

Matter of Kermit Gitenstein Found. Inc.
2016 NY Slip Op 32018(U)
May 26, 2016
Surrogate's Court, Nassau County
Docket Number: 31537
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

Accounting Proceeding in the Matter of the

KERMIT GITENSTEIN FOUNDATION INC.,

Steven R. Schlesinger, As Receiver of the Foundation.

-----X

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

**Accounting by the Kermit Gitenstein Foundation Inc. c/o
Steven R. Schlesinger, Receiver, as the Administrator, c.t.a.,
of the Estate of**

SHIRLEY GITENSTEIN,

Deceased.

-----X

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

**Accounting by the Kermit Gitenstein Foundation Inc. c/o
Steven R. Schlesinger, Receiver, as the Administrator, c.t.a.,
of the Estate of**

AARON L. GITENSTEIN,

Deceased.

-----X

**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

**Accounting by the Kermit Gitenstein Foundation Inc., c/o
Steven R. Schlesinger, Receiver, as Successor Trustee of
the Trust Created Under the Last Will and Testament of**

KERMIT GITENSTEIN,

Deceased.¹

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this Decision:

- Order to Show Cause, dated January 12, 2016, to Vacate the Court
- Order, dated December 18, 2015, Affirmation & Exhibits 1

¹ The Successor Letters of Trusteeship, dated July 22, 2014, sets forth the Fiduciary Appointed for the Trust created under the Last Will and Testament of Kermit Gitenstein, as Steven R. Schlesinger, receiver of the Kermit Gitenstein Foundation Inc.

**DECISION
AND ORDER**

**Decision No. 31537
File No. 357003A**

File No. 346141V

File No. 301202D

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Steven R. Schlesinger moves, pursuant to CPLR §2221, by Order to Show Cause to Vacate the Corrected Order of the Court, dated December 18, 2015. The Attorney General of the State of New York, filed a Memorandum in Opposition.

In order to decide the Order to Show Cause before the Court and to take appropriate judicial action, the Court finds it necessary to digest the complex history of the Estates of the Gitenstein family and the Kermit Gitenstein Foundation Inc., obtained from the filings of the Nassau County Surrogate’s Court. This Court has reviewed the filings with regard to the Estates of the Gitenstein family and the Kermit Gitenstein Foundation Inc. The history obtained from the Court filings is outlined below.

I. HISTORY

On January 4, 1969, Kermit Gitenstein, a resident of Nassau County, died. Kermit Gitenstein was not married and had no children, natural or adopted. He was survived by his mother, Celia, three sisters, Ruth, Annette and Shirley, and one brother, Aaron. None of Kermit Gitenstein’s siblings married, nor did any of Kermit Gitenstein’s siblings have any children, natural or adopted.

On March 3, 1969, by a Decree of Probate issued by the Nassau County Surrogate’s Court, the Last Will and Testament of Kermit Gitenstein, dated March 28,

1968, was admitted to probate. The sixth paragraph of The Last Will and Testament of Kermit Gitenstein, read as follows:

“SIXTH: I give the sum of two hundred thousand (\$200,000.00) dollars to a charitable foundation to be established by my Executor or charitable organizations to be selected by him, or if he deems best, to the foundation and such organization as he selects, and to such case the moneys are to be apportioned to whatever manner he determines. In all events, the foundation and the charitable organizations sharing this legacy must be so qualified as to permit my estate to receive an estate tax deduction under Section 2055 of the Internal Revenue Code. To this end, the foundation, if established, must be established within a reasonable period after my demise and must be either a New York Membership Corporation or a Charitable Trust operating under the laws of New York and whose aims and purposes shall be limited to the language of Section 501(c)(3) of the Internal Revenue Code”.

The Last Will and Testament of Kermit Gitenstein appointed his brother, Aaron L. Gitenstein, as executor, and Aaron L. Gitenstein and his sister, Shirley Gitenstein, as Trustees of Kermit Gitenstein’s Testamentary Trusts. On March 3, 1969, the Nassau County Surrogate’s Court issued Letters of Trusteeship to Aaron L. Gitenstein and Shirley Gitenstein and Letters Testamentary to Aaron L. Gitenstein, as executor of the Last Will and Testament of the Estate of Kermit Gitenstein.

On April 17, 1969, under the New York Membership Corporation Law, the Kermit Gitenstein Foundation Inc., was established.² The Certificate of Incorporation of the Kermit Gitenstein Foundation Inc., reads in relevant part as follows:

“We, the undersigned, for the purpose of forming a membership corporation pursuant to the Membership Corporation Law of the State of New York, and to carry out the testamentary direction of Kermit Gitenstein who died a resident of Atlantic Beach, New York, on the 4th day of January 1969, do hereby certify as follows:

FIRST: The name of the proposed corporation is: KERMIT GITENSTEIN FOUNDATION INC.

² Effective September 1, 1970, the New York Membership Corporation Law was repealed and replaced by the New York Not-For-Profit Corporation Law.

SECOND: The corporate purposes, which are exclusively charitable, follow:

(a) To receive interests in realty, securities, cash and other personal property from the Estate of Kermit Gitenstein, from members of his family, and from other persons, associations and corporations, in the discretion of its directors.

(b) To hold, manage, invest and re-invest the corporate assets and the income derived therefrom and to use, donate and distribute the same pursuant to the terms and conditions of this certificate, and in accordance with the by-laws and rules to be adopted.

(c) To make gifts of principal and income to corporations when they are organized and operating exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children. To make gifts of principal and income to or for the use of the United States, any State, Territory, or any political subdivision thereof for exclusively public purposes. And lastly to make gifts of principal and income to or for the use of any veterans organization incorporated by act of Congress or its departments or local chapters or posts.

(d) The corporation shall not engage in any activity which shall bring it within the purview of Article 2, Section 11 of the Membership Corporation Law of the State of New York, nor shall it perform any educational function beyond making donations for educational purposes.

(e) No part of the corporation's net earnings shall inure to the benefit of any member, officer or employee of this corporation. Nor shall any gift of income or principal be made to any donee where any part of its earnings inure to the benefit of an individual, or where any substantial part of its activities in the carrying on of propaganda or otherwise attempting to influence legislation. The corporation shall not be operated for profit, nor shall it attempt to influence legislation or carry on propaganda.

(f) In the event of liquidation, dissolution, or winding up of the corporate affairs, whether voluntary or involuntary or by operation of law, the corporate assets shall be distributed to one or more of the charitable organizations set forth in paragraph SECOND(c) above.

THIRD: The territories in which the corporation shall operate shall be the United States of America, the State of Israel and other foreign countries, subject, however, to the laws of the State of New York.

FOURTH: The principal office of the corporation shall be located in the County of Nassau, State of New York, Village of Atlantic Beach.

FIFTH: The number of directors of the corporation shall be not less than three nor more than five.

SIXTH: The names and residences of the directors until the first annual meeting of the corporation are as follows:

AARON L. GITENSTEIN
51 Montgomery Boulevard
Atlantic Beach, New York

SHIRLEY GITENSTEIN
51 Montgomery Boulevard
Atlantic Beach, New York

RUTH GITENSTEIN
51 Montgomery Boulevard
Atlantic Beach, New York

Annette Gitenstein, 51 Montgomery Blvd., Atlantic Beach, New York,
Max J. Weintraub, 315 Ocean Parkway, Brooklyn, New York.

SEVENTH: That all of the subscribers to the certificate are of full age; that all of them are citizens of the United States; that all of them are residents of the State of New York; and that all of the directors are citizens of the United States and residents of the State of New York. That the number of directors shall be not less than three nor more than five.”

On September 18, 1991, Ruth Gitenstein, died a resident of Nassau County (51 Montgomery Blvd., Atlantic Beach, New York). An instrument labeled Last Will and Testament of Ruth Gitenstein, signed on March 11, 1989 and witnessed by Murray Varoba and Joseph B. Varoba was filed with the Nassau County Surrogate’s Court. On December 3, 1991, a Decree of the Nassau County Surrogate’s Court admitted to probate the Last Will and Testament of Ruth Gitenstein. On December 3, 1991, Shirley Gitenstein and Annette Gitenstein were issued Letters Testamentary and appointed executrixes of Ruth Gitenstein’s estate. In ¶SECOND of Ruth Gitenstein’s Last Will and Testament, she gave all of her estate, real and personal, to her sisters who survive her in equal shares. ¶THIRD of the Last Will and Testament of Ruth Gitenstein set forth that, should any of her sisters renounce all or part of their shares, then their share shall pass to The Kermit Gitenstein Foundation Inc. The Court file did not contain a notice of renunciation.

On March 3, 1996, Annette Gitenstein died a resident of Nassau County (51 Montgomery Blvd., Atlantic Beach, New York). An instrument labeled Last Will and Testament of Annette Gitenstein, signed March 13, 1989 and witnessed by Murray Varoba and Joseph B. Varoba was filed with the Nassau County Surrogate's Court. On April 1, 1996, a Decree of the Nassau County Surrogate's Court admitted to probate the Last Will and Testament of Annette Gitenstein. On April 1, 1996, Shirley Gitenstein was issued Letters Testamentary and appointed executrix of Annette Gitenstein's Estate. In ¶SECOND of Annette Gitenstein's Last Will and Testament, Annette Gitenstein gave all of her estate, real and personal, to her sisters who survive her in equal shares. In ¶THIRD of the Last Will and Testament of Annette Gitenstein, it set forth that, should any of her sisters renounce all or part of their shares, then their shares shall pass to the Kermit Gitenstein Foundation Inc. (Ruth Gitenstein, sister of Annette Gitenstein, predeceased Annette Gitenstein).

On December 13, 1996, an asset inventory for the Estate of Annette Gitenstein, was filed with the Nassau County Surrogate's Court. This inventory set forth the total gross estate assets individually owned by the decedent, Annette Gitenstein, were in the amount of \$1,539,256.82 and non probate, joint or trust property was in the amount of \$355,789.98. On August 14, 1996, Shirley Gitenstein, Annette Gitenstein's only remaining living sister, filed a renunciation which read in pertinent part as follows:

“On the 8th day of August, 1996, I duly renounced in writing all of my share of decedent's estate except for a sum equal to the largest amount that can pass free of Federal estate tax by reason of the unified credit and the State death tax credit, as determined by the values finally fixed in the Federal estate tax proceeding.”

On April 18, 1997, Aaron L. Gitenstein died a resident of Nassau County (51 Montgomery Blvd., Atlantic Beach). An instrument labeled Last Will and Testament of Aaron L. Gitenstein, was signed March 11, 1989, witnessed by Murray Varoba and Joseph B. Varoba and filed with the Nassau County Surrogate's Court. A Decree

admitting into probate the Last Will and Testament of the Estate of Aaron L. Gitenstein was signed on September 4, 1997. An asset inventory was filed in the Nassau County Surrogate's Court on February 13, 1998 for the Estate of Aaron L. Gitenstein. A tax return of Aaron L. Gitenstein was filed in the Nassau County Surrogate's Court on February 17, 1998, setting forth \$1,938,545.00 as a gross estate value. Schedule "B" of said return set forth that \$1,244,633.00 of the estate was passed to the Kermit Gitenstein Foundation Inc. On January 9, 1998, Shirley Gitenstein filed a renunciation which read in pertinent part as follows:

"I, Shirley Gitenstein, domiciled at 51 Montgomery Blvd., Atlantic Beach, NY pursuant to Section 2-1.11 of the New York Estates, Powers and Trusts Law, irrevocably renounce the smaller amount of property which passed to me pursuant to Article SECOND of the Last Will and Testament of Aaron L. Gitenstein, dated March 11, 1989 which will qualify for a charitable deduction pursuant to Section 205 of the Internal Revenue Code of 1986 that would eliminate any federal estate tax liability arising by reason of the death of the above captioned deceased, after taking into account the unified credit against estate tax and the credit for state death taxes."

On March 14, 2007, Shirley Gitenstein died a resident of Nassau County (51 Montgomery Blvd., Atlantic Beach). On April 5, 2007, an instrument, labeled the Last Will and Testament of Shirley Gitenstein, dated October 7, 1989, was filed with the Nassau County Surrogate's Court. The instrument, labeled the Last Will and Testament of Shirley Gitenstein, dated October 7, 1989, witnessed by Behn Goldis and Joseph B. Varoba, was two pages in length and read as follows:

"I, Shirley Gitenstein, being of sound mind and memory and being cognizant of the uncertainties of this life, DO HEREBY PUBLISH AND DECLARE THIS AS MY LAST WILL AND TESTAMENT, hereby revoking all prior Will and Codicils heretofore made by me.

FIRST: I direct that all my just debts and funeral expenses be paid as soon after my death as may be practicale [sic].

SECOND: I give all my estate, real and personal, to my sisters who survive me in equal shares.

THIRD: Should any of my sisters [sic] renounce all or part of their shares, then in that event, such share or portion of share so renounced, shall pass to THE KERMIT GITENSTEIN FOUNDATION INC.

FOURTH: In the event that my sisters shall fail to survive me, then in that event, I give all my estate to The Kermit Gitenstein Foundation Inc”

The instrument labeled Last Will and Testament of Shirley Gitenstein, filed with the Nassau County Surrogate’s Court, did not contain an executor paragraph. Furthermore, the instrument filed did not have numbered pages and was not stapled.

On April 5, 2007, the Public Administrator of Nassau County filed a Petition for the Probate of the Last Will and Testament of Shirley Gitenstein, and for Letters of Administration, c.t.a.³ In the Petition, the Public Administrator listed in ¶5 on p. 2, section f, that two first cousins survived the decedent. ¶6(a) p. 3 in the Petition, listed Stanley Masters and Milton Hurtes as persons adversely affected by the purported exercise of the will and/or as persons having an interest under the will. In ¶6b of the Petition unknown distributees were listed.⁴ ¶7(a) of the Petition, set forth two parties interested in the proceeding: the Kermit Gitenstein Foundation Inc., and the Attorney General of the State of New York. ¶9(a) of the Petition, set forth that the approximate total value of the property constituting the decedent’s gross testamentary estate was between \$500,000.00 and \$10,000,000.00.⁵

On April 5, 2007, the Public Administrator, filed a Verified Petition for Temporary Letters of Administration for the Estate of Shirley Gitenstein. An Affirmation requesting acceptance of alternate evidence of death, pursuant to 22 NYCRR §207.15(b), was filed

³ Administrator c.t.a. is any person to whom Letters of Administration with the will annexed have been issued (*see* SCPA §103[3]).

⁴ Distributee is any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution (*see* SCPA §103[14]).

⁵ The Court file does not contain the issuance of citations, affidavits of service, waivers, or any notation that citations were ever issued on the Petition for Probate, dated April 5, 2007.

by the attorney for the Public Administrator on April 5, 2007. An affidavit of heirship was also filed by the Public Administrator on April 5, 2007.

On April 5, 2007, Letters of Temporary Administration were issued to the Public Administrator of Nassau County by the Nassau County Surrogate's Court.⁶

On June 25, 2007, the Attorney General of the State of New York filed a Notice of Appearance, pursuant to EPTL, Article 8.

On July 19, 2007, an affidavit of attesting witness, Behn Goldis, of an instrument labeled the Last Will and Testament of Shirley Gitenstein, was filed with the Nassau County Surrogate's Court. Also on July 19, 2007, an affidavit of Deena Varoba, proving the handwriting of Joseph B. Varoba, her son, a witness to the Last Will and Testament of Shirley Gitenstein, was filed with the Nassau County Surrogate's Court.

On October 17, 2007, the Public Administrator of Nassau County filed a list of inventory assets for the Estate of Shirley Gitenstein, which set forth \$9,953,902.56 in total assets.

On November 1, 2007, the Attorney General of the State of New York, as statutory representative of the beneficiaries of a disposition for charitable purposes, pursuant to EPTL §8-1.1(f), and the Public Administrator, as Temporary Administrator of the Estate of Shirley Gitenstein, filed a joint Verified Petition, dated October 29, and October 30, 2007, for an Order appointing a "Permanent Receiver" of the assets of the Kermit Gitenstein Foundation Inc. The Verified Petition, set forth that Shirley Gitenstein was the last surviving director of the Kermit Gitenstein Foundation Inc. The Verified Petition further stated that, as a result of Shirley Gitenstein's death, there were no persons acting as director of the Kermit Gitenstein Foundation Inc. The total assets of the Kermit Gitenstein Foundation Inc. was set forth as approximately \$4,650,000.00. The Petitioners set forth in the Verified Petition, that a Permanent Receiver was necessary because:

⁶ Extensions to the Letters of Temporary Administration issued to the Public Administrator of Nassau County were granted by the Nassau County Surrogate's Court on October 22, 2007 and April 28, 2008, upon Petitions of the Public Administrator filed with the Court.

“38. First, the Foundation needs a representative to take possession of the Foundation’s bank accounts and brokerage account, and to authorize the sale of the Foundation’s marketable securities in order to preserve the value thereof.

39. The Foundation also needs to retain legal counsel to represent it in any actions and proceedings affecting the Foundation, including all proceedings involving the Estate of Shirley Gitenstein.

40. Additionally, the Foundation is required to file Form 990-PF with the Internal Revenue Service and Form CHAR 500 with the Attorney General. As a result, the Foundation needs to retain attorneys and/or accountants to prepare such returns and reports.⁷

41. Furthermore, the Foundation is required to make annual distributions to public charities at least annually in an aggregate amount equivalent to approximately five percent (5%) of its assets each calendar year, and to comply with the relevant provisions of the Internal Revenue Code, the EPTL, the NPCL and the New York Tax Law.

42. ***Lastly, after the Foundation receives a final distribution*** from the Estate of Shirley Gitenstein, pursuant to the Will, ***the Attorney General intends to seek judicial dissolution of the Foundation.*** The permanent receiver will need to represent and act on behalf of the Foundation in connection with such dissolution proceeding. [Emphasis Added]

43. Based on the foregoing, a qualified and disinterested individual must be appointed immediately to serve as permanent receiver of the assets of the Foundation.”⁸

On November 1, 2007, in a written Order, the Court appointed Steven R. Schlesinger as a Permanent Receiver (hereinafter referred to as “receiver”) of the assets of the Kermit Gitenstein Foundation Inc.⁹ The Order of November 1, 2007 further ordered Steven R. Schlesinger to “take and subscribe an oath to faithfully, honestly and

⁷ In 2008, an amendment to the IRS form 990 was aimed at non profit corporate governance, to increase transparency and accountability of non profit boards (*see* Duties of Non Profit Corporate Directors - Emphasizing Oversight Responsibilities, North Carolina Law Review 90 N.C. Rev 1845, 1852 Sept 2012).

⁸ The Petition for a Permanent Receiver, dated November 1, 2007, set forth that necessary parties were the Attorney General of the State of New York and the Public Administrator of Nassau County (the co-petitioners). The Petition sets forth that there are no other persons or entities entitled to notice of the proceeding. The instrument, labeled Last Will an Testament of Shirley Gitenstein, had not yet been admitted to probate. Service was not ordered on the interested parties named in the Probate Petition, filed on April 5, 2007.

⁹ The Nassau County Surrogate from January 2001 to December 31, 2010 was Surrogate John Riordan.

impartially discharge the trust committed to him” and required him to post a bond in the amount of \$4,650,000.00 “payable from the assets of the Kermit Gitenstein Foundation Inc.”¹⁰ The November 1, 2007 written Order authorized the receiver to:

“sell the marketable securities owned by the Kermit Gitenstein Foundation, Inc., and to reinvest the proceeds solely in bank accounts, money market accounts and certificates of deposit in amounts insured by the Federal Depository Insurance Corporation, and insured and guaranteed notes, bonds and obligations of the United States of America; to retain attorneys to represent it in all actions and proceedings upon the express approval of the Surrogate pursuant to 22 NYCRR §36.1, et seq., including those concerning the Estate of Shirley Gitenstein; to file any reports, returns and other documents required to be filed with the Internal Revenue Service, the Attorney General of the State of New York, the Nassau County Surrogate’s Court or any other regulatory agency, and to retain accountants for such purposes; and to cause the Kermit Gitenstein Foundation, Inc. to comply with the relevant provisions of the Internal Revenue Code, the New York Estates, Powers and Trusts Law, Not-for-Profit Corporation Law and Tax Law and all other federal, state and local laws affecting and governing the Kermit Gitenstein Foundation, Inc.”

In addition, this Order required that, within six (6) months of the date of the Order¹¹, the receiver shall file with the Nassau County Surrogate’s Court and serve upon the Attorney General of the State of New York, Charities Bureau, an interim accounting for such six (6) month period, of the assets, income and expenses of the Kermit Gitenstein Foundation Inc. and ordered that the receiver shall comply with the provisions of the Not-For-Profit Corporation Law §1216.¹²

¹⁰ On November 13, 2007, Steven R. Schlesinger obtained a bond, pursuant to the Order of Surrogate Riordan, in the amount of \$4,650,000.00.

¹¹ The first accounting was not filed in the time directed by the Court. That accounting was filed on July 27, 2009, more than one year and seven months after the date of said Order.

¹² On November 19, 2007, Steven R. Schlesinger signed an oath and designation to “faithfully and honestly discharge the duties as the permanent receiver of the Kermit Gitenstein Foundation Inc.”

On December 4, 2007, Steven R. Schlesinger, as receiver of the Kermit Gitenstein Foundation Inc., filed an Order to Show Cause and Verified Petition for distribution of funds. The Petition requested that the Surrogate's Court distribute the following:

“the sum of \$250,000.00 to North Shore-Long Island Jewish Health System Foundation pursuant to the November 26, 2007 grant request, submitted on behalf of Long Island Jewish Medical Center as and for the annual distribution for the calendar year of 2007 from the Kermit Gitenstein Foundation Inc.”

Steven R. Schlesinger, in the Verified Petition stated that “such, it is my duty and responsibility to ensure that the Foundation's work is carried on ...” The Verified Petition also set forth that Steven R. Schlesinger had “no affiliation or business relationship with the intended beneficiary.” Steven R. Schlesinger, further posited in the Verified Petition that at the time of his appointment, the assets of the Foundation were valued at approximately \$4,650,000.00. The Verified Petition sets forth a history of grants made by the Kermit Gitenstein Foundation Inc., via a copy of a Big Database.com report, which was attached to the Verified Petition, as Exhibit “C”¹³

¹³ History of grants of the Kermit Gitenstein Foundation Inc. as set forth in a Big Database.com report attached to the Petition, filed with the Nassau County Surrogate's Court, as Exhibit “C.”

Bikur Cholem Hospital	Southfield, MI	\$25,000	2001
American Committee for Shaare Zedek Hospital in Jerusalem	New York, NY	\$25,000	2002
American Society for Yard Vashani Chai Lifeline	New York, NY	\$25,000	2002
American Committee for Shaare Zedek Hospital in Jerusalem	New York, NY	\$25,000	2000
American Committee for Shaare Zedek Hospital in Jerusalem	New York, NY	\$25,000	2001
American Association for Bikar Cholim Hospital	Southfield, MI	\$25,000	2002
American Society for Yard Vashani	New York, NY	\$25,000	2001
American Society for Yard Vashani	New York, NY	\$20,000	2000
American Association Bikar Cholim Hospital	New York, NY	\$20,000	2000
Jewish Braille Institute of American	New York, NY	\$15,000	2002
National Osteoporosis Foundation	Washington, DC	\$15,000	2000
General Israel Orphan Home for Girls	New York, NY	\$10,000	2002
Chai Lifeline	New York, NY	\$10,000	2001
National Osteoporosis Foundation	Washington, DC	\$ 5,000	2002
Jewish Braille Institute of American	New York, NY	\$ 5,000	2001

On December 4, 2007, the Court signed the Order to Show Cause seeking distribution of funds. Service was directed to be made on the Attorney General, as statutory representative of the beneficiaries of disposition for charitable purposes pursuant to the EPTL and upon the Public Administrator of Nassau County as Temporary Administrator of the Estate of Shirley Gitenstein.¹⁴ The Court file contains an affidavit of service of the December 4, 2007, Order to Show Cause which sets forth that the Attorney General and the Public Administrator of Nassau County were served on December 4, 2007. No objections by the New York State Attorney General or the Public Administrator were contained in the file.

On December 12, 2007, by written Order, the Court authorized the distribution of \$250,000.00 “to the North Shore-Long Island Jewish Health System Foundation”.

On December 13, 2007, the Gitenstein residence, located at 51 Montgomery Boulevard, Atlantic Beach, New York, was sold.

On December 19, 2007, Steven R. Schlesinger filed an affidavit seeking the Court’s permission to retain “Henry E. Klosowski, Esq., as legal counsel to Steven R. Schlesinger, as Receiver of the assets of the Kermit Gitenstein Foundation Inc.” and Ellis Ende, as accountant. The reason set forth by Steven R. Schlesinger in the affidavit was “as receiver, I will undertake the administration of the Foundation, which I expect will involve complicated and extensive legal issues.”

On December 21, 2007, the Court, by written Order, appointed Henry E. Klosowski (employed by Moritt, Hock, Hamroff & Horowitz, LLP) as legal counsel to

National Osteoporosis Foundation	Washington, DC	\$ 5,000	2001
Chai Lifeline	New York, NY	\$ 5,000	2000
General Israel Orphan Home for Girls	New York, NY	\$ 5,000	2000
Jewish Braille Institute of American	New York, NY	\$ 5,000	2000
General Israel Orphan Home for Girls	New York, NY	\$ 5,000	2001

¹⁴ The instrument labeled Last Will and Testament of Shirley Gitenstein, although filed with the Nassau County Surrogate’s Court on April 5, 2007, had not been probated as of December 4, 2007, the date of the Verified Petition. Service for the Verified Petition, dated December 4, 2007, was not ordered on any interested parties named in the Probate Petition, filed on April 5, 2007.

Steven R. Schlesinger, as Receiver of the Kermit Gitenstein Foundation Inc., and Ellis Ende as accountant.¹⁵

On May 5, 2008, Steven R. Schlesinger, as Receiver of the Kermit Gitenstein Foundation Inc., signed a “combined corporate verification, consent and designation” and accepted the appointment as Administrator, c.t.a.

On May 21, 2008, Steven R. Schlesinger, as Receiver of the Kermit Gitenstein Foundation Inc., filed a Petition for an Order (1) granting Letters of Temporary Administration for the Estate of Shirley Gitenstein as sole beneficiary; (2) revoking Letters of Temporary Administration issued to the Public Administrator of Nassau County; (3) directing the Public Administrator to withdraw his Petition for his appointment as Administrator c.t.a.; and (4) appointing the Foundation as Temporary Administrator upon qualifying according to law¹⁶.

On May 21, 2008, Steven R. Schlesinger, as Receiver, filed an Order to Show Cause and Verified Petition for the order of distribution of assets authorizing him to distribute the sum of \$100,000.00 to Surprise Lake Camp. In the Verified Petition, Steven R. Schlesinger set forth that he had “no affiliation or business relationship” with Surprise Lake Camp. On June 9, 2008, an Assistant Attorney General in the Charities Bureau of the Attorney General of the State of New York, filed an Affidavit in Response to the Petition, dated May 21, 2008 for a distribution to Surprise Lake Camp as and for a current grant of the Foundation. The Assistant Attorney General’s Affidavit stated that “the Attorney General had no objection to the relief sought by the motion.”

¹⁵ Steven R. Schlesinger, by affidavit dated December 14, 2007, sought an Order from Nassau County Surrogate’s Court for the appointment of an attorney for Steven R. Schlesinger, as Permanent Receiver.

¹⁶ The Petition seeking Letters of Temporary Administration for the Estate of Shirley Gitenstein filed on May 21, 2008 by Steven R. Schlesinger, as Permanent Receiver of the Kermit Gitenstein Foundation Inc., listed the following names in ¶7(a) as distributees or other necessary parties: Kermit Gitenstein Foundation Inc., John W. Sinon, Public Administrator, Milton Hurtes, Stanely Masters a/k/a Stanley Mostkowitz, Annette Gitenstein, Seymour Gitenstein, Rhonda Gitenstein, Attorney General of the State of New York. The Petition in ¶7(b), set forth “see Attached Schedule A of Unknown Distributees.” Schedule “A” attached to the Petition listed Eva Mostkowitz, Sidney L. Mostkowitz, Ruth Mostkowitz, Roslyn Mostkowitz and Marilyn Mostkowitz.

In this Verified Petition, Steven R. Schlesinger advised the Court that:

“Historically, the Foundation has given grants or gifts to health related or Jewish charities, specifically, Bikur Cholem Hospital, American Committee for Shaare Zedek Hospital in Jerusalem; the National Osteoporosis Foundation; and, most recently, the North Shore-Long Island Jewish Health System Foundation.”

On May 22, 2008, the Kermit Gitenstein Foundation Inc. c/o Steven R. Schlesinger, Receiver, filed a Petition for Probate of the Last Will and Testament of Shirley Gitenstein, and for Letters of Administration, c.t.a. The Petition listed in ¶5 on p. 2, section f, that two first cousins survived the decedent. ¶6(a) on p. 3 of the Petition filed, listed a Stanley Masters a/k/a Stanley Mostkowitz, Milton Hurtes, Annette Gitenstein, Seymour Gitenstein, Rhoda Gitenstein and Kermit Gitenstein, as persons adversely affected by the purported exercise of the will and/or as persons having an interest under the will. In ¶6b of the Petition, the following persons listed as having a disability were as follows: Eva Mostkowitz, Sidney Mostkowitz, Ruth Mostkowitz, Roslyn Mostkowitz and Marilyn Mostkowitz. ¶7(a) of the Petition, set forth one party interested in the proceeding: the Attorney General of the State of New York. ¶9(a) of the Petition filed, set forth the approximate total value of the property constituting the decedent’s gross testamentary estate was between \$500,000.00 and \$10,065,406.00.¹⁷

On June 11, 2008, the Public Administrator filed an answer to Steven R. Schlesinger’s Petition for Letters of Temporary Administration.

On June 17, 2008, the Court, by written Order, authorized “Steven R. Schlesinger, Esq., as receiver of the Kermit Gitenstein Foundation Inc., to distribute the sum of One Hundred Thousand (\$100,000.00) dollars to Surprise Lake Camp”.

On November 25, 2008, the Court by written Order, appointed the Kermit Gitenstein Foundation Inc., Temporary Administrator of the Estate of Shirley Gitenstein,

¹⁷ The court file does not contain the issuance of citations, affidavits of service, waivers, or any notation that citations were ever issued for the Petition for Probate, filed May 22, 2008.

upon the posting of a \$10,000,000.00 bond. This Order revoked the Temporary Letters issued to the Nassau County Public Administrator upon the appointment of the Kermit Gitenstein Foundation Inc. as Temporary Administrator of the Estate of Shirley Gitenstein. The Court further ordered that the Kermit Gitenstein Foundation Inc., be substituted as Petitioner in place of the Public Administrator with respect to the Public Administrator's Petition for appointment as the Administrator c.t.a. of the Estate of Shirley Gitenstein. This Order also set forth that there was no opposition filed by the Attorney General of the State of New York or the Public Administrator of Nassau County¹⁸. On November 25, 2008, Letters of Temporary Administration were issued to the Kermit Gitenstein Foundation Inc.¹⁹

On December 8, 2008, Steven R. Schlesinger, as Receiver of the Kermit Gitenstein Foundation Inc., filed an Order to Show Cause and Verified Petition, seeking authorization "to distribute the sum of \$50,000.00 to the Chron's [sic] & Colitis Foundation of America...; \$50,000.00 to the Molloy College Nursing Program...; and \$20,000.00 to the American Committee for Shaare Zedek Medical Center in Jerusalem, Israel". Steven R. Schlesinger, in his Petition for the distribution of assets, advised the Court that he had "no affiliation or business relationship with the intended beneficiaries." In an affidavit in support of his Petition, Steven R. Schlesinger added in pertinent part the following paragraphs:

3. I have no affiliation or business relationship with the Crohn's & Colitis Foundation of America... nor do any of my family members or members of my firm.

¹⁸ On November 25, 2008, a Temporary Administrator's Bond, in the amount of \$10,000,000.00, for Steven R. Schlesinger, issued by International Fidelity Insurance Company, was filed.

¹⁹ Letters of Temporary Administration issued to Kermit Gitenstein Foundation Inc., were extended on June 29, 2009, December 18, 2009 and June 29, 2010 by Court Order. On February 9, 2011, Temporary Letters issued to the Kermit Gitenstein Foundation Inc., were revoked.

4. I have no affiliation or business relationship with the Molloy College Nursing Program... nor do any of my family members or members of my firm.

5. I have no affiliation or business relationship with the American Committee for Shaare Zedek Medical Center in Jerusalem, Israel... nor do any of my family members or members of my firm.”

On December 15, 2008, Assistant Attorney General, on behalf of the Attorney General of the State of New York, filed an affidavit which stated that “the Attorney General has no objection to the relief sought by the motion.”

On December 18, 2008, the Public Administrator of Nassau County filed a Petition for the Judicial Accounting as Temporary Administrator of the Estate of Shirley Gitenstein for the period from March 14, 2007 to September 30, 2008. A summary of the account judicially settled, is as follows:

“Summary Statement Combined Account:

CHARGES:

Schedule “A” (Principal Received)	\$	10,624,638.53
Schedule “A-1” (Realized increases)	\$	595,508.57
Schedule “A-2” (Income collected)	\$	607,823.54
Schedule “G” (Unrealized increases)	\$	<u>131,465.71</u>
Total charges	\$	<u>11,959,436.35</u>

CREDITS:

Schedule “B” (Realized decreases)	\$	40,858.57
Schedule “C” (Funeral and administration expenses)	\$	220,700.98
Schedule “D” (Creditors’ claims actually paid)	\$	239,420.32
Schedule “E” (Distributions)	\$	0.00
Schedule “G”(Unrealized decreases)	\$	<u>26,117.32</u>
Total credits	\$	<u>527,097.19</u>
Balance on hand shown by schedule “G”	\$	<u>11,432,339.16”</u>

On December 24, 2008, an Order authorizing distribution of assets was signed by the Court, authorizing the following:

“The sum of Fifty Thousand (\$50,000.00) Dollars to the Crohn’s [sic] & Colitis Foundation of America; Fifty Thousand (\$50,000.00) Dollars to Molloy College Nursing Program; and Twenty Thousand (\$20,000.00) Dollars to the American Committee for Shaare Zedek Medical Center in Jerusalem, Israel as and for a current grant of the Kermit Gitenstein Foundation, Inc.”

On December 24, 2008, by written Decision, the Court consolidated two filed proceedings for resolution; the accounting proceeding filed by the Public Administrator of Nassau County, as Temporary Administrator of the Estate of Shirley Gitenstein, filed on December 18, 2008; and a proceeding filed by Steven R. Schlesinger, as receiver for the Kermit Gitenstein Foundation Inc., for the distribution of assets from the Kermit Gitenstein Foundation Inc., filed on December 8, 2008. The Court approved the accounting filed by the Public Administrator of Nassau County as Temporary Administrator of the Estate of Shirley Gitenstein, in its entirety, including the legal fees for the counsel to the Public Administrator, in the requested amount of \$148,000.00 which included fees in the proceeding on “behalf of Attorney General of the State of New York and the Nassau County Public Administrator for appointment of receiver of the Foundation.”²⁰ In the December 24, 2008 written Decision, the Court also authorized the distribution of \$50,000.00 to the Crohn’s & Colitis Foundation of America, \$50,000.00 to Molloy College Nursing Program and \$20,000.00 to the American Committee for Shaare Zedek Medical Center in Jerusalem, Israel, from the Kermit Gitenstein Foundation Inc.

On December 24, 2008, a Decree was signed, judicially settling the account of the Temporary Administrator of the Estate of Shirley Gitenstein for the period of March 14, 2007 to September 30, 2008. In the Decree, attorneys fees were granted to the attorney

²⁰ N-PCL §1202 authorizes the appointment of a receiver in an action or proceeding brought by the Attorney General. No statutory authority exists for reimbursement to the Attorney General from a corporation for the Petition for the appointment of a receiver.

for the Public Administrator in the amount of \$148,000.00, commissions to the Public Administrator in the amount of \$141,872.15, reasonable expenses in the amount of \$115,970.33 and accounting fees in the amount of \$3,450.00. The Decree further set forth a release and discharge from liability to the Public Administrator, as Temporary Administrator, his predecessors and Liberty Mutual Insurance Company.

On July 27, 2009, an accounting of the Kermit Gitenstein Foundation Inc., by Steven R. Schlesinger as the Receiver, was filed with the Court, which covered the period of November 1, 2007 to December 31, 2008.

On August 19, 2009, a waiver of citation and consent to the accounting was filed by the Assistant Attorney General, Charities Bureau.²¹

On October 19, 2009, the Court judicially settled the interim accounting, filed on July 27, 2009, with a Decree. A summary of the account judicially settled, is as follows:

“Summary Statement Combined Account:

CHARGES:

Schedule “A” (Principal Received)	\$	4,497,403.25
Schedule “AA” (Subsequent Receipts)	\$	239,091.76
Schedule “A-1” (Realized increases)	\$	0.00
Schedule “A-2” (Income collected)	\$	87,577.94
Total charges	\$	<u>4,824,072.95</u>

CREDITS:

Schedule “B” (Realized decreases)	\$	0.00
Schedule “C” (Funeral and administration expenses)	\$	47,002.38
Schedule “D” (Creditors’ claims actually paid)	\$	0.00
Schedule “E” (Distributions)	\$	355,000.00
Total credits	\$	<u>402,002.38</u>
Balance on hand shown by schedule “G”	\$	<u>4,422,070.57”</u>

²¹

The instrument labeled Last Will and Testament of Shirley Gitenstein, although filed with the Nassau County Surrogate’s Court, had not been probated as of December 4, 2007, the date of the Verified Petition. Service for the Verified Petition, dated December 4, 2007, was not ordered on any interested parties named in the Probate Petition, filed on April 5, 2007.

This accounting set forth that the following distributions were made:

- 12/13/07: North Shore-Long Island Jewish Health System Foundation - \$250,000.00 [**An Order to Show Cause and Petition for Distribution was filed on December 4, 2007. An Order authorizing this distribution was granted on December 12, 2007**];
- 06/17/08: Surprise Lake Camp - \$100,000.00 [**An Order to Show Cause and Petition for Distribution was filed on May 21, 2008. An Order authorizing this distribution was granted on June 17, 2008**]; and
- 08/18/08: We Care Fund - \$5,000.00 [**No Petition was filed in the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution**].

On March 18, 2010, a second Petition for Probate of the Last Will and Testament of Shirley Gitenstein, and for Letters of Administration, c.t.a., by the Kermit Gitenstein Foundation Inc., c/o Steven R. Schlesinger, was filed. The Petition listed in ¶5 on p. 2, section f, that six first cousins survived the decedent. ¶6(a) on p. 3 of the Petition filed, listed Milton Hurtes, Stanley Masters a/k/a Stanley Mostkowitz, Annette Gitenstein, Seymour Gitenstein, Rhonda Gitenstein, and Marilyn Mostkowitz a/k/a Marilyn Jones, as persons adversely affected by the purported exercise of the will and/or as persons having an interest under the will. ¶7(a) of the Petition, set forth the Attorney General of the State of New York as a person interested in the proceeding. ¶9(a) of the Petition filed, set forth the approximate total value of the property constituting the decedent's gross testamentary estate was between \$500,000.00 and \$10,065,406.00.²²

²²

The Court file contains a citation, dated April 6, 2010 to Milton Hurtes, Stanley Masters a/k/a Stanley Mostkowitz, Annette Gitenstein, Seymour Gitenstein, Rhoda Gitenstein Sunberg, and Marilyn Mostkowitz a/k/a Marilyn Jones. The Court file contains affidavits of service for the citation on (1) Stanley Masters a/k/a Stanley Mostkowitz, by personal delivery, dated April 20, 2010; (2) Rhoda Gitenstein Sunberg, by personal delivery, dated April 20, 2010; and (3) by certified mail return receipt requested on Milton Hurtes, Annette Gitenstein, Marilyn Jones, Stanley Masters, Seymour Gitenstein and a director for Wellington Place.

On April 9, 2010, an affidavit amending the Probate Petition was filed by Moritt, Hock, Hamroff & Horowitz, LLP. The affidavit sought to “amend Paragraph “6(a)” of the second Petition of Steven R. Schlesinger. The affidavit read in pertinent part as follows:

“Paragraph “6(a)” of the Amended Petition of Steven R. Schlesinger, and as Receiver of the Kermit Gitenstein Foundation Inc., dated March 18, 2010, lists Marilyn Mostkowitz a/k/a Marilyn Jones as an Interested Person of Full Age and Sound Mind. However, according to the genealogist’s Addendum Affidavit, dated October 20, 2009, Marilyn Mostkowitz a/k/a Marilyn Jones resides in a nursing home and therefore should be included in Paragraph “6(b).” Therefore, it is respectfully requested that Paragraph “6(a)” be amended to remove Marilyn Mostkowitz a/k/a Marilyn Jones.

On April 9, 2010, an affidavit amending Probate Petition was filed. Paragraph “6(a)” lists Rhonda Gitenstein as an Interested Person. The genealogist’s report dated January 15, 2008, lists the full name of the decedent’s alleged paternal first cousin as Rhoda Gitenstein Sumberg. Therefore, it is respectfully requested that Paragraph “6(a)” of the Petition be further amended as follows:

Name:	Rhoda Gitenstein Sumberg
Address:	46 Villa Road Larchmont, New York 10004
Relationship to Decedent:	Alleged Paternal First Cousin
Description of Legacy:	None
Fiduciary Status:	None”

On June 24, 2010, the Court appointed a guardian ad litem to represent Marilyn Mostkowitz, an incapacitated person, heir and distributee named in the Petition for Probate of the Last Will and Testament of Shirley Gitenstein, dated March 18, 2010. Attached to the Amended Petition to Probate was a series of letters from the guardian ad litem to the attorney for Steven R. Schlesinger, as receiver of the Kermit Gitenstein Foundation Inc., as Temporary Administrator of the Estate of Shirley Gitenstein. The letters were dated September 13, 2010 and September 20, 2010. The September 13, 2010 letter read in relevant part as follows:

“As you know, we had a conversation on September 1, 2010, regarding our efforts to find the sole surviving witness to the Will in the subject estate, Behn Goldis. As I understand, as of that date, you have had no luck in locating him. I have sent several letters to his last known address. Those letters have not yet been returned by the Postal Service.”

The September 20, 2010 letter read, in pertinent part, as follows:

“I have reviewed your September 14, 2010 correspondence with Affidavit of Due Diligence and exhibits.²³ Frankly, I am having difficulty preparing a report agreeing that the subject Will should be admitted to probate without any proof of the genuineness of the Will considering that we cannot interview, at the very least, or at best, take the testimony of the two (2) witnesses, one known to be deceased and the other not located, nor the draftsman, who is also known to be deceased. Some further proof must be provided to me, unless the Court is of a different opinion, that the signatures of the deceased and the witnesses are genuine and that the provisions of the EPTL and SCPA regarding a probating of Will with no surviving witnesses or draftsman, are met. I believe that we should have a conference at Court with a court/attorney referee to discuss how to move this matter to completion with satisfactory proof of the genuineness of the Gitenstein Will.”

On November 15, 2010, the guardian ad litem filed his report. The guardian ad litem report indicates that he spoke with Deena Voraba, mother of the attesting witness, and she affirmed that the handwriting on the will was that of her son. Additionally, the guardian ad litem reported that he spoke with the attorneys for the receiver and efforts to locate Behn Goldis had been unsuccessful. The guardian ad litem further spoke with Charlotte Edwards, a person claiming to have ‘Durable General Power of Attorney’ for ward, Marilyn Mostkowitz a/k/a Marilyn M. Jones. The conclusion of the guardian ad litem’s report read as follows:

“When I first went to the Court to review the court file in this matter and saw all of the documentation preceding the probate of the subject Will, I found myself somewhat amazed and concerned as to what type of matter I found myself dealing with. Upon review of the voluminous file, I realized that this was not the run of the mill probate proceeding. In fact, when I

²³

Affidavit of due diligence was filed on March 11, 2008 by the Public Administrator.

reviewed the three page document purporting reporting to be the Last Will of Shirley Gitenstein dated October 7, 1989, I was surprised that the document was prepared by a law firm and was so simplistic in nature and missing an elementary clause, namely a clause appointing an executor. As I delved into the matter, I found that the lawyer died, one witness was definitely dead and the other witness, Behn Goldis, could not be located. I also discovered various documents, including handwriting affidavits, and documentation from the Public Administrator, relative to this probate.

Frankly, my initial reaction and that which I dealt with for quite sometime, was that this Will should not be admitted to probate without appropriate proof of Shirley Gitenstein having executed and acknowledged the subject Will. Therefore, I delved more deeply into the probate issues, speaking with Steven Schlesinger, Esq., the Court appointed Receiver of the Kermit Gitenstein Foundation Inc., the attorneys for the Estate at the Moritt Hock law firm, and ultimately with my Ward's attorney-in-fact, Charlotte Edwards That discussion included issues relating to whether or not the Will could be admitted as an ancient document, my concerns regarding the fact that my Ward may have heirs who would benefit from her objecting to the Shirley Gitenstein Last Will and Testament. Once I had the opportunity to speak with Charlotte Edwards and understood from her what she believed to be my Ward's desires in this matter and my Ward's financial circumstances, it appeared to me that objecting to the probate of the Shirley Gitenstein Will, on behalf of my Ward, may not be in the best interests of my Ward and society in general.

Therefore, having studied all of the documents at length in the court file, considering the issue of not finding Behn Goldis to interview and/or take his testimony, and concerned about the best interests of my Ward, who is in a nursing home facility in Florida suffering from Alzheimer's disease, it became clear to me that I should make no attempt to object to the probate of the subject Will.

Therefore, I respectfully report to this Court that there is no valid objection to the probate of the proposed Will, and on behalf of my Ward, Marilyn Moskowitz a/k/a Marilyn Jones, consent to the relief sought by the Petitioner, the probate of the subject Will."

On December 21, 2010, the Court, by written Decision, admitted the Last Will and Testament of Shirley Gitenstein to probate.

On February 9, 2011, a Decree of Probate was signed by the Court, admitting to probate, the Last Will and Testament of Shirley Gitenstein.²⁴ The Decree discharged the Temporary Administrator's bond, filed in the sum of \$10,000,000.00.²⁵ The Letters of Temporary Administration issued to the Kermit Gitenstein Foundation Inc., were revoked.

On February 9, 2011, Letters of Administration, c.t.a., were issued to the Kermit Gitenstein Foundation Inc. c/o Steven R. Schlesinger, Receiver.

On June 24, 2011, the Kermit Gitenstein Foundation Inc., filed a Petition for Letters of Administration, c.t.a., after probate on the Estate of Aaron L. Gitenstein. The property listed in ¶7(a) of the Petition as unadministered was personal property in the amount of \$75,000.00.

On June 29, 2011, Steven R. Schlesinger filed an application for the appointment of Successor Trustee of the Trust created by the Last Will and Testament of Kermit Gitenstein. Pursuant to the Last Will and Testament of Kermit Gitenstein, upon the death of Shirley Gitenstein, the remaining Trust corpus and any unexpended income shall be distributed to the Kermit Gitenstein Foundation Inc. In the Petition, the Petitioner valued the property constituting the Trust to be about \$25,000.00.²⁶

On August 2, 2011, the Court ordered and decreed that the Kermit Gitenstein Foundation Inc., be appointed as Successor to Shirley Gitenstein as Administrator, c.t.a.,

²⁴ Edward W. McCarty III, from January 1, 2011 to December 31, 2015, was the Nassau County Surrogate.

²⁵ A bond for advance payment of commissions was posted in the amount of \$131,323.39 on December 22, 2011. On January 25, 2011, Steven R. Schlesinger, as receiver of the Kermit Gitenstein Foundation Inc., signed a Bond Affidavit, in which he sets forth that, pursuant to the November 25, 2008, Order appointing the Kermit Gitenstein Foundation Inc., temporary administrator of the Estate of Shirley Gitenstein, he obtained a temporary administrator's bond in the sum of \$10,000,000.00 which is still in full force and effect.

²⁶ On July 22, 2014, a Decree was issued appointing Steven R. Schlesinger, as Receiver, fit and proper to be appointed as Successor Trustee of the Trust created under the Last Will and Testament of Kermit Gitenstein. It further advised that Letters of Trusteeship should further be issued. On July 24, 2014, Successor Letters of Trusteeship were issued to Steven R. Schlesinger, receiver of Kermit Gitenstein Foundation Inc.

of the Last Will and Testament of Aaron L. Gitenstein, upon qualifying. In the Order, the Letters of Testamentary issued to Shirley Gitenstein, for the Estate of Aaron L. Gitenstein, were revoked.

On December 23, 2011, Steven R. Schlesinger filed a Petition for advance payment of commissions, under SCPA §2311. The proceeding was captioned “In the Matter of the Application of Steven R. Schlesinger as Administrator, c.t.a., of the Estate of Shirley Gitenstein, deceased ...”. In the proceeding for advanced commission, the Petitioner, Steven R. Schlesinger, set forth that the ‘Petitioner’ is applying, pursuant to “SCPA §2311, for a payment to himself at this time, the sum of \$131,323.39 on account of the receiving commissions to which he is entitled, pursuant to his account as Administrator, as if such account were judicially settled.”²⁷ The Petition for commission was based on assets received in the amount of \$11,432,339.16 and calculated as follows:

“EXHIBIT B
ESTATE OF SHIRLEY GITENSTEIN
CALCULATION OF RECEIVING COMMISSIONS

Assets Received					\$11,432,339.16
2 ½	x	\$ 100,000.00	=	\$ 2,500.00	
2%	x	\$ 200,000.00	=	\$ 4,000.00	
1 1/2	x	\$ 700,000.00	=	\$ 10,500.00	
1 1/4	x	\$ 4,000,000.00	=	\$ 50,000.00	
1%	x	\$ 6,432,339.16	=	<u>\$ 64,323.39</u>	
					\$ 131,323.39” ²⁸

On December 23, 2011, the Court issued an Order permitting payment on account of commissions for Steven R. Schlesinger, as Administrator, c.t.a., of the Estate of Shirley

²⁷ Statutory commissions were previously awarded to the Public Administrator of Nassau County in the accounting filed December 18, 2008, specifically in the amount of \$141,872.15.

²⁸ SCPA §2307 sets forth the applicable law on commissions for fiduciaries.

Gitenstein. In that Order, the Court authorized payment of \$131,323.39 to Steven R. Schlesinger.²⁹ In addition, the Court required Steven R. Schlesinger to post a bond in the authorized amount of \$131,323.39.

On August 9, 2012, Steven R. Schlesinger, as Receiver, petitioned the Court for the approval of the sale of real property from the Kermit Gitenstein Foundation Inc. In that Petition, Steven R. Schlesinger stated that “a piece of real property in the Town of Southampton, New York, came into your Petitioner’s hands as Receiver”. The Petition sets forth that a Contract of Sale was signed on July 11, 2012 for the property, in the amount of \$50,000.00. The Petition further stated that the Petitioner, Steven R. Schlesinger, does not have “sufficient power to sell and dispose of the property in question absent Court approval”. The Petition did not state that Steven R. Schlesinger, his firm, or his family members had any affiliation or business dealings with the intended beneficiaries. Nor did the Petition contain any information on the property to be sold or comparable properties in the area and their value. The Petition did set forth that the property was listed for “sale last year. No offers were ever received”. The Attorney General filed a Notice of Appearance and Statement of No Objection with Reservation of Rights in that he “reserves the right to object to the sale that is the subject of the Petition upon any subsequent application by Petitioner to settle his accounts as Receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On August 9, 2012, the Court, by written Order, granted the sale of the property in the Town of Southampton, New York, for the sum of \$50,000.00.

On December 21, 2012, Steven R. Schlesinger filed a Petition for distribution of assets of the Kermit Gitenstein Foundation Inc. The Petition requested that the Court approve the distribution of the following:

²⁹ Steven R. Schlesinger was granted the commission, not the Kermit Gitenstein Foundation Inc., as Administrator, c.t.a. Steven R. Schlesinger is not the fiduciary of the Estate of Shirley Gitenstein. The Kermit Gitenstein Foundation Inc. was appointed Administrator c.t.a.

“(a) The sum of \$1,000,000.00 to Hofstra University, Maurice A. Deane School of Law for the establishment of the Kermit Gitenstein Institute for Health Law and Policy... a ‘collaborative effort between Hofstra Law, Hofstra North Shore-LIJ School of Medicine at Hofstra University, and the North Shore-LIJ Health System’...

(b) The sum of \$1,000,000.00 to the Touro College Jacob D. Fuchsberg Law Center for the establishment of The Kermit Gitenstein Visiting Chair in Health Law and Policy...

(c) The sum of \$100,000.00 to the American Committee for Shaare Zedek Medical Center, a public non-for-profit hospital located in Jerusalem, Israel. Distributions have been made in the past to this organization during my tenure as Receiver.”

The Petition failed to state, as previously done in similar Petitions, whether Steven R. Schlesinger, his firm or his family members had any affiliation or business dealings with the intended beneficiaries. On December 21, 2012, an Assistant Attorney General signed a Notice of Appearance and Statement of No Objection with Reservation of Rights, filed by Steven R. Schlesinger, which stated “that the Attorney General has no objection to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Permanent Receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On December 21, 2012, the Court, by written Order “authorized and empowered” Steven R. Schlesinger to make the following distributions:

- “(i) \$1,000,000.00 to Hofstra University, Maurice A. Deane School of Law for the establishment of the Kermit Gitenstein Institute for Health Law and Policy;
- (ii) \$1,000,000.00 to Touro College Jacob D. Fuchsberg Law Center for the establishment of the Kermit Gitenstein Visiting Chair in Health Law and Policy; and
- (iii) \$100,000.00 to the American Committee for Shaare Zedek Medical Center.”

On March 14, 2013, Steven R. Schlesinger filed a Petition for distribution of assets from the Kermit Gitenstein Foundation Inc. In that Petition, Steven R. Schlesinger states that “it is my duty and responsibility to ensure the Foundation’s work is carried on”. The Petition requested the Court to approve the distribution of:

“a. The sum of \$25,000.00 to North Shore-LIJ Health System for the Destination 2020 Campaign... b. The sum of \$5,000.00 to the To Life! Foundation, a not-for-profit organization which breast [sic] cancer awareness and research...”

The Petition failed to state whether Steven R. Schlesinger, his firm or his family members had any affiliation or business dealings with the intended beneficiaries. The sum of \$25,000.00 to the “North Shore-LIJ Health System for the Destination 2020 Campaign” (attached as “Exhibit A” to the Petition) was for a sponsorship and/or tickets to a “Destination Celebration” gala on April 25, 2013, to be held at the Intrepid Sea, Air and Space Museum in New York City, including a “special performance by Grammy Award winner, Harry Connick, Jr.”.

On March 14, 2013, Steven R. Schlesinger filed the Attorney General’s Notice of Appearance and Statement of No Objection with Reservation of Rights, with the Petition, dated March 14, 2013. The Assistant Attorney General, on behalf of the Attorney General, reserved “all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Permanent Receiver of the assets of the Kermit Gitenstein Foundation Inc.”.

On March 14, 2013, by written Order, the Court “authorized and empowered” the distribution of:

- “(i) \$25,000.00 to the North Shore-LIJ Health System Foundation;
- (ii) \$5,000.00 to the To Life! Foundation.”

On March 27, 2013, Steven R. Schlesinger filed a Petition for the distribution of assets from the Kermit Gitenstein Foundation Inc. In that Petition, Steven R. Schlesinger requested the Court approve the distribution of:

- “a. The sum of \$25,000.00 for ‘Gold Coast Cares’ an event in support of St. Jude Children’s Research Hospital (the ‘Hospital’).”

The Verified Petition failed to state whether Steven R. Schlesinger, his firm or his family members had any affiliation or business dealings with the intended beneficiary. The Petition set forth that “the Foundation is required to make distributions to public charities on an at least annual basis of its assets each calendar year of approximately five (5%) percent of its assets to comply with the applicable provisions of the Internal Revenue Code, the Estates, Power & Trust Law, the Not-For-Profit Corporation Law and the New York State Tax Law”. Steven R. Schlesinger states “As such, your Affirmant requests permission to distribute some of the funds on hand”. Exhibit “A” attached to the Petition revealed that The Gold Coast Cares for St. Jude distribution was for “an exquisite evening at Oheka Castle”, one of Long Island’s most historic and beautiful venues, for cocktails, a seated gourmet dinner, entertainment by Hank Lane Music, dancing and a fabulous live and silent auction.

On April 4, 2013, by written Order, the Court “authorized and empowered” the distribution of \$25,000.00 to the “Gold Coast Cares” event in support of St. Jude Children’s Research Hospital.

On April 11, 2013, a Notice of Appearance and Statement of No Objection with Reservation of Rights, stated “that the Attorney General has no objection to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Permanent Receiver of the assets of the Kermit Gitenstein Foundation Inc.”.

On December 23, 2013, a Verified Petition filed by Steven R. Schlesinger as Receiver, requested authorization to distribute assets as follows:

- a. The sum of \$50,000.00 to St. Jude Children’s Research Hospital, for the construction of a new tower which will house, inter alia, a proton therapy center, the most effective and safest form of radiation for children with cancer ...
- b. The sum of \$15,000.00 to Memorial Sloan-Kettering Cancer Center for the continued funding of the Immune Cell Therapy Laboratory. The Laboratory is currently spearheading an innovative, groundbreaking treatment of several forms of pediatric cancer ...
- c. The sum of \$10,000.00 to Pave the Way Foundation, a non-sectarian organization dedicated to achieving peace by closing gaps in tolerance and education with practical relations between religions. The grant would be earmarked for its “Generations” initiative in Israel, which supports, inter alia, ongoing holiday programs benefitting indigent holocaust survivors ...
- d. The sum of \$10,000.00 to Parents for Megan’s Law and the Crime Victims Center, an organization dedicated to, inter alia, the treatment of child sexual abuse and rape, for the victims’ services program ...
- e. The sum of \$15,000.00 to The Mayo Clinic, to its Center for the Science of Health Care Delivery, which investigates ways to curb medical costs ...
- f. The sum of \$10,000.00 to The Guide Dog Foundation, a local organization that trains and places guide and service dogs ...
- g. The sum of \$5,000.00 to Homes for Homecoming Heroes, an organization that builds homes for veterans who served the United States in Iraq and Afghanistan. Nassau County has donated a site in Hicksville on which the organization plans to build its first home in the County...
- h. The sum of \$25,000.00 to WLIW, for the continuation of a series known as Long Island Business Report, an award-winning production currently producing a series of health-related episodes ...

- i. The sum of \$25,000.00 to Lenox Hill Hospital, GI research Fund #580283, for research with respect to inflammatory bowel disease headed by Burton I. Korelitz, M.D., Chief Emeritus of North Shore LIJ-Lenox Hill Hospital ...
- j. The sum of \$50,000.00 to the Myotonic Dystrophy Foundation, an organization researching this genetic disorder. The grant would help the organization's efforts in the support and education of those living with Myotonic Dystrophy, and will assist research ...”

The Verified Petition failed to state whether Steven R. Schlesinger, his firm or his family members had any affiliations or business dealings with the intended beneficiaries. In addition, the exhibits attached to the Verified Petition requesting the distributions revealed the following:

1. A letter, dated November 5, 2013, from Memorial Sloan-Kettering Cancer Center, Clare H. Pugsley, Development Officer, was cc'd to Gary Melius;
2. A letter from Pave the Way Foundation, Inc., identifies Gary Melius as a member of their board; and
3. A letter from the Mayo Clinic, Patrick Stewart, PHD, was cc'd to Gary Melius.

On December 20, 2013, by written notice, the Attorney General of the State of New York stated that he had “no objection to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Permanent Receiver of the assets of the Kermit Gitenstein Foundation Inc.”.

On December 20, 2013, the Court, by written Order, “authorized and empowered” the donations in the requested amounts as follows:³⁰

³⁰ The Court file reflects that the Order authorizing the distribution was signed three days prior to the Petition requesting said distributions being filed.

- “a. The sum of \$50,000.00 to St. Jude Children’s Research Hospital, for the construction of a new tower which will house, inter alia, a proton therapy center, the most effective and safest form of radiation for children with cancer;
- b. The sum of \$15,000.00 to Memorial Sloan-Kettering Cancer Center for the continued funding of the Immune Cell Therapy Laboratory;
- c. The sum of \$10,000.00 to Pave the Way Foundation, for its “Generations” initiative in Israel, which supports, inter alia, ongoing holiday programs benefitting indigent holocaust survivors;
- d. The sum of \$10,000.00 to Parents for Megan’s Law and the Crime Victims Center, for the victims’ services program;
- e. The sum of \$15,000.00 to The Mayo Clinic, to its Center for the Science of Health Care Delivery;
- f. The sum of \$10,000.00 to The Guide Dog Foundation;
- g. The sum of \$5,000.00 to Homes for Homecoming Heroes, for the construction of its’ first home in Nassau County;
- h. The sum of \$25,000.00 to WLIW, for the continuation of a series known as Long Island Business Report, currently producing a series of health-related episodes;
- i. The sum of \$25,000.00 to Lenox Hill Hospital GI Research Fund #580283, for research with respect to inflammatory bowel disease headed by Burton I. Korelitz, M.D., Chief Emeritus of North Shore LIJ-Lenox Hill Hospital; and
- j. The Sum of \$50,000.00 to the Myotonic Dystrophy Foundation.”

On March 7, 2014, a Verified Petition, filed by Steven R. Schlesinger, as Receiver, requested the distribution of assets from the Kermit Gitenstein Foundation Inc. In said Verified Petition, Steven R. Schlesinger requested the following distributions:

- “a. The sum of \$250,000.00 to the Elena Melius Foundation, Inc., a not-for-profit organization which assists local, humane service organization by programmatic funding of project and initiatives ...

- b. The sum of \$250,000.00 to fund the Gitenstein Scholars Program at Touro Law, Touro College Jacob D. Fuchsberg Law Center ...
- c. The sum of \$60,000.00 to Hofstra Law School, for use toward the establishment of the Justice Incubator ... to provide civil legal service to low-income individuals and families ...
- d. The sum of \$10,000.00 to Gold Coast Cares for St. Jude, event in support of St. Jude Children's Research Hospital. The funds raised in this campaign will support the Hospital's programs for and to support its' mission to find cures for childhood cancers and other life-threatening illnesses through research and treatment ...
- e. The sum of \$5,000.00 to The Cystic Fibrosis Foundation, in support of the Great Strides Walk to be held on May 10, 2014 at Blydenburg Park, Smithtown, New York ...”

The Verified Petition, signed by Steven R. Schlesinger failed to state whether he, his firm or his family members had any affiliation or business dealings with the beneficiaries. A copy of a proposal, annexed to the Verified Petition as Exhibit “D”, identifies one of the intended donations was for an event to be held on March 15, 2014 at Oheka Castle for Gold Coast Cares for St. Jude. The amount was to purchase a “Danny’s Dream Sponsor” consisting of a table of 10, along with other benefits at said event.

The New York State Attorney General filed a Notice of Appearance with Steven R. Schlesinger’s law office in response to the Verified Petition, dated March 3, 2014. The notice was then filed with the Court by Steven R. Schlesinger. The Notice of Appearance and Statement of No Objection with Reservation of Rights specifically stated that “the Attorney General has no objections to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On March 7, 2014, by written Order, the Court “authorized and empowered” Steven R. Schlesinger to distribute the following:

- “a. The sum of \$250,000.00 to the Elena Melius Foundation Inc;
- b. The sum of \$250,000.00 to fund the Gitenstein Scholars Program at Touro Law, Touro College Jacob D. Fuchsberg;
- c. The sum of \$60,000.00 to Hofstra Law School, for use toward the establishment of the Justice Incubator;
- d. The sum of \$10,000.00 to Gold Coast Cares for St. Jude; and
- e. The sum of \$5,000.00 to the Cystic Fibrosis Foundation.”

On July 32, 2014, a Verified Petition by Steven R. Schlesinger as Receiver of the Kermit Gitenstein Foundation Inc., for the distribution of assets from the Kermit Gitenstein Foundation Inc. was filed.³¹ The Verified Petition requested the following distributions:

- “a. The sum of \$50,000.00 to The Armand & Antoinette D’Amato Family Foundation, a not-for-profit local organization which benefits the residents of the Village of Island Park, devastated by Hurricane Sandy. The funds would be earmarked for the construction of a splash park at Masone Beach for the families of Island Park ...
- b. The sum of \$5,000.00 to The INN (Interfaith Nutrition Network), a not-for-profit organization [sic] which provides food, clothing, and temporary shelter for homeless Long Islanders ...
- c. The sum of \$5,000.00 to The Heckscher Museum of Art, for their collaboration with school districts on Long Island (with a concentration in the Town of Huntington), for which assists school age children [sic] understand and strengthen problem solving skills through art ...”

The Verified Petition signed by Steven R. Schlesinger did not advise the Court of any affiliation he, his firm or his family members may have had with any of the proposed beneficiaries. The Attorney General filed with the office of Steven R. Schlesinger a Notice of Appearance and Statement of No Objection with Reservation of Rights. The

³¹ Date stamp on the Verified Petition set forth July 32, 2014. This Court is not certain as to the exact date of filing, as July 32, 2014 is incorrectly date stamped. It is believed that the filing was August 1, 2014.

statement read that “the Attorney General has no objections to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent applications by Petitioner to settle his accounts as receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On August 7, 2014, by written Order, the Court, “authorized and empowered” Steven R. Schlesinger to make the following distributions:

- “a. The sum of \$50,000.00 to The Armand & Antoinette D’Amato Family Foundation;
- b. The sum of \$5,000.00 to The INN (Interfaith Nutrition Network);
- c. The sum of \$5,000.00 to The Heckscher Museum of Art.”

On March 13, 2015, a Verified Petition, signed by Steven R. Schlesinger was filed for the distribution of assets. Steven R. Schlesinger requested the following distributions:

- “a. The sum of \$250,000.00 to the Maurice A. Deane School of Law at Hofstra Law School, for the expansion of the Gitenstein Institute’s programs, including the new Health Law and Policy Clinic and the Health Law and Policy Fellowship...
- b. The sum of \$25,000.00 to The Mayo Clinic for the Individualized Medicine Program, which uses fully sequenced DNA to ensure that patients are receiving the proper type and amount of drug for their particular illness...
- c. The sum of \$20,000.00 to Yad Marcell, a not-for-profit organization located in Shederot, Jerusalem, for the renovation of the town’s mikvah. The town is 800 meters from the Gaza border...
- d. The sum of \$10,000.00 to Spectrum Designs Foundation, for the Believe Campaign. The funds would be used to purchase a new building where those who are on the autism spectrum can find employment. The organization has identified a building known as 85 Channel Drive, Port Washington, New York, as a potential space for the new facility.”

In the Petition, filed March 13, 2015, Steven R. Schlesinger did not set forth whether he, his firm or his family members had any affiliation or business dealings with any of the intended beneficiaries. The Attorney General filed with Jaspan Schlesinger LLP, a Notice of Appearance and Statement of No Objection with Reservation of Rights. In said notice, the Attorney General stated that he had “no objection to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application to settle his accounts as Receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On March 13, 2015, the Court “authorized and empowered” the following distributions:

- “a. The sum of \$250,000.00 to Maurice A. Deane School of Law at Hofstra Law School;
- b. The sum of \$25,000.00 to The Mayo Clinic;
- c. The sum of \$20,000.00 to Yad Marcell; and
- d. The sum of \$10,000.00 to Spectrum Designs Foundation.”

On May 18, 2015, a Verified Petition, signed by Steven R. Schlesinger, was filed for the distribution of assets. Steven R. Schlesinger requested the following distributions:

- “a. The sum of \$1,000.00 to the North Shore Animal League, for the support of the 15th Annual Tour for Life ...
- b. The sum of \$2,500.00 to the American Foundation for Suicide Prevention, in support of its annual fund-raising effort known as ‘A Good Bet’ ...
- c. The sum of \$10,000.00 to Chai Mitzvah, an organization dedicated to assisting individuals to re-invigorate American Jewry on personal and communal levels ...
- d. The sum of \$5,000.00 to the Don Monti Memorial Research Foundation ...”

The distribution request for the American Foundation for Suicide Prevention was solicited by Dale Camhi for a “Wheel Sponsor” which included the following:

- “• Six complimentary tickets to the event
- Banner signage at event
- Recognition AFSP website with links
- Recognition as Wheel Sponsor in event program ...”

The distribution request for Chai Mitzvah in an exhibit attached to the Petitions, detailed their fund-raising event which included tickets to a “fundraiser on Wednesday, June 3, 2015 at Club 101, at 101 Park Avenue in New York City from 5:30 to 7:30 p.m.”

Filed with the Petition was a Notice of Appearance and Statement of No Objection with Reservation of Rights by the Attorney General which stated that the “Attorney General has no objection to the granting at this time of the relief requested in the Petition but reserves all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Permanent Receiver of the assets of the Kermit Gitenstein Foundation Inc.”

On May 18, 2015, by written Order, the Court “authorized and empowered” the following disbursements:

- a. The sum of \$1,000.00 to the North Shore Animal League;
- b. The sum of \$2,500.00 to the American Foundation for Suicide Prevention;
- c. The sum of \$10,000.00 to Chai Mitzvah; and
- d. The sum of \$5,000.00 to The Don Monti Memorial Research Foundation.

On October 7, 2015, by written Order, the Court ordered an interim accounting of the Kermit Gitenstein Foundation Inc.

On December 7, 2015, a Petition for Judicial Settlement of Account of Receiver of the Kermit Gitenstein Foundation Inc., was filed. The summary of the account set forth, “Accounting by Steven R. Schlesinger” covering the period of January 1, 2009 to October 31, 2015, was as follows:

“SUMMARY OF ACCOUNT
Kermit Gitenstein Foundation Inc.
For Period 01/01/2009 Through 10/31/2015

CHARGES:

Amount shown by Schedule “A” (Principal received)	\$14,097,244.08	
Amount shown by Schedule “A-1” (Realized increases on principal)	0.00	
Amount shown by Schedule “A-2” (Income Collected)	<u>81,653.36</u>	
Total charges		\$14,178,897.44

CREDITS:

Amount shown by Schedule “B” (Realized decreases on principal)	\$ 0.00	
Amount shown by Schedule “C” (Funeral and administration expenses)	1,124,656.59	
Amount shown by Schedule “D” (Creditors’ claims actually paid)	0.00	
Amount shown by Schedule “E” (Distributions to legatees, distributees, etc.)	<u>11,221,000.00</u>	
Total credits		<u>12,345,656.59</u>
Balance on hand shown by Schedule “G”		1,833,240.85
Cash	\$ 1,833,240.85	
Other property	\$ 0.00 ”	

The expenses set forth in schedule “C”, released expenses for legal fees, accounting fees, bank fees, bond fees and taxes. The distributions listed in the accounting, filed on December 7, 2015, were made on the following dates as follows:

08/03/2009: Holocaust Memorial & Tolerance Center of Nassau County - \$25,000.00.
[No Petition was filed with the Nassau County Surrogate’s Court for

this distribution and no Court authorization was given for said distribution].

- 08/14/2009: The We Care Fund of the Nassau County Bar Association - \$10,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 09/07/2009: Nassau Health Care Corporation - \$1,200,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 11/06/2009: Ezer Mizion Inc. - \$100,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 11/10/2009: Molloy College Nursing Program - \$300,000.00. **[On December 24, 2008, an Order was authorized for \$50,000.00 to Molloy College Nursing Program; No other Court authorization was ordered].**
- 12/10/2009: Surprise Lake Camp - \$100,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/10/2009: Hofstra Medical School - \$1,000,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/10/2009: North Shore-Long Island Jewish - \$1,000,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/10/2009: Integrated Medical Foundation - \$5,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 02/05/2010: IsraAid - \$35,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/27/2011: Ezer Mizion, Inc. - \$50,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/27/2011: North Shore-LIJ - \$4,000,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**

- 12/27/2011: North Shore-LIJ - \$250,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 04/10/2012: Hofstra Law School - \$10,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 06/28/2012: Lupus Foundation of America - \$5,000.00 **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 06/28/2012: Holocaust Memorial & Tolerance Center of Nassau County - \$5,000.00. **[No Petition was filed with the Nassau County Surrogate's Court for this distribution and no Court authorization was given for said distribution].**
- 12/20/2012: American Committee for Shaare Zedek Medical Center - \$100,000.00. **[The Petition for this distribution was filed December 21, 2012; the Order authorizing the distribution was dated December 21, 2012].**
- 12/24/2012: Hofstra Law School - \$1,000,000.00 **[The Petition for this distribution was filed December 21, 2012; the Order authorizing the distribution was dated December 21, 2012].**
- 12/24/2012 Touro College, Jacob Fuchsberg Law Center - \$1,000,000.00 **[The Petition for this distribution was filed December 21, 2012; the Order authorizing the distribution was dated December 21, 2012].**
- 03/14/2013: To Life! Foundation - \$5,000.00 **[The Petition for this distribution was filed on March 14, 2013; The Order authorizing the distribution was dated March 14, 2013].**
- 03/15/2013: North Shore - LIJ Health Systems Foundation - \$25,000.00 **[The Petition for this distribution was filed on March 14, 2013; The Order authorizing the distribution was dated March 14, 2013].**
- 04/06/2013: St. Jude's Childrens Research Hospital - \$25,000.00 **[The Petition for this distribution was filed on April 4, 2013. The Order authorizing the distribution "to the 'Gold Coast Cares' event in support of St. Jude Children's Research Hospital" was dated April 4, 2013].**
- 12/13/2013: WLIW - \$25,000.00. **[The Petition for distribution was filed on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013].**
- 12/31/2013: Lenox Hill Hospital GI Research Fund #580283 - \$25,000.00 **[A Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013].**

- 12/31/2013: St. Judes Childrens Research Hospital - \$50,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: Memorial Sloan Kettering Cancer Center - \$15,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: Pave the Way Foundation - \$10,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: Parents for Megan's Law & the Crime Victims - \$10,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: The Mayo Clinic - \$15,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: The Guide Dog Foundation - \$10,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: Homes for Homecoming Heroes - \$5,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 12/31/2013: Myotonic Dystrophy Foundation - \$50,000.00 [A **Petition was filed for distribution on December 23, 2013. An Order authorizing distribution was granted on December 20, 2013**].
- 03/07/2014: St. Jude's Childrens Research Hospital (Gold Coast Cares) - \$10,000.00 [A **Petition was filed for distribution on March 7, 2014. An Order authorizing distribution was granted on March 7, 2014**].
- 03/07/2014: Touro College, Jacob Fuchsberg Law Center - \$250,000.00 [A **Petition was filed for distribution on March 7, 2014. An Order authorizing distribution was granted on March 7, 2014**].
- 03/07/2014: Cystic Fibrosis Foundation - \$5,000.00 [A **Petition was filed for distribution on March 7, 2014. An Order authorizing distribution was granted on March 7, 2014**].
- 03/07/2014: Elena Melius Foundation - \$250,000.00. [A **Petition was filed for this distribution on March 7, 2014. An Order authorizing distribution was granted on March 7, 2014**].

- 03/07/2014: Maurice A. Deane School of Law at Hofstra - \$60,000.00 [A Petition was filed for this distribution on March 7, 2014. An Order authorizing distribution was granted on March 7, 2014].
- 08/15/2014: The INN - \$5,000.00 [A Petition was filed for this distribution on July 32, 2014 [sic] (August 1, 2014). An Order authorizing distribution was granted on August 7, 2014].
- 08/15/2014: The Heckscher Museum of Art - \$5,000.00 [A Petition was filed for this distribution on July 32, 2014 [sic] (August 1, 2014). An Order authorizing distribution was granted on August 7, 2014].
- 08/15/2014: Armond & Antoinette D'Amato Family Foundation - \$50,000.00 [A Petition was filed for this distribution on July 32, 2014 [sic] (August 1, 2014). An Order authorizing distribution was granted on August 7, 2014].
- 03/17/2015: The Mayo Clinic - \$25,000.00³². [A Petition for this distribution was filed on March 13, 2015 and the Order authorizing said distribution was granted on March 13, 2015].
- 03/17/2015: Spectrum Designs Foundation - \$10,000.00 [A Petition for this distribution was filed on March 13, 2015 and the Order authorizing said distribution was granted on March 13, 2015].
- 03/17/2015: Yad Marcell - \$20,000.00 [A Petition for this distribution was filed on March 13, 2015 and the Order authorizing said distribution was granted on March 13, 2015].
- 05/19/2015: Chai Mitzvah - \$10,000.00 [A Petition for this distribution was filed on May 18, 2015. An Order authorizing distribution was granted on May 18, 2015].
- 05/19/2015: North Shore Animal League - \$1,000.00 [A Petition for this distribution was filed on May 18, 2015. An Order authorizing distribution was granted on May 18, 2015].
- 05/19/2015: Don Monti Memorial Research Foundation - \$5,000.00 [A Petition for this distribution was filed on May 18, 2015. An Order authorizing distribution was granted on May 18, 2015].
- American Suicide Prevention - \$2,500.00³³ [A Petition for this distribution was filed on May 18, 2015. An Order authorizing distribution was granted on May 18, 2015].

³² On December 24, 2008, the Court authorized distribution of \$50,000.00 to Crohn's & Colitis Foundation of America. Said distribution did not appear on the account.

³³ On May 18, 2015, the Court authorized distribution of \$2,500.00 to the American Foundation for Suicide Prevention. Said distribution did not appear on the account.

06/01/2015: Maurice A. Deane School of Law at Hofstra - \$250,000.00.

[A Petition for this distribution was filed on March 13, 2015. An Order authorizing said distribution was granted on March 13, 2015].

According to the Accounting, a distribution was returned by North Shore-LIJ on April 14, 2010 in a “cash” amount of \$200,000.00.

On December 7, 2015, an Interim Accounting of the Estate of Shirley Gitenstein was filed, pursuant to the Order of the Court. The summary of account for the period November 28, 2008 through October 31, 2015, is as follows:

“SUMMARY OF ACCOUNT

Estate of Shirley Gitenstein
For Period 11/28/2008 Through 10/31/2015

CHARGES:

Amount shown by Schedule “A” (Principal received)	\$11,355,557.04	
Amount shown by Schedule “A-1” (Realized increases on principal)	47,645.86	
Amount shown by Schedule “A-2” (Income Collected)	497,189.43	
	<hr/>	
Total charges		\$11,900,392.33

CREDITS:

Amount shown by Schedule “B” (Realized decreases on principal)	\$ 1,505.36	
Amount shown by Schedule “C” (Funeral and administration expenses)	638,694.42	
Amount shown by Schedule “D” (Creditors’ claims actually paid)	0.00	
Amount shown by Schedule “E” (Distributions to legatees, distributees, etc.)	9,793,866.63	
	<hr/>	
Total credits		10,434,066.41
Balance on hand shown by Schedule “G”		1,466,3265.92
Cash	\$ 1,455,321.42	
Other property	\$ 11,044.50 ”	

Further, in Schedule E, the distributions made by the Estate are as follows:

“SCHEDULE E - STATEMENT OF DISTRIBUTIONS MADE

Estate of Shirley Gitenstein
For Period 11/28/2008 Through 10/31/2015

To: The Kermit Gitenstein Foundation Inc.
Distribution

12/08/2009	Cash	\$ 91,018.64
06/17/2011	Valley National a/c# 1110007921 Check number 132	312,000.00
12/21/2011	Cash	4,400,000.00
	Estate of Aaron Gitenstein -inheritance	75,322.45
12/19/2012	Cash	2,200,000.00
12/23/2013	Cash	200,000.00
3/31/2014	Cash	575,000.00
6/11/2014	Cash	<u>1,940,525.54³⁴</u>
	Total for The Kermit Gitenstein Foundation Inc.	<u>\$9,793,866.63</u>
	TOTAL DISTRIBUTIONS TO BENEFICIARIES	\$9,793,866.63

On December 10, 2015, the Court, by written Order, set forth the following:

“Having reviewed the petition for judicial settlement of accounting filed by Stephen [sic] R. Schlesinger, Esq., Permanent Receiver for the Kermit Gitenstein Foundation, Inc. filed December 7, 2015 and questions having been raised in an article in the public media concerning Mr. Schlesinger’s performance as Permanent Receiver, the court finds the need for a far more definite analysis of the documents and matters that they reflect in order to maintain:

1. The goals and intentions of the creators of the Gitenstein Foundation, Inc.;
2. To reaffirm the confidence of the public in the oversight responsibility of the Nassau County Surrogate’s Court; and

³⁴ This Court is not certain why the distributions are set forth as “cash”. Further clarifications by Steven R. Schlesinger shall be required in the accounting proceeding.

3. To review the specific actions of receiver Stephen [sic] Schlesinger in his duties as receiver of the Gitenstein Foundation, Inc.

IT IS HEREBY ORDERED in the exercise of the general, legal and equitable powers of the Surrogate and under the New York State Not For Profit [sic] Law §1206(6)(c):

1. That Stephen [sic] R. Schlesinger be relieved of his authority to dispense funds from the Kermit Gitenstein Foundation, Inc., pending further order of the court, but he shall continue to oversee the requirements of the Kermit Gitenstein Foundation, Inc.; and
2. That Joseph W. Ryan, Jr. of Melville, New York, is hereby appointed to conduct an inquiry as to the performance of Mr. Schlesinger, and to ‘Hear and Report’ to the court his findings concerning the management, execution and disbursement of funds of the Foundation. Mr. Ryan is authorized to use of the funds of the Foundation to defray the costs of his inquiry and he is further authorized to retain any professional investigative personnel or accountants to assist him in the areas of his inquiry.”

On December 18, 2015, the Court issued a Corrected Order which was identical to the December 10, 2015 Order except, N-PCL §1202(b), was cited rather than N-PCL §1206(6)(c).

On January 11, 2016, the Referee filed a report with the Nassau County Surrogate’s Court.³⁵ He indicated in his report that he had not received the degree of cooperation urged by the former Nassau County Surrogate. Further, he wrote letters to Steven R. Schlesinger on December 11, 2015 and December 30, 2015 asking for full cooperation and documents to be produced on a rolling basis, if possible, with complete production by January 14, 2016. According to the Referee, no documents were produced by Steven R. Schlesinger. The Referee set forth the following reasons why document discovery is necessary:

“1. The \$250,000.00 grant to the Elena Melius Foundation at the time of Mr. Schlesinger’s Oheka Castle Wedding” Oheka Castle is the home of the Elena Melius Foundation and is owned and operated by Gary Melius, reported to be a close personal friend of Mr. Schlesinger by Newsday six

³⁵

The Surrogate of Nassau County from January 1, 2016 to the present is Hon. Margaret C. Reilly.

days before the wedding, Mr. Melius as President . . . submitted . . . a proposal for a \$250,000.00 grant from the Gitenstein Foundation Two days before the wedding, Mr. Schlesinger petitioned . . . [a former] Nassau County Surrogate, without disclosing his relationship with Mr. Melius, Oheka Castle on the Wedding.”

The Referee, believing that he had no subpoena power, requested from Gary Melius production of the wedding books, contracts, accounting books showing the costs and profits from the event, invoices and Melius Foundation records, tracing the \$250,000.00 distribution. No response was given by Gary Melius to the Referee. The Referee further expressed concern in his report whether grants “were motivated to promote legal business for the [Steven R. Schlesinger’s] law firm . . . and to cater to firm clients.” The Referee set forth other areas of significant concern with Steven R. Schlesinger’s management of the Foundation that included grants motivated to promote legal business for his law firm and to cater to firm clients.

On January 12, 2016, Steven R. Schlesinger moved by Order to Show Cause for an Order, pursuant to CPLR §2221, vacating the Corrected Order of this Court, dated December 18, 2015. In his Affirmation in Support of the Order to Show Cause, Steven R. Schlesinger posited that the Corrected Order of this Court, dated December 18, 2015, should be vacated because

- no factual predicate to justify the appointment of the court evaluator, as the court did not identify specific discrepancies in the accounting filed;
- the court issued an order without affording the receiver an opportunity to respond and address any issues with the accounting which is an abuse of discretion and denial of due process;
- the order will result in a waste of the Foundation’s assets;
- the money in the Foundation was intended by its founder to be used by charitable purposes, not to pay for unnecessary and unwarranted investigation;
- the investigation is duplicative of the investigation being conducted by the New York State Attorney General;

- virtually all of the charitable distributions were pre-approved by the Attorney General Charities Bureau and were “So Ordered” by the court; and
- as receiver, Steven R. Schlesinger has not taken any fees for the work done, not “one penny from the Foundation.” In the Affirmation in Support of the Order to Vacate, Steven R. Schlesinger stated the following:

“The court refused to provide any factual basis for its order which would justify suspending my ability to make further distribution (**all of which in any event would require prior approval by both the Attorney General and the Court**) ...”
(Emphasis Added)

On January 12, 2016, this Court signed the Order to Show Cause by Steven R. Schlesinger. This Court struck the Temporary Restraining Order (TRO) language contained in the Order to Show Cause, requested by Steven R. Schlesinger.

On January 25, 2016, the New York State Attorney General submitted to the Court a Memorandum of Law in Opposition to the Permanent Receiver’s Order to Show Cause, dated January 12, 2016, to Vacate the Corrected Order of the Court, dated December 18, 2015. The Attorney General set forth that it has jurisdiction over the Kermit Gitenstein Foundation Inc., pursuant to EPTL §8-1.4 and has been a real party in interest in this matter since November 2007, when the Receiver was appointed to wind up the affairs of the Foundation.³⁶ The Attorney General had no objection to the Court’s Corrected Order, dated December 18, 2015, and agreed that a close examination of the Receiver’s conduct and administration of the Foundation is warranted. Furthermore, the Attorney General, in his Memorandum, strongly disagreed with the Receiver’s contention that the Court’s Corrected Order, dated December 18, 2015, should be vacated because there is

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The Court notes that in the Verified Petition, dated October 29, and 30, 2007, for the appointment of a Permanent Receiver, the Attorney General and the Public Administrator set forth in ¶42 that after the Foundation receives a final distribution from the Estate of Shirley Gitenstein, pursuant to the Will, the Attorney General intends to seek a judicial dissolution of the Foundation. Contrary to the Attorney General’s Memorandum, the Order from the Court, dated November 1, 2007, appointing Steven R. Schlesinger as Permanent Receiver, did not appoint the Receiver to wind up the affairs of the Foundation. A judicial dissolution was never sought from the Attorney General. The Foundation has not received a final distribution of the assets of the Estate of Shirley Gitenstein.

purportedly no factual predicate to justify the Court's appointment of a Referee to conduct an investigation and as such, an investigation will constitute a waste of Foundation assets. The Attorney General also asserts that the Receiver's position that he has been denied due process by not having advance notice and an opportunity to respond to the Court's concern about the accounting before the entry of the December 18, 2015 Corrected Order, is unfounded. The Attorney General posits that the Receiver operates at the behest of the Court. The Receiver is appointed by the Court and "may be removed by the Court at any time" citing N-PCL §1202 (b).

On February 10, 2016, the Referee filed a second report with the Nassau County Surrogate's Court. The report indicated that the Referee had faced obstacles with Steven R. Schlesinger due to his resistance to cooperate. According to the report, he obtained full cooperation from the Attorney General, according to the report and received over two thousand documents obtained by subpoena from Steven R. Schlesinger. Six hundred more emails were to be forthcoming from the Attorney General. The report indicated that on February 3, 2016, the Referee received partial document production from Steven R. Schlesinger, which consisted of Court files and documents that the Attorney General had previously supplied to him. According to the report, Steven R. Schlesinger refused to produce records relating to the Oheka Castle wedding held on March 2, 2014, or the March 7, 2014 \$250,000.00 distribution to the Elena Melius Foundation. Documents relating to the Estate of Shirley Gitenstein were also not produced. The report states that Steven R. Schlesinger claims that the subject matter does not fall within the scope of the Referee's appointment. The report goes on to state the following:

"Our preliminary analysis indicates that Mr. Schlesinger's decisions were influenced by cronyism and other factors which the Court finds inappropriate. For example, near the end of 2013, Mr. Schlessinger abdicated his decision making process to Mr. Gary Melius, his client, business associate and personal friend. Mr. Melius decided what grantees would receive \$100,000.00 of foundation funds. In an email to Mr. Melius, Sherry L. Mionis, legal assistant to Mr. Schlesinger, requested the following:

Steve spoke with you about grants from the Kermit Foundation. I need to know what organizations you decided on and the amounts requested, so that I can do the application to the Court. I don't want to miss any of them, so I need a list from you as soon as you can as to what you would like requested and, to the extent I haven't received the back-up needed, I will need that as well.

Mr. Melius responded:

I forwarded you all the emails, \$10k to Pave the Way, \$10K to Parents for Megan's Law, \$50K to St. Jude, \$15k to the Mayo Clinic. I had sent them all to Steve.

None of Mr. Schlesinger's applications for the Court approval of these grants disclosed these circumstances."

The Referee sought explanation of his decision making process from Steven R. Schlesinger, yet no explanation was given to him.

On March 15, 2016, the Referee filed a third report with the Court. The Referee, requested this Court to give him the approval to further investigate. The third report reiterated the previous two reports and noted the following areas of concern:

- “(1) The \$250,000.00 grant to the Elena Melius Foundation at the time of the Schlesinger wedding at Oheka Castle;
- (2) The Shirley Gitenstein Estate ... (a) the failure to make final distribution of the estates to the Foundation for years; (b) the issuance of a \$312,000.00 check from the Shirley Gitenstein estate account to the Jaspan Schlesinger IOLA account without explanation; (c) the issuance of a \$23,520.00 check to Steven R. Schlesinger account bearing notation “reimbursement”, and (d) issuance of a check to Steven R. Schlesinger in the amount of \$131,323.39, for commission statutorily belonging to the Kermit Gitenstein Foundation Inc.
- (3) The absence of court approval relating to 13 grants in the aggregate sum of more than seven million dollars ...
- (4) Various grants indicate that Mr. Schlesinger's decisions may have been motivated by political, personal and public relations considerations for this law firm rather than the objectives of the Foundation ...”

On March 29, 2016, this Court ordered the Referee to serve all three of his reports on Steven R. Schlesinger and the Attorney General. The Court further gave both Steven

R. Schlesinger and the Attorney General an opportunity to file a written response to the reports within fifteen (15) days of receipt of said reports.

On March 31, 2016, this Court ordered Steven R. Schlesinger, Receiver of the Kermit Gitenstein Foundation Inc., as Successor Trustee, to file a judicial accounting of the Estate of Kermit Gitenstein by April 20, 2016.

On March 31, 2016, this Court ordered the Kermit Gitenstein Foundation Inc., as Administrator, c.t.a., to file a judicial accounting of the Estate of Aaron L. Gitenstein by April 20, 2016.

On April 15, 2016, Steven R. Schlesinger filed an Affirmation in Reply to report(s) of the Referee. Steven R. Schlesinger stated, in a five paragraph reply, that:

- “1. With regard to the allegations in the Report that the grant to the Elena Melius Foundation, which was stipulated to by the Attorney General Charities Bureau and approved by this Court, was related to my wedding reception, has no basis in fact whatsoever.
2. With regard to the sums reported in Paragraph ‘2’ of the Report, annexed hereto as Exhibit ‘A’ is a full accounting of my law firm’s escrow account, which items were fully reflected in the accounting previously filed with this Court, including the amount of \$23,520.00, which was the sum that was advanced by my law firm for the bond premium. With regard to the sum of \$131,323.39, a copy of the order directing the payment, which order was prepared by the outside law firm appointed by this Court and duly entered on notice to all interested parties is annexed hereto as Exhibit ‘B’.
3. Outside counsel provided your Affirmant an opinion letter that court approval was not required to make charitable distributions and that letter was provided to the Attorney General. When I discontinued the services of the outside law firm appointed by the court, I resumed getting Court approvals as I felt it to be a better practice.³⁷
4. As to the grants specified in Paragraph ‘4’ of the Report all were in the mission statement of the Foundation and no

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Steven R. Schlesinger did not provide the Court with an opinion letter as an Exhibit to his Affirmation nor as a separate filing with the Court. The Court was first notified of disbursements made without Court notification and approval with the filing of the interim accounting of the Kermit Gitenstein Foundation Inc. on December 7, 2015.

personal benefit from any of those grant was derived by me or my law firm.³⁸

5. The Foundation has been administered with complete transparency and exemplary administrative efficiency. All beneficiaries were proper charities of laudable quality and were selected only after careful review, investigation, and appropriate input from the community.

WHEREFORE, I respectfully request the Report be disregarded in its entirety.”

On April 21, 2016, an accounting by the Kermit Gitenstein Foundation Inc., as Administrator, c.t.a., of the Estate of Aaron Gitenstein was filed with this Court. This accounting was for the period from August 11, 2011 to April 1, 2016. The final accounting set forth the following:

**“ SUMMARY
PRINCIPAL ACCOUNT**

CHARGES:

Schedule A.	Principal Received	\$75,322.45	
Schedule 1-1.	Realized Increases in Principal	4.08	
Schedule A-2.	Income Collected	<u>0.00</u>	
	Total Charges	\$75,326.53	\$75,326.53

CREDITS:

Schedule B.	Realized Decreases in Principal	0.00	
Schedule C.	Funeral and Administration Expenses	0.00	
Schedule D.	Creditor’s Claims Actually Paid	0.00	
Schedule E.	Distributions of Principal	<u>75,326.53</u>	
	Total Credits	\$75,326.53	\$75,326.53
	Charges Minus Credits		<u>\$0.00</u>
	Balances on hand shown by Schedule G		<u>\$0.00</u> ”

³⁸ Steven R. Schlesinger did not disclose in many of his Petitions to distribute Foundation assets, including the \$250,000.00 distribution to the Elena Melius Foundation, Inc., that he, his family members or his firm had any affiliation or business dealings with the intended beneficiary. Moreover, the Attorney General did not agree to the disbursements but reserved all objections thereto that may be asserted upon any subsequent application by Petitioner to settle his accounts as Receiver of the assets of the Kermit Gitenstein Foundation, Inc.

On April 22, 2016, an accounting by Steven R. Schlesinger, Receiver of the Kermit Gitenstein Foundation Inc., as the Successor Trustee of a Trust established in the will of Kermit Gitenstein, was filed. The period of account was from July 22, 2014 to April 1, 2016. In the accounting of Steven R. Schlesinger, as Receiver of the Kermit Gitenstein Foundation Inc., waived, renounced and relinquished any and all rights to any and all commissions or other compensation which may be payable to it, both as principal and income, as a Successor Trustee. Said accounting indicated that there were no assets in said Trust. A summary of the interim account was as follows:

**“ SUMMARY
PRINCIPAL ACCOUNT**

CHARGES:

Schedule A.	Principal Received	0.00	
Schedule A-1	Realized increases in principal	0.00	
	Total Principal Charges	0.00	0.00

CREDITS:

Schedule B.	Realized Decreases in Principal	0.00	
Schedule C.	Funeral & Administration Expenses	0.00	
Schedule D.	Creditor’s Claims Actually Paid	0.00	
Schedule E.	Distributions of Principal	0.00	
	Total Principal Credits	\$0.00	0.00
	Charges Minus Credits		\$ 0.00
	Principal balance on hand shown by Schedule G		\$0.00 ”

Schedule J, entitled “Statement of Other Pertinent Facts, Cash Reconciliation and Proposed Distribution”, read in relevant part as follows:

“ Other Pertinent Facts

The fiduciary has been pursuing a claim for delivery of funds on deposit with the State of New York in the approximate amount of \$25,000.00.

Once concluded, the account will be amended to reflect the receipt of the proceeds.”

II. LEGAL ANALYSIS
A. CPLR §2221 - MOTION TO REARGUE

On January 17, 2016, Steven R. Schlesinger moved by Order to Show Cause pursuant to CPLR §2221, before this Court, to Vacate the Corrected Order, dated December 18, 2015 (*see* SCPA §209[9], *see also* CPLR §2221[a]).

CPLR §2221 (d)(1) and (d)(2) requires proper identification of a motion to renew or to reargue. Failing to label a motion as one to reargue or renew violates the Civil Practice Law and Rules (hereinafter “CPLR”). In the Order to Show Cause by Steven R. Schlesinger, relief was sought, pursuant to “CPLR §2221, to Vacate the Corrected Order of this Court, dated December 18, 2015.” The Order to Show Cause filed was not identified as one to reargue or renew. Upon a review of the papers, it appears that the Order to Show Cause filed is one to reargue, not to renew. This Court shall not dismiss the Order to Show Cause submitted based upon the procedural defect present. Rather, this Court shall treat it as one to reargue, based upon the Affirmation submitted in support of the Order to Show Cause to Vacate (*see* CPLR §104).

Motions for reargument are addressed to the sound discretion of the Court which decided the prior motion (*see Deutsche Bank Nat. Trust Co. v. Ramirez*, 117 AD3d 674 [2d Dept 2014]), and may be granted upon a showing that the Court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (*see* CPLR §2221[d][2]; *Central Mortg. Co. v. McClelland*, 119 AD3d 885 [2d Dept 2014]; *Vaughn v. Veolia Transp., Inc.*, 117 AD3d 939 [2d Dept 2014]; *see also, McGill v. Goldman*, 261 AD2d 593 [2d Dept 2014]). Notably, the remedy “is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*see McGill v. Goldman, supra*, 261 AD2d 593, 594 [2d Dept 1999]).

The December 18, 2015 Corrected Order of the Court (1) relieved Steven R. Schlesinger of his duty to dispense funds from the Kermit Gitenstein Foundation Inc. and

(2) appointed a Referee to conduct an inquiry as to the performance of Steven R. Schlesinger, as receiver and to “hear and report” to the Court.

The Court, in its discretion, finds that the former Surrogate did not overlook or misapprehend the facts or law in the Corrected Order of this Court, dated December 18, 2015 (*see* CPLR §2221[d][2]; *see also* SCPA §209). Accordingly, Steven R. Schlesinger’s Order to Show Cause to Vacate the Court’s Corrected Order, dated December 18, 2015, is **DENIED**.

Steven R. Schlesinger set forth in his Affirmation in Support of his Order to Show Cause to Vacate, the following reasons why the December 18, 2015 Corrected Order of the Court should be vacated.

- No factual predicate to justify the appointment of the “court evaluator”, as the court did not identify specific discrepancies in the accounting filed;
- The court issued an order without affording the receiver an opportunity to respond and address any issues with the accounting which is an abuse of discretion and denial of due process;
- The order will result in a waste of the Foundation’s assets;
- The money in the Foundation was intended by its founder to be used by charitable purposes, not to pay for unnecessary and unwarranted investigation;
- The investigation is duplicative of the investigation being conducted by the New York State Attorney General;
- Virtually all of the charitable distributions were pre-approved by the Attorney General Charities Bureau and were ‘So Ordered’ by the court; and
- As receiver, Steven R. Schlesinger has not taken any fees for the work done, not “one penny from the Foundation”.

1. Receiver is Subject to the Control of the Court

Steven R. Schlesinger, was appointed a receiver by the Nassau County Surrogate’s Court, pursuant to the Not-For-Profit Corporation Law. A receiver shall be subject to the

control of the Court (*see* N-PCL §1202[b]). The Court had the statutory authority to relieve Steven R. Schlesinger of his duty to dispense funds (*see* N-PCL §1202[b]).

2. Court Has Authority to Appoint a Referee

A Surrogate has the statutory authority to appoint a Referee to “hear and report” to the Court. SCPA §506, entitled “Reference to hear and report”, reads in relevant part as follows:

“1. In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts ... or upon a specific question of fact or upon the law and the facts”.³⁹

3. Receiver’s Arguments for Vacatur Lack Merit

Steven R. Schlesinger’s arguments set forth in his Order to Show Cause are without merit. Contrary to Steven R. Schlesinger’s claim, the Court’s Corrected Order, dated December 18, 2015, did not deny Steven R. Schlesinger “due process”. Steven R. Schlesinger fails to cite any authority requiring a Court to give a receiver appointed pursuant to the Not-For-Profit Corporation Law, due process, prior to curtailing the authority given or believed to be given to a receiver or prior to appointing an individual to hear and report on management, execution and disbursements made by a receiver. A receiver appointed, pursuant to the Not-For-Profit Corporation Law, is subject to the control of the Court (*see* N-PCL §1202[b]). In fact, a Court is not even required to give due process to a receiver appointed by the Court, pursuant to the Not-For-Profit Corporation Law, prior to removal (*see* N-PCL §1202[b]; *cf.* *Flinn v. Hanbury*, 157 AD207 [2d Dept 1933]). Moreover, a Surrogate has the authority pursuant to SCPA §506 to appoint a Referee to “hear and report” to the Court, without notice or due process to the parties.

Steven R. Schlesinger’s assertion that “virtually all of the charitable distributions were pre-approved by the Attorney General Charities Bureau” is far from accurate. This

³⁹ On the non-list appointment (§36.2[B][2]), UCS-872.5 form, the type of appointment was set forth as “court examiner”. This type of appointment does not mirror the Corrected Order, dated December 18, 2015.

Court has ascertained that only \$350,000.00 of approximately \$11,778,500.00 in distributions from the Kermit Gitenstein Foundation Inc., were approved by the Attorney General. Approximately, \$8,100,000.00 in distributions made by the Foundation, with Steven R. Schlesinger as Receiver, failed to seek approval from the Nassau County Surrogate's Court, as well as, the Attorney General. Steven R. Schlesinger acknowledges in his application in support of his Order to Show Cause that all distributions would require prior approval by both the Attorney General and the Court. Yet despite Steven R. Schlesinger's acknowledgment, he failed to seek approval from the Attorney General or the Surrogate's Court for over \$8,100,000.00 in distributions from the Kermit Gitenstein Foundation Inc. Moreover, Steven R. Schlesinger misstates the position of the Attorney General on Court approved distributions made from January 2012 to June 01, 2015. The Attorney General's Office reserved their right to object, upon subsequent settlement of account as Receiver of the assets of the Kermit Gitenstein Foundation Inc. A reservation of rights to object does not constitute approval.

Steven R. Schlesinger stated, in his Affirmation in Reply, dated April 15, 2016, that he has not taken "one penny from the Foundation". Steven R. Schlesinger's statement that he did not take "one penny from the Foundation", simply lacks candor. Steven R. Schlesinger received a commission as "Administrator, c.t.a.," of the Estate of Shirley Gitenstein in the amount of \$131,323.39 on December 23, 2011. The Administrator c.t.a. of the Estate of Shirley Gitenstein is the Kermit Gitenstein Foundation Inc., not Steven R. Schlesinger.⁴⁰ Any statutory commission, as a fiduciary, was to be received by the Kermit Gitenstein Foundation Inc., not Steven R. Schlesinger. Furthermore, the Kermit Gitenstein Foundation Inc. is the sole beneficiary of the Estate of Shirley Gitenstein. Thus, although "not one penny" was taken for *work* provided to the Kermit Gitenstein Foundation Inc., Steven R. Schlesinger took a commission, which statutorily belonged to the Foundation, as Administrator, c.t.a. and/or should have been distributed to the Foundation, as the sole beneficiary of the Estate of Shirley Gitenstein.

⁴⁰ On February 9, 2011, Letters of Administration, c.t.a. were issued to the Kermit Gitenstein Foundation Inc., for the Estate of Shirley Gitenstein.

Court approval does not erase the fact that Steven R. Schlesinger knowingly took money from the Foundation that did not belong to him.

Pursuant to EPTL §8-1.1(f), the Attorney General shall represent the beneficiary of bequests for religious charitable educational or benevolent purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceeding in the courts. This Court understands that many documents have been subpoenaed by the Attorney General.⁴¹ Further, the Attorney General represents the Kermit Gitenstein Foundation Inc., as the charitable beneficiary in the accounting proceedings for the Estates of Shirley, Aaron L. and Kermit Gitenstein that have recently been filed in this Court.⁴² This Court, however, is not privy to any of the matters or investigations being conducted by the Attorney General. Thus, the appointment of the Referee cannot be considered duplicative of the work done or investigations conducted by the Attorney General. Furthermore, the Attorney General in a Memorandum of Law, dated January 25, 2016 indicated that he “had no objection to the Court’s Corrected Order [dated December 18, 2015] and agreed that a close examination of the Receiver’s conduct and administration of the Foundation is warranted”. Additionally, the Attorney General’s office, in their Affirmation, noted that they “strongly disagreed” that the Court’s Corrected Order, dated December 18, 2015, should be vacated.

This Court disagrees with Steven R. Schlesinger’s assertion that the Corrected Order, dated December 18, 2015, will result in a waste of the Foundation’s assets, as the assets were to be used for charitable purposes. The Referee set forth in his first report, that he would like complete production of documentation from Steven R. Schlesinger by

⁴¹ See Referee’s reports to the Court.

⁴² -Kermit Gitenstein Foundation Inc.,
Interim Accounting filed on December 7, 2015
-Estate of Shirley Gitenstein
Accounting filed on December 7, 2015
-Estate of Aaron Gitenstein
Accounting file on April 22, 2016
-Estate of Kermit Gitenstein
Accounting file on April 22, 2016

January 14, 2016. Moreover, SCPA §506, set forth that a Referee has thirty (30) days to file a report. No documents were provided by Steven R. Schlesinger. Failure to cooperate by Steven R. Schlesinger and to provide full transparency has created a delay in the Referee's ability to file a final report and the possible ultimate waste of the assets of the Foundation. To date, it is this Court's understanding that Steven R. Schlesinger has not provided the Referee with all of the documentation he requested.⁴³

In view of the foregoing, Steven R. Schlesinger's Order to Show Cause, pursuant to CPLR §2221, dated December 18, 2015, is **DENIED**, in its entirety.

B. REMOVAL OF RECEIVER

The Court is cognizant that a Receiver can be removed at any time (*see* N-PCL §1202[b]; *see also* Judiciary Law §13-a).

The jurisdiction to appoint a Receiver is statutorily governed (*see Schindler v. George Ringler & Co.*, 206 AD 217 [1st Dept 1923]). A Court of equity has the power to appoint a Receiver in certain actions against corporations, as well as, actions against individuals. The general judicial power to appoint a Receiver is set forth in Article 64 of the Civil Practice Law and Rules. The Business Corporation Law and the Not-For-Profit Corporation Law also outline particular situations in which a Receiver for a corporation may be appointed (*see* BCL §§1201 to 1218, N-PCL §§1201 to 1218).

On November 1, 2007, the Attorney General and Nassau County Public Administrator jointly petitioned the Nassau County Surrogate's Court for an Order appointing Steven R. Schlesinger Receiver of the Kermit Gitenstein Foundation Inc., pursuant to N-PCL §§112(a)(7) 1202 (a)(3), 1203, 1205, 1206 and 1212. The November 1, 2007 Order appointing the Receiver reiterates the sections of the Not-For-Profit Corporation Law set forth in the Petition filed by the Attorney General and Public Administrator as the grounds for the appointment of a Receiver.

⁴³ In March of 2016, the Court instructed the Referee to stop further work, pursuant to the appointment, until further notice from this Court.

N-PCL §112(a)(7) permits the Attorney General to maintain an action or special proceeding “to enforce any right given [under the Not-For-Profit Corporation Law] to members, a director or an officer of a charitable corporation. The Attorney General shall have the same status as a member, director or officer”.

N-PCL §1202 sets forth the instances in which a Receiver may be appointed under the Not-For-Profit Corporation Law, including non-judicial and judicial dissolution (*see* Exploratory Memorandum on Not-For-Profit Corporation Law, Senate No. 956, Assembly No. 1690-A, 1/13/1969, Article 12). N-PCL §1202 entitled “Appointment of Receiver of Property of Domestic or Foreign Corporations” reads in relevant part as follows:

“(a) A Receiver of the property of a corporation can be appointed only by the Court and in one of the following cases:

- (1) *An action* or special proceeding brought under Article 10 (non-judicial dissolution) or 11 (judicial dissolution).
- (2) *An action* under section 1201 (Action by judgment creditor for sequestration).
- (3) *An action* brought by the attorney-general under section 112 (Actions or special proceedings by attorney-general), or brought by the attorney-general or by a member to preserve the assets of a corporation, which has no officer within this state qualified to administer them.
- (4) *An action* to preserve the assets in this state, of any kind, tangible or intangible, of a foreign corporation which has been dissolved, nationalized or its authority or existence otherwise terminated or cancelled in the jurisdiction of its incorporation or which has ceased to conduct its activities, brought by any creditor or member of such corporation or by one on whose behalf an order of attachment against the property of such corporation has been issued.
- (5) *An action* brought for the foreclosure of a mortgage upon property of the corporation, where the mortgage debt or the interest thereon has remained unpaid for at least thirty (30) days after payment demanded and where either the income of the property is specifically mortgaged or the property itself appears to be insufficient to pay the mortgage debt. A receiver appointed under

this subparagraph shall be receiver only of the property upon which the mortgage is being foreclosed.

(6) *An application* of the regents fo the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or on the application of the trustees of such a corporation, on notice to the regents.”[Emphasis Added]

N-PCL §1202(a)(3), the applicable statute set forth in the Petition, permits a Receiver to be appointed when an action is brought by the Attorney General under N-PCL §112 or brought by a member to preserve assets of a corporation, which has no officer within this state qualified to administer.

N-PCL §1203 entitled “Temporary and Permanent Receiver”, reads in relevant part as follows:

- “(a) At any stage before *final judgment or final order in an action or special proceeding brought under this article, the court may appoint one or more receivers of the property of the corporation or of the property* in this state of a foreign corporation against which an action has been brought under subparagraph (4) of paragraph (a) of section 1202 of this article. Notice of an application shall be given to the attorney-general, to each governmental body or officer whose consent is required for the dissolution of such corporation, and to such other persons and in such manner as the court directs. The determination by the court of the necessity or advisability of appointing a Permanent Receiver or an attorney for a Permanent Receiver, and the allowance of expenses, commissions or compensation to the Permanent Receiver or such attorney, shall be subject to review on appeal. This provision shall not affect any other right to review on appeal.
- (b) A receiver appointed by or under *a final judgment or order in an action or special proceeding*, or a temporary receiver who is continued by the final judgment or order, is a permanent receiver. The court may confer upon a temporary receiver the powers and subject the temporary receiver to the duties of a permanent receiver, or so much thereof as it deems proper.” [Emphasis Added]

N-PCL §1205, entitled “ Designation of Depositories by Court”, reads in relevant part, as follows:

“All orders appointing a receiver of a corporation shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited and no other deposits and no investment of such funds shall be made, *except upon the order of the court.*”[Emphasis Added]

N-PCL §1212 entitled “Disposition of Moneys Retained; Surplus; Unclaimed Distributions”, reads in relevant part as follows:

- “(a) When any action pending at the time of *final distribution* shall be terminated, the receiver shall apply the moneys retained by the Permanent Receiver to the payment of the amount recovered, and the Permanent Receiver’s necessary charges and expenses incurred therein.
- (b) *After the final distribution to creditors* and after deducting the Permanent Receiver’s charges and expenses, the Permanent Receiver shall distribute any surplus in the manner prescribed in section 1002-a of this chapter or, if dissolution of the corporation is not involved, in such manner as the court shall order.”[Emphasis Added]

The appointment of a Receiver is a drastic remedy (*see Romano v. Belt Painting Corp.*, 77 AD2d 565 [2d Dept 1980]). “The principal ground for the appointment of a Receiver is, generally stated, danger of the loss of or injury to the property or thing in controversy before the Court can make a disposition thereof by a final decree on the merits” (*see Schindler v. George Ringler & Co.*, 206 AD at 695, *citing Hastings v. Tousey*, 121 AD 815 [1923]). A Receiver cannot be appointed if the facts and circumstances of the case or proceeding does not fall within the provisions of the New York Civil Practice Law & Rules, New York Business Corporation Law and/or Not-For-Profit Corporation Laws (*see CPLR §6401, BCL §1203, N-PCL §1203; see also Schindler v. George Ringler & Co.*, 206 AD 217, *supra*). An appointment of a Receiver, pursuant to N-PCL §1202, requires an action or special proceeding to be filed by a member of the Foundation or the Attorney General before a Receiver could be appointed (*see N-PCL §1202*). Moreover, the appointment of a Receiver, pursuant to N-PCL

§1203, contemplates a final judgment or order to be made by the Court in an action or special proceeding.

Upon the death of Shirley Gitenstein, no member, officer or director of the Foundation remained. Thus, no action could be filed by a member of the Foundation, as contemplated in N-PCL §1202(a)(3). Nor has an action or special proceeding been filed by the Attorney General with regard to the Kermit Gitenstein Foundation Inc., to enforce any right under the Not-For-Profit Corporation Law, or any law, other than the Petition for the appointment of a Receiver (*see* N-PCL §§112, 1202)

This Surrogate, based on the facts reviewed in the Surrogate Court filings, questions the Surrogate Court’s authority to appoint a Receiver in 2007. Powers of a Surrogate, however, are purely statutory (*see In Re Starbuck* 221 AD 702 [2d Dept 1927]).⁴⁴ A Surrogate has no authority to sit in review of its own decrees (*see In Re Starbuck*, 221 AD 702, *supra*). This Surrogate further questions the Court’s jurisdiction over the Kermit Gitenstein Foundation Inc., in 2007. The Foundation, in 2007, was a corporation, separate and apart from the Estate of Shirley Gitenstein. It is questionable whether the Foundation was “an action or proceeding relating to the affairs of the decedent” (*see* Article VI, §12[d], New York State Constitution SCPA §201, *see also In Re Liebowitz Will*, 34 AD2d 750 [1st Dept 1970]). A Surrogate, however, does not have the authority to review its own decrees, other than for ministerial or clerical errors (*see In Re Starbuck* 221 AD 702, *supra*).

Thus, this Surrogate shall not review the 2007 Order Appointing the Receiver for the Foundation (*see In re Heller’s Estate* 33 Misc2d 798 [Surrogate’s Court, NY County 1962]).

1. Permanent Receiver - Exceeds Authority

Steven R. Schlesinger often states in papers filed with this Court, that “it was his duty and responsibility to ensure the Foundation’s work was carried on.” Contrary to

⁴⁴ The authority, however, for a Court to appoint a Receiver, is statutorily given.

Steven R. Schlesinger's assertions and beliefs, the powers and duties of a Receiver are those that are statutorily or judicially given. Statutorily, a Receiver appointed pursuant to the Not-For-Profit Corporation Law (N-PCL §1206[b]), has the following authority:

“(1) To sue in his own name or otherwise for the recovery of the property, debts and causes of action of the corporation. No set-off or counterclaim shall be allowed in any such action for any demand unless it was owing by the corporation to the defendant before the commencement of the action or special proceeding in which the receiver was appointed or unless it shall have been incurred by the receiver subsequent to his appointment.

(2) To sell at public or private sale all the property vested in the permanent receiver, in such manner and on such terms and conditions as the court shall direct, and to make necessary transfers and conveyances thereof.

(3) To examine on oath, to be administered by the permanent receiver, any person concerning any matter pertaining to or affecting the receivership.

(4) To settle or compound any demands by or against the receivership.

(c) When more than one receiver is appointed, all provisions in this article in reference to one receiver shall apply to them.

(d) When more than one receiver is appointed, the debts and property of the corporation may be collected and received by any of them; when more than two receivers are appointed, the powers and rights conferred on them may be exercised by any two.

(e) When more than one receiver is appointed, the survivor or survivors of such receivers shall have all the powers and rights of the receivers.”

The Court, in its November 1, 2007 written Order appointing Steven R. Schlesinger Receiver of the Foundation, gave the following authorization to the Receiver:

“sell the marketable securities owned by the Kermit Gitenstein Foundation, Inc., and to reinvest the proceeds solely in bank accounts, money market accounts and certificates of deposit in amounts insured by the Federal Depository Insurance Corporation, and insured and guaranteed notes, bonds and obligations of the United States of America; to retain attorneys to represent it in all actions and proceedings upon the express approval of the Surrogate pursuant to 22 NYCRR §36.1, et seq., including those concerning the Estate of Shirley Gitenstein; to file any reports, returns and other documents required to be filed with the Internal Revenue Service, the Attorney General of the State of New York, the Nassau County Surrogate's Court or any other regulatory agency, and to retain accountants for such

purposes; and to cause the Kermit Gitenstein Foundation Inc. to comply with the relevant provisions of the Internal Revenue Code, the New York Estates, Powers and Trusts Law, Not-for-Profit Corporation Law and Tax Law and all other federal, state and local laws affecting and governing the Kermit Gitenstein Foundation Inc.”

The statutory and judicial authority given to Steven R. Schlesinger did not authorize Steven R. Schlesinger “to ensure that the Foundation’s work is carried on”. Nor did a statute or Judicial Order authorize Steven R. Schlesinger as the Receiver to distribute assets from the Foundation without Court approval. Based upon the accounting filed by Steven R. Schlesinger for the Kermit Gitenstein Foundation Inc., approximately \$8,100,000.00 was distributed without the knowledge of the Court or Attorney General and without the approval of the Court or the Attorney General.

The following distributions, in the total sum of \$8,100,000.00, were made from the Kermit Gitenstein Foundation Inc., without Court Order:

- 08/18/2008 - We Care Fund: \$5,000.00
- 08/03/2009 - Holocaust Memorial & Tolerance Center of Nassau County: \$25,000.00.
- 08/14/2009 - The We Care fund of the Nassau County Bar Association: \$10,000.00.
- 09/07/2009 - Nassau Health Care Corporation: \$1,200,000.00.
- 11/06/2009 - Ezer Mizion Inc.: \$100,000.00.
- 11/10/2009 - Molloy College Nursing Program: \$300,000.00.⁴⁵
- 12/10/2009 - Surprise Lake Camp: \$100,000.00
- 12/10/2009 - Hofstra Medical School: \$1,000,000.00.
- 12/10/2009 - North Shore-LIJ: \$1,000,000.00
- 12/10/2009 - Integrated Medical Foundation: \$5,000.00
- 02/05/2010 - IsraAid: \$35,000.00
- 12/27/2011 - Ezer Mizion, Inc.: \$50,000.00.
- 12/27/2011 - North Shore-LIJ: \$4,000,000.00
- 12/27/2011 - North Shore-LIJ: \$250,000.00

⁴⁵

On December 24, 2008, an Order authorized \$50,000.00 to Molloy College Nursing Program. The Court ordered distribution was never made.

- 04/10/2012 - Hofstra Law School: \$10,000.00
- 06/28/2012 - Lupus Foundation of America: \$5,000.00
- 06/28/2012 - Holocaust Memorial & Tolerance Center of Nassau County: \$5,000.00.

In Steven R. Schlesinger's Affirmation in Reply, dated April 15, 2016, to the Referee's report, Steven R. Schlesinger set forth that he was "provided an opinion letter that Court approval was not required to make charitable distributions and that the letter was provided to the Attorney General." Steven R. Schlesinger did not attach an opinion letter to his Reply Affirmation, nor is this Court in possession of said letter. This letter, if it exists, does not excuse the fact that Steven R. Schlesinger acted without statutory and/or judicial authority.

Moreover, some distributions, according to the accounting filed for the Foundation on December 7, 2015, were made from the Foundation days before a Petition for said distributions was even submitted to the Court.⁴⁶ Thus, judicial authority was not given for said distributions until after the distributions were made. These Petitions did not set forth to the Court that distributions were already made days before the Petitions were filed with this Court.

Steven R. Schlesinger wrote in his Affirmation in Support of the Order to Show Cause to Vacate the December 18, 2015 Corrected Order of this Court, that "virtually all" of the charitable distributions were pre-approved by the Attorney General. Only \$350,000.00 of the monies distributed by Steven R. Schlesinger were approved by the Attorney General. The Attorney General did not approve over \$3,235,000.00 in the distributions, rather the Attorney General reserved his right to object. The following distributions made from the Kermit Gitenstein Foundation Inc., was made with a reservation of right to object, by the Attorney General:

⁴⁶ The Petition for a distribution to American Committee for Shaare Zedek Medical Center c/o Jerusalem Israel was filed with the Court on December 21, 2012. Pursuant to the accounting filed on December 7, 2015, the distribution to said charity was made on December 20, 2012.

- 12/21/2012: Hofstra University, Maurice A. Deane School of Law - \$1,000,000.00
- 12/21/2012: Touro College Jacob D. Fuchsberg Law Center - \$1,000,000.00
- 12/21/2012: American Committee for Shaare Zedek Medical Center - \$100,000.00
- 03/14/2013: North Shore-LIJ Health Systems for the Destination 2020 Campaign - \$25,000.00
- 03/14/2013: To Life! Foundation - \$5,000.00
- 12/23/2013: St. Jude Children's Research Hospital - \$50,000.00
- 12/23/2013: Memorial Sloan Kettering Cancer Center - \$15,000.00
- 12/23/2013: Pave the Way Foundation - \$10,000.00
- 12/23/2013: Parents for Megan's Law and the Crime Victims Center - \$10,000.00
- 12/23/2013: The Mayo Clinic, Center for the Science of Health Care Delivery - \$15,000.00
- 12/23/2013: The Guide Dog Foundation - \$10,000.00
- 12/23/2013: Homes for Homecoming Heroes - \$5,000.00
- 12/23/2013: WLIW - \$25,000.00
- 12/23/2013: Lenox Hill Hospital - \$25,000.00
- 12/23/2013: Myotonic Dystrophy Foundation - \$50,000.00
- 03/07/2014: Elena Melius Foundation Inc. - \$250,000.00
- 03/07/2014: Gitenstein Scholars Program at Touro Law, Touro College Jacob D. Fuchsberg Law Center - \$250,000.00
- 03/07/2014: Hofstra Law School - \$60,000.00
- 03/07/2014: Gold Coast Cares for St. Jude (in support of St. Jude Children's Research Hospital - \$10,000.00
- 03/07/2014: Cystic Fibrosis Foundation (in support of the Great Strides Walk) - \$5,000.00
- 08/07/2014: The Armand & Antoinette D'Amato Family Foundation - \$50,000.00
- 08/07/2014: The INN (Interfaith Nutrition Network) - \$5,000.00
- 08/08/2014: The Heckscher Museum of Art - \$5,000.00
- 03/13/2015: Maurice A Deane School of Law at Hofstra Law School - \$250,000.00

- 03/13/2015: The Mayo Clinic for the Individualized Medicine Program - \$25,000.00
- 03/13/2015: Yad Marcell - \$20,000.00
- 03/13/2015: Spectrum Designs Foundation for the Believe Campaign - \$10,000.00

The November 1, 2007, Order appointing Steven R. Schlesinger as Receiver ordered an interim accounting within six (6) months and compliance with N-PCL §1216. N-PCL §1216 entitled “Final Accounting Notice; Duty of Attorney General”, reads in relevant part as follows:

“(a) Within one year after qualifying, the receiver shall apply to the court for a final settlement of his accounts and for an order for distribution, or, upon notice to the attorney-general and to any governmental body or officer whose consent is required for the dissolution of the corporation, for an extension of time, setting forth the reasons therefor. If the receiver has not so applied for a settlement of his accounts or for such extension of time, the attorney-general or any creditor or member may apply for an order that the receiver show cause why an accounting and distribution should not be had, and after the expiration of eighteen months from the time the receiver qualified, it shall be the duty of the attorney-general to apply for such an order on notice to the receiver.

(b) Before presenting a final account, the receiver shall give notice of his intention to file it by publication, under subparagraph (a)(1) of section 1207 (duties of receiver upon appointment), setting forth the time and place of filing and presentation to the court. The receiver shall also give not less than eight days’ written notice to the sureties on his official bond.

(c) Upon presentation of such account, the court shall hear the allegations, objections and proofs of all parties interested and allow or disallow such account, in whole or in part, and make a final order. The Court may refer the account and the hearing, in whole or in part, to a referee who shall report thereon to the court.”[Emphasis Added]

Steven R. Schlesinger failed to comply with N-PCL §1216 as directed by this Court in 2007. On July 27, 2009, an interim accounting of the Kermit Gitenstein Foundation Inc., was filed by Steven R. Schlesinger nineteen months after his appointment as Receiver. On October 19, 2009, the Court approved the accounting for the period of November 1, 2007 to December 31, 2008. On December 7, 2015, eight

years after the appointment as Receiver and only because of a directive by the Court, did Steven R. Schlesinger file an interim accounting for the Kermit Gitenstein Foundation Inc., for the period between January 1, 2009 and October 31, 2015. Almost nine (9) years after the appointment of Steven R. Schlesinger as Receiver of the Kermit Gitenstein Foundation Inc., a final accounting has yet to be filed, in contravention of the Order of this Court, dated November 1, 2007 and N-PCL §1216.⁴⁷

On December 24, 2008, an Order was signed by the Court authorizing distributions to (1) Molloy College Nursing Program for \$50,000.00; (2) American Committee for Shaare Zedek Medical Center in Jerusalem Israel for \$20,000.00; and (3) Crohn's & Colitis Foundation of America for \$50,000.00. On October 19, 2009, a Decree judicially settled the interim accounting of the Kermit Gitenstein Foundation Inc. (filed on July 27, 2009), for the period of November 1, 2007 to December 31, 2008. The three distributions to "Crohn's Colitis Foundation of America [sic] for \$50,000.00, Molloy College Nursing Program for \$50,000.00 and the American Committee for Shaare Zedek Medical Center for \$20,000.00", were not set forth in the interim accounting filed by the Kermit Gitenstein Foundation Inc., on July 27, 2009, for the period of November 1, 2007 to December 31, 2008. The distributions also failed to appear on the interim accounting filed on December 7, 2015 covering the period from January 1, 2009 to October 31, 2015. This Court, cannot ascertain from the accountings filed by the Kermit Gitenstein Foundation Inc., with Steven R. Schlesinger as Receiver, whether these distributions were ever made and why they are not accounted for.

The Court Order, dated November 1, 2007, appointing Steven R. Schlesinger as Receiver required the Receiver "to deposit in the CDARS program account at State Bank of Long Island in the County of Nassau, State of New York, all funds of the Kermit Gitenstein Foundation Inc. coming into his/her hands which are not needed from immediate disbursements, and no other deposits or investments of such funds shall be

⁴⁷ On November 1, 2007, Steven R. Schlesinger was appointed Receiver of the Kermit Gitenstein Foundation Inc.

made except upon the Order of this Court ...”. The State Bank of Long Island was used by the Receiver for approximately \$4,302,070.57. However, in contravention of the November 1, 2007 Order, other funds were deposited in numerous other banks.

Furthermore, many of the Petitions made by Steven R. Schlesinger seeking Orders for interim distributions did not contain information of the relationship, if any, that Steven R. Schlesinger, his firm or family members had with the intended beneficiaries of the distributions. The following Petitions for distributions failed to set forth what, if any, relationship Steven R. Schlesinger, his firm or family members had with the intended beneficiaries.

- 12/21/2012: Hofstra University, Maurice A. Deane School of Law - \$1,000,000.00
- 12/21/2012: Touro College - Jacob D. Fuchsberg Law Center - \$1,000,000.00
- 12/21/2012: American Committee for Shaare Zedek Medical Center - \$1,100,000.00
- 03/14/2013: North Shore - LIJ Health System for Destination 2020 Campaign - \$25,000.00
- 03/14/2013: To Life! Foundation - \$5,000.00
- 03/27/2013: Gold Coast Cares, St. Jude Hospital - \$25,000.00
- 12/23/2013: St. Jude Children’s Research Hospital - \$50,000.00
- 12/23/2013: Memorial Sloan-Kettering Cancer Center for the continued funding of the Immune Cell Therapy Laboratory - \$15,000.00
- 12/23/2013: Pave the Way Foundation - \$10,000.00
- 12/23/2013: Parents for Megan’s Law and the Crime Victims Center - \$10,000.00
- 12/23/2013: The Mayo Clinic - \$15,000.00
- 12/23/2013: The Guide Dog Foundation - \$10,000.00
- 12/23/2013: Homes for Homecoming Heroes - \$5,000.00
- 12/23/2013: WLIW - \$25,000.00
- 12/23/2013: Lenox Hill Hospital, GI Research Fund #580283 - \$25,000.00

- 12/23/2013: The Myotonic Dystrophy Foundation - \$50,000.00
- 03/07/2014: Elena Melius Foundation, Inc. - \$250,000.00
- 03/07/2014: Gitenstein Scholars Program at Touro Law, Touro College Jacob D. Fuchsberg Law Center - \$250,000.00
- 03/07/2014: Hofstra Law School, for use toward the establishment of the Justice Incubator - \$60,000.00
- 03/07/2014: Gold Coast Cares for St. Jude, event in support of St. Jude Children’s Research Hospital - \$10,000.00
- 03/07/2014: The Cystic Fibrosis Foundation, in support of the Great Strides Walk - \$5,000.00
- 07/32/2014⁴⁸: The Armand & Antoinette D’Amato Family Foundation - \$50,000.00
- 07/32/2014: The INN - \$5,000.00
- 07/32/2014: The Heckscher Museum of Art - \$5,000.00
- 03/13/2015: Maurice A. Deane School of Law at Hofstra Law School - \$250,000.00
- 03/13/2015: The Mayo Clinic for the Individualized Medicine Program - \$25,000.00
- 03/13/2015: Yad Marcell - \$20,000.00
- 03/13/2015: Spectrum Designs Foundation for the Believe Campaign - \$10,000.00

The Court, in its own review of the files, found documentary support of a conflict of interest with three of the intended distributions. Three letters cc’d or identifying Gary Melius, were attached as Exhibits to a Verified Petition filed by Steven R. Schlesinger on December 23, 2013. The letter from Memorial Sloan Kettering Cancer Center, was cc’d to Gary Melius. The letter from Pave the Way Foundation, Inc., identifies Gary Melius as a member of their board. A letter from the Mayo Clinic was cc’d to Gary Melius. The Referee, in his second report, dated February 10, 2016, attached an email from Steven R. Schlesinger’s legal assistant to Gary Melius. The legal assistant, in the email, made a request to Gary Melius “to list the organizations Gary Melius decided on and the amounts requested, ... I don’t want to miss any”.

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Date stamp on the Verified Petition for this distribution was July 32, 2014.

The Referee pointed out other possible conflicts of interest that may have existed with certain distributions. Steven R. Schlesinger did not controvert these conflicts in his two page, five paragraph response, nor did he address said conflicts. Steven R. Schlesinger did not disclose, in his Petition for approval, to distribute \$250,000.00 to the Elena Melius Foundation, Inc., just days before his wedding at the Oheka Castle, that he, his firm or family members had any dealings with the intended beneficiary.

Pursuant to the Petitions filed in the Nassau County Surrogate's Court, the April 6, 2013 event for Gold Coast Cares for St. Jude was "an exquisite evening at Oheka Castle for cocktails, gourmet dinner and entertainment by Hank Lane Music, dancing and a fabulous live and silent auction". The April 25, 2013, \$25,000.00 distribution to North Shore Hospital was for "a very special evening on the Intrepid Sea, Air and Space Museum in New York City", including "a special performance by Grammy Award winner, Harry Connick, Jr." The \$25,000.00 distribution from the Foundation went for a "sponsorship". The events may have been attended by individuals whose attendance was paid for by the Foundation. This Court does not know who may have attended these events paid for by the Foundation or their relationship, if any, to Steven R. Schlesinger. This Court, however, should have been fully informed as to the names of the individuals attending these events, funded by the Kermit Gitenstein Foundation Inc. Moreover, an evening of entertainment does not remotely resemble the distributions made by Shirley Gitenstein, as the sole officer of the Foundation, in the years prior to her death. Other distributions made by the Foundation, including distributions made to the Guide Dog Foundation, do not mirror or align with the corporate purpose set forth in the Certificate of Incorporation of the Foundation.

Upon a review of the numerous documents filed in the Estates of the Gitenstein family, and the Kermit Gitenstein Foundation Inc., this Surrogate, in her discretion, hereby removes Steven R. Schlesinger, as the Receiver of the Kermit Gitenstein Foundation Inc. (*see* N-PCL §1202[b]). The preservation of the assets of the Kermit Gitenstein Foundation Inc., requires this Court to take such action. Steven R. Schlesinger

has (1) misunderstood his role as a Receiver; (2) exceeded statutory and judicial authority by making over eight million dollars in distributions without the knowledge or approval of the Attorney General or this Court; (3) failed to comply with Court Orders; (4) failed to disclose his relationship with intended beneficiaries; (5) engaged in potential self-dealing; (6) made distributions to charities which did not remotely resemble the corporate purpose set forth in the Certificate of Incorporation of the Foundation; and (7) made distributions to charities which did not resemble those made by the Foundation, in both size and substance, during the lifetime of the Gitenstein family. Although an action for the preservation of assets was mentioned in the original Petition for the appointment of a Receiver in 2007, no such action was filed in either the Surrogate's Court or Supreme Court. Unfortunately and clearly, the preservation of the Foundation's assets was not a primary concern of Steven R. Schlesinger. This Receiver has, without authority, conducted himself as the sole officer, director and member of the Kermit Gitenstein Foundation Inc. A Receiver appointed, pursuant to the Not-For-Profit Corporation Law, is not an officer, director or member of a charitable corporation (*see* N-PCL §1202).

This Surrogate's decision to remove Steven R. Schlesinger is based on the documentary evidence contained in the Court files, that establishes that Steven R. Schlesinger exceeded his authority as Receiver and failed to comply with Court Orders. Of equal concern to this Court is the potential self dealing that Steven R. Schlesinger was involved in as his role as Receiver of the Foundation. Steven R. Schlesinger held himself out as the head of the Kermit Gitenstein Foundation Inc. Documentary proof attached to a Petition submitted by Steven R. Schlesinger, established that Steven R. Schlesinger abdicated the authority he believed he had to make distributions to others.

Steven R. Schlesinger's removal as the Receiver of the Kermit Gitenstein Foundation Inc., is effective, as of the date of this Decision and Order. Steven R. Schlesinger is *not authorized to act* on behalf of the Kermit Gitenstein Foundation Inc., except with regard to the actions necessary to turn over all assets, funds, and documentation of the Foundation to a successive Receiver, when appointed, and if no Receiver is appointed, to this Court. Steven R. Schlesinger shall preserve all assets, funds

and documentation of the Foundation until further Court Order. The documentation to be turned over shall also include any and all information and documents regarding the Foundation, such as by-laws or corporate minutes. Steven R. Schlesinger shall move, by Order to Show Cause, prior to making any actions with regard to the Foundation. Any bonds obtained by Steven R. Schlesinger, as Receiver, for advance commission on behalf of the Kermit Gitenstein Foundation Inc., or as Administrator, c.t.a., shall remain in full force and effect until further Order of this Court.

**C. REMOVAL OF ADMINISTRATOR, C.T.A.
AND REVOCATION OF LETTERS**

A Surrogate must determine what is in the best interest of an estate (*see In The Matter of The Estate of Jones*, 8 NY2d 24 [1960]). It is the function of the Court to preserve and enhance the assets of the decedent's estate as far as possible (*see In The Matter of The Estate of Jones*, 8 NY2d 24, *supra*). In order for this Court to determine what is in the best interest of the estates of Shirley, Aaron and Kermit Gitenstein, this Court found it necessary to digest under what authority and circumstances the Kermit Gitenstein Foundation Inc. became the Administrator, c.t.a., of the estates of the Gitenstein family members.

The Last Will and Testament of Shirley Gitenstein did not contain an executor paragraph. In April of 2007, the Public Administrator, pursuant to SCPA §1418, filed for Letters of Temporary Administration and the Probate of the Last Will and Testament of Shirley Gitenstein and Letters of Administration, c.t.a., for the Estate of Shirley Gitenstein. In 2007, Letters of Temporary Administration were issued to the Public Administrator, for the Estate of Shirley Gitenstein. In May of 2008, the Kermit Gitenstein Foundation Inc., petitioned for Letters of Temporary Administration for the Estate of Shirley Gitenstein. In November of 2008, Letters of Temporary Administration were issued to the Kermit Gitenstein Foundation Inc., for the Estate of Shirley Gitenstein. In May of 2008, an Amended Petition for Probate and Letters of Administration, c.t.a., was filed by the Kermit Gitenstein Foundation Inc., for the Estate of Shirley Gitenstein. The 2007 and 2008 Petitions failed to obtain jurisdiction over the interested parties. On

March 18, 2010, another Petition for Probate and Letters of Administration, c.t.a., for the Estate of Shirley Gitenstein was filed by the Kermit Gitenstein Foundation Inc. In December, 2010, the Court found jurisdiction was obtained, with regard to the 2010 Petition for Probate, filed by the Kermit Gitenstein Foundation Inc. A Decree admitting the Will of Shirley Gitenstein to Probate was signed by the Court on February 9, 2011 and Letters of Administration, c.t.a., issued to the Kermit Gitenstein Foundation Inc., for the Estate of Shirley Gitenstein. On August 2, 2011, the Court ordered that the Kermit Gitenstein Foundation Inc. be appointed as Successor to the Administrator, c.t.a., of the Estate of Aaron L. Gitenstein. On July 22, 2014, Successor Letters of Trusteeship were issued to Steven R. Schlesinger, Receiver of the Kermit Gitenstein Foundation Inc., for a Trust created, pursuant to the Will of Kermit Gitenstein.

SCPA §1418, entitled “Letters of Administration with will annexed; when and to whom granted” reads in relevant part as follows:

“1. If no person is named as executor in the will or selected by virtue of a power contained therein or if at any time there is no executor or administrator with will annexed qualified to act, upon the application of any person who may petition for the probate of the will under 1402 the court must issue letters of administration with will annexed in the following order of priority:

(a) to a sole beneficiary or if he be dead to his fiduciary;

(b) to one or more of the residuary beneficiaries or, if any be dead, to his fiduciary;

(c) if there is no eligible person entitled to letters under subparagraphs (a) and (b) of this subdivision who will accept, the court may issue letters to one or more of the persons interested in the estate or, if any be dead, to his fiduciary.

2. If there is no eligible person entitled to letters under the foregoing subdivision who will accept or an appointment is not made by consent as provided in subdivision 6, letters shall issue to the public administrator or, if there be none for the county, to the treasurer of the county ...”

The statutory order of priority in appointing an administrator is mandatory and the Court may not go into a lower priority without ascertaining the eligibility of every

member of the class with greater priority (*see* SCPA §1418 *Matter of Boyle*, 224 AD2d 374 [1st Dept. 1996]). The Kermit Gitenstein Foundation Inc. was the sole beneficiary of the Last Will and Testament of Shirley Gitenstein and, pursuant to SCPA §1418(1)(a), had higher priority than the Public Administrator.

SCPA §707, entitled “Eligibility to receive letters”, permits letters to issue to “a natural person or to a person authorized by law to be a fiduciary ...”. Natural person refers to a human being (*see In the Matter of Probate Proceeding, Will of Huntington*, 16 Misc3d 914 [Surrogate Court, Onondaga County 2007]). A person authorized by law to be a fiduciary has been construed to mean trust companies that are specifically authorized by the Banking Law to act as fiduciaries or those corporations specifically allowed to act as fiduciaries in their corporate charters (*In the Matter of Probate Proceeding, Will of Huntington*, 16 Misc3d 914, *supra*). A corporation may be eligible as an administrator where the corporation is the sole or residuary legatee (*see Matter of Nichols*, 124 Misc2d 204 [Surrogate’s Court, Clinton County 1984]; *see also* SCPA §1418[1][a]).

A corporation with no members, officers or directors is not able to carry out the purpose of the corporation or its duty as a fiduciary. A not-for-profit corporation, that has no members, officers or directors, is not eligible to serve as an administrator. A Surrogate, however, does not have the authority to review its own decrees, other than for ministerial or clerical errors (*see In Re Starbuck*, 221 AD 702, *supra*). This Court will not review the 2011 Decree appointing the Kermit Gitenstein Foundation Inc., Administrator, c.t.a., of the Estate of Shirley Gitenstein.

1. Administrator, c.t.a. - Unfit for the Execution of Office

An administrator is a fiduciary burdened with obligations requiring diligence in the supervision and direction of estate matters (*see Matter of Israel*, 64 Misc2d 1035 [Nassau County Surrogate 1970]). The most fundamental duty owed by a fiduciary is to render an account of her stewardship (*see Matter of Israel* 64 Misc2d 1035, *supra*). Letters of Administration can only be revoked pursuant to the statutory authority conferred upon the Surrogate (*see In Re Estate of DeBalardino*, 77 Misc2d 253 [Monroe County 1974]).

SCPA §719 entitled “In what cases letters may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process” reads in relevant part as follows:

“In any of the following cases, the court may make a decree suspending, modifying or revoking letters issued to a fiduciary from the court or removing a lifetime trustee or modifying or suspending the powers of a lifetime trustee without a petition or the issuance of process ...

10. Where any of the facts provided in 711 are brought to the attention of the Court.”

SCPA §711 entitled “Suspension, modification or revocation of letters or removal for disqualification or misconduct” reads in relevant part as follows:

“In any of the following cases a creditor or person interested, any person in behalf of an infant or any surety on a bond of a fiduciary may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly ...

2. Where by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding, he is unfit for the execution of his office ...
3. Where he has wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of laws relating to the discharge of his duty...
8. Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office ...

The Surrogate may remove without a hearing only where the misconduct is undisputed facts or concessions (*see DePicabia v. Chester Nat'l Bank*, 50 AD2d 812 [1975]). By contrast, issuance of a decree without a hearing under SCPA §719 will constitute an abuse of discretion where facts are disputed, and where conflicting

inferences can be drawn (*see Matter of Farber*, 98 AD2d 720 [2d Dept 1983]). “Removal of a fiduciary constitutes a judicial nullification of the testator’s choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established”. (*see Matter of Leland’s Will*, 219 NY 387 [1983]). Removal of a fiduciary is an extraordinary measure (*see Probate Proceeding of Doris Duke*, 220 AD2d 241 [1st Dept. 1995]). Accordingly, courts are required to exercise the power of removal sparingly upon a showing of misconduct that endangers the safety of the estate (*see Matter of Israel*, 64 Misc2d 1035 [Surrogate’s Court, Nassau County 1970]).

Letters can be revoked when a fiduciary is “otherwise unfit for the execution of the office” (*see* SCPA §711[2]). The case law surrounding SCPA §711(2), addresses natural persons, not corporations. Based on the facts presented, this Court was required to address whether a corporation was unfit for the execution of the office. N-PCL §701(a), provides that except as otherwise provided in the Certificate of Incorporation, a Not-For-Profit Corporation shall be managed by its board of directors. N-PCL §702 entitled “number of directors” reads in relevant part as follows:

“(a) The number of directors constituting the entire board shall be ***not less than three***. Subject to such limitation, such number may be fixed by the by-laws or by action of the members or of the board under the specific provisions of a by-law allowing such action, or by any number within a range set forth in the by-laws. If not otherwise fixed under this paragraph, the number shall be three.

(b) The number of directors may be increased or decreased by amendment of the by-laws or, in the case of a corporation having members, by action of the members, or of the board under the specific provisions of a by-law adopted by the members, subject to the following limitations:

(1) If the board is authorized by the by-laws to change the number of directors, whether by amending the by-laws or by taking action under the specific provisions of a by-law adopted by the members, such amendment or action shall require the vote of a majority of the entire board.” [Emphasis Added]

In the absence of a provision in the Certificate of Incorporation or by-laws, vacancies among directors at large can be filled by a vote of the majority of directors then

in office, regardless of their number (*see* N-PCL §705[a]). The Certificate of Incorporation of the Kermit Gitenstein Foundation Inc., dated April 17, 1969, listed five directors. The filing of vacancies of the directors was not addressed in the Foundation's Certificate of Incorporation. This Court is not in possession of the by-laws of the Foundation. In the Petition, dated November 1, 2007, to appoint the "permanent receiver", ¶15, the movants attached as Exhibit "6", a copy of the minutes of the Foundation, dated December 30, 1980. The minutes indicated "all the directors of the Foundation", as Annette Gitenstein, Shirley Gitenstein and Aaron L. Gitenstein. It is possible that the by-laws or actions of the board reduced the number of directors from five to three.

Upon the death of Shirley Gitenstein, it is uncontroverted that the Kermit Gitenstein Foundation Inc. had no members, officers or directors. The Not-For-Profit Corporation Law does not set forth the action or mechanism to be taken by a charitable corporation when no directors remain. This Court could not find a case addressing the status of a charitable corporation that has no members, officers or directors. The Not-For-Profit Corporation Law requires a corporation to have no less than three directors. Thus, the Foundation is and was upon Shirley Gitenstein's death, in violation of the Not-For-Profit Corporation Law. In *Nixon v. Lichenstein*, 959 SW2d 854 [1997], the Court held that a not-for-profit corporation was no longer able to carry out its purpose because three directors were needed at all times, pursuant to law. The *Matter of the Application for Revocation of the Letters Testamentary Issued to the American Security Trust Company upon the Will of Andrew J. Aray*, 45 Misc. 529 (Surrogate's Court, Chatanuga County, 1904) set forth that the powers of an executor are subject to the limitations that the provisions of a will must not be contrary to the Law of the State of New York or against public policy.

Accordingly, a corporation in violation of the Laws of the State of New York is a corporation unfit for the execution of office. Moreover, if a corporation cannot carry out the purpose of the corporation set forth in the Certificate of Incorporation, or manage its

own affairs, it cannot fulfill its duty as a fiduciary for an estate (*see Andrew M. Cuomo v. Henry Reinhard Memorial*, 2010 NY Misc. Lexis 5567 [Supreme Court, NY County 2010]). For example, the Kermit Gitenstein Foundation Inc., as fiduciary, failed to object to the receiver's Petition to receive commissions belonging to the fiduciary, the Kermit Gitenstein Foundation Inc. The Foundation, as fiduciary, was not capable of objecting because it had no member, officer or director to manage the corporation or fulfill its duty as fiduciary.

The fiduciary's management of the Estate of Shirley Gitenstein has resulted in a waste of Estate assets. The Estate of Shirley Gitenstein has incurred various expenses that could have been avoided if a fiduciary timely settled and closed the Estate of Shirley Gitenstein. The accountings filed for the Estate of Shirley Gitenstein show the following expenses: \$142,637.74 in commission fees to the Public Administrator; \$116,376.50 in expenses, pursuant to §1207 to the Public Administrator; \$131,323.39 in commission fees to Steven R. Schlesinger; \$159,588.67 in attorney fees for the Public Administrator; \$146,170.26 in attorneys fees for the Receiver (Moritt, Hock, Hamroff & Horowitz, LLP); \$84,940.33 in accounting fees; \$179,025.00 in bond fees; and \$802,589.35 in taxes. The Estate of Shirley Gitenstein never had an objection filed. A mismanagement of the Estate of Shirley Gitenstein has occurred, resulting in this waste of estate assets.

The Kermit Gitenstein Foundation Inc., as fiduciary, has also acted without judicial or statutory authority. SCPA §903(1) restricts a Temporary Administrator from having the authority to pay or to satisfy testamentary disposition or intestate share. The Court Order, dated June 29, 2009, granting the Kermit Gitenstein Foundation Inc., Temporary Administrator, cited SCPA §903(1) and specifically ordered that the "Temporary Administrator is granted any and all power and authority as granted by statute to a Temporary Administrator, except that they do not confer any power to pay or satisfy a legacy or distributive share." Accordingly, the Kermit Gitenstein Foundation Inc., as Temporary Administrator of the Estate of Shirley Gitenstein had no authority, statutorily or judicially, to distribute on December 8, 2009, the sum of \$91,018.64 to the

Kermit Gitenstein Foundation Inc., as beneficiary. Acting without statutory or judicial authority, is the apparent management style of Steven R. Schlesinger as Receiver of the Foundation and as the Receiver, acting as Fiduciary of the Estate of Shirley Gitenstein.

A dissolution of the Foundation was to occur, according to the Joint Petition filed by the Attorney General and Public Administrator on November 1, 2007, “after the Foundation receives a final distribution from the Estate of Shirley Gitenstein”. This Court firmly believes that the assets of the Estate of Shirley Gitenstein have not been distributed to the Foundation, despite over nine years since Shirley Gitenstein’s death, to prevent dissolution of the Foundation, thereby, keeping the assets of the Estate of Shirley Gitenstein, along with the assets of the Kermit Gitenstein Foundation Inc., solely in the hands of Steven R. Schlesinger to distribute as he saw fit, without Court approval.

This Court hereby holds that removal of the Kermit Gitenstein Foundation Inc., as Fiduciary of the Estates of Shirley Gitenstein, Aaron L. Gitenstein, and Kermit Gitenstein, is warranted without an evidentiary hearing because the fiduciary is unfit for the execution of the office, disobeyed Court Orders and statutory authority. The fiduciary has also mismanaged the Estates, causing a waste of the Estates’ assets. The facts in this case are undisputed. The Estate of Shirley Gitenstein has remained open for almost nine years and numerous assets of the Estate have been wasted on attorney fees, bond fees, accounting fees and storage fees. The fiduciary distributed assets, while a Temporary Administrator, without Court approval and thus the Foundation is unfit for the execution of the office.

D. APPOINTMENT OF THE PUBLIC ADMINISTRATOR

The orderly function of our society demands the proper handling of a decedent’s estate (*see Matter of Wyche*, 96 Misc2d 324 [Surrogate Court, Albany County 1978]). The Public Administrator is an essential part of our legal structure by assuring the administration of unattended assets. If there are no eligible persons able to serve as an administrator, the Court must turn to the Public Administrator (*see* SCPA §1418[2]).

This Court holds that there are no eligible persons able to serve as Administrator, c.t.a., to the Estate of Shirley Gitenstein.

The Public Administrator shall be appointed Administrator, c.t.a., of the Estate of Shirley Gitenstein, Successor Administrator, c.t.a., of Aaron L. Gitenstein Estate and Successor Trustee of the Estate of Kermit Gitenstein. The Public Administrator shall, upon qualifying, marshal the assets for the Estates of Shirley, Aaron and Kermit Gitenstein from the removed fiduciary, the Kermit Gitenstein Foundation Inc., and all other sources. There shall be no distribution of assets from the Estates or payment of expenses, without prior Court approval.

SCPA §2307 set forth the computation for calculating commissions due a fiduciary. The law is clear that a successor fiduciary is entitled to full commissions on all assets actually received and paid out by him (*see Estate of Richmond*, 187 Misc2d 872 [Surrogate Court, Broome County 2001], *citing Matter of Farone*, 162 AD2d 828 [3d Dept]). Therefore, case law requires that successor administrators receive commissions on the principal of the fund turned over to him by his predecessor. This results in duplication of commissions on the same assets (*see In the Matter of the Estate of McGrath*, 74 Misc2d 92 [Surrogate's Court, Kings County 1973]). "The Bennett Commission on the Law of Estates in its Fifth Report (1966) (No. 7.15.4B, p. 140 et seq.), thought it feasible to adopt a statutory rule governing successor executors and administrators, but not successor trustees. With respect to the former, the reports recommended that the Court be given authority to apportion a single commission between a deceased executor or administrator and his successor in office. Such a bill was drafted but not introduced" (*see In the Matter of the Estate of McGrath*, 74 Misc2d at 99).

Although this Court is bound by statute, this Court reminds the Public Administrator that his office has already taken a commission for the Estate of Shirley Gitenstein and said Estate is returning to his office due to the removal of the Kermit Gitenstein Foundation Inc., as Administrator, c.t.a.

Almost nine years have passed from the death of Shirley Gitenstein, the sole and last remaining member, officer and director of the Kermit Gitenstein Foundation Inc. There has been no direction from this Court or the Attorney General with regard to the Kermit Gitenstein Foundation Inc. Judicial intervention is long overdue. The Attorney General is strongly encouraged to statutorily act, with the commencement of an action, on behalf of the Foundation, to preserve the assets, or possibly seek judicial dissolution of the Foundation, if warranted, and for the appointment of a Receiver (*see* N-PCL §§112, 1102). Although a Successor Receiver is necessary to preserve the assets and to assist with the possible dissolution of the Foundation, this Court can not statutorily act without an action being filed by the Attorney General.

E. KERMIT GITENSTEIN FOUNDATION, INC.

1. Kermit Gitenstein Foundation Inc. - Beneficiary Under the Will

The Accounting filed for the Estate of Shirley Gitenstein on December 7, 2015, set forth that \$1,466,325.92 had yet to be distributed to the sole beneficiary under her will, the Kermit Gitenstein Foundation Inc. A literal compliance with the terms of the disposition under the will of Shirley Gitenstein may not be possible, due to the fact that the Kermit Gitenstein Foundation Inc. has no members, officers or directors. The Kermit Gitenstein Foundation Inc., is not capable of carrying on the purpose set forth in its Certificate of Incorporation. If the charitable bequest under the Will of Shirley Gitenstein to the Kermit Gitenstein Foundation Inc., “has become impossible or impracticable to achieve”, the doctrine of cy pres may apply. The doctrine of cy pres codified in EPTL §8-1.1(c)(1), provides in relevant part as follows:

“... Whenever it appears to [the] court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may ... make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein ...”

“In order for a Court to exercise its cy pres powers under EPTL §8-1.1(c)(1), a three prong test must be met by a Court (1) the gift or trust must be charitable in nature; (2) the language of the will or trust instrument, when read in light of all attendant circumstances, must indicate that the donor demonstrated a general, rather than specific, charitable intent; and (3) it must be determined to the Court’s satisfaction that the particular purpose for which the gift or trust was created has failed, or has become impossible or impracticable to achieve. If these three conditions are met, the Court then has the power to reform the gift in a manner which will most effectively accomplish its original, general purpose.” Internal citation omitted (*In Re Trust Bank 37 Misc3d* [Surrogate’s Court, Schenectady County, 2012]).

At a conference with the Attorney General and the Public Administrator, this Court shall address the charitable bequest under the will to the Kermit Gitenstein Foundation Inc., and whether the bequest has become impossible or impracticable to achieve, and the cy pres doctrine.

2. **Kermit Gitenstein Foundation Inc. - Corporation Not Under the Will**

A Surrogate’s Court has jurisdiction over matters “relating to the affairs of a decedent”. SCPA §201 reads in pertinent part as follows:

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

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

3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding or between any party and any

other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

Article VI §12 (d), of the New York State Constitution, provides in relevant part, as follows:

“the Surrogate’s Court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents ... administration of estates and actions and proceedings arising thereunder ... and such other actions and proceedings not within the exclusive jurisdiction of the Supreme Court, as may be provided by law.”

To decline jurisdiction, it should be abundantly clear to a Surrogate’s Court that the matter in controversy in no way effects the affairs of a decedent or the administration of his estate (*see Matter of Piccione*, 57 NY2d 278 [1982]). The mere fact, however, that an estate owns stock in a corporation, does not confer jurisdiction on the Surrogate’s Court to resolve all matters involving that corporation and relief will not be granted by the Surrogate where it does not relate to the affairs of the decedent and would not affect the administration of the Estate (*see Lincoln First National Bank, NA v. Sanford*, 173 AD2d 65 [4th Dept 1991]).

The Kermit Gitenstein Foundation Inc., is no longer able to carry out its purpose and an action is required to be filed.

N-PCL §1102(e) authorizes a member or director of a corporation to petition for the judicial dissolution of a corporation when the corporation is no longer able to “carry out its purpose”. N-PCL§112 permits the Attorney General to dissolve a corporation under Article 11 of the Not-For-Profit Corporation Law. The Certificate of Incorporation of the Kermit Gitenstein Foundation Inc., dated April 17, 1969, in ¶(f) anticipated a possible dissolution of the Foundation. ¶(f) of the Certificate of Incorporation of the Foundation read as follows:

“In the event of liquidation, dissolution, or winding up of the corporate affairs whether voluntary or involuntary, or by operation of law, the

corporate assets shall be distributed to one or more of the charitable organizations set forth in second(c) above.”

This Court finds that the operation or dissolution of the not-for-profit corporation, is not a matter relating to the Estates of the Gitenstein Family and does not affect the affairs of the decedent. Therefore, the Surrogate’s Court shall decline future jurisdiction over a preservation action, dissolution action or any other action that may be brought by the Attorney General on behalf of the Foundation (N-PCL §112). Any action brought, pursuant to N-PCL §112, must be brought in Nassau County Supreme Court.

III. CONCLUSION AND ORDER OF THIS COURT

IT IS HEREBY ORDERED, that Steven R. Schlesinger’s Order to Show Cause to Vacate the Corrected Order, dated December 18, 2015 is **DENIED**; and

ORDERED, that Steven R. Schlesinger is hereby **REMOVED** as the receiver of the Kermit Gitenstein Foundation Inc. (*see* N-PCL §1202 [b]); and

ORDERED, that the removal of Steven R. Schlesinger as receiver is effective as of the date of this Decision and Order; and

ORDERED, that all bonds shall be kept in effect until further Order of this Court; and

ORDERED, that Steven R. Schlesinger bring the receivership account for the Kermit Gitenstein Foundation Inc., up to date as of the date of transfer to a Successor Receiver or deposit of assets into Court, within ten (10) days of transfer or deposit; and

ORDERED, that the Kermit Gitenstein Foundation Inc., is hereby **REMOVED** as Administrator, c.t.a., without an evidentiary hearing, pursuant to SCPA §719; and

ORDERED, that Letters of Administration, c.t.a., shall issue to the Public Administrator in the Estate of Shirley Gitenstein, Estate of Aaron Gitenstein, and Estate of Kermit Gitenstein, pursuant to SCPA §1418[2], upon his qualification, according to law; and

ORDERED, that funds, assets, and all documentation under the control of the Kermit Gitenstein Foundation Inc., as Administrator, c.t.a., of the Estate of Shirley Gitenstein, Successor Administrator, c.t.a., of Aaron L. Gitenstein, and Successor Trustee of Kermit Gitenstein, are to be transferred to the Public Administrator, after the issuance of Letters to him and within five (5) days of a demand by the Public Administrator; and

ORDERED, that the Public Administrator as Administrator, c.t.a., of the Estate of Shirley Gitenstein, Successor Administrator c.t.a. of the Estate of Aaron L. Gitenstein or Successor Trust of the Estate of Kermit Gitenstein is enjoined from making any distributions without prior approval of the Court; and

ORDERED, that the Public Administrator as Administrator, c.t.a., of the Estate of Shirley Gitenstein, Successor Administrator, c.t.a., of the Estate of Aaron L. Gitenstein and Successor Trustee Kermit Gitenstein, shall file final accountings with this Court, within thirty (30) days of the date of transfer of the assets from the Estate of Shirley Gitenstein, Estate of Aaron L. Gitenstein and the Estate of Kermit Gitenstein; and

ORDERED, that the Letters of Administration, c.t.a., issued to the Kermit Gitenstein Foundation Inc., for the Estate of Shirley Gitenstein, are hereby revoked; and

ORDERED, that Successor Letters of Administration, c.t.a., issued for the Kermit Gitenstein Foundation Inc., for the Estate of Aaron L. Gitenstein are hereby revoked; and

ORDERED, that Successor Letters of Trustee issued to the Kermit Gitenstein Foundation Inc., for the Trust created under the will of Kermit Gitenstein are hereby revoked.

The Attorney for the Public Administrator and the Attorney General are directed to appear on June 3, 2016, at 9:30 a.m., at the Nassau County Surrogate's Court, located at 262 Old Country Road, Mineola, for a conference on the matters addressed in the Decision and Order.

Dated: May 26, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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