la Haba. The cast features Melody Bates (Patrial Comfort's Booty Candy), Joseph Mullen (Pre Disposal), Mary Notari (International WOW's Auto DaFe, FringeNYC's There Will Come Soft Rains), Alan B. Netherton (Jean Claude van Itallie's America Hurrah, Labapalooza! at St. Ann's Warehouse), Tommy Piper (Andrei Serban's Richard 3) and Travis York (Anne Washburn's The Internationalist, Adam Szymkowicz's Nerve).

MIKE GORMAN is a playwright in residence at La MaMa ETC where he has presented works including The Honor and Glory of Whaling (2008), Death by Joinery (2006), Counting Coup (2002), Single Action Shotgun (2001), UltraLight (2000) and A Funny Old Bird (1998). His plays have also been seen at The Portland Stage Company and Gloucester Stage Company (Israel Horovitz, Artistic Director), among others. Mike was the co creator of the acclaimed performance troupe The Fabulous Giggin' Bros. He began his career as a playwright at Clark University in Worcester, Massachusetts where received a degree in Literature (1988). At Clark, **MIKE GORMAN** was nominated for a Rhodes Scholarship and has recently been nominated for induction into the Clark University Athletic Hall of Fame.

The late **ELLEN STEWART** [1919-2011], who died earlier this year at age 91, founded La MaMa in 1961 in a tiny basement on Manhattan's Lower East Side. She dedicated it to the playwright and all aspects of the theater. Today, La MaMa is a world renowned cultural institution rec-



Howard L. Wieder

ognized as the seed bed of new work by artists of all nations and cultures. To date, La MaMa has presented artists from over 70 nations. Each season, over 100 productions with over 400 performances are staged in their three theaters. Among the playwrights whose early work was presented on its stage were Harold Pinter, Sam Shepard, and Hanford Wilson; the actors Harvey Keitel, Jill

Clayburgh, Bette Midler and Nick Nolte performed there. Harvey Fierstein created "Torch Song Trilogy" at La MaMa before its critically acclaimed transfer to Broadway. Among those other artists who began at La MaMa include: Meredith Monk, Robert Wilson, Jean Claude van Itallie, Tan Dun, Joel Zwick, Mike Figgis, Jackie Curtis, Blue Man Group, John Kelly, David and Amy Sedaris. La MaMa has been honored with over thirty Obie Awards, Drama Desk Awards, Bessie Awards and Villager Awards. www.lama-ma.org.

HOW AND WHY I ROBBED MY FIRST CHEESE STORE runs May 19 June 5, Thursday Saturday at 7:30 PM, Sunday at 2:30 PM. La MaMa E.T.C. is located at 74A East Fourth Street (between 2nd Avenue & Bowery - - accessible from the F train at 2nd Ave). Tickets are \$18, available at 212 475 7710 or www.lama-ma.org.

MANIPULATION

MANIPULATION, a world premiere play by **VICTORIA E. CALDERON** about one woman's struggle for freedom and self discovery, is set to begin Off Broadway previews May 14 prior to its official press opening June 16 at Cherry Lane Theatre (38 Commerce Street) in Manhattan. **MARILYN FRIED** directs.

In **MANIPULATION**, Cristina outwardly appears to have everything she can desire, however, she cannot enjoy her life. Her husband, Mauricio, torments her with flagrant displays of infidelity while her mother, Dona Beatriz, encourages her to have an affair with Luis. When Cristina turns to a psychoanalyst for help, he proceeds to take advantage of her. With every attempt to find herself, Cristina is manipulated back into submission until she finds a way to cut the ties that bind her to her previous existence.

The ensemble of **MANIPULATION** features Robert Bogue ("Guiding Light," "Oz"); Mark Ethan; Gabriel Furman; Jeremy Stiles Holm (Mint Theatre's WIFE TO JAMES WHELAN); Mihaela Mihut ("Perkins' 14," National Theatre of Romania's FOOL FOR LOVE);

Robert Mobley (SUDDENLY LAST SUMMER); and Sandra Santiago ("The Sopranos," "Miami Vice," NINE on Broadway with Antonio Banderas).

MANIPULATION features scenic design by Bill Stabile (TORCH SONG TRILOGY, Drama Desk nominee for SPOOKHOUSE, SUDDENLY LAST SUMMER); lighting design by Kirk Bookman (THE SUNSHINE BOYS, THE GIN GAME); costume design by Alejo Vietti (SECRETS OF THE TRADE); sound design by Jeremy Lee; and technical supervision by Jay Janicki (FELA!). Mexican born playwright **VICTORIA E. CALDERON** began her writing career as a journalist. "El Heraldo de Mexico" published a series of her essays. Additionally she was a columnist and director of the social and cultural section at "El Sol de Mexico." **MANIPULATION** marks her American premiere.

Director **MARILYN FRIED** has traveled extensively throughout Europe, conducting acting workshops. Some of the actors she has worked with have been nominated for Academy Awards and Golden Globes and others have been nominated for and awarded Emmys and Tonys. Her credits include "Reds," "Baby Boom," "Something's Gotta Give," The Godfather I, II & III, "First Wives Club," "Prizzi's Honor," "Michael Clayton," and "Silence of the Lambs." She currently has two films, which she will direct, in development, one of which will be shot in Romania.

Off Broadway, **MARILYN FRIED** recently directed Tennessee Williams's SUDDENLY LAST SUMMER with Kathryn Luce and Joan Copeland. She became a member of The Actors Studio under the leadership of Lee Strasberg.

VICTORIA E. CALDERON'S MANIPULATION begins its open ended Off Broadway run on May 14, with an official press opening set for June 16 at the Cherry Lane Theatre (38 Commerce Street). Performances run Tuesdays Fridays at 8pm; Saturdays at 2PM and 8PM; Sundays at 3pm and 7pm Tickets are \$68.50. For tickets, visit Telecharge.com or call 212 239 6200 or 800 432 7250. Tickets may also be purchased at the Cherry Lane box office: Tuesdays Fridays, 4 8 PM; Saturdays, 12 8 PM; and Sundays, 1 7 PM.

* * * * *

HOWARD L. WIEDER is the writer of both "THE CULTURE CORNER" and the "BOOKS AT THE BAR" columns, appearing regularly in THE QUEENS BAR BULLETIN, and is JUSTICE CHARLES J. MARKEY'S PRINCIPAL LAW CLERK in Supreme Court, Queens County, Long Island City, New York.

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Marital Quiz

ANSWERS TO MARITAL QUIZ ON PAGE 4

Question #1 - Does an appeal lie from an order denying leave to reargue?

Answer: No, *Rogers v. Rogers* 2011 NY Slip Op 1012 (2nd Dept.).

Question #2 - Does prohibition against double counting apply to distribution of parties' tangible income-producing business?

Answer: No, *Weintraub v. Weintraub* 912 N.Y.S.2d 674 (2nd Dept. 2010).

Question #3 - Is a life insurance policy on wife's parents, with defendant wife as beneficiary, purchased during the marriage and premiums were paid, in part, with marital funds, marital property?

Answer: Yes, *Weintraub v. Weintraub* 912 N.Y.S.2d 674 (2nd Dept. 2010).

Question #4 - May the court suspend child support payments, if the non-custodial parent established that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent?

Answer: Yes, *Matter of Thompson v. Thompson* 2010 NY Slip Op 08120 (2nd Dept.).

Question #5 - Husband prior to commencement began taking classes necessary to earn Bachelor of Science and Doctorate degrees in physical therapy. Twenty-one months after the wife's commencement of an action for divorce the husband was awarded both degrees. Is the wife entitled to equitable distribution of a portion of the husband's enhanced earnings?

Answer: Yes, *Kuznetsova v. Kuznetsova* 913 N.Y.S.2d 325 (2nd Dept. 2010).

Question #6 - Can child support payments be waived prospectively, before the obligation to make such payments has accrued?

Answer: Yes, *Stevens v. Stevens* 2011 NY Slip Op 1830 (2nd Dept.).

Question #7 - Can the court set aside the child support provisions of a stipulation of settlement which was incorporated but not merged into the judgment of divorce, upon the motion of one of the parties?

Answer: No, a plenary action to set aside a stipulation of settlement is required, *Brody v. Brody* 2011 NY slip Op 1782 (2nd Dept.).

Questions #8 - If a pending action was commenced prior to the "no-fault" legislation, may the defendant start a new action on "no-fault" grounds?

Answer: Yes, *Heinz v. Heinz* 203438/10, NYLJ 1202483036423 at *1 (Sup., NA Decided February 16, 2011).

Question #9 - Are motions to enforce the terms of a stipulation of settlement subject to a statute of limitation?

Answer: No, *Bayen v. Bayen* 2011 NY Slip Op 01421 (2nd Dept.).

Question #10 - Is an action to enforce a distributive award in matrimonial action governed by the six-year statute of limitations?

Answer: Yes, *Bayen v. Bayen* 2011 NY Slip Op 01421 (2nd Dept.).

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Usually the parties set an agreed upon date for the examination and inform the Judge of the proposed date. It is advisable to leave enough time from the return date of the citation to the date of the actual examination to provide for the turning over of documents that are subject to discovery associated with the accounting. Article 31 discovery is broad and may take time to be provided. In the Matter of the Estate of Delisle, 149 A.D.2d 793, 339 N.Y.S.2d 588 (3rd Dept 1989).

Most of the document discovery that a party would require of the fiduciary is required to be turned over pre-objection. SCPA 2211 (2) states that a party conducting an examination is entitled to all rights granted under Article 31 of the CPLR with respect to document discovery, equally if such examination takes place before or after the party files objections. However, the objecting attorney should keep in mind that just because they are now filing objections they will not be permitted to examine the fiduciary for a second time. See *In Re Coyles Will*, 61 Misc. 2d 720, 306 N.Y.S.2d 161 (Sur. Ct. Albany County 1969).

Ordinarily, the Court will also ask the parties for an agreed upon date for the objections, if any, to be filed. This date is usually ten days after the completion of the examination. Pursuant to Hon. C. Raymond Radigan, "Courts typically order that objections must be filed within 10 days after the completion of such examinations" or within such other time as is fixed by stipulation of the parties or by the Court. Margaret Valentine Turano & C. Raymond Radigan, *New York Estate Administration* 6.03(b) (2007). All of these dates should be well thought out by the attorney seeking the examination. As stated, the Court rarely allows for a second examination. See *In the Matter of the Will of Ettinger*, 7 Misc. 3d 316, 793 N.Y.S.2d 739 (Sur. Ct. Nassau County 2005) (holding that SCPA examinations may be as broad as any objections that may be filed and the examining party gets only one opportunity to examine. Permission from the Court to reexamine these witnesses is not granted lightly.); *In re Estate of MacLeman*, 9 Misc. 3d 1119(A), 808 N.Y.S.2d 918 (Sur. Ct. Westchester County 2005); *In re Estate of Roth*, 7 Misc. 3d 1010(A), 801 N.Y.S.2d 242 (Sur. Ct. Bronx County 2005). Therefore, all potential issues should be the subject of the discovery demands and the fiduciary should be questioned about said issues during that examination.

The scope of the examination of the fiduciary is broad. The fiduciary should be prepared to turn over documentation and be questioned on all issues which are part of the accounting. Additionally, the fiduciary can be questioned regarding assets

which were not collected. In the Matter of Fenton, 23 Misc. 2d 1074, 203 N.Y.S.2d 23 (Sur. Ct. Nassau County 1960); *In re Estate of Stanley*, 59 Misc. 2d 232, 299 N.Y.S.2d 47 (Sur. Ct. NY County 1969); *In the Estate of Dorman*, 175 Misc. 2d 479, 669 N.Y.S.2d 193 (Sur. Ct. Cattaraugus County 1998). Items that passed by operation of law such as testamentary substitutes can be the subject of inquiry as well as Totten Trust accounts and payable on death beneficiary designations (i.e. life insurance). The inquiring attorney will also be permitted to question the fiduciary regarding the activities of a corporation that was owned by the decedent in which the fiduciary continued the activities of the business. Therefore, the activities of the corporation for which the estate had a controlling interest are to be fully disclosed. *In Re Tuttle's Estate*, 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).

The fiduciary will be required to produce checkbook ledgers, QuickBooks reports, cancelled checks, bank statements, broker agreement statements, estate tax returns, fiduciary returns, appraisals of real property, business appraisals, etc. Attorney's bills for services and accounting reports can also be disclosed. *In the Matter of Storecky*, 85 N.Y.2d 518, 626 N.Y.S.2d 733 (1995). *In the case of the Matter of Dorman*, 175 Misc. 2d 479, 669 N.Y.S.2d 193 (Sur. Ct. New York County 1998), the Court held that a thorough 2211 examination may be difficult without document discovery. See also, *In re Schneier*, 50 A.D.2d 715, 374 N.Y.S.2d 872 (4th Dept 1975) which makes clear that the scope of disclosure is broad. "The test is materiality; that is relevancy and usefulness." *Id.* Disclosure in Surrogate's Court is governed by Article 31 of the CPLR.

An accounting proceeding is one of the most utilized proceedings because of the wide range of relief that can be sought. As the scope of the examination and the discovery of information leading up to the examination are very broad so is the nature of the relief that can be demanded in the accounting. *In re Rappaport's Estate*, 150 A.D.2d 779, 542 N.Y.S.2d 215 (2d Dept 1989) (holding that "the obligation rests on the fiduciaries to make complete disclosure of all relevant data pertaining to the estate."); See, also, *In re Levine's Will*, 15 Misc. 2d 281, 181 N.Y.S.2d 316 (Sur. Ct. Kings County 1958); *In re Davidson's Estate*, 89 N.Y.S.2d 221 (Sur. Ct. NY County 1949) (holding that a party can seek information as to any matter relating to the administration of the estate); *In re Estate of Grossman*, 211 A.D.2d 409, 621 N.Y.S.2d 44 (1st Dept 1995) (holding that "the statute gives examiners even wider latitude than the pertinent general discovery rules.") The accounting proceeding can be the forum where an interested party seeks relief against the fiduciary such as a claim that the fiduciary has withheld property from the estate. *In re Fenton's Estate*, 23 Misc. 2d

1074, 203 N.Y.S.2d 23 (Sur. Ct. Nassau County 1960) finding that the inquiry relates to her acts or neglect in her fiduciary capacity. Accounting examination or inquiry historically is a remedy for the discovery of assets withheld by the representative. In the alternative, the fiduciary can seek a surcharge against a beneficiary for a loan that remains unpaid to the decedent and the decedent's estate. All other outstanding issues that may remain are to be addressed and litigated in the accounting.

The attorney involved in the accounting proceeding should also keep in mind that the issue of whether they are entitled to a trial by jury is dependent on whether the relief requested is equitable in nature or legal in nature. Generally, no right to trial by jury exists in an accounting proceeding because the proceeding is a matter of equity. *Matter of Estate of Rappaport*, 150 A.D.2d 779, 542 N.Y.S.2d 215 (2d Dept 1989). Usually the assertions made in an accounting proceeding are made regarding property owned by the decedent; therefore, generally, the claim is in equity. *In re Estate of Filipiak*, 66 Misc. 2d 742, 322 N.Y.S.2d 9713 (Sur. Ct. Erie County 1971). Additionally, it is generally a dispute that involves a fiduciary obligation which also sounds in equity. *Matter of Estate of Rappaport*, 150 A.D.2d 779, 542 N.Y.S.2d 215 (2d Dept 1989). The SCPA preserves the claimant's right to trial by jury of issues relating to the validity and enforceability of the rejected claim, even when they must be determined in an accounting proceeding. *In re Boyle's Estate*, 242 N.Y.2d 342 (1926); 40 N.Y. Jur. 2d Decedents' Estates Section 1242.

Among the actions of the fiduciary that are fair game in the SCPA 2211 examinations and subsequent to objections to the account, include but are not limited to: self dealing; failure to marshal all assets; negligent handling of estate taxes; investments that are improper; wrongful payment of creditors or claims; failure to distribute; wrongful payment of commissions; loans; propriety of appointing the preliminary executor; issues relating to the right of election; administration expenses; reasonableness of attorney's fees and construction of the will. In addition, a beneficiary may seek to surcharge a fiduciary for the sale of real property for less than fair market value.

The accounting proceeding is the forum where a client can have his/her allegations heard with regard to the administration of a trust or an estate. The examination of the fiduciary pursuant to SCPA 2211 and the discovery tools associated with the examination is critical in ascertaining whether objections should be filed. The Examination can also be used to allow the parties to adequately frame their objections.

**Editor's Note: Scott G. Kaufman is a partner in the firm Crowley & Kaufman, PC, located in Elmhurst, NY. He is also a Vice-Chair of the Surrogate's Court, Estates and Trusts Committee of the Queens County Bar Association.*

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