

PRACTICE IN SURROGATE'S COURT: ADVICE AND WAR STORIES FROM COURT ATTORNEY-REFEREES

A CLE GENEROUSLY HOSTED BY SAGE
WEDNESDAY, DECEMBER 7, 2016 | 8:00 - 10:00 A.M.*

*BREAKFAST STARTS AT 8:00 A.M. | PROGRAM AT 8:30 A.M.

305 SEVENTH AVENUE, 15TH FLOOR (B/W 27TH & 28TH ST.)

1.5 CREDITS IN AREAS OF PROFESSIONAL PRACTICE

APPROPRIATE FOR NEWLY ADMITTED AND EXPERIENCED ATTORNEYS

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FACULTY

Helen Z. Galette, Esq., Court Attorney-Referee, Kings County Surrogate's Court

Cynthia Hammond, Esq., Court Attorney-Referee, Kings County Surrogate's Court

Thomas Sciacca, Esq., Moderator, Law Offices of Thomas Sciacca, PLLC

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CLE Certificate Information

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Please allow up to two weeks for distribution of your certificate.

**PRACTICE IN SURROGATE'S COURT: ADVICE AND WAR STORIES FROM COURT
ATTORNEY-REFEREES**

SAGE Advisors Series

CLE presented by the LGBT Bar Association of Greater New York (LeGaL)

Wednesday, December 7, 2016, 8:30-10:00 a.m.

The SAGE Center, 305 Seventh Ave, 15th Floor, New York, NY

AGENDA

- I. Registration, breakfast 8:00-8:30**
- II. Welcome, 8:30-8:40 (LeGaL's Matthew Skinner and SAGE's Jerry Chasen)**
- III. Introduction of the panel and topic, 8:40-8:55 (Sciacca)**
- IV. Role of the Court Attorney-Referee in calendar, jurisdiction, and conferences 8:55 - 9:05 (Galette)**
- V. Role of the Court Attorney-Referee in kinships, inquest, and trials, 9:05 – 9:15 (Hammond)**
- VI. Moderated questions, 9:15 - 9:40 (Panel)**
- VII. Questions from audience, 9:40 – 10:00 (Panel)**

Practice in Surrogate's Court: Advice and War Stories from Court Attorney-Referees

CLE Faculty Biographies

Helen Z. Galette, Esq.

Helen Z. Galette is a Court Attorney-Referee in the Law Department of Honorable Margarita López Torres of Kings County Surrogate's Court. Prior to this position, Helen practiced privately in the areas of Trusts and Estates, Surrogate's Court Practice, Guardianships and Elder Law. Helen also served as a guardian ad litem in Surrogate's Court on various matters. Helen received her undergraduate degree from Marist College in 1991. She received her Juris Doctor, cum laude, from Pace University School of Law in 1995. She was admitted to practice in New York in the Appellate Division, Second Department, and is also admitted in the Eastern and Southern Districts of New York and the Supreme Court of the United States. Helen is a Past President of the Bay Ridge Lawyers Association and has served on various committees, including its Programs Committee and its Winter Seminar CLE Committee. She is active in the Brooklyn Bar Association, where she has lectured on promoting law practices through the use of social media, was a panelist for the OCA Article 81 training course, and is a member of its Grievance Committee. Helen was recently a panelist in the New York State Bar Association CLE "What You Need to Know as a Guardian ad Litem."

Cynthia Hammond, Esq.

Cynthia Hammond has been a Court Attorney-Referee in the Law Department of Honorable Margarita López Torres of Kings County Surrogate's Court since 2009. Cynthia received her undergraduate degree from The College of William and Mary in 1979, and her Juris Doctor in 1985 from the University of South Carolina, where she was Associate Editor-in-Chief of the *South Carolina Law Review*. She was admitted to practice in New York in the Appellate Division, Second Department. Prior to her position with Surrogate López Torres, Cynthia was an associate at LeBeouf Lamb Leiby & MacRae from 1985 to 1992, handling primarily SEC and insurance regulatory matters. In addition, she volunteered as a pro bono appellate attorney for the NAACP Legal Defense Fund, writing appellate briefs in habeas corpus proceedings for indigent defendants on death row in Louisiana and Georgia. From 1992 until her present position, Cynthia raised her family in Brooklyn while serving in numerous volunteer capacities, including as a Latin teacher at St. Joseph's High School. She is a member of the Brooklyn Women's Bar Association, a member of the Board of Trustees of the Brooklyn Waldorf School, and a member of the Board of the Breukelein Institute.

Thomas Sciacca, Esq. (Moderator)

Thomas Sciacca is the Principal of Law Offices of Thomas Sciacca, PLLC, where, since 2007, he has focused his practices on trusts and estates, estate administration, Surrogate's Court litigation, and guardianship. In addition, Mr. Sciacca is an adjunct assistant professor at New York University's School of Continuing and Professional Studies, an appointment he has held since January 2006. In 2013, he received two distinguished awards—recognition as a Rising Star by SuperLawyers and as Empire State Counsel by the New York State Bar Association, in recognition of his pro bono efforts. Mr. Sciacca is a frequent speaker on various topics related to his various areas of practice. He is a graduate of New York University School of Law (LLM-taxation), Pace University School of Law (JD), and the University at Albany, State University of New York (BA). He is licensed to practice law in New York, New Jersey, Florida, and the United States Tax Court.

PRACTICE IN SURROGATE'S COURT: ADVICE AND WAR STORIES FROM COURT
ATTORNEY-REFEREES

Outline of Course Materials

- A. Kinship Proceeding - Objections
- B. Kinship Proceeding - Transcripts
- C. Kinship Proceeding – Guardian Ad Litem’s Report
- D. Kinship Proceeding - Decision
- E. Compromise Proceeding - Guardian Ad Litem’s Report
- F. Probate Proceeding – Guardian Ad Litem’s Report
- G. Affidavit of Heirship – Kings County Form
- H. *Matter of Michelle M.* (Surrogate’s Court, Kings County July 22, 2016)
- I. *Matter of Antonio C.* (Surrogate’s Court, Kings County July 22, 2016)

A. Kinship Proceeding - Objections

OCT 27 2015

RECEIVED

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
Accounting of the Public Administrator of the County of
New York, as Administrator of the Estate of

VERIFIED OBJECTIONS
TO ACCOUNT

INGE BECKMANN,

File No. 2014-1589/A

Deceased.
-----X

To the Surrogate's Court, County of New York:

The undersigned (1) Werner Beckmann, (2) Karl-Heinz Beckmann, (3) Ulrich Haneklaus, a/k/a Bernd Ulrich Haneklaus, (4) Heinz Werner Haneklaus, and (5) Annette Metzger, hereinafter "the Objectants," all of whom are interested parties herein as distributees of Inge Beckmann, by Thomas Sciacca, Esq., their attorney herein, IN RESPONSE TO the Petition for Judicial Settlement of Account filed by the Public Administrator of the County of New York in the above-captioned proceeding, DOES HEREBY OBJECT, upon information and belief, as follows:

1. Objectants object to any portion of the Petition or of the Account seeking to deposit any funds of the Estate with the Commissioner of Finance of the City of New York for the benefit of the Decedent's "unknown" distributees.
2. Objectants object to any distribution of the net proceeds of the Estate to anyone but themselves, as they are the sole distributees of the Decedent's Estate entitled to inherit pursuant to EPTL § 4-1.1(a)(5).
3. With the exception of their exclusion as the sole distributees of the Decedent's Estate, Objectants have no objections to Petitioners' Account, as filed, including those expenses listed on Schedules C and C-1 of the Account.

WHEREFORE, Objectants respectfully request that this Court hold a hearing at which Objectants and/or their representatives may submit proof of their kinship and make a determination that Objectants are the sole distributees of the Decedent's Estate. Objectants consent to a Court Attorney-Referee conducting such hearing at a date mutually-agreeable to all parties who have appeared herein.

Dated: New York, New York
October 26, 2015

Yours, etc.,



Thomas Sciacca, Esq.
Counsel for Objectants

LAW OFFICES OF THOMAS SCIACCA, PLLC
44 Wall Street – 10th Floor
New York, NY 10005
(212) 495-0317
(646) 349-5795 fax
tom@sciaccalaw.com

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Thomas Sciacca, being duly sworn, hereby deposes and says:

I am an Attorney-at-Law duly admitted to the practice of law before the Courts of the State of New York, and I maintain an office at 44 Wall Street – 10th Floor, in the County, City, and State of New York.

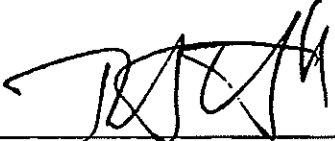
I am the Attorney for the Objectants in the within proceeding; I have read the foregoing Objections to Account and know the contents thereof; the same is true to my knowledge,

except as to matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge is correspondence and documents provided by Objectants.

This verification is made by the undersigned because the Objectants, with knowledge of facts and circumstances, are not presently within or do not reside or have a principal place of business in the County, City, and State of New York, in which deponent maintains his law office.


THOMAS SCIACCA

Sworn to before me this
26th day of October, 2015.



Notary Public

NORMAN PIASECKI II
Notary Public, State of New York
No. 01PI6214685
Qualified in NEW YORK County
Commission Expires 12/14/2017

TO:

Shawna A. Brown, Esq.
Schram Graber & Opell, PC
11 Park Place – Ste. 615
New York, NY 10007

NYS Attorney General's Office
120 Broadway
New York, NY 10271

Wendy C. Pelle-Beer, Esq.
61-43 186th Street – Ste. 599
Fresh Meadows, NY 11365-2710

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
Accounting of the Public Administrator of the County of
New York, as Administrator of the Estate of

PROOF OF SERVICE

INGE BECKMANN,

File No. 2014-1589/A

Deceased.
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

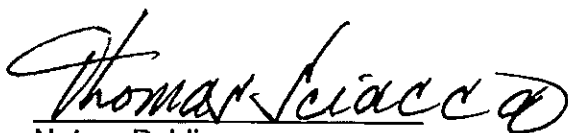
NORMAN PIASECKI, being duly sworn, hereby deposes and says.

1. I am over the age of eighteen years and not a party to this action. I reside in the County, City, and State of New York.
2. On the 26th day of October, in the year 2015, I served the enclosed *Verified Objections to Account* by depositing true and complete copies of same in a secure, postage-paid first-class mail envelope in a mailbox in the exclusive care and custody of the United States Postal Service located in the County, City, and State of New York, addressed to each of the following:
 - Shawna A. Brown, Esq., Schram Graber & Opell, PC, 11 Park Place – Ste. 615, New York, NY 10007;
 - NYS Attorney General's Office, 120 Broadway, New York, NY 10271; and
 - Wendy C. Pelle-Beer, Esq., 61-43 186th Street – Ste. 599, Fresh Meadows, NY 11365-2710.



NORMAN PIASECKI

Sworn to before me this
26th day of October, 2015.



Notary Public

THOMAS SCIACCA
Notary Public, State of New York
No. 01SC6102957
Qualified in New York County
Commission Expires Dec. 15, 2015

B. Kinship Proceeding - Transcripts

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- - - - -x
Accounting of the P.A. as Admin. :
of the Estate of :
William Matteo, : File Number
Deceased. : 2012-1312/A
- - - - -x

2 Johnson Street
Brooklyn, New York 11201

June 4, 2014

B E F O R E:

ASHWANI PRABHAKAR, ESQ.
Court Attorney/Referee

TRANSCRIBER:

ELIZABETH BARRON
ARIA SERVICES, INC.
102 Sparrow Ridge Road
Carmel, NY 10512
(845) 260-1377

Proceedings recorded by electronic recording.

Transcript produced by transcription service.

A P P E A R A N C E S:

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New York, New York 10158
Attorney for Objectants

W I T N E S S E S:

Frank R. Seddio

I N D E XWITNESSESDirect Cross Rdrct

MR. SEDDIO BY:

MR. FANNING	4	
MR. SCIACCA		7
MR. TOBIAS		13
THE COURT		13

EXHIBITSMarked Rcd

OBJECTANT'S EXHIBITS

50	D.C. Theresa Pepe	21	21
51	Internment record Adolf DiMore	21	21
52	Death record Theresa Mitchell	21	21
53	Baptism cert. Phyllis Ann DiMore	21	21
54	D.C. Phyllis Ann Cosco	21	21
55	Funeral pamphlet Phyllis Ann Cosco	21	21
56	B.C. Margaret Tindle	21	21
57	M.C. Margaret DiMore	21	21

1 THE COURT: This is a continued kinship
2 in the estate of William Matteo, file number 2012-
3 1312/A. This is the Public Administrator's
4 accounting.

5 Mr. Fanning, you have a witness today?

6 MR. FANNING: Yes.

7 (AT THIS TIME, THE WITNESS WAS SWORN BY THE
8 COURT.)

9 THE COURT: Can you please state your
10 name and address, your full name.

11 THE WITNESS: Frank R. Seddio, S-e-d-d-i-
12 o, 2333 East 69th Street, Brooklyn, New York.

13 THE COURT: Mr. Fanning, your witness.

14 MR. FANNING: Thank you.

15 DIRECT EXAMINATION

16 BY MR. FANNING:

17 Q. Thank you for coming down, Mr.
18 Seddio. Did you know the decedent in this case,
19 William Matteo?

20 A. Yes, I did.

21 Q. How long did you know him?

22 A. Over thirty years.

23 Q. In what setting did you know him?

24 A. He was a member of an organization
25 which I belong to called the Knights of Columbus,

1 which is a Catholic fraternal society. We had
2 about 700 members in that organization with a very
3 large facility, and he would frequent all of the
4 events and was an active member of the
5 association. I also knew, after that organization
6 changed, that he became a member of the Midget
7 Squadron Yacht Club, and I spent many a weekend
8 sitting at the bar having conversations with him
9 when boating season was around.

10 Q. Did he share with you personal
11 information about his life?

12 A. In terms of the sharing of
13 information, we've had many discussions over the
14 years about our families, about different things
15 that we might have been involved in or events that
16 he would participate in that he would be helpful
17 in.

18 Q. Through your discussions with him and
19 knowing him, can you inform whether he had a
20 spouse?

21 A. He had no spouse. I've been at his
22 home a number of times. He had a wonderful old-
23 style car. I'm trying to think of whether it was
24 a '68 or a Mustang, I think it was, but an older
25 car that he used to keep and he loved it. It was

1 kind of like his pride and joy. There would be a
2 number of times where he would do something with
3 it or bring it down to one of the antique shows
4 and get to see him.

5 Q. Can you also tell us whether he had
6 children?

7 A. He had no children to my knowledge.
8 Billy was always by himself. He never came
9 anyplace with children. In the organization I
10 described to you, we would have many, many family
11 events. Billy was always there. As a matter of
12 fact, he was one of the helpers more than anything
13 else. He'd be Santa Claus' elf for Christmas when
14 everyone brought their kids down. He never
15 brought any children. He lived with his mother
16 and father, if I recall correctly, originally,
17 before they passed on. There were no other people
18 in that house but him. He had no brother or
19 sisters, either, by the way.

20 Q. Would you have known if he had
21 children?

22 A. I would have definitely known.

23 Q. Thank you.

24 CROSS-EXAMINATION

25 BY MR. SCIACCA:

1 Q. Mr. Seddio, you say that you would
2 have definitely known if he had children. Why do
3 you say that?

4 A. I don't know how often you speak with
5 your friend but you usually kind of know their
6 family circumstances when you spend enough time
7 with them. You've gone to their home or you've
8 shared many conversations, and children never came
9 up at any time. I never asked him outright did he
10 have kids but he never described any relationship
11 with any female that I knew of in the time I knew
12 him.

13 Q. Just to be clear, you never asked him
14 outright whether or not he had any children?

15 A. That's correct. I never asked him
16 but it's not too difficult to presume that he
17 didn't have children when we had children's events
18 and he didn't bring them or even -- one
19 conversation we did have once in a while was about
20 lady friends. He had one lady friend years ago
21 but that was the only one I can recall that he
22 ever had.

23 Q. How did that relationship end?

24 A. To the best of my knowledge, they
25 just broke up one way or the other. Billy was a

1 very -- how would I describe Billy? He was a good
2 Catholic, who I think maybe not always was able to
3 be the person he might want to have been.

4 Q. What does that mean?

5 A. That's a presumption, it's not fair,
6 but there was always the belief that Billy may
7 have been gay and just never acted on it or just
8 was not able -- did not have female relationship,
9 nor to the best of my knowledge did he ever have a
10 male relationship with anyone, other than the
11 friends we had among ourselves. We did a lot of
12 drinking together in our time.

13 Q. Did the decedent ever have a
14 conversation with you about whether he was
15 sexually active with this lady friend?

16 A. No.

17 Q. No, he wasn't or no --

18 A. In a Catholic organization, you don't
19 usually get into those kinds of conversations. If
20 I recall, and I'm going way back -- I'm going back
21 like to the '80s. That's how long ago it might
22 have been. That's not the kind of conversation we
23 usually have but --

24 Q. But he never affirmatively told you
25 that he was not sexually active.

1 A. That's correct. He never said that
2 and no one ever asked. Let me just say in the
3 times that we shared, they were extensive. We
4 were spending a lot of time together. It would be
5 at least once a week and many times in the summer,
6 on the weekend, when we were at the yacht club --
7 I call it a yacht club but it's really a boat
8 club. You don't call a twenty-foot outboard a
9 yacht. Billy didn't own a boat himself. He just
10 like to come down.

11 When the Knights of Columbus closed
12 in 2000, Billy liked -- Billy did enjoy sitting at
13 the bar, spending time and drinking, sometimes a
14 beer, sometimes something more. We'd have a lot
15 of conversations about things. One of the big
16 things we would have conversations about was his
17 car.

18 Q. Just so I'm clear, your testimony
19 that you believe he did not have a spouse and did
20 not have children is based upon the lack of him
21 bringing it up as opposed to statements he made.

22 A. It would be about thirty years of
23 observance of someone you know. When you spend
24 that much time with someone -- and he lived in his
25 mother and father's house right in the

1 neighborhood. It wasn't like he lived (ui) so
2 much so that I made the arrangements for his
3 funeral when this happened. I was the first
4 person they called and I took care of the
5 arrangements for his funeral (ui).

6 Q. But you never affirmatively asked him
7 if he had a spouse.

8 A. Never did, never mentioned one, never
9 in any way, shape or form present with one in
10 thirty years, never brought a child to any event
11 that was ever held when we had children's events,
12 and never at any time to the best of my knowledge
13 ever discussed the idea of being married or having
14 kids. (ui).

15 Q. But there was no affirmative
16 discussion, yes or no.

17 A. That's correct.

18 MR. FANNING: Objection.

19 THE WITNESS: I don't know how you decide
20 that, except to say certainly, there were other
21 people that could say the same as I just
22 discussed.

23 BY MR. SCIACCA:

24 Q. Sure.

25 A. I couldn't imagine -- if he had a

1 wife, we would have known that. If he had
2 children, we would have known that.

3 Q. Mr. Seddio, is it fair to say that
4 you're very active in the local community here in
5 Brooklyn?

6 A. I would say yes. The answer is yes.

7 Q. Would it be fair to say that you've
8 met a lot of people during the course of your
9 career?

10 A. Yes.

11 Q. Have you ever been surprised to learn
12 that one of them had kids that you didn't --

13 A. No.

14 Q. Never.

15 A. No. I'm Sicilian. Italians have
16 their own way of sharing time with each other.
17 I've never had that. I can't ever remember --
18 even men who were bachelor men, I've never seen
19 that happen, that there was a situation where some
20 wife popped up or some kid popped up out of the
21 clear blue.

22 Q. What about during your tenure as a
23 judge of this Court? Did you ever have the
24 opportunity to preside over a case where people
25 came forward claiming to be the children of a

1 decedent?

2 MR. FANNING: Objection. I don't see how
3 this is relevant.

4 THE COURT: It's not relevant.

5 MR. SCIACCA: I'll withdraw the question
6 and the questioning.

7 THE WITNESS: There's no doubt in my
8 mind. If I had to give a strong opinion on it
9 that Billy Matteo was not married, had no
10 children, lived mostly with his parents. His main
11 love in his life, if you could call it his child,
12 was his car.

13 As a matter of fact, that car -- I can
14 speak about it because it pisses me off, quite
15 frankly, because it's my belief that the upstairs
16 tenant, who may no longer be there, stole the car.
17 Billy got sick and went in the hospital for a few
18 days, went downstairs and took the title out of
19 his house. By coincidence, two or three days
20 before his death, it was transferred to the tenant
21 upstairs. It might be an asset that should be
22 looked for.

23 THE COURT: Anything else, counselor?

24 MS. TOBIAS: I have a couple of quick
25 questions.

1 THE COURT: Okay, Ms. Tobias.

2 CROSS-EXAMINATION

3 BY MS. TOBIAS:

4 Q. About how old was Billy when you
5 first met him?

6 A. I guess in his twenties. A little
7 younger than me. He was in his twenties. What
8 was Billy, about 58, 59 when he died? About that
9 age.

10 THE COURT: He died March 1st, 2012.

11 BY MS. TOBIAS:

12 Q. Do you recall when you last saw him
13 before he passed away?

14 A. Sure, about a week before he died,
15 about ten days before he died. As I said, I was
16 the first person they contacted when he died.

17 MS. TOBIAS: That's all I have.

18 CROSS-EXAMINATION

19 BY THE COURT:

20 Q. How many times were you -- you
21 mentioned you're 63.

22 A. Was he born in '47?

23 MR. FANNING: He was born in '48.

24 THE WITNESS: I was born in '46. We were
25 closer than I thought. He looked a lot younger.

1 MR. FANNING: He didn't have a wife and
2 kids. Of course, he looked younger.

3 THE WITNESS: That's right. Why would he
4 want to be as miserable as the rest of us?

5 MR. SCIACCA: Objection.

6 BY THE COURT:

7 Q. How many times were you inside the
8 house that he lived in?

9 A. Over the years, maybe four or five
10 time. I recall one time was around Christmastime.
11 We were having a party for mentally challenged
12 children back in the '80s. He was helping out and
13 he had a lot of stuff at his house.

14 Q. Did he introduce to a spouse or any
15 children on those occasions?

16 A. His mother and father I think were
17 there at the time. That's it. Obviously, there
18 was always tenants upstairs but I don't think he
19 hid his wife and kids upstairs.

20 Q. Did you attend his funeral?

21 A. I attended his funeral as I did many
22 of those from the neighborhood.

23 Q. Did anybody introduce themselves to
24 you as a spouse or his children?

25 A. Sad to say but there was only about

1 six people there. It was a well-known fact that
2 he had passed away. I'm minimizing. There were
3 more. There were about 25 people at the funeral.
4 No one stood up and said, I'm his kid.

5 THE COURT: Okay, thank you. Thank you
6 very much.

7 THE WITNESS: You're welcome.

8 (TAPE OFF.)

9 (TAPE ON.)

10 THE COURT: We're back on the record in
11 the Matteo estate. We're going to do housekeeping
12 with regard to exhibits.

13 Counsel for alleged paternal kin has
14 presented originals, a certificate of birth for
15 Angelo Matteo, original certificate of birth of
16 Joseph Matteo and a certificate, original record
17 of birth of Lorenza Matteo.

18 Is there any objection to the Court
19 taking copies and returning the originals to
20 counsel?

21 MR. FANNING: No objection.

22 MS. TOBIAS: No objection.

23 THE COURT: Additionally, Exhibits C and
24 E of the paternal's case, we had certificates of
25 death for Giorgiana Matteo, C, and E, which is

1 John Matteo's death certificate. Counselor, I'm
2 returning the originals to you.

3 Is there any objection to me taking the
4 copies that I made? No objection? Okay, great.

5 Is there any other housekeeping?

6 MR. FANNING: I have some documentation
7 to submit.

8 THE COURT: Okay. Speaking is Mr.
9 Fanning.

10 MR. FANNING: I'd like to start by
11 offering an amendment to the tree. I don't know
12 if anybody has received (ui).

13 THE COURT: This is the tree that was
14 marked for identification purposes only and you
15 are changing --

16 MR. FANNING: He was on the tree
17 previously. He's the eighth child of the maternal
18 grandparents.

19 THE COURT: Okay, I got it. So the
20 family tree -- we'll take the amendment in for
21 identification purposes only, to assist all
22 counsel and GAL with the report and reviewing the
23 records that have been submitted. Thank you for
24 doing that.

25 Is there anything else?

1 MR. FANNING: Next, I'd like to circulate
2 -- some of the parties may already have this.
3 This is an updated exhibit list. The updated one
4 is numbered 1 through 57 so if you have that one,
5 then you have the updated list.

6 THE COURT: Just give me one second. So
7 this list is actually new for me.

8 MR. FANNING: 1 through 49 are the same,
9 although there are some notations on some
10 documents that (ui) pursuant to the GAL's
11 objection (ui).

12 THE COURT: Okay.

13 MR. FANNING: When you're ready, I can go
14 through the adjustments.

15 THE COURT: Yes.

16 MR. FANNING: I've already noted on this
17 some of the documents that I'm withdrawing,
18 primarily because (ui) and I also have some better
19 documents today and also some that will be coming
20 at a future date. Number 1 (ui) --

21 THE COURT: Number 1 was the census
22 report from ancestry.com, so that's withdrawn.

23 MR. FANNING: The 1920 census. Number 6,
24 the Social Security death index for Ralph (ui),
25 that's withdrawn. I presume next time, I'm going

1 to have his death certificate. Number 11 is
2 withdrawn and I will later in this hearing submit
3 an internment record. Number 38 is withdrawn and,
4 again, we'll have an interment record.

5 Number 45 -- this I'm actually just doing
6 a replacement. 45 is a marriage record of the
7 decedent's mother, which was referenced in the
8 P.A.'s affidavit of due diligence, but it could
9 not be located, so I ended up just ordering it.
10 So I have the marriage record. I have the
11 original here.

12 THE COURT: This is the marriage record
13 or Giorgina DiMore (ph).

14 MR. FANNING: That's right.

15 THE COURT: And you have the original?

16 MR. FANNING: I have the original here.
17 Do you need that?

18 THE COURT: I'm just going to do a quick
19 review just to make sure it matches up to the
20 signatures (ui) okay. This to me looks like a
21 true copy. Any objections to it being taken in, a
22 true copy? No objection.

23 MR. FANNING: Exhibit 48 is withdrawn.
24 Now we have to address -- I'd like to address
25 Exhibit 49. I had asked for a production of

1 Exhibit 49. This was referenced in the P.A.'s
2 affidavit of due diligence. It is a baptism
3 record of William Matteo. The P.A.'s affidavit
4 (ui) in which he states that he received
5 personally (ui) baptismal record of William
6 Matteo, born June 1st, 1948 to Anthony Matteo and
7 Giorgina DiMore. It's important in that it links
8 the decedent to his parents.

9 Is your office still unable to produce
10 that?

11 MS. TOBIAS: It looked like it was a
12 copy. I didn't find it.

13 MR. FANNING: You didn't find the copy
14 (ui).

15 MS. TOBIAS: I didn't find anything.

16 THE COURT: The Public Administrator is a
17 commissioner of the City of New York. If he says
18 that record is a valid record, I don't have an
19 objection.

20 MR. FANNING: I was going to ask if it
21 could be stipulated that that -- the facts stated
22 in that line in the affidavit produced (ui).

23 THE COURT: We'll give it weight. The
24 Court will give it weight.

25 MR. FANNING: It said where he was

1 baptized, I believe.

2 THE COURT: It's not an affidavit of a
3 private party.

4 MR. FANNING: I'd like to move on to new
5 exhibits numbered 50 through 57.

6 MR. SCIACCA: Do you have originals?

7 MR. FANNING: Yes. Should we go through
8 those?

9 THE COURT: Let me go through them very
10 quickly for the record and the transcriber.

11 Number 50 is a copy of the death
12 certificate of Theresa Pepe. Number 51 is the
13 internment record for Adolf DiMore from Catholic
14 Cemeteries. Number 52 is the death record from
15 the State of Tennessee for Theresa Mitchell.
16 Number 53 is a baptism certificate from Shrine
17 Church of Our Lady of Mount Carmel for Phyllis Ann
18 -- well, it says Phyllis DiMore. Exhibit 54 is
19 Phyllis Ann Cosco (ph) death certificate. This is
20 a copy from the State of Tennessee. 55 is a
21 funeral pamphlet for Phyllis Ann Cosco. 56 is the
22 birth certificate for Margaret Tindle (ph), issued
23 by the City of New York. Number 57 is the
24 marriage certificate for Margaret Mary DiMore and
25 Charles Wayne Tindle dated 1996.

1 Do you want to discuss these any further?

2 MR. FANNING: We don't have to.

3 THE COURT: Is there guardian ad litem
4 satisfied? Is there any objection to --

5 MR. SCIACCA: If they're originals, there
6 are no objections. No objections to any of these.

7 THE COURT: Number 50 through 57, true
8 copies are taken into evidence.

9 (Objectant's Exhibits 50-57 Marked and
10 Received.)

11 MR. FANNING: Those are all the documents
12 I have today. I do have two additional documents
13 (ui).

14 THE COURT: We don't have to all appear
15 for your submitting documents. What I would
16 suggest, since we have so many documents, is that
17 you just mail them to us. Will they be the type
18 that originals will need to be seen?

19 MR. FANNING: One is a death record, one
20 is an internment record.

21 THE COURT: Okay. Why don't you send
22 them to all of us with an affirmation for me that
23 they're true copies and explain their relevance
24 briefly, very briefly. Just because we have so
25 much paperwork, it makes everybody's job easier to

1 know, where do I stick this? So we don't need a
2 future date, right?

3 MR. FANNING: (Ui).

4 THE COURT: The guardian ad litem will
5 write his report. I will present the judge with
6 that as well as various findings. I can't tell
7 you right now -- it's not right for me to say this
8 is how I'm feeling. It's just not right.

9 MR. CAPATANAKIS: Nor do we want to put
10 you in that position. That's why I think we
11 should have a holding date and if in fact we don't
12 come up with a witness who did have a direct
13 conversation, we'll do that. If we do, we'll
14 bring them.

15 THE COURT: Do you want to do a holding
16 date or just tell us that you want to come back?
17 We'll have a holding date. If no one shows up
18 here, then --

19 MR. CAPATANAKIS: Either way.

20 THE COURT: I'm going to have surgery on
21 June -- the end of June is gone. Let's make it
22 late July, July 23rd at 2:30.

23 MR. CAPATANAKIS: Do we need to do this
24 in the afternoon?

25 THE COURT: No, we could do it in the

1 morning. It depends. Some lawyers like doing it
2 in the afternoon because they have to be in court
3 in the morning.

4 MR. CAPATANAKIS: The only reason is
5 because yesterday, we thought we were coming in
6 the morning. We were just on automatic pilot.

7 THE COURT: Do you like coming in in the
8 morning?

9 MR. FANNING: I like the morning.

10 THE COURT: Mr. Sciacca, are you --

11 MR. SCIACCA: I have no preference.

12 MS. TOBIAS: I'm free all day, also.

13 THE COURT: So we'll make it for 10:00
14 a.m. Is that too far out or is that okay? I
15 usually don't go that far out.

16 MR. FANNING: (Ui).

17 THE COURT: Please let us know as soon as
18 you know, so that Mr. Sciacca can start drafting
19 his report. If you're not going to call anyone --

20 MR. FANNING: If we're not going to call
21 anyone, do we need to do anything to rest or we
22 put in a stipulation of resting?

23 THE COURT: No. You would write a letter
24 saying you have no further witnesses and then
25 we'll know we can proceed.

1 MR. FANNING: Okay.

2 THE COURT: Thank you very much,
3 everybody.

4 * * * * *

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9
10 I, Elizabeth Barron, certify that the
11 foregoing transcript of proceedings in the
12 Surrogate's Court, Kings County, in the matter of
13 Estate of William Matteo, Docket No. 2012-1312/A
14 was prepared using FTR Gold electronic
15 transcription equipment and that, to my best
16 knowledge and belief, the above record, as typed
17 by me, is a true and accurate record of the audio
18 recorded contents.

19
20 

21
22 Elizabeth Barron

23 Dated: December 4, 2014
24

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----- -x
:
Accounting of the P.A. as Admin. :
of the Estate of :
William Matteo, : File Number
:
Deceased. : 2012-1312/A
----- -x

2 Johnson Street
Brooklyn, New York 11201

September 18, 2014

B E F O R E:

ASHWANI PRABHAKAR, ESQ.
Court Attorney/Referee

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MR. CILIBRASI BY:

MR. FANNING	5	8
MR. SCIACCA		6
MR. CAPATANAKIS		7
THE COURT		8

MR. SPAGNUOLO BY:

MR. FANNING	10	
MR. SCIACCA		12

EXHIBITSMarked Rcd

OBJECTANT'S EXHIBITS

58	D.C. Ralph Abresi	13	13
59	Internment record Angelo DiMore	14	14
60	D.C. Aldolf DiMore	14	14

1 THE COURT: This is the continued kinship
2 hearing in the estate of William Matteo. This
3 specific proceeding is the accounting of the
4 Public Administrator as administrator of the
5 estate of William Matteo, file number 2012-1312/A.

6 Counsel, can you state your appearances,
7 please.

8 MR. SCIACCA: Thomas Sciacca as guardian
9 ad litem for the unknown distributees of the
10 decedent.

11 MS. TOBIAS: Cullen & Dykman by Wendy
12 Tobias for the Public Administrator.

13 MR. FANNING: Christopher Fanning for
14 maternal distributees.

15 MR. CAPATANAKIS: On behalf of the
16 paternal distributees, Charles Capatanakis.

17 THE COURT: Mr. Fanning, you have a
18 witness today. Did you want to deal with your
19 documents first?

20 MR. FANNING: I'll do the witness first,
21 if that's all right.

22 THE COURT: That's fine.

23 (AT THIS TIME, THE WITNESS WAS SWORN BY THE
24 COURT.)

25 THE COURT: Can you state and spell your

1 name?

2 THE WITNESS: Anthony Cilibrasi.

3 THE COURT: How do you spell Cilibrasi?

4 THE WITNESS: C-i-l-i-b-r-a-s-i.

5 THE COURT: And your address?

6 THE WITNESS: 1662 Rider Street.

7 THE COURT: That's in Brooklyn?

8 THE WITNESS: Brooklyn.

9 THE COURT: Go ahead.

10 MR. FANNING: Thank you.

11 DIRECT EXAMINATION

12 BY MR. FANNING:

13 Q. Thanks for coming down today.

14 A. You're welcome.

15 Q. Did you know the decedent in this
16 case?

17 A. Yes, I did. Billy Matteo, we called
18 him.

19 Q. How long did you know him?

20 A. Since I was 15 years old. We grew up
21 together, lived on the same block.

22 Q. Did you know him through the course
23 of the years or just when you were young?

24 A. He was the best man at my wedding --
25 not best man at my wedding. He was in my wedding

1 party. We grew up together and we stayed in touch
2 until he passed away.

3 Q. Can you tell us whether or not he
4 ever married?

5 A. No, he was never married.

6 Q. Did he ever have children?

7 A. Not that I know of, no.

8 Q. Did you ever discuss marriage or
9 children with him?

10 A. We'd kid around about it many times.
11 He had girlfriends. I'd say, Bill, when are you
12 going to make it permanent. When are you going to
13 get married, settle down? He never wanted to. He
14 just never wanted to get married.

15 MR. FANNING: I have no further questions
16 at this point.

17 MR. CAPATANAKIS: No questions.

18 CROSS-EXAMINATION

19 BY MR. SCIACCA:

20 Q. Mr. Cilibrasi, did Billy Matteo ever
21 tell you that he wasn't married or was it just a
22 running gag?

23 A. He didn't have to tell me he wasn't
24 married because we kept in touch. We were so
25 close with each other. I used to call him every

1 week, he used to call me. I knew he never got
2 married.

3 Q. But he never told you that he wasn't
4 married?

5 A. No, he never told me.

6 Q. Did he ever tell you that he had no
7 children?

8 A. No, he never told me that. He had no
9 children.

10 Q. Thank you very much.

11 MR. CAPATANAKIS: I have a question.

12 CROSS-EXAMINATION

13 BY MR. CAPATANAKIS:

14 Q. Sir, but you were so close to Mr.
15 Matteo that you would have known if he were
16 married, correct?

17 A. Yes.

18 MR. SCIACCA: Objection.

19 THE COURT: Overruled.

20 BY MR. CAPATANAKIS:

21 Q. You were so close to Mr. Matteo that
22 you would have known if he had children, correct?

23 A. Yes.

24 CROSS-EXAMINATION

25 BY THE COURT:

1 Q. Mr. Cilibrasi, over the course of
2 your knowing the decedent, Billy Matteo, how many
3 times did you see him?

4 A. I seen him maybe once a month, every
5 three or four weeks, something like that.

6 Q. For how many years?

7 A. I would say 35 years, 36 years.

8 Q. Did you ever have telephone
9 conversations with him?

10 A. Yes.

11 Q. Do you know how many times you talked
12 to him on the phone?

13 A. I usually talked to him like maybe
14 like once a week. I used to call him, he used to
15 call me.

16 Q. How many years did that go on for?

17 A. About 30, 35 years.

18 Q. Thank you.

19 REDIRECT EXAMINATION

20 BY MR. FANNING:

21 Q. Can you tell me about -- you had
22 mentioned that there were moments where you would
23 joke with him about -- was it not having kids or
24 was it not --

25 A. About getting married, you know,

1 getting married and settled down. He was always
2 alone. He had girlfriends but he just never
3 wanted to make it permanent.

4 Q. And what would his response be, if he
5 had a regular response to that?

6 A. His response was, I guess because he
7 wasn't ready. He didn't want to get married.

8 MR. FANNING: I have no further
9 questions.

10 THE COURT: Mr. Cilibrasi, thank you very
11 much for coming today. We appreciate it.

12 (TAPE OFF.)

13 (TAPE ON.)

14 THE COURT: Mr. Fanning, you have a
15 second witness today?

16 MR. FANNING: I do.

17 (AT THIS TIME, THE WITNESS WAS SWORN BY THE
18 COURT.)

19 THE COURT: What's your name, sir?

20 THE WITNESS: Louis Spagnuolo.

21 THE COURT: Can you spell your last name?

22 THE WITNESS: S-p-a-g-n-u-o-l-o.

23 THE COURT: What's your address?

24 THE WITNESS: 3235 Edmunds (ph) Avenue,
25 Brooklyn, New York.

1 THE COURT: Mr. Fanning?

2 DIRECT EXAMINATION

3 BY MR. FANNING:

4 Q. Thank you for coming down today. Did
5 you know the decedent in this case?

6 A. Yes.

7 Q. When did you first meet him?

8 A. I knew Billy -- he grew up on 94th
9 Street and Avenue M, I grew up on 94th Street and
10 Avenue K. We all saw each other (ui). I would
11 say we go back at least 40 years. I know Billy
12 even more the last 30 years because he was a
13 member at the (ui) club in Canarsie. I got to
14 know Billy down there. I got to know him even
15 more in 1999, when I got my boat. I believe his
16 mother died around that time (ui). (Ui) maybe
17 twice a week, we'd go out fishing. He helped me
18 with the boat and all. He was a good guy.

19 Q. How frequently did you socialize with
20 him?

21 A. The last couple of years, almost
22 every day. He was always down the club every day.
23 We would fish twice a week, three times a week
24 (ui). There was one time I would say, go back
25 about three years ago, four years ago, when he was

1 (ui), so I seen him almost every day.

2 Q. From your knowledge knowing Billy,
3 can you tell us whether he ever married?

4 A. As far as I'm concerned, no, Billy
5 (ui).

6 Q. Did he ever talk about it?

7 A. In a way, you know. We were both
8 single, you know. Now, I regret not having no
9 children. I would say, Billy, it would be nice to
10 have a son to help me with the boat and all (ui).
11 As far as him having children, no (ui). Most of
12 the time, he lived with his parents. Billy was a
13 quiet guy, believe it or not.

14 Q. Would you have known if he had
15 children?

16 A. No. He said --

17 Q. Would you have known if he had
18 children?

19 A. Oh, yeah, I think he would have said
20 something. Without a doubt, he would have said
21 something. (Ui).

22 Q. Would you have known if he was
23 married?

24 A. He would have said something. That
25 wasn't Billy. He never said he had a wife. If he

1 did, he would have said something. We were pretty
2 open with each other and he never said nothing.

3 MR. FANNING: No further questions.

4 CROSS-EXAMINATION

5 BY MR. SCIACCA:

6 Q. Sir did you ever ask Billy directly
7 if he were married?

8 A. No.

9 Q. Did he ever affirmatively say that he
10 was not married?

11 A. In all the conversations that I had
12 with him, he never said nothing.

13 Q. Did you ever ask Billy directly if he
14 had any children?

15 A. I brought up that I wish I had a son,
16 you know, with the boat, and he never said that he
17 had a son or daughter.

18 Q. But did you ever ask him directly?

19 A. Directly? No.

20 Q. Did he ever volunteer that he had
21 children or had no children?

22 A. If he did, he would have said
23 something without a doubt.

24 Q. I'm sorry, just to be clear, did he
25 ever affirmatively say, I have children or I have

1 no children?

2 A. No.

3 Q. Thank you.

4 MR. CAPATANAKIS: And he never said he
5 had a wife, either, correct?

6 THE WITNESS: No.

7 THE COURT: Thank you so much for coming
8 down today. We really appreciate it.

9 (TAPE OFF.)

10 (TAPE ON.)

11 THE COURT: Mr. Fanning, do you have any
12 documents you'd like to admit into evidence?

13 MR. FANNING: I do. I have three
14 documents.

15 THE COURT: We'll mark the first document
16 as 58 for identification. This is the death
17 certificate of Ralph Abresi (ph). Any objections
18 to it being taken into evidence?

19 MR. SCIACCA: No objection.

20 THE COURT: Okay, it's taken into
21 evidence.

22 (Objectant's Exhibit 58 Marked and
23 Received.)

24 THE COURT: Do you have any other
25 documents?

1 MR. FANNING: Yes. I'd like to offer as
2 Exhibit 59 an interment record for Angelo DiMore,
3 3.

4 THE COURT: What do you mean by 3?

5 MR. FANNING: Since there are so many
6 Angelo DiMore's on the tree --

7 THE COURT: You mean 3 on the tree.

8 MR. FANNING: Yeah, I gave them numbers.

9 THE COURT: Okay. But this is the one
10 who was born in 1928 and died in 1953.

11 MR. FANNING: Correct.

12 THE COURT: Okay, very good.

13 Any objection?

14 MR. SCIACCA: No objection.

15 THE COURT: Number 59 is taken into
16 evidence.

17 (Objectant's Exhibit 59 Marked and
18 Received.)

19 MR. FANNING: I'd like to offer lastly
20 Exhibit 60, Adolf DiMore's death certificate.

21 THE COURT: There being no objection, 60
22 is taken into evidence.

23 (Objectant's Exhibit 60 Marked and
24 Received.)

25 * * * * *

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10 I, Elizabeth Barron, certify that the
11 foregoing transcript of proceedings in the
12 Surrogate's Court, Kings County, in the matter of
13 Estate of William Matteo, Docket No. 2012-1312/A
14 was prepared using FTR Gold electronic
15 transcription equipment and that, to my best
16 knowledge and belief, the above record, as typed
17 by me, is a true and accurate record of the audio
18 recorded contents.

19
20 
21

22
23 Elizabeth Barron

24 Dated: December 4, 2014

C. Kinship Proceeding – Guardian Ad Litem’s Report

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Accounting by the Public Administrator of the County of
Kings, as Administrator of the Estate of

REPORT & RECOMMEND-
ATIONS OF G.A.L. _____

WILLIAM MATTEO,
a/k/a WILLIAM MATEO,

File No. 2012-1313/A

Deceased.
-----X

TO THE SURROGATE'S COURT, COUNTY OF KINGS:

I, Thomas Sciacca, an Attorney admitted to the practice of law in the Courts of the State of New York, as Guardian Ad Litem in the above-captioned accounting proceeding, respectfully report as follows:

APPOINTMENT AS GUARDIAN AD LITEM

1. I received my appointment as Guardian Ad Litem in this proceeding by Order of the Hon. Margarita López Torres dated April 16, 2011. Thereafter, I filed my appearance and consent, along with the requisite UCS-872 form, in the Accounting Department on or about April 21, 2014. I served copies of my *Notice of Appearance* on all interested parties the same day.
2. I am appearing as Guardian Ad Litem for the benefit of the unknown distributees of William Matteo, a/k/a William Mateo (hereinafter "my wards" and "the Decedent," respectively).
3. I have no adverse interest to, or conflict with, my wards, and I am neither related to, nor connected in business with, any party or attorney in this proceeding.

NATURE OF PROCEEDING

4. The Kings County Public Administrator (hereinafter "the Petitioner"), commenced an accounting proceeding in the Kings County Surrogate's Court, by filing a Petition verified September 9, 2013. Petitioner seeks a Decree of this Court (1) judicially settling his account; (2) setting reasonable fees for the Petitioner and Petitioner's counsel; and (3) identifying the distributees of the Decedent, or, if same cannot be identified, directing Petitioner to deposit the net estate with the Commissioner of Finance for the benefit of unknown distributees.
5. Since the inception of this matter, the following parties have appeared: (1) Petitioner; (2) various alleged paternal distributees of the Decedent; (3) various alleged maternal distributees of the Decedent; (4) the New York State Department of Taxation and Finance; and (5) the New York State Attorney General.
6. This Court received Objections to the Petitioner's Account in April and May 2014 from the Decedent's alleged paternal and maternal distributees (hereinafter "Objectants.") The objections are limited their exclusion from the class of the Decedent's distributees and request a kinship hearing in this matter. These objections are discussed at length in the kinship discussion below.
7. As of the writing of this Report, no additional party has appeared or filed objections to the relief requested. I do not anticipate additional appearances, or any forthcoming objections, at this time.

JURISDICTION

8. The decedent resided in Kings County at the time of his death, domiciled at 1509 East 94th Street, Brooklyn, New York. Therefore, this Court is the proper venue for this proceeding.

9. I have reviewed all jurisdictional documents in this matter, and I have no objection to same.

PETITIONER'S ACCOUNT

10. A summary statement of the account of Petitioner as Administrator of the goods, chattels, and credits of the Decedent is as follows:

CHARGES

Schedule A	\$	374,700.80
Schedule A-1	\$	0.00
Schedule A-2	\$	<u>159.35</u>
TOTAL CHARGES:	\$	374,860.15

CREDITS

Schedule B	\$	0.00
Schedule C	\$	24,915.32
Schedule D	\$	0.00
Schedule E	\$	<u>0.00</u>
TOTAL CREDITS:	\$	24,915.32
BALANCE (Schedule G)	\$	349,944.83

11. I have reviewed each of the aforementioned schedules, and have no objections thereto.

12. I have checked all the disbursements shown in the account, including fees paid to Petitioner's counsel, reflected in Schedules C and C-1 of the account, and I find all such disbursements to be in order.

KINSHIP HEARING

13. I prepared for, attended, and participated in a kinship hearing held by Principal Law Clerk Ashwani Prabhakar, Esq. The hearing took place over the course of three days on April 23, 2014, June 4, 2014, and September 8, 2014. On September 29, 2014, I received confirmation from Objectants' counsel that they had no further evidence to submit.
14. Petitioner's counsel, Objectants' counsel, and I all attended and participated in the hearing. The witnesses included several of the Decedent's family members (most of whom were interested in this proceeding, as distributees of his Estate) and long-time friends.
15. Prior to the first session, Objectants' counsel submitted an exhaustive set of genealogical records in support of their claims that they were the distributees of this Estate. Although I received photocopies of several official documents, I compared my set of papers against the original certified official document present to the Court to confirm a match. These documents were collectively offered into evidence at the kinship hearing. With the exception exhibits to which I specifically objected at the hearing, I have no objection to the admission of same into evidence.
16. At the hearing, Objectants' counsel proffered compelling proof that they are related to the Decedent, as various issue of grandparents. However, I do not agree that they proffered sufficient evidence that there are no distributees within a closer degree of consanguinity than the Objectants with a priority right to an intestate share, most notably a spouse and/or issue of the Decedent. I reach my conclusion based upon the following reasons:

- a. Several witnesses testified that (1) they never observed the Decedent with a spouse and/or issue, and/or (2) the Decedent never mentioned that he had a spouse and/or issue. However, upon cross-examination, every witness stated that (1) the Decedent never affirmatively stated he had no spouse and/or issue, and/or (2) they never asked the Decedent directly whether he had any spouse and/or issue. As no witness presented anything other than circumstantial evidence and never directly inquired as to the Decedent's family tree, their evidence is speculative at best.
- b. At least one witness, Anthony Celebresi, testified that the Decedent had numerous girlfriends during his lifetime. Objectants failed to enter any evidence that the Decedent was neither sexually inactive nor medically unable to bear children. Presumably, any one of these romantic encounters could have resulted in one or more non-marital children, who would be entitled to the Decedent's entire intestate Estate pursuant to EPTL § 4-1.1(a)(3). The burden to prove otherwise falls squarely on the Objectants, as they are the ones claiming kinship. See TURANO & RADIGAN, NEW YORK ESTATE ADMINISTRATION at § 6.17(a) (LexisNexis 2014), citing Matter of Lorre, 39 A.D.2d 731 (2d Dep't 1972).

17. I note that the Decedent died on March 1, 2012. As less than three years have elapsed since the date of the Decedent's death, Objectants are not entitled to the presumption that other potential distributees do not exist found in SCPA § 2225(b). The statute requires this minimum passage of time.

18. Had three years elapsed, I would have no objection to the entire Estate being divided among the Objectants, as the paternal and maternal kindred of the Decedent.
19. Therefore, my recommendation to this Court varies, depending on whether or not this Court renders a decision on or before March 1, 2015. Specifically:
- a. Decision before March 1, 2015. On behalf of my wards, I object to any distribution being made to the Objectants herein, and respectfully request that this Court direct the Petitioner to deposit the entire Estate with the Commissioner of Finance for the benefit of my wards. If my wards do not come forward before March 1, 2015, I have no objection to this Court entertaining and granting an application for the withdrawal of these funds, to be divided among the Objectants.
 - b. Decision on or after March 1, 2015. On behalf of my wards, I have no objection to this Court directing the Petitioner to distribute the entire Estate amongst the Objectants, in compliance with the intestacy statute and SCPA § 2225(b).

RECOMMENDATIONS

20. I have no objection on behalf of my wards to the account as filed (except as to the potential exclusion of the Objectants as distributees), nor do I have an objection to the judicial settlement and allowance of the account.
21. I have no objections to the fees paid to the Petitioner or to the fees paid to Petitioner's counsel.

22. If this Court renders a decision before March 1, 2015, I respectfully request that this Court direct the Petitioner to deposit the entire Estate for the benefit of my wards with the Commissioner of Finance of the City of New York.

23. If this Court renders a decision on or after March 1, 2015, I respectfully request that this Court direct the Petitioner to divide the entire Estate among the Objectants pursuant to the intestacy statute.

REQUEST FOR COMPENSATION

24. As of the date of this Report, I have expended 11.4 hours on this matter, exclusive of any time spent in preparing my *Affirmation of Legal Services* herein.

25. I have attached my *Affirmation of Legal Services*, with detailed time records annexed, to this *Report* as Exhibit A.

26. My usual and customary hourly rate for these services is \$325.00 per hour, or \$3,705.00. I respectfully request compensation in that amount.

27. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

Dated: New York, New York
October 2, 2014

Yours, etc.:



THOMAS SCIACCA
Guardian Ad Litem

LAW OFFICES OF THOMAS SCIACCA, PLLC
44 Wall Street – 10th Floor
New York, NY 10005
(212) 495-0317
(646) 349-5795 fax
tom@sciaccalaw.com

Courtesy copy to:

Ashwani Prabhakar, Esq.
Principal Law Clerk
Chambers of Hon. Margarita López Torres
Kings County Surrogate's Court
2 Johnson Street – Rm. 302
Brooklyn, NY 11201

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Accounting by the Public Administrator of the County of
Kings, as Administrator of the Estate of

PROOF OF SERVICE

WILLIAM MATTEO,
a/k/a WILLIAM MATEO,

File No. 2012-1313/A

Deceased.

-----X
THOMAS SCIACCA, an attorney-at-law duly admitted to the practice of law before
the Courts of the State of New York, hereby affirms the following under penalties of
perjury:

1. On October 2, 2014, I served the within *Report & Recommendations by Guardian Ad Litem* (with all exhibits annexed, including a copy of my *Affirmation of Legal Services*) via first class mail, by depositing the same in an official depository under the exclusive care and custody of the United States Postal Service within the County, City, and State of New York, addressed to the following persons at the last known address set forth after the name:

- Wendy Tobias, Esq., Cullen & Dyckman, LLP, 44 Wall Street, New York, NY 10005;
- Charles Capatanakis, Esq., Davidoff Hutcher & Ditron, LLP, 605 Third Avenue, New York, NY 10158;
- Christopher Fanning, Esq., Fanning & Hughes, PLLC, 108-18 Queens Boulevard – 4th Floor, Forest Hills, NY 11375;
- John C. Miller, Esq., NYS Department of Taxation & Finance, Attn: Diana Eckler, TDAB – Estate Tax Audit, W.A. Harriman Campus, Albany, NY 12227; and
- Lisa Barbieri, Esq., NYS Attorney General's Office, 120 Broadway, New York, NY 10271.

Dated: New York, New York
October 2, 2014


THOMAS SCIACCA

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Accounting by the Public Administrator of the County of
Kings, as Administrator of the Estate of

AFFIRMATION OF LEGAL
SERVICES BY G.A.L.

WILLIAM MATTEO,
a/k/a WILLIAM MATEO,

File No. 2012-1313/A

Deceased.
-----X

THOMAS SCIACCA, an Attorney admitted to the practice of law in the Courts of the State of New York, as Guardian Ad Litem in the above-captioned proceeding, hereby affirms the following, under penalties of perjury:

1. I am the Guardian Ad Litem appointed in this matter for the benefit of the unknown distributees of the Decedent.
2. I am an attorney experienced in the field of Trusts & Estates, and have been engaged in the active practice of law in this field for the past ten years. Over ninety (90%) percent of my practice is dedicated to Trusts & Estates.
3. I have received many appointments as Guardian Ad Litem in the Surrogate's Court in Kings, Bronx, and New York Counties in the past nine years.
4. I regularly attend CLE courses offered on Surrogate's Court practice offered by the County and State bar associations. I have also served as faculty on multiple CLE courses on Trusts & Estates topics.
5. I am a May 2010 graduate of New York University School of Law, having received my LL.M. in Taxation. I received my J.D. from Pace University in May 2003.
6. I am also an Assistant Adjunct Professor at New York University's School of Continuing and Professional Studies, where I teach law related topics.

7. As Guardian Ad Litem, I submitted a *Report* dated October 2, 2014. The *Report* details the various activities I undertook in completing my duties.
8. As of the date of this *Report*, I have expended 11.4 hours on this matter, no part of which is attributable to preparing this *Affirmation of Legal Services*. I have annexed my detailed and contemporaneous time records to this *Affirmation of Legal Services* for the Court's review.
9. My customary hourly rate is \$325.00 per hour; my normal fee for these services would be \$3,705.50. I respectfully request that this Court award me compensation in this amount.
10. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

Dated: New York, New York
October 2, 2014

Yours, etc.:

A handwritten signature in cursive script, reading "Thomas Sciacca", written over a horizontal line.

THOMAS SCIACCA
Guardian Ad Litem

44 Wall Street - Fl. 10
New York, NY 10005
www.sciaccalaw.com

Estate of William Matteo (2012-1313/A)
GAL appointment
[rate/fee subject to Court approval]

Invoice # 622

Client ID 0324

Hours	Amount
-------	--------

4/21/2014	TS	Drafted Notice of Appearance in accounting/kinship proceeding.	0.40	130.00
	TS	Preliminary review of papers submitted by various counsel.	0.80	260.00
		E-mails with counsel.		
4/22/2014	TS	Drafted UCS-872 forms.	0.30	97.50
	TS	Review of Petition, due diligence affidavit, and kinship documents submitted by objectants' counsel.	3.40	1,105.00
4/23/2014	TS	Prepared for hearing	0.50	162.50
	TS	Kinship hearing - day 1.	2.20	715.00
5/15/2014	TS	E-mails RE: F. Seddio as witness, 3101(d) notice.	0.10	32.50
6/4/2014	TS	Prepared for second day of kinship hearing.	0.60	195.00
	TS	Kinship hearing - day 2.	0.80	260.00
9/8/2014	TS	Continuation of hearing (2 witnesses), conferences with counsel.	0.70	227.50
9/29/2014	TS	E-mails with counsel RE: status of evidence submissions.	0.10	32.50
10/2/2014	TS	Research RE: SCPA 2225(b), drafted GAL Report.	1.50	487.50
Total for professional services rendered			11.40	\$3,705.00

Please make checks payable to "THOMAS SCIACCA, PLLC." Thank you for your business!

Law Offices of Thomas Sciacca, PLLC

Client ID 0324

Page 2

Estate of William Matteo (2012-1313/A)

October 02, 2014

	<u>Amount</u>
Balance due	<u>\$3,705.00</u>

Billing Summary

Total for services rendered	\$3,705.00
Total expenses	\$0.00
Total interest and finance charges	\$0.00
Total payments and other transactions	\$0.00
Total previous balance	\$0.00
Balance Due	\$3,705.00

D. Kinship Proceeding - Decision

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Accounting by the Public Administrator of Kings County,
as Administrator of the Estate of

File No. 2012-1313/A

WILLIAM MATTEO a/k/a
WILLIAM MATEO,

AMENDED
DECISION

Deceased.

----- X
LÓPEZ TORRES, S.

This Amended Decision amends and supercedes the Decision of this Court issued on March 3, 2015. Specifically, the prior Decision found the decedent to be survived by 14 maternal kin, while this Amended Decision includes a fifteenth member of the decedent's maternal family, Angelo A. D'Amore.

This is a proceeding for judicial settlement of a final accounting by the Kings County Public Administrator (the "petitioner"), as administrator of the estate of William Matteo a/k/a William Mateo (the "decedent"), who died on March 1, 2012. The petitioner was issued Letters of Administration on May 21, 2012.

Objections to the account were filed by persons alleging to be cousins on both decedent's paternal and maternal side. Accordingly, kinship hearings were held on April 23, 2014, June 4, 2013, and September 18, 2014 to determine the status of the objectants. All parties waived the filing of the referee's report, and have stipulated to the Court's determination of kinship based upon a transcript of the hearing pursuant to SCPA 307(3)(a) and the documents admitted into evidence. A guardian *ad litem* ("GAL") was appointed to protect the interests of unknown kin.

The objectants submitted over 50 documents which proved the birth, marriage and deaths of the decedent's kin. The documents also showed that the objectants are descended from the same grandparents as the decedent. Additionally at the hearing, Patricia DeSibio, Maryann Bradley and Charles Pullara testified concerning the decedent's family tree which testimony corroborated the documentary evidence.

Witnesses Frank R. Seddio, Esq., Anthony Cilibrasi and Louis Spagnuolo were called to testify concerning the absence of a marriage by the decedent or the birth of any children of whom he could be the father. Mr. Seddio testified that he had known the decedent for approximately 30 years. He had discussions about family with the decedent, but the decedent never mentioned having a spouse or children. Mr. Seddio had also visited the decedent's home and saw no evidence of anyone else residing with the decedent. Mr. Seddio recalled a Christmas event for children which was attended by the decedent, but to which the decedent brought no children. Through the course of his relationship with the decedent, Mr. Seddio would see him approximately once a week, the decedent never mentioned any spouse or children. Finally, Mr. Seddio attended the decedent's funeral at which no one presented themselves as the decedent's spouse or child.

Witness Anthony Cilibrasi testified that he knew the decedent since he was 15 years old and that their relationship was close enough that decedent was a member of Mr. Cilibrasi's wedding party. Mr. Cilibrasi had

discussions with the decedent about getting married and that he suggested the decedent should "settle down," but the decedent would not agree with Mr. Cilibrasi's suggestions. Mr. Cilibrasi testified that he never knew the decedent to have a spouse or any children. He spoke with the decedent over the phone on a weekly basis.

Louis Spagnuolo testified that he had known the decedent for approximately 40 years and that during the last few years of decedent's life, he saw him on a daily basis. Mr. Spagnuolo testified that he would work on his boat with the decedent and often said that he, Mr. Spagnuolo, regretted not having any children who could help him with the boat's upkeep. He testified that the decedent never mentioned having any kids of his own during these conversations. Mr. Spagnuolo testified that to his knowledge, the decedent had no children or spouse.

The GAL has filed his report and recommendation. The GAL notes that the objectants submitted an "exhaustive set of genealogical records in support of their claims . . ." The GAL also noted in his report that the objectants offered "compelling proof" that they are issue of the same grandparents as the decedent. However, the GAL asserts that the objectants never proved that decedent had no spouse or children because he never affirmatively stated that fact to the witnesses. In light of the GAL's concerns that there may exist a class of persons closer in degree of kinship than the objectants, the Court, in a decision dated December 16, 2014, deferred a final decision on this matter until after March 1, 2015, at which time three years would have elapsed since decedent's death and SCPA 2225(b) would be applicable to this estate. That time has now come.

Based on the foregoing, the Court determines that the decedent was survived by the following maternal kin: Margaret Tindell, George A. D'Amore, Mary Ann Bradley, Joseph F. Mariano, Frank Mariano, Angelo D'Amore, Angelo A. D'Amore, Sal A. Nastro, Frederick D'Amore, James D'Amore, Theresa D'Amore Stoeber, Mary Ann D'Amore, Angela D'Amore Mikhael, Matthew R. D'Amore, and David J. D'Amore. Additionally, the decedent was survived by the following paternal kin: Laura Carrara, Charles Matteo, and Joseph Matteo.

The fees of the GAL have been fixed and determined pursuant to the standards enumerated in *Matter of Potts*, 213 A.D. 59, 209 N.Y.S. 655 (4th Dep't 1925), *aff'd* 241 N.Y. 593 (1925) and *Matter of Freeman*, 40 A.D.2d 397, 341 N.Y.S.2d 511 (4th Dep't 1973).

Settle decree.

Dated: March 10, 2015

Hon. Margarita Lopez Torres
SURROGATE

E. Compromise Proceeding - Guardian Ad Litem's Report

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

SURROGATE'S COURT,
KINGS COUNTY
RECEIVED
DATE. 4/14/16

-----X
In the Matter of the Petition of Yon Motskin,
as Administrator of the Estate of

MICHAL SHEMESH MOTSKIN,

REPORT AND RECOMMEN-
DATIONS OF G.A.L.

Deceased,

File No. 2011-4003/A

for leave to compromise and settle certain causes of
action for wrongful death and conscious pain and suffering
of the Decedent and for the Judicial Settlement of the
Account with respect to the proceeds.
-----X

To the Surrogate's Court, County of Kings:

I, Thomas Sciacca, an Attorney admitted to the practice of law in the Courts of the
State of New York, as Guardian Ad Litem in the above-captioned proceeding, respectfully
report as follows:

APPOINTMENT AS GUARDIAN AD LITEM

1. I received my appointment as Guardian Ad Litem in this proceeding by Order of the
Hon. Margarita López Torres dated January 12, 2016. I filed my appearance and
consent, along with the requisite UCS-872 form, with the Court on or about February
2, 2016. I served my Notice of Appearance the same day.
2. I am appearing as Guardian Ad Litem for the benefit of (1) Roman Motskin and (2)
Mia Motskin ("my wards"), both of whom are the minor children of Michal Shemesh
Motskin ("the Decedent").
3. I have no adverse interest to, or conflict with, my wards, and I am neither related to,
nor connected in business with, any party or attorney in this proceeding.

NATURE OF PROCEEDING

4. Yon Motskin, as Limited Administrator of the Decedent's Estate ("Petitioner") commenced this proceeding in the Kings County Surrogate's Court by Petition verified October 19, 2015.
5. Petitioner seeks a Decree of this Court (1) removing the restrictions on his Letters of Limited Administration, thus allowing him to accept a settlement offer for the underlying lawsuit; (2) allocating the settlement proceeds between the causes of action for wrongful death and the conscious pain and suffering of the Decedent; (3) allocating the net settlement proceeds among the appropriate parties; (4) judicially settling his account as Administrator; and (5) other related relief.
6. Petitioner amended his Petition by attorney Affirmation dated March 23, 2016 to amend the portion of the relief requested to request that the Court approve a higher distribution amount to my ward. As discussed below, Petitioner made this amendment at my request.
7. I have had extensive conversations with Petitioner's counsel, and I do not anticipate any amendments to the Petition.
8. No party has filed any objections to the relief requested in the Petition.
9. Since the inception of this matter, only two parties have appeared: (1) Petitioner, and (2) the undersigned, as Guardian Ad Litem for my wards. I do not anticipate any further appearances.

VENUE & JURISDICTION

10. At the time of her death, Decedent resided in, Brooklyn, New York. Further, this Court previously issued Letters of Limited Administration to the Petitioner. Therefore, this Court is the proper venue for this proceeding.

11. Petition (¶ 35) lists the following interested parties to this proceeding: (1) Petitioner, both as a distributee and as my wards' parent¹; (2) my wards, as distributees; and (3) the New York State Department of Taxation and Finance – a statutory party and possible creditor of the Estate.

12. This Court obtained jurisdiction over the necessary parties in the following manner:

- a. Petitioner. Petitioner has appeared and consented to the jurisdiction of this Court by filing the Petition.
- b. Wards. My wards are both minors under the age 14, and are not entitled to service of process. They reside with the Petitioner, who has appeared herein and consented to the jurisdiction of this Court.
- c. Tax Department. The New York State Department of Taxation and Finance has filed a Waiver and Consent in this matter dated October 29, 2015.

13. Therefore, I believe that this Court has jurisdiction over all necessary parties to this proceeding.

WARDS' INTEREST IN THE ESTATE & CAUSES OF ACTION

14. Petitioner proposes settling the underlying action for four million six hundred thousand dollars (\$4,600,000.00).

15. Of that settlement, Petitioner proposes that this Court allocate the first million dollars (\$1,000,000.00) to the cause of action for the Decedent's conscious pain and suffering, and the remaining three million six hundred thousand dollars (\$3,600,000.00) to the cause of action for the wrongful death of the Decedent. For

¹ Petitioner does not hold Letters of Guardianship for either of my wards. As the proposed settlement does not call for pre-majority distributions to my wards, Letters of Guardianship will be unnecessary if this Court grants the relief requested in the Petition.

the wrongful death proceeds, Petitioner proposes distribution in accordance with the Kaiser formula.

16. Based on my review of this file, I believe that the Decedent likely endured a significant amount of pain and suffering for approximately thirty (30) hours before her death.

Putting such a precise dollar figure on pain and suffering can be problematic.

17. However, allocating such a large portion (21.7%) of the settlement to the cause of action for conscious pain and suffering would provide one of my wards with less total funds than allocation entirely to wrongful death. I have prepared a spreadsheet illustrating this, which I annex hereto as Exhibit A. As shown in Exhibit A, Petitioner's proposal would yield the following disparate results:

- a. Petitioner would receive \$8,889.16 more than he would by allocating the entire settlement to the wrongful death claim;
- b. my older ward would receive \$7,315.47 more than he would by allocating the entire settlement to the wrongful death claim; and
- c. my younger ward would receive \$16,204.63 less than she would by allocating the entire settlement to the wrongful death claim.

18. I raised this issue with Petitioner's counsel, and Petitioner has agreed to reduce his share of the wrongful death settlement by \$16,204.63 to allow the Court to increase the distribution to my younger ward by this same amount. The net result is that (1) my older ward still fares better than he would by allocating the entire settlement to the cause of action for the Decedent's wrongful death, and (2) my younger ward is not financially prejudiced by the proposed allocation because she receives exactly what she would by allocating all to wrongful death.

19. The attorney's Affirmation amending the Petition dated March 23, 2016 asks the Court to approve this proposed distribution; I join in the Petitioner's request.

FUNERAL CREDITORS

20. Petitioner reports at ¶ 31 of the Petition that he has paid all funeral expenses totaling \$9,933.05, and states that he does not seek reimbursement for same.

STATUTORY COMMISSIONS: § 2307

21. In his Account at ¶ 7, Petitioner waives his right to seek statutory commissions.²

SETTLEMENT OF LAWSUIT

22. Petitioner currently has an offer to settle the pending litigation for four million six hundred thousand dollars (\$4.6 million).

23. Based upon my review of the Petitioner's papers and telephone conferences with his attorneys, I am satisfied that this settlement offer is fair and reasonable. I respectfully recommend that this Court allow Petitioner to accept it.

PRE-MAJORITY DISTRIBUTIONS TO WARDS

24. After deducting the various fees and expenses against the settlement amount, both of which receive in excess of \$10,000.00 apiece. This exceeds the amount that could be distributed to a parent pursuant to SCPA § 2220(1).

25. However, Petitioner proposes using all funds payable to my wards (from both causes of action) to purchase structures (annuities) for them, which delay payments until after they reach the age of majority. They will receive two distributions of the entire funds, plus interest, in the months following their respective eighteenth birthdays. I have no opposition to this proposal.

² This statement appears only in the Account; Petitioner does not address this in his Verified Petition.

ATTORNEYS' FEES AND DISBURSEMENTS

26. It should be noted that, as minors, my wards were unable to join into the Letter of Engagement between Petitioner and his litigation counsel.
27. In determining a request to pay attorney's fees, this Court may approve any amount they find fair and reasonable. Thus, this Court may also lower the requested legal fee if it so chooses: "As a result, the courts will often approve attorneys' fees that are less than provided for in the contingent fee agreement. In such cases, only those distributees who, as competent adults, consented to the contingent fee retainer agreement will be bound to pay their proportionate share of attorneys' fees set forth in the retainer agreement." WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 124.13[4][d] (LexisNexis 2009)(emphasis added)(citations omitted).
28. In fact, this Court has considered this issue before. In Estate of Agront, this Court allowed litigation counsel full payment of their contingent legal fee provided that such payment constituted full and final payment for all legal services rendered, including the Surrogate's Court proceedings after the issuance of Letters. See Estate of Agront, New York Law Journal, Sept. 29, 2004, at 29 (Surr. Ct. Kings Co.)(Feinberg, J.). I have attached a copy of this decision to my Report as Exhibit B.
29. Any legal fees this Court awards will directly reduce my ward's distribution dollar-for-dollar. Therefore, to the extent that this Court wishes to award the full legal fees requested, I respectfully request that it stipulate that these fees include full compensation for all legal services rendered, including this Petition, and completion of the work through Decree/Order and distribution.

30. I have no objection to proposed legal fees. I respectfully recommend that this Court approve the requested legal fees for Petitioner's counsel.

31. Petitioner's counsel also seeks reimbursement for expenses in this matter. Petitioner's counsel has provided me with a detailed list of their disbursements. I have no exception to any of the disbursements, nor do I think any of them are barred by applicable law. See Matter of Diamond, 219 A.D.2d 717 (2d Dep't 1995).

32. Therefore, I recommend that this Court approve disbursements to Petitioner's counsel in the amount of \$29,897.00.

THE ACCOUNTING

33. I have reviewed Petitioner's accounting, and have no objection to same.

34. I approve Petitioner's accounting with the Summary Statement included therein.

RECOMMENDATIONS

35. I respectfully make the following recommendations to the Court:

- a. Except as noted otherwise, I have no objection on behalf of my wards to the Petition, or any of the relief requested therein.
- b. I recommend that this Court modify the restrictions on Limited Letters of Administration and allow Petitioner to settle the litigated matter for \$4.6 million, and allow Petitioner to execute any and all necessary documents to facilitate such settlement.
- c. I recommend that this Court allocate the first \$1 million of the settlement amount to the cause of action for the Decedent's conscious pain and suffering, and allocate the remaining \$3.6 million to the cause of action for the wrongful death of the Decedent.

- d. I recommend that this Court approve Petitioner's legal fees in the requested amount of \$607,010.00. I recommend that this Court approve reimbursement of disbursements to Petitioner's counsel in the amount of \$29,897.00.
- e. I recommend that this Court judicially settle Petitioner's account, as filed and as amended by the Affirmation dated March 23, 2016.
- f. I recommend that this Court distribute the net proceeds among Petitioner and my wards in the percentages described in the Petition as amended by the Affirmation dated March 23, 2016.
- g. I recommend that this Court approve the proposed structures providing for post-majority payouts to my ward, as described in the Petition and as amended by the Affirmation dated March 23, 2016.
- h. I recommend that this Court dispense with the filing of a bond, as my wards' shares will be paid directly to financial firms to fund the structures described above.

REQUEST FOR COMPENSATION

36. As of the date of this Report, I have expended 5.5 hours on this matter, excluding any time I spent in preparing my *Affirmation of Legal Services*. Based on my current hourly rates, my regular and customary fee for these services would be \$2,117.50. I respectfully request compensation in this amount.
37. I have attached my *Affirmation of Legal Services*, with detailed time records annexed, to this *Report* as Exhibit C.
38. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

Dated: New York, New York
April 13, 2016

Yours, etc.:

A handwritten signature in cursive script, reading "Thomas Sciacca". The signature is written in dark ink and is positioned above the printed name and title.

THOMAS SCIACCA
Guardian Ad Litem

LAW OFFICES OF THOMAS SCIACCA, PLLC
44 Wall Street - 10th Floor
New York, NY 10005
(212) 495-0317
(646) 349-5795 fax
tom@sciaccalaw.com

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
In the Matter of the Petition of Yon Motskin,
as Administrator of the Estate of

MICHAL SHEMESH MOTSKIN,

PROOF OF SERVICE

Deceased,

File No. 2011-4003/A

for leave to compromise and settle certain causes of
action for wrongful death and conscious pain and suffering
of the Decedent and for the Judicial Settlement of the
Account with respect to the proceeds.
-----X

Thomas Sciacca, an attorney-at-law duly admitted to the practice of law before the
Courts of the State of New York, hereby affirms the following under penalties of perjury:

1. On April 13, 2016, I served the within *Report & Recommendations of Guardian Ad Litem* (with all exhibits annexed thereto, including my *Affirmation of Legal Services*) via first class mail, by depositing the same in an official depository under the exclusive care and custody of the United States Postal Service within the County, City, and State of New York, addressed to the following person at the last known address set forth after the name:

- Carmine A. Rubino, Esq., Kramer, Dillof, Livingston, & Moore, Esqs., 217 Broadway, New York, NY 10007.

Dated: New York, New York
April 13, 2016


THOMAS SCIACCA

Exhibit A

\$4,600,000.00	Gross settlement
(\$607,010.00)	Less requested legal fees
(\$29,897.00)	Less requested disbursements
\$0.00	Requested commissions
\$0.00	Requested funeral reimbursement - waived at para. 31
<u>\$3,963,093.00</u>	TOTAL FOR DISTRIBUTION

All to wrongful death

\$2,055,656.34	51.87% to spouse
\$899,622.11	22.70% to Roman Motskin
<u>\$1,007,814.55</u>	25.43% to Mia Motskin
<u>\$3,963,093.00</u>	

All via Intestacy

(\$25,000.00) First \$25k as family exempt to spouse 5-3.1(a)(6)

(\$50,000.00) First \$50k as intestate share to spouse

\$3,888,093.00 Avail. under intestacy

\$2,019,046.50 50% to spouse as intestate share (figure includes =\$75k)

\$972,023.25 25% of residue to Roman Motskin

\$972,023.25 25% of residue to Mia Motskin

\$3,963,093.00

Proposal - \$1MM Intestacy; balance w/d

\$1,608,774.50	w/d to spouse, per pet @ 27
\$704,052.08	w/d to RM, per pet @ 27
\$788,724.42	w/d to MM, per pet @ 27
\$455,771.00	Intestate to spouse, pet pet @ 29 (does not take fam exmpt)
\$202,885.50	Intestate to RM, pet pet @ 29
<u>\$202,885.50</u>	Intestate to MM, pet pet @ 29
<u>\$3,963,093.00</u>	

\$906,937.58 Total to RM under proposal

\$991,609.92 Total to MM under proposal

\$2,064,545.50 Total to spouse under proposal

\$2,064,545.50 SPOUSE - proposed

\$2,019,046.50 SPOUSE - intestacy

\$2,055,656.34 SPOUSE - w/d

\$906,937.58 RM - proposed

\$972,023.25 RM - intestacy

\$899,622.11 RM - w/d

\$991,609.92 MM - proposed
\$972,023.25 MM - intestacy
\$1,007,814.55 MM - w/d

\$8,889.16 SPOUSE - gain under proposal vs. all to w/d
\$7,315.47 RM - gain under proposal vs. all to w/d
(\$16,204.63) MM - loss under proposal vs. all to w/d

New York Law Journal
Volume 231

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Wednesday, September 29, 2004
Decisions

SURROGATE'S COURT DECISION
Kings County Surrogate's Court

Surrogate Feinberg

ESTATE OF JUAN ALBERTO AGRONT, deceased This is an application by petitioner, the administratrix of the decedent's estate, to compromise a cause of action for conscious pain and suffering and wrongful death of the decedent. Petitioner also seeks a determination of the identity of the decedent's distributees.

The decedent, Juan Alberto Agront, died intestate on April 24, 1996, in a collision with a truck while he was riding his bicycle. At the time of his death, he was allegedly survived by a non-marital infant.

EPTL 4-1.2(a)(2)(c) provides that a non-marital child is the legitimate child of his father so that he can inherit from the father if "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own."

After hearings held before a court attorney-referee, paternity was established by clear and convincing proof and that the decedent openly and notoriously acknowledged that he was the father of the non-marital infant, John Sebastian Agront. The proof further shows that this infant is the decedent's only issue and sole distributee of this estate.

With respect to petitioner's request to settle the cause of action, the entire settlement in the sum of \$180,000.00 is hereby approved and allocated to the cause of action for wrongful death.

The restrictions in the limited letters of administration issued to petitioner on January 20, 1998, are hereby removed and bond is dispensed with. Petitioner is authorized to collect the proceeds including the \$2,000 no-fault death benefit and to execute any instruments necessary to effectuate the settlement.

Petitioner shall be allowed full statutory commissions for her services as administratrix of decedent's estate.

Attorney's fees are allowed in the sum of \$59,282.26 for all legal services including kinship hearings, the appointment of a guardian of the property of the infant, and shall include all services to be rendered through final decree and distribution. Disbursements are allowed in the sum of \$2,153.22 as requested.

The New York State Department of Taxation and Finance has appeared and does not oppose the relief requested.

The guardian ad litem appointed by the court to protect the interests of the infant filed his final report recommending the settlement and allocation as in the best interest of his ward.

Accordingly, the net proceeds of the settlement and the \$2,000.00 no-fault death benefit shall be distributed to John Sebastian Agront (EPTL 5-4.4), payable to the guardian of his property, for deposit jointly with the Clerk of the Court.

Settle decree.

9/29/2004 NYLJ 29, (col. 2)

END OF DOCUMENT

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
In the Matter of the Petition of Yon Motskin,
as Administrator of the Estate of

MICHAL SHEMESH MOTSKIN,

AFFIRMATION OF LEGAL
SERVICES BY G.A.L.

Deceased,

File No. 2011-4003/A

for leave to compromise and settle certain causes of
action for wrongful death and conscious pain and suffering
of the Decedent and for the Judicial Settlement of the
Account with respect to the proceeds.
-----X

THOMAS SCIACCA, an Attorney admitted to the practice of law in the Courts of the
State of New York, as Guardian Ad Litem in the above-captioned proceeding, hereby affirms
the following, under penalties of perjury:

1. I am the Guardian Ad Litem appointed in this matter for the benefit of the minor distributees of this Estate.
2. I am an attorney experienced in the field of Trusts & Estates, and have been engaged in the active practice of law in this field for the past twelve years. Over ninety (90%) percent of my practice is dedicated to Trusts & Estates.
3. I have received many appointments as Guardian Ad Litem in the Surrogate's Court in Kings, Bronx, and New York Counties in the past nine years.
4. I regularly attend CLE courses offered on Surrogate's Court practice offered by the County and State bar associations. I have also served as faculty on multiple CLE courses on Trusts & Estates topics.
5. I am a May 2010 graduate of New York University School of Law, having received my LL.M. in Taxation. I received my J.D. from Pace University in May 2003.

6. I am also an Assistant Adjunct Professor at New York University's School of Continuing and Professional Studies, where I teach law related topics.
7. As Guardian Ad Litem, I submitted a *Report* dated April 13, 2016. The *Report* details the various activities I undertook in completing my duties.
8. As of the date of this *Report*, I have expended 5.5 hours on this matter, no part of which is attributable to preparing this *Affirmation of Legal Services*. I have annexed my detailed and contemporaneous time records to this *Affirmation of Legal Services* for the Court's review.
9. My customary hourly rate is \$385.00 per hour; my normal fee for these services would be \$2,117.50. I respectfully request that this Court award me compensation in this amount.
10. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

Dated: New York, New York
April 13, 2016

Yours, etc.:

A handwritten signature in cursive script, reading "Thomas Sciacca", enclosed within an oval-shaped flourish.

THOMAS SCIACCA
Guardian Ad Litem

INVOICE

Invoice # 1224
Date: 04/13/2016
Due Upon Receipt

Law Offices of Thomas Sciacca, PLLC

44 Wall Street Fl 10
New York, New York 10005
www.sciaccalaw.com

E/O Michal Motskin (GAL appointment)

Compromise proceeding (2011-4003/A)

Type	Date	Attorney	Description	Hours	Rate	Total
Service	02/02/2016	TS	prepared Notice of Appearance; drafted letter to Petitioner's counsel requesting information necessary to review and prepare report.	0.80	\$385.00	\$308.00
Service	02/29/2016	TS	File review: thorough review of papers submitted by Petitioner's counsel.	1.40	\$385.00	\$539.00
Service	02/29/2016	TS	Research: reviewed Kalser distribution pattern against proposal in Petition. Calculations. Determined Petitioner and elder ward receive more under proposal than by allocating all to w/d; while younger ward gets less. E-mail to Petitioner's counsel asking for clarification and raising questions.	0.70	\$385.00	\$269.50
Service	03/07/2016	TS	E-mail: w/ Petitioner's counsel RE: responses to GAL questions; allocation between wrongful death and conscious pain and suffering.	0.20	\$385.00	\$77.00
Service	03/08/2016	TS	Telephone call: w/ Petitioner's counsel RE: issues on proposed allocations.	0.30	\$385.00	\$115.50
Service	03/08/2016	TS	Telephone call: from Petitioner's counsel RE: justification for allocating \$1MM to cause of action for conscious pain and suffering; difference in payment to younger ward	0.30	\$385.00	\$115.50

Service	04/13/2016	TS	Correspondence: reviewed Affirmation Amending Petition submitted by Counsel; confirmed that figures relate to my proposal and are in wards' best interests	0.60	\$385.00	\$231.00
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Service	04/13/2016	TS	Drafting - litigation: drafted GAL Report.	1.20	\$385.00	\$462.00
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Time Keeper	Position	Hours	Rate	Total
Thomas Sciacca	Principal	5.5	\$385.00	\$2,117.50
			Subtotal	\$2,117.50
			Total	\$2,117.50

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1224	04/13/2016	\$2,117.50	\$0.00	\$2,117.50
			Outstanding Balance	\$2,117.50
			Total Amount Outstanding	\$2,117.50

Please make all amounts payable to: Law Offices of Thomas Sciacca, PLLC

Payment is due upon receipt.

F. Probate Proceeding – Guardian Ad Litem’s Report

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Probate Proceeding, Will of

RIA CHARISSE,
a/k/a CHARISSE SCHELLINGER,

REPORT/RECOMMENDATION
OF GUARDIAN AD LITEM

Deceased.

File No. 2013-4684

-----X
TO THE SURROGATE'S COURT, COUNTY OF KINGS:

I, THOMAS SCIACCA, an Attorney admitted to the practice of law in the Courts of the State of New York, as Guardian Ad Litem in the above-captioned probate proceeding, respectfully report as follows:

APPOINTMENT AS GUARDIAN AD LITEM

1. I received my appointment as Guardian Ad Litem in this proceeding by Order of the Hon. MARGARITA LÓPEZ TORRES dated February 10, 2014. Thereafter, I filed my appearance and consent, along with the requisite UCS-872 form, in the Probate Department on or about March 4, 2014. I served my Notice of Appearance the same day.
2. I am appearing as Guardian Ad Litem for the benefit SKYLER KIM SCHELLINGER ("my ward"). My ward is the infant daughter of RIA CHARISSE, a/k/a CHARISSE SCHELLINGER ("the Decedent").
3. I have no adverse interest to, or conflict with, my ward, and I am neither related to, nor connected in business with, any party or attorney in this proceeding.

NATURE OF PROCEEDING / SUMMARY OF PLEADINGS

4. Petitioner, RICHARD KIM ("the Petitioner") commenced a probate proceeding in the Kings County Surrogate's Court, by filing a Petition verified on December 7, 2013.

5. In his Petition, Petitioner requests that this Court (1) probate of a paper writing dated November 27, 2013 as the Last Will and Testament of the Decedent; (2) issue Letters Testamentary to the Petitioner, to serve without bond; and (3) issue Letters of Trusteeship to Petitioner and ANNE PROSSER, also to serve without bond.
6. On December 7, 2013, Petitioner also applied to this Court for Preliminary Letters Testamentary. Petitioner's counsel has advised me that this Court issued Preliminary Letters Testamentary to the Petitioner on or about March 7, 2014. Upon information and belief, Preliminary Letters Testamentary remain in full force and effect.
7. I do not anticipate any further supplements or any amendments to the Probate Petition.
8. As of the writing of this Report, no party has filed objections to probate. I do not anticipate objections to probate.
9. On March 12, 2014, Petitioner commenced a proceeding continue the Decedent's business, which is currently pending before the Court. As that matter is pending as a separate proceeding, I do not address it herein.

JURISDICTION

10. The decedent resided in Kings County at the time of her death, domiciled at 1670 Eighth Avenue, Brooklyn, New York. Therefore, this Court is the proper venue for the probate proceeding.

11. Petitioner lists two interested parties to the proceeding in ¶ 6 of her Petition: (1) the Petitioner, who is my ward's surviving parent; and (2) my ward. This Court gained jurisdiction over the interested parties in the following manner:

- a. This Court has jurisdiction over the Petitioner by virtue of filing the Petition.
- b. As my ward is currently nine years of age and resides with the Petitioner, service of a Citation is not required upon her pursuant to SCPA § 309(3).

12. Therefore, this Court has jurisdiction over all necessary parties.

PROPOUNDED INSTRUMENT & INTEREST OF WARD

13. Petitioner propounds a paper writing dated November 24, 2013 for probate. The propounded instrument is dated three days before the Decedent died.

14. The propounded instrument is regular on its face. It contains both an attestation clause and a self-proving Affidavit.

15. In the propounded instrument, the Decedent leaves her car and a 20% interest in her real property to the Petitioner. She further leaves the balance of her Estate to my ward, in trust, until her twenty-fifth birthday. The Trustees may make discretionary invasions for her benefit prior to that date.

16. My ward is the sole distributee of the Decedent. Had the Decedent died intestate, my ward would have received her entire Estate.

17. In his Application for Preliminary Letters Testamentary, Petitioner estimates the gross value of the Estate assets at approximately \$745,000.00. Therefore, had the Decedent died intestate, my ward would be entitled to this entire amount. Of course, this share would be reduced by estate taxes, expenses of administration, and the Decedent's debts).

18. As the Decedent was unmarried at the time of her death, my ward is also entitled to the family exempt property described in EPTL § 5-3.1(a). This includes tangibles, cash, and automobiles. As my ward is already receiving the entire Residuary Estate in her testamentary trust, I decline to insist that the cash sum is paid to her as family exempt property. At my request, the Petitioner has signed an acknowledgement that the car is family exempt property. I annex a copy of this acknowledgement hereto as Exhibit A.

DUE EXECUTION; LACK OF FRAUD / UNDUE INFLUENCE

19. The propounded instrument is supervised by an attorney, and, as such, is entitled to a presumption of due execution. See Matter of Finocchio, 270 A.D.2d 418 (2d Dep't 2000). It also has a self-proving affidavit attesting to same.

20. Given the fact that my ward's testamentary trust receives substantially the entire probate estate, I decline to pursue filing objections to probate on my ward's behalf. My ward is a minor, and depositing these funds in a testamentary trust is in her best interests.

21. Therefore, I have no objections to this Court admitting the propounded instrument to probate as the Decedent's Last Will and Testament.

REQUEST FOR COMPENSATION

22. As of the date of this Report, I have expended 3.6 hours on this matter. My *Affirmation of Legal Services* (with contemporaneous time records) is annexed hereto as Exhibit B.

23. My customary hourly rate is \$325.00 per hour. Therefore, my normal fee for these services would be \$1,170.50. I respectfully request that this Court award me compensation in this amount.

24. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

WAIVER OF NOTICE OF SETTLEMENT

25. I hereby waive notice of settlement of the Decree herein, and consent to this Court entering a Decree Granting Probate without further notice to me.

RECOMMENDATION

26. Based on the review of the probate file and conversations with the Petitioners' attorney, I respectfully recommend that:

- a. this Court admit the propounded instrument to probate as the Last Will and Testament of the Decedent;
- b. this Court grant Letters Testamentary in favor of the Petitioner, allowing him to serve without posting bond;
- c. this Court issue Letters of Trusteeship to the Petitioner and ANNE PROSSER, allowing them to serve without posting bond; and
- d. this Court revoke Preliminary Letters Testamentary previously issued to the Petitioner, and discharge and Preliminary Executor's bond filed with the Court, if any.

Dated: New York, New York
April 30, 2014

Yours, etc.:

A handwritten signature in black ink, reading "Thomas Sciacca". The signature is fluid and cursive, with the first name "Thomas" and last name "Sciacca" clearly distinguishable.

THOMAS SCIACCA
Guardian Ad Litem

LAW OFFICES OF THOMAS SCIACCA, PLLC
44 Wall Street - 10th Floor
New York, NY 10005
(212) 495-0317
(646) 349-5795 fax
tom@sciaccalaw.com

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Probate Proceeding, Will of

RIA CHARISSE,
a/k/a CHARISSE SCHELLINGER,

PROOF OF SERVICE

Deceased.

File No. 2013-4684

-----X
THOMAS SCIACCA, an attorney-at-law duly admitted to the practice of law before the Courts of the State of New York, hereby affirms the following under penalties of perjury:

1. On April 30, 2014, I served the within *Report & Recommendations by Guardian Ad Litem* (with all exhibits annexed thereto, including my *Affirmation of Legal Services*) via first class mail, by depositing the same in an official depository under the exclusive care and custody of the United States Postal Service within the County, City, and State of New York, addressed to the following person at the last known address set forth after the name:
 - Jay Rubin, Esq., Jay Rubin, PC, 17 Deane Place, Larchmont, NY 10538.

Dated: New York, New York
April 30, 2014


THOMAS SCIACCA

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PROBATE PROCEEDING, Will of

RIA CHARISSE
aka CHARISSE SCHELLINGER

Deceased

ACKNOWLEDGMENT OF
RICHARD KIM REGARDING
FAMILY EXEMPT
PROPERTY

File No.: 2013-4684/A

I, RICHARD KIM, state as follows,

1. I am the legatee of a Honda Element motor vehicle under Article THIRD of the Will submitted for probate in this proceeding.
2. The decedent and I were not married at the time of her death.
3. I am the father of SKYLER KIM SCHELLINGER ("Skyler"), the child of the decedent who is a minor (date of birth October 29, 2004).
4. I hereby acknowledge that, pursuant to EPTL §5-3.1 (a) (5), Skyler is entitled to such property.
5. Skyler and I reside together at 1670 Eighth Avenue, Brooklyn, NY.
6. On information and belief the value of the motor vehicle does not exceed \$10,000.00.
7. As Skyler's father and pursuant to SCPA § 2220 I understand that I may receive this property for the use and benefit of Skyler.
8. I further acknowledge and agree that should this motor vehicle be in my possession upon Skyler's 18th birthday (October 29, 2022) that I will transfer such vehicle to her, or if the motor vehicle is sold by me prior to that date, any proceeds from such sale shall be added to the corpus of the Trust for Skyler's benefit under Article FOURTH of the Will.

4/23/14
Dated


RICHARD KIM

Exhibit B

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
Probate Proceeding, Will of

RIA CHARISSE,
a/k/a CHARISSE SCHELLINGER,

Deceased.
-----X

AFFIRMATION OF LEGAL
SERVICES BY G.A.L. _____

File No. 2013-4684

THOMAS SCIACCA, an Attorney admitted to the practice of law in the Courts of the State of New York, as Guardian Ad Litem in the above-captioned proceeding, hereby affirms the following, under penalties of perjury:

1. I am the Guardian Ad Litem appointed in this matter for the benefit an infant distributee of the Decedent.
2. I am an attorney experienced in the field of Trusts & Estates, and have been engaged in the active practice of law in this field for the past ten years. Over ninety (90%) percent of my practice is dedicated to Trusts & Estates.
3. I have received many appointments as Guardian Ad Litem in the Surrogate's Court in Kings, Bronx, and New York Counties in the past nine years.
4. I regularly attend CLE courses offered on Surrogate's Court practice offered by the County and State bar associations. I have also served as faculty on multiple CLE courses on Trusts & Estates topics.
5. I am a May 2010 graduate of New York University School of Law, having received my LL.M. in Taxation. I received my J.D. from Pace University in May 2003.
6. I am also an Assistant Adjunct Professor at New York University's School of Continuing and Professional Studies, where I teach law related topics.

7. As Guardian Ad Litem, I submitted a *Report* dated April 30, 2014. The *Report* details the various activities I undertook in completing my duties.
8. As of the date of this *Report*, I have expended 3.6 hours on this matter, no part of which is attributable to preparing this *Affirmation of Legal Services*. I have annexed my detailed and contemporaneous time records to this *Affirmation of Legal Services* for the Court's review.
9. My customary hourly rate is \$325.00 per hour; my normal fee for these services would be \$1,170.00. I respectfully request that this Court award me compensation in this amount.
10. I am willing to accept compensation for my services as Guardian Ad Litem in any amount this Court deems just and proper.

Dated: New York, New York
April 30, 2014

Yours, etc.:

A handwritten signature in black ink, appearing to read "Thomas Sciacca", written over a horizontal line.

THOMAS SCIACCA
Guardian Ad Litem

Law Offices of Thomas Sciacca, PLLC

44 Wall Street - Fl. 10
New York, NY 10005
www.sciaccalaw.com

212-495-0317

Estate of Ria Charisse
GAL appointment
[rate/fee subject to Court approval]

April 30, 2014
Invoice # 468

Billing for: to

Client ID 0309

Professional Services

		<u>Hours</u>	<u>Amount</u>
3/4/2014	TS Rec'd and rev'd notice of appointment, brief review of file in Record Room	0.30	97.50
	TS Drafted Notice of Appearance & UCS-872 form	0.60	195.00
	TS Admission and service and notice of settlement for Preliminary Letters	0.10	32.50
	TS Letter to Petitioner's counsel	0.40	130.00
4/21/2014	TS Thorough review of all papers submitted by Petitioner's counsel	0.80	260.00
4/22/2014	TS Tel w/ Petitioner's counsel RE: Decedent's car as family exempt property	0.20	65.00
4/30/2014	TS Drafted GAL Report.	1.20	390.00
Total for professional services rendered		3.60	\$1,170.00
Balance due			<u>\$1,170.00</u>

Billing Summary

Total for services rendered	\$1,170.00
Total expenses	\$0.00
Total interest and finance charges	\$0.00

Please make checks payable to "THOMAS SCIACCA, PLLC." Thank you for your business!

Law Offices of Thomas Sciacca, PLLC

Client ID 0309

Page 2

Estate of Ria Charisse

April 30, 2014

Total payments and other transactions	\$0.00
Total previous balance	\$0.00
Balance Due	\$1,170.00

**G. Affidavit of Heirship – Kings County
Form**

Note: This affidavit must be from a disinterested party; It must not be from the petitioner, a distributee, or the spouse or child of a distributee.

**SURROGATES'S COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

-----X
Administration Proceeding

AFFIDAVIT OF HEIRSHIP

Estate of

File No. _____

a/k/a

Deceased

-----X
STATE OF NEW YORK)

)ss:

COUNTY OF KINGS)

I _____, being duly sworn depose and say that am not a party to this action, am over eighteen years of age and my residence is _____

and my relationship to the decedent and the basis of my knowledge of the decedent's family tree is :

1. Was the decedent ever married? ☐ Yes ☐ No

If yes, state how many times and to whom. If any spouse or former spouse is deceased, also state their dates of death.

2. Was the decedent ever divorced? ☐ Yes ☐ No

If yes, state how many times, from whom and the dates of divorce.

3. Did the decedent have any marital children? ☐ Yes ☐ No

If yes, state their full names.

4. Were there any out-of-wedlock (non-marital) children? ☐ Yes ☐ No

If yes, state their full names.

5. Were there any adopted children? ☐ Yes ☐ No
If yes, state their full names.

6. Are any of the decedent's children deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

6a. If yes, state the full names of their children (*grandchildren of decedent*).
Indicate if any are adopted and/or out-of-wedlock.

6b. Are any grandchildren listed in 6a deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

6c. If yes for #6b, state the full names of their children (*great-grandchildren of decedent*).
Indicate if any are adopted and/or out-of-wedlock

PARENTS

**[STOP! PROCEED TO QUESTION 7 ONLY IF THE ANSWERS TO QUESTIONS
1 through 6b WERE ALL "NO" OR "NONE", OR IF THE DECEDENT WAS MALE AND SURVIVED
ONLY BY NON-MARITAL (OUT-OF-WEDLOCK) CHILDREN.]**
(Notarize this affidavit on page 4)

7. State the full names of the decedent's parents. (If deceased, state their dates of death.)

SIBLINGS, NIECES AND NEPHEWS

**[STOP! PROCEED TO QUESTIONS 8 AND 9 ONLY IF THE ANSWER
TO QUESTION 7 IS THAT THE DECEDENT'S PARENTS ARE PRE-DECEASED.]**
(Notarize this affidavit on page 4)

A FAMILY TREE DIAGRAM MUST BE INCLUDED IF THERE ARE ANY DISTRIBUTEES FROM THIS POINT ON

8. Did the decedent have any brothers and/or sisters? ☐ Yes ☐ No
(Include half-brothers, half-sisters, and adopted brothers and sisters.)
If yes, state their full names.

- 8a. Did the decedent's parents have any non-marital (out-of-wedlock) children? ☐ Yes ☐ No
If yes, state their full names.

9. Are any of the decedent's siblings deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

- 9a. State the full names of the children of each *deceased* sibling (*nieces and nephews of decedent*).
Indicate if any were non-marital (out-of-wedlock).

- 9b. Are any of the nieces or nephews listed in 9a deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

- 9c. State the full names of the children of each *deceased* niece and/or nephew (*grandnieces and grandnephews of decedent*). Indicate if any were non-marital (out-of-wedlock).

GRANDPARENTS

**[STOP! PROCEED TO QUESTIONS 10 AND 11 ONLY IF THERE ARE
NO PERSONS IN QUESTIONS 8 THROUGH 9b WHO ARE ALIVE.]**
(Notarize this affidavit on page 4)

10. State the names of the decedent's maternal grandparents? If deceased, also indicate their dates of death.
11. State the names of the decedent's paternal grandparents? If deceased, also indicate their dates of death.

AUNTS AND UNCLES AND COUSINS

**[STOP! PROCEED TO QUESTIONS 12 THROUGH 15 ONLY IF THERE
ARE NO PERSONS IN QUESTIONS 10 AND 11 WHO ARE ALIVE. (Attach additional rider sheets if necessary)]**

12. State the full names of the decedent's maternal aunts and maternal uncles.
Indicate, if any are adopted and/or non-marital (out-of-wedlock).

13. Are any maternal aunts or maternal uncles deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

13a. State the full names of the children of each of the deceased maternal aunts and/or maternal uncles (*maternal cousins of the decedent*). Indicate if any were non-marital (out-of-wedlock).

13b. Are any of the maternal cousins listed in 13a deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

14. State the full names of the decedent's paternal aunts and paternal uncles.
Indicate, if any are adopted and/or non-marital (out-of-wedlock).

15. Are any paternal aunts and/or paternal uncles deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

15a. State the full names of the children of each of the deceased paternal aunts and/or paternal uncles (*paternal cousins of the decedent*). Indicate if any were non-marital (out-of-wedlock).

15b. Are any of the paternal cousins listed in 15a deceased? ☐ Yes ☐ No
If yes, state their full names and dates of death.

Signature _____

Print your name _____

Sworn to before me this _____ day of _____ 20____

(Notary Public)

H. *Matter of Michelle M.* (Surrogate's Court,
Kings County July 22, 2016)

Matter of Michelle M.

[*1] Matter of Michelle M. 2016 NY Slip Op 51114(U) Decided on July 22, 2016
Surrogate's Court, Kings County López Torres, J. Published by New York State Law
Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will
not be published in the printed Official Reports.

Decided on July 22, 2016
Surrogate's Court, Kings County

Proceeding for the Appointment of a Guardian for Michelle M. Pursuant to SCPA Article
17-A

2014-XXXX

Lauren Mechaly, Esq.
(attorney for petitioners)
666 Fifth Avenue, 17th Floor
New York, NY 10103

Mental Hygiene Legal Services by Rebecca Kittrell, Esq.
(attorney for respondent)
888 Fountain Avenue
Brooklyn, NY 11208

Margarita Lopez Torres, J.

Nicole M. and Daniel M. (together, the petitioners) bring the instant petition seeking
guardianship of their daughter, Michelle M. (Michelle), pursuant to Article 17-A of the
Surrogate's Court Procedure Act.

Michelle is a vibrant and engaging thirty-four-year-old who enjoys an independent life.
Since 2008, Michelle lives in Brooklyn with two roommates in a supported apartment.
Taking pride in her culinary skills, Michelle enjoys grocery shopping and cooking for
herself and her roommates, and especially likes to use her mother's recipes. For the
past six years, until 2015, Michelle worked part-time at a cellular phone supply store.
She travels independently, using public transportation to go to work, run errands, and

meet friends. Michelle engages in vocational and recreational activities at a day habilitation program run by Ohel Bais Ezra, a social services agency that provides programs and services for individuals with developmental disabilities. Michelle sees her doctors on a regular basis, making and keeping her appointments with her physicians. She takes medicine daily for her thyroid and stores her medicine in her room. Michelle does banking at her local bank, where she deposits her checks and uses both online banking and the ATM machine to keep track of and access her money. In her spare time, Michelle likes to go shopping for clothes, get her nails done, spend time with her boyfriend, and invite friends over to her apartment. On the weekends, she may visit her parents in New Jersey. In the regular course of her everyday life, Michelle makes decisions about her employment, [*2]finances, health, interpersonal relationships, personal safety, and place of residence. Michelle is also an individual living with Down's Syndrome and diagnosed with an intellectual disability.

While acknowledging that Michelle is independent in her activities of daily living, the petitioners contend that Michelle is unable to make medical and other decisions relating to her welfare. A hearing was held on September 30, 2015, at which oral testimony was presented by Michelle, who was represented by Mental Hygiene Legal Services (MHLS),[FN1] and the petitioners, who were represented by counsel. In addition to testimony, certifications by Anna L., M.D., and Myriah R., Ph.D. (together, the certifications), as well as a psychological evaluation dated September 3, 2014, and Individualized Service Plans (ISP) from Ohel Bais Ezra for 2012, 2013, and 2014, were considered.[FN2] The certifications opine, in a conclusory manner, that "the respondent is mentally retarded [FN3] and in my opinion incapable of managing himself/herself and/or his/her affairs by reason of mental retardation . . . the respondent is not capable of understanding and appreciating the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and of reaching an informed decision in order to promote his/her own well being." Michelle scored a full scale IQ of 46 on the Stanford-Binet Intelligence Scales-5th Edition, placing her cognitive ability within the Moderate Intellectual Disability range, and a Vineland Adaptive Behavior Composite Standard Score of 33.

An affirmation from MHLS by Rebecca Kittrell, Esq., dated June 24, 2015, has been submitted. MHLS observed that the petitioners are actively involved in Michelle's life, that Michelle trusts the petitioners and often consults with them in her decision-making process, and, if the court were to determine that Michelle is in need of an Article 17-A

guardian, the petitioners would be appropriate. However, MHLS concludes that "there may be less restrictive means available to protect both Michelle and her family's interests, while maximizing Michelle's independence and autonomy." This court agrees.

Statutory Framework of Article 17-A

Article 17-A of the Surrogate's Court Procedure Act (Article 17-A) governs guardianship [*3]of persons who are intellectually [FN4] or developmentally disabled. An intellectually disabled person is defined by SCPA 1750 as a person who is permanently or indefinitely incapable of managing herself and/or her own affairs because of an intellectual disability. The condition must be certified by a licensed physician and a licensed psychologist, or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual disabilities. It must appear to the satisfaction of the court that the best interests of such person will be promoted by the appointment of a guardian. SCPA 1754 (5).

A developmentally disabled person is defined by SCPA 1750-a as a person who has an impaired ability to understand and appreciate the nature and consequences of decisions which result in an incapacity to manage himself and/or his own affairs. The developmental disability must be permanent or indefinite and attributable to cerebral palsy, epilepsy, neurological impairment, autism, traumatic brain injury, or any condition found to be closely related to intellectual disability. The condition must have originated before the age of twenty-two, except for traumatic brain injury which has no age limit. As with SCPA 1750, the condition must be properly certified by the appropriate healthcare professionals, and the court must determine that appointment of a guardian is in such person's best interest. SCPA 1754 (5). Regardless of whether an individual's disability is categorized under SCPA 1750 or SCPA 1750-a, the determination of the need for guardianship is functionally the same and relies upon the same body of law.

Unlike guardianships granted under Article 81 of the Mental Hygiene Law, in which the relief granted is "closely tailored to grant the guardian no more power than is absolutely necessary under the circumstances of the case" (Matter of Chaim A.K., 26 Misc 3d 837, 844 [Sur Ct, New York County 2009]), the appointment of a guardian under Article 17-A is an entirely plenary guardianship. The plain language of Article 17-A does not grant a court authority or discretion to limit or tailor the scope of guardianship of the person to address the individual's specific areas of need.[FN5] Article 17-A guardianship

completely removes that individual's legal right to make decisions over her own affairs and vests in the guardian "virtually complete power over such individual," *Matter of Mark C.H.*, 28 Misc 3d 765, 776 (Sur Ct, New York County 2010). Many decisions that define the essence of an individual, such as where and with whom she lives, whether she can travel, work, marry, engage in certain social activities, whether and how she manages her income and resources, and what medical treatment she undergoes or refuses, are removed from that individual, who will have lost the legal right and ability to govern her own affairs and participate in society without the approval of another. For this reason, Article 17-A guardianship is perhaps the most restrictive type of guardianship available under New York law.

In order to support the significant loss of individual liberty to the person with disability, the petitioners bear the burden of proving, to the satisfaction of the court, that the appointment of [*4]a guardian is necessary and in the "best interest" of the person whose legal rights are being removed. SCPA 1750; SCPA 1750-a; *Matter of Maselli*, NYLJ, March 29, 2000 at 28, col 4 (Sur Ct Nassau County). The term "best interest" has been aptly described as "amorphous" (see *Matter of Chaim A.K.*, supra at 845) and the criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed. *Matter of Akiva*, NYLJ, June 11, 2013 at 31 (Sur Ct, Kings County). One such assumption is that upon a diagnosis of intellectual disability, an individual is presumed to lack capacity to make independent decisions in every area of his life. The perfunctory appointment of a plenary guardian based upon medical certifications or diagnostic tests alone, without careful and meaningful inquiry into the individual's functional capacity, relies upon the incorrect assumption that the mere status of intellectual disability provides sufficient basis to wholly remove an individual's legal right to make decisions for himself. This approach is contrary to established conventions of international human rights (see Convention on the Rights of Persons with Disabilities, G.A. Res. 61/611, U.N. Doc. A/RES/61/611, art. 12 [Dec. 6, 2006]) (CRPD), the implementation of the United States Supreme Court decision in *Olmstead v L.C.*, 527 US 581 (1999) (*Olmstead*), and the findings and underlying purpose of the Americans with Disability Act of 1990 (ADA). Instead, article 12 (1) and (2) of the CRPD provide persuasive authority for the foundational premise that "persons with disabilities have a right to recognition everywhere as persons before the law" and "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Consistent with the ADA's mandate "to assure equality of opportunity, full participation, independent living and

economic self-sufficiency" (42 U.S. Code § 12101 [a] [7]) for individuals with disabilities, any evaluation of "best interests" requires assisting those individuals in an integrative manner that least restricts their autonomy. Interpreting the ADA, the Supreme Court in *Olmstead* held that a state's services, programs, and activities for people with disabilities must be administered in the most integrated setting appropriate to each person's unique needs. Charged with developing a plan consistent with the state's obligations under *Olmstead*, New York State Governor Cuomo created the *Olmstead* Plan Development and Implementation Cabinet (*Olmstead* Cabinet) in 2012. The *Olmstead* Cabinet issued a report of its recommendations, finding that

Community integration includes the ability of people with disabilities to make their own choices to the maximum extent possible. Guardianship removes the legal decision-making authority of an individual with a disability and should, consistent with *Olmstead*, only be imposed if necessary and in the least restrictive manner.

(see, Report and Recommendations of the *Olmstead* Cabinet: A Comprehensive Plan for Serving New Yorkers with Disabilities in the Most Integrated Setting at 27, October 2013).[FN6] With the [*5]increasing recognition that a wide range of functional capacity is present among persons with diagnoses of intellectual disability, autism, and other developmental disabilities (see *Matter of Chaim*, supra), the New York State Legislature, in evaluating Article 17-A in 1990, observed

[S]ince this statute was enacted in 1969, momentous changes have occurred in the care, treatment and understanding of these individuals. Deinstitutionalization and community-based care have increased the capacity of persons with mental retardation and developmental disabilities to function independently and make many of their own decisions. These rights and activities which society has increasingly come to recognize should be exercised by such persons to the fullest extent possible . . . [FN7]

Consequently, this court finds that understanding the functional capacity of an individual with disability, that is, what an individual can or cannot do in managing her daily affairs, and assessing what is the least restrictive tool available to address that individual's specific area of need, is a necessary inquiry in determining what is in her "best interest." Proceeding for Hytham M.G., NYLJ 1202756960466 (Sur Ct, Kings County 2016).

Least Restrictive Alternatives and Supported Decision Making

In order to identify less restrictive alternatives to guardianship that meet the state's legitimate goal of protecting a person with intellectual or developmental disabilities from harm connected to those disabilities, an inquiry into the availability of resources to assist the individual, including a support network of family and supportive services, is required. *Matter of Dameris*, supra at 579; see also, Leslie Salzman, Rethinking Guardianship (Again): Substituted Decision Making As A Violation of the Integration Mandate of Title II of the Americans with Disability Act, 81 Colorado L. Rev. 157 [2010] (Salzman). As Professor Salzman notes,

. . . [J]ust as we recognize that the law " and common principles of human decency " generally require that we build a ramp so that an individual with a physical impairment can enter a building without being carried up the steps, we should also recognize a legal obligation to provide decision making support to an individual with limitations in mental capabilities rather than assign a guardian to make decisions for that person.[FN8]

Indeed, "proof that a person with an intellectual disability needs a guardian must exclude the possibility of that person's ability to live safely in the community supported by family, friends and mental health professionals," *Matter of Dameris*, 38 Misc 3d 570, 578 (Sur Ct, New York County 2012). The extreme remedy of Article 17-A guardianship should be the last resort for addressing an individual's needs because "it deprives the individual of so much power and control over his or her life," *Id.* "SCPA 17-A must be read to require that supported decision making must be explored and exhausted before guardianship can be imposed or, to put it another way, where a person with an intellectual disability has the other resource' of decision making support, that resource/network constitutes the least restrictive alternative, precluding the imposition of a legal guardian," *Id.* at 577. If there are less restrictive alternatives that are [*6]sufficient and reliable to meet the needs of the person, guardianship is not warranted. See *In re D.D.*, 50 Misc 3d 666 (Sur Ct, Kings County 2015); *Proceeding for Hytham M.G.*, supra; *Matter of Guardian for A.E.*, NYLJ, August 17, 2015 at 22, col 4 (Sur Ct, Kings County).

Record Presented

The record and testimony reveal that, with appropriate supportive services, Michelle already makes decisions and manages herself and her affairs without a guardian. It is undisputed that Michelle is independent in all of her activities of daily living. Since 2008, Michelle has lived in a three-bedroom supportive apartment in Brooklyn with her two

apartmentmates, while her parents live in New Jersey. Michelle and her apartmentmates agree on a rotation for cooking and grocery shopping, although Michelle testified that she mostly cooks because "I love to be in the kitchen." Once a week, a counselor from Ohel Bais Ezra's (Ohel) self-directed supportive housing program meets with Michelle and her two apartmentmates in planning for the week. Michelle makes a list of items needed in the house and reviews it with the counselor. According to MHLS, the supportive apartment in which Michelle lives does not have 24 hour-staffing, as Michelle has been determined not to require 24-hour protective oversight. She is fully ambulatory and aware of all fire safety procedures.

The record reflects that Michelle is able to work. From 2009 until May 2015, she was employed part-time at a cell phone supplies store. Her responsibilities included sorting and packaging cell phone parts. She worked four days a week from 10 am to 3 pm when the store was located in Brooklyn. After the store moved to New Jersey, Michelle worked fewer days. Michelle is presently unemployed and attends a day habilitation program where she assists older people by helping to prepare lunch, going shopping for them, and providing manicures. She testified that she would like to be employed.

Michelle is able to manage her money. Michelle testified that her wages get deposited through direct deposit and she uses online banking to check how much money she has in her account. She receives checks from Social Security by the mail, which she testified she deposits in the bank. In the 2014 ISP, it was reported, "In regards to managing her money she at one point needed total support, however she is now able to do a bulk of her money management on her own." Michelle has an ATM card and uses it to withdraw money when needed.

Michelle is able to make decisions about her medical care, in consultation with the nurse at Ohel and her parents. Michelle calls the doctors' offices to make her own appointments, although she may need to be reminded to make the call. She has her primary care physician, gynecologist, and dentist's telephone numbers in her cell phone and she travels to the doctors' offices independently. Michelle keeps track of her doctor's appointments by entering the dates into her calendar, visiting her physician monthly and the dentist twice a month,. The petitioners testified, "We're not even aware of when she goes to the doctor." Michelle testified that her prescriptions are called into the pharmacy, which then delivers the medications to her. Michelle is able to self-

administer her medication. She takes her medicine daily without reminders, including thyroid medication, birth control pills, and vitamin D.

Michelle is independent in her socialization. She invites friends over to her apartment and has a boyfriend. She goes clothing shopping on Kings Highway in Brooklyn on her own, or in the mall in New Jersey with her mother, goes to the nail and hair salon, and engages in other recreational activities. She had a gym membership in 2014, where she tried to attend twice a [*7]week. Michelle also travels independently. She rides the public bus, takes the subway, or walks, to her job, to her day habilitation program, to the doctors' and dentist's offices, and into Manhattan, on her own.

Petitioners contend that while Michelle can make decisions on her own, she does not make "the best decisions." During the hearing, petitioner Nicole M. was asked by her counsel,

[Question:] Do you feel that Michelle is able to make decisions with regard to her care plan without your assistance?

[Answer:] She can make decisions but she doesn't follow through. She needs to be directed on a daily basis. She needs somebody really on top of it. She can make a decision but it's not always the right decision. Then when she decides and she knows and she understands that it has to be a certain way, she doesn't always do it.

Petitioners expressed they "would like her to have regular doctors, somebody that we really follow up and make sure that everything is okay," and are concerned about Michelle's weight. Moreover, other than a brief mention that Michelle had to be taken to the hospital, there were no other medical incidents about which testimony was given. Petitioner was unable to provide specific instances where Michelle made medical decisions contrary to her best interest and the record is utterly devoid of evidence regarding Michelle's inability to make decisions regarding her medical, financial, or daily affairs. Petitioners appear to be motivated by a generalized and speculative fear of unspecified dangers, rather than upon evidence of actual harm arising from Michelle's choices.

It is evident that the petitioners deeply love and care for Michelle, wanting what they believe is best for her. But while parents' desire for peace of mind and natural instinct to protect their loved one may be assuaged by the appointment of a guardian, it is not,

however, in the best interest of a person with the capacity to make independent decisions to have her decision making wholly removed through Article 17-A guardianship, no matter how well-intentioned the guardian. The appropriate legal standard is not whether the petitioners can make better decisions than Michelle, it is whether or not Michelle has the capacity to make decisions for herself, albeit with supportive services. See Matter of Raymond J.R., Sur Ct, Kings County, Dec. 9, 2011, L³pez Torres, S., File No. 2011-XXX. Upon the record presented, the credible evidence clearly demonstrates that Michelle is an adult who, despite cognitive limitations, has capacity to make decisions affecting the management of her own affairs with the support of her family and supportive services. Like the rest of us, Michelle makes decisions about her affairs " where to live, where to work, what to buy, whom to date — with the advice of those whom she chooses to consult. This does not render her in need of guardianship any more than it does an adult of typical intelligence and functioning who consults with trusted friends and family prior to making important decisions. To the extent that Michelle may require or desire additional support, evidence of which has not been presented, alternatives to guardianship, such as a durable power of attorney, advance directives, health care proxies, representative payee arrangements, and direct bank deposit systems, can provide targeted assistance without wholly supplanting Michelle's right to make decisions in all her affairs.

Conclusion

Michelle has an inherent right and ability to make her own choices, with dignity, independence, and support. The long-standing view of plenary guardianship as the best and only mechanism available to meet the needs of every person with intellectual and developmental disabilities is challenged by the emerging recognition that persons with disabilities have varying degrees and areas of functional capacity and need, the availability of less restrictive alternatives to guardianship which provide targeted assistance and supported, instead of substituted, decision making, and the growing emphasis on empowering, integrating, and preserving the rights of persons with mental and physical disabilities. To allow Michelle to retain the legal right to make personal decisions about her own affairs, while providing her with any necessary assistance to make or communicate those decisions in a supported decision-making framework which she already has in place, is ultimately in her best interest.

For all the foregoing reasons, the court finds that petitioners have failed to meet their burden of showing that Michelle is in need of an Article 17-A guardianship. Accordingly, the petition is dismissed.

Dated: July 22, 2016
Brooklyn, New York

HON. MARGARITA L'PEZ TORRES
Surrogate

Footnotes

Footnote 1: Pursuant to Article 47 of the Mental Hygiene Law, Mental Hygiene Legal Services provides legal assistance to individuals who live in residences supervised by certain social service agencies including Ohel Bais Ezra.

Footnote 2: These certifications are often boilerplate forms that include sections where the affirmant physician or psychologist checks off pre-printed conclusions relating to the decision-making capabilities of an intellectually or developmentally disabled individual. The court has found the certifications wanting in useful information and requires, at a minimum, psychological and psychosocial evaluations of the respondent as well as the respondent's IEP or ISP.

Footnote 3: This court adopts the diagnostic term "intellectual disability," in lieu of "mental retardation," a diagnosis which has been replaced in the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). The revision has been adopted by the Supreme Court of the United States (see *Hall v Florida*, 572 US __, 134 S Ct 1986 [2014]), by the U.S. Department of Education and other federal agencies (see Rosa's Law, Pub. L. 111-256, 124 Stat. 2643 [references in federal law to "mental retardation" are to be substituted with the term "intellectual disability"]) and by the New York State Office for Persons with Developmental Disabilities (OPWDD), previously known as the "Office of Mental Retardation and Developmental Disabilities" (OMRDD). The terminology contained in SCPA 17-A has not been amended and continues to refer to a diagnosis that no longer exists. The term "mental retardation" in the SCPA is antiquated and offensive, and will not be used by this court to describe individuals with disabilities.

Footnote 4: See footnote 3.

Footnote 5: While Article 17-A allows for the limited guardianship of property, as provided in SCPA 1756, there is no equivalent statutory provision permitting limited guardianship of the person.

Footnote 6: The Olmstead Cabinet also identified the need to reform the guardianship laws for people with intellectual and developmental disabilities in New York. Criticizing Article 17-A as "diagnosis driven" rather than based upon functional capacity of the person with disability, and recognizing the inability of Article 17-A to limit guardianship rights to the individual's specific incapacities as inconsistent with the least-restrictive philosophy of Olmstead, the Olmstead Cabinet "recommends that Article 17A be modernized in light of the Olmstead mandate to mirror the more recent Article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision making," Report and Recommendations of the Olmstead Cabinet, *supra* at 27-28.

Footnote 7: McKinney's Cons Laws of NY, Book 58A, SCPA 1750, Historical and Statutory Notes, L 1990, c. 516.

Footnote 8: Salzman at 165-166

I. *Matter of Antonio C.* (Surrogate's Court,
Kings County July 22, 2016)

Matter of Antonio C.

[*1] Matter of Antonio C. 2016 NY Slip Op 51120(U) Decided on July 22, 2016
Surrogate's Court, Kings County López Torres, J. Published by New York State Law
Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will
not be published in the printed Official Reports.

Decided on July 22, 2016
Surrogate's Court, Kings County

In the Matter of the Proceeding for the Appointment of a Guardian for Antonio C.,
Pursuant to SCPA Article 17-A.
2015-4490

No counsel, petition submitted pro se.

Margarita López Torres, J.

This is a proceeding pursuant to Article 17-A of the Surrogate's Court Procedure Act (SCPA) for the appointment of Dennis G. (petitioner) as the guardian of the person of Antonio C. (respondent). The respondent is currently sixty-six years old. His parents are deceased and his only relatives are his sister and brother. The petitioner is not a relative of the respondent, instead, he is the former boyfriend of the respondent's sister, Gloria C.

In New York, there are two statutory mechanisms for the appointment of guardians of intellectually disabled individuals " SCPA Article 17-A (Article 17-A) and Mental Hygiene Law Article 81 (Article 81). Article 17-A applies to persons who are intellectually disabled. An intellectually disabled person [FN1] is defined as a person who has been certified as having an inability to understand and appreciate the nature and consequences of decisions and incapable of managing herself and her affairs by reason of such disability. SCPA 1750-a (1). Historically, Article 17-A was originally enacted "primarily to provide a means for parents of [intellectually disabled] children to continue decision making power after those children reached age twenty one." Matter of Chaim A.K., N.Y.L.J., September 21, 2009, at 27 (col. 1) (Sur. Ct. NY County 2009).

Essentially, in an Article 17-A proceeding, the petitioner bears the burden of demonstrating that the respondent is an intellectually disabled individual, which condition originated before he attained the age of twenty-two, who is incapable of managing himself and/or his affairs by reason of such disability, and that such condition is permanent in nature or likely to continue indefinitely. SCPA 1750-a.

A hearing was held in which the petitioner, respondent, and respondent's sister testified. The petitioner has been acquainted with the respondent since approximately 1993, or since the respondent was forty-three years old. There is no evidence in the record or adduced at the hearing that would indicate that the respondent's alleged disabilities occurred before the age of twenty-two years as required by statute. Additionally, the medical records submitted fail to show that the respondent's alleged disabilities were present before the age of twenty-two years. The certification [FN2] of the examining physician, after a "mini mental exam," in a conclusory manner determined that he has "cognitive dysfunction" and that he requires "supervision." The physician also notes that the respondent has "short term memory loss." The certification of the examining psychologist indicates that the respondent suffers from "moderate mental retardation." While the certification also notes that this condition was diagnosed when the respondent was five years old, the report fails to state a basis for this conclusion. No medical or school records were provided respecting the respondent's condition prior to the age of twenty-two years. As such, the conclusory finding in the psychologist's report may not be given weight. While most Article 17-A petitions are accompanied by individual education assessments or individual service plans, which detail a history of a respondent's condition, no such documents were produced. The petitioner has failed to meet the requirement of Article 17-A, that the respondent is a person who, by virtue of an intellectual disability commencing before the age of twenty-two, is not capable of managing himself.

Moreover, the evidence adduced at the hearing demonstrates that the respondent possesses essential living skills. He washes his own clothes, does his own cooking, and goes food shopping independently. He takes no medication with which he requires assistance. Notably, the petitioner has only resided with the respondent for approximately nine months. Prior to that, the respondent lived on his own for an unknown period of time. He previously lived with his brother subsequent to his mother's death. It appears that for most of his life he resided with his mother. The respondent's sister, and not the petitioner, is the payee for respondent's Supplemental Security

Income. While the petitioner stated that he and the respondent's sister assist the respondent with activities such as taking him to the doctor, the petitioner affirmed that he and the respondent's sister would assist with those activities whether or not the petitioner was appointed guardian. There was no testimony that respondent is unable to see doctors without assistance. Additionally, the testimony from the petitioner and [*2]respondent's sister indicates that this sixty-six year old respondent is capable of managing many of his affairs, albeit with some assistance from relatives.

When asked why the petitioner is seeking to become the respondent's guardian at such a late stage in the respondent's life, the petitioner stated that it is to secure housing for himself. He has resided with the respondent for approximately nine months in a New York City Housing Authority (NYCHA) apartment which contains more than one bedroom. The petitioner testified that he was informed by NYCHA that, as a non-family member, he would have to become the respondent's legal guardian to be added to the lease for the apartment. It would appear that the impetus for filing this petition is for the purposes of securing housing for the petitioner.

To the extent that respondent is unable to manage some of his affairs, recourse may be had pursuant to an Article 81 proceeding, which does not require that a respondent's disabilities be present before the age of twenty-two. Additionally, respondent will be afforded more safeguards in that proceeding, such as the appointment of an attorney to represent him and a court evaluator to investigate more fully which of his affairs he is unable to manage and to what degree a guardian should be empowered to assist him. A tailored guardianship may be fashioned for him rather than the global guardianship provided by Article 17-A.

As determined by this Court in Matter of Luis,

Article 81 guardianships are granted over adults whose functional incapacities make the person unable to manage her person or property and, upon proof of specific incapacity, a guardian may be appointed to remedy the particular incapacity. While Article 17-A guardianships remove decision making power from the respondent and "divests [that individual] of any control over that property..." (Matter of Mark C.H., 28 Misc 3d 765 [Sur. Ct. NY County 2010]), Article 81 guardianships "are closely tailored to grant the guardian no more power than is absolutely necessary under the circumstances of the case" and "aims to preserve the person's autonomy to the greatest degree possible."

Matter of Chaim A.K., N.Y.L.J., September 21, 2009, at 27 (col. 1) (Sur. Ct. NY County 2009).

Matter of Luis, N.Y.L.J., April 4, 2014, at 35 (col. 2) (Sur. Ct. Kings County 2014). The tailored approach of an Article 81 proceeding may be the more suitable avenue for the respondent.

For the foregoing reasons, the petitioner has failed to demonstrate that the respondent is a person in need of a guardian pursuant to Article 17-A. As such, the petition is dismissed.

Dated: July 22, 2016
Brooklyn, New York

HON. Margarita L³pez Torres
S u r r o g a t e

Footnotes

Footnote 1: This Court uses the term "intellectual disability" in lieu of "mental retardation" even though the SCPA utilizes the latter to describe the same condition. This change in terminology has been approved and used in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the standard texts used by psychiatrists and mental health professionals in classifying mental disorders. See *Hall v. Florida*, 134 S. Ct. 1986 (2014), citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013). The shift away from usage of "mental retardation" is reflected in federal statutes (see Rosa's Law, Pub. L. 111-256, 124 Stat. 2643) (all references in federal law to "mentally retarded individual" are changed to "individual with an intellectual disability"). New York has renamed its "Office of Mental Retardation and Developmental Disabilities" to "Office for Persons with Developmental Disabilities." Accordingly, the term "mental retardation" in the SCPA is antiquated and offensive and will not be used by this Court to describe individuals with disabilities.

Footnote 2: These certifications are often boilerplate forms that include sections where the affiant physician or psychologist checks off pre-printed conclusions relating to the decision-making capabilities of an intellectually or developmentally disabled individual.

The Court has found these certifications wanting in useful information and requires, at a minimum, psychological and psychosocial evaluations of the respondent, as well as the respondent's Individual Education Plan or Individual Service Plan. The petition and supporting documents in this proceeding are unquestionably lacking in this regard.