

Matter of Siegel

2010 NY Slip Op 33065(U)

September 30, 2010

Surrogate's Court, Nassau County

Docket Number: 332730/H

Judge: John B. Riordan

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

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 In the Matter of the Petition of DEBORAH E. SIEGEL,
 as Preliminary Executor of the Estate of MARTIN SIEGEL,
 to render an Accounting of MARTIN SIEGEL, as trustee
 of

File No. 332730/H

Dec. No. 26583

ANNETTE G. SIEGEL,

Deceased.

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In this proceeding to settle the final account of Deborah E. Siegel as preliminary executor of the estate of Martin Siegel with respect to Martin's performance as co-trustee of the Annette G. Siegel Trust (hereafter "Petitioner"), objections have been filed by David I. Siegel and Deborah R. Siegel (collectively "Respondents"). The parties have filed cross motions for summary judgment.

Respondents' motion seeks partial summary judgment: a) determining the ownership of the one-half of Netto Lane [as hereafter defined] by reason of the prior renunciation of Martin Siegel as to an undivided one-half interest in same; b) declaring the monies taken by Martin Siegel from Netto Lane and the Annette G. Siegel Trust must be repaid to Respondents and/or the Annette G. Siegel Trust and that restitution be made out of the asset purchased by Martin, i.e., 60 Eden Way, Roslyn Harbor, New York, and that the Annette G. Siegel Trust has a lien on said premises; c) fixing the amount taken and owed to Respondents and/or the Annette G. Siegel Trust in the sum of \$371,000 plus interest at the statutory rate; d) dismissing the claim for commissions as waived;¹ e) directing a further accounting as to certain purportedly missing assets; f) directing a further accounting as to income received on the Vanguard accounts;

¹ Petitioner has conceded that she waived commissions and has withdrawn her claim for commissions.

g) surcharging Petitioner for the legal and other expenses incurred by both sides in litigating this motion; h) denying Petitioner's claim for legal fees and expenses; and i) such other and further relief as the court deems just and proper.

Petitioner's cross motion seeks summary judgment denying Respondents' claim for a declaration that the monies taken by Martin Siegel from Netto Lane and the Annette G. Siegel Trust must be repaid to Respondents and/or the Annette G. Siegel Trust and that restitution be made out of the asset purchased, i.e., 60 Eden Way, Roslyn Harbor, New York and that the Annette G. Siegel Trust have a lien on said premises; and such other and further relief as the court deems proper. Petitioner also opposes Respondents' motion on the basis of the existence of issues of disputed material facts.

Many of the background facts are not disputed. Martin was married to his first wife, the decedent Annette G. Siegel, for over thirty years. They had two children, Respondents David and Deborah. The family resided in a single family house located at 22 Netto Lane in Plainview, Long Island. Annette died on February 23, 2004. The Netto Lane property was held by Martin and Annette as tenants by the entireties. However, on November 1, 2004, Martin executed and filed a renunciation agreement renouncing ownership of a one-half interest in that property.

Annette's will provided for the creation of the Annette G. Siegel Trust which was to be funded primarily from a one half interest in the Netto Lane house, a bank account at Astoria Federal [Acct. No. 8310675297] and a brokerage account at Vanguard [Acct no. 88009399637]. Martin was the income beneficiary of the trust and there were liberal provisions for the payment of income and principal to Martin during his lifetime. Respondents are the residuary beneficiaries under the trust.

Article Three A-2 of the will provides for income distributions from the Annette G. Siegel Trust to Martin to maintain “my spouse liberally ...as my Trustees in their sole discretion may from time to time determine.” Article Three A-3 provides for principal to be distributed “as my Trustees in their sole and absolute discretion shall determine”. The stated testamentary plan of Annette was to “Maintain [her] spouse [Martin] liberally according to [Martin’s] accustomed standard of living taking into account [his] desire to travel, owning a home, owning a car, attending college and graduate school and all other reasonable desires not clearly inconsistent with [Martin’s] accustomed standard of living.”

Martin met Petitioner at a bereavement group in March of 2004, Petitioner’s husband, having died in 2002. Martin and petitioner got married on September 25, 2005. When they met, he had been diagnosed with prostate cancer but was believed to be in remission. By the fall of 2006, the cancer was reactivated, metastasized and Martin passed away on November 16, 2007. Petitioner is the preliminary executor of Martin’s estate.

When they met, Martin and Petitioner each resided in their own homes. Martin moved in with Petitioner. However, they agreed that her house was too small for them and Petitioner’s two grown sons and decided to sell the two houses and purchase a larger residence. Martin and Petitioner took out equity loans on their respective residences² and pooling their resources, purchased the Roslyn Harbor property for \$1.2 million on December 20, 2006. The prior residences were sold after the Roslyn Harbor purchase. The Netto Lane property was sold on or about January 22, 2007 for \$510,000.00. The net sales price after expenses but before payment of

² Martin took out a \$400,000.00 mortgage on Netto Lane on November 11, 2005. He had already renounced a one half (½) interest.

the mortgage note was \$472,714.00. It appears that all the net sales proceeds were paid to Martin and none were deposited in the Annette G. Siegel Trust accounts. Martin and Petitioner owned the Roslyn Harbor property as tenants by the entirety at the time of Martin's death on November 16, 2007.

Martin had been named as executor in Annette's will and as a co-trustee with son David of the pour over trust created under and pursuant to such will. The will had been prepared by attorney Robin Maynard and she was and remains involved in all matters involving Martin's estate.

It is Respondents' contention that Martin improperly used various trust assets in his purchase of the Roslyn Harbor property. These included the proceeds of a \$400,000.00 equity loan on the Netto Lane property (as to which Martin was a 50% owner and one of two co-trustees respecting the 50% owned by the trust), \$46,000.00³ from the trust's Astoria Federal account and \$35,000.00 from the trust's Vanguard account.⁴ The parties disagree as to the amount transferred from the Astoria Federal account to an Astoria Federal trust account but agree that Martin took and mingled those funds in his personal (and/or joint with Petitioner) bank accounts, and the down payment and balance of the purchase price for the Roslyn Harbor property was paid from those accounts.⁵ There are emails from Martin to David suggesting that Martin intended to treat

³ \$36,000 was withdrawn on March 6, 2006 and an additional \$10,000 on June 7, 2006.

⁴ \$20,000 was withdrawn on May 31, 2007 and an additional \$15,000 on August 2, 2007. These withdrawals occurred subsequent to the purchase of the Roslyn Harbor property and could thus not have been used as part of the purchase price.

⁵ As discussed below, while the items have been traced into Martin's personal bank accounts, there has been no effort to apply the judicial tracing rules or actually trace the funds from Martin's accounts into the funds used for the purchase.

these items as loans from the Annette G. Siegel Trust to Martin. The affirmation of attorney Judith B. Engelberg recounts a telephone conversation with David prior to the closing on the sale of Netto Lane where he said “[i]t’s my father’s house.” She also affirmed that David didn’t request copies of the closing documents on Netto Lane until approximately April of 2008, over one year after the closing and subsequent to Martin’s death.

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY 2d 329 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to establish through proof in evidentiary form that triable issues of fact exist or that the party has an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Davenport v County of Nassau*, 279 AD2d 497 [2d Dept 2001]; *Bras v Atlas Construction Corp.*, 166 AD2d 401 [2d Dept 1991]). “Where different inferences may be drawn from facts that are undisputed, the case must go to trial and summary judgment will be denied” (*Sodexo Management, Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]; *Shea v Johnson*, 101 AD2d 1018, 1019 [4th Dept 1984]).

The court’s function is issue finding, not issue determination (*Matter of Suffolk County Dept. Of Social Services v James M.*, 83 NY2d 178 [1994] *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). When deciding a motion for summary judgment, the court must

view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence (*Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]). If the court has any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]; *Groger v Morrison Knudsen Co., Inc.*, 184 AD2d 620 [2d Dept 1992]).

A. Ownership of the Netto Lane property. Martin and Annette owned the Netto Lane property as tenants by the entirety. Upon Annette's death, her 100% undivided interest was expunged and Martin's 100% interest remained. However, Martin made a timely renunciation of a one-half interest in such property on November 1, 2004 (EPTL § 2-1.11). Petitioner does not contest the fact of such renunciation or its legal effect. It permitted the renounced 50% interest to pass pursuant to the terms of Annette's will to the Annette G. Siegel Trust. This was part and parcel of the couple's estate planning. This then was the status of the Netto Lane property when Martin placed a \$400,000.00 equity loan lien on it on November 10, 2005 and when it was subsequently sold on January 22, 2006. Martin owned 50% in his own right and the other 50% was owned by the Annette G. Siegel Trust. Thus, when the property was sold, Martin individually and Martin and David as co-trustees executed the closing papers. The court also concludes that at the time of such closing, if not before, David was or should have been aware of the existence of the equity loan, because it was satisfied at the closing. Based upon the foregoing uncontested facts, Respondents are granted partial summary judgment declaring the ownership of the Netto Lane property as of the date of its sale as 50% Martin and 50% the Annette Trust.

B. Repayment and Restitution. This claim goes to the heart of the case and the cross motions. Respondents seek to invoke the trust pursuit rule enunciated in *Holmes v Gilman*, 138 NY 369 [1893] and its progeny and trace the proceeds to the Roslyn Harbor property. In *Holmes*, the Court of appeals impressed a constructive trust on the proceeds of life insurance policies payable to decedent's wife where the policies had been purchased with money misappropriated by decedent (*Baxter House, Inc. v Rosen*, 47 Misc2d 77, 80 [Sup Ct, Queens County 1965]). The right to follow the funds sprang from the fiduciary nature of the decedent's relation to the monies acquired in breach of his fiduciary duties. Equitable rights and remedies arise whenever a fiduciary relationship is abused and if by such abuse the legal title to property is acquired, equity intervenes to declare the wrongdoers trustees (*Holmes v Gilman*, 138 NY 369, 377 1893)).

“The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, . . . or, in case the original property or its proceeds have been commingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted, and is a jurisdiction founded upon the plainest principles of reason and justice” (*Sugar-Refining Co. v Fancher*, 145 NY 552, 556-557 [1895]).

“Many judgments dealing in equity with the disposition of particular funds are, when analyzed, found to be declaratory in character, and the relief awarded springs from the rights found and declared” (*National City Bank of New York v Waggoner*, 230 AD 88, 94 [1st Dept 1930]).

“Where funds are being traced in equity, the form which the moneys take may change and the successive changes render the pursuit difficult, but they do not, however, suffice to render it unavailable. The substance of the transaction, not the form, will ultimately be the basis upon which a proper judgment will be rendered. A court of equity is frequently called upon to adjust property rights where the property stolen or procured by devious means has passed through more than one hand and been changed into more than one form” (*National City Bank of New York v Waggoner*, 230 AD 88, 92 [1st Dept 1930]).

“The right of the cestui que trust to follow and appropriate trust property ceases only when the means of ascertainment fail (*Holmes v Gilman*, 138 NY at 376), which is but another way of saying that it must be ascertained, traced and identified “ (*Maged v Bank of United States*, 234 AD 295, 298 [2d Dept 1932] [Werner, J. concurring]).

“In order to follow money into lands and impress the latter with a trust, the money must be distinctly traced and clearly proved to have been invested in the land. There must be a direct and unbroken connection between the two. The funds must be ‘ascertained, traced and identified’” (*In re Early’s Estate*, 112 Misc 54, 58-59 [Sur Ct, New York County 1920]).

“When money held by a person in a fiduciary capacity has been paid or deposited by him in his general account at a bank, the party for whom the money is held can follow it, and has a charge on the balance in the banker’s hands, and if a person holding money in a fiduciary capacity pays it to his account at his bankers, and mixes it with his own money and afterwards draws out sums by checks, generally, and in the ordinary manner, the drawer of the checks must be taken to have drawn out his own in preference to the trust-money” (*Importers’ and Traders’ Bank v Peters*, 123 NY 272, 278 [1890]).

Petitioner claims that David acquiesced in the equity loan on the Netto Lane property and the use of the proceeds of such loan for the purchase of the Roslyn Harbor property.

Acquiescence by the cestui que trust can be found based upon their acts and conduct including silence. “From long silence ‘there is a presumption of fair dealing which overrides any presumption of wrongdoing growing out of the trust relation of the party’” (*Matter of Early’s Estate*, 112 Misc 54, 60 [Sur Ct, New York County 1920], citing *Geyer v Snyder*, 140 NY 394, 402 [1893]; *Barry v Lambert*, 98 NY 300 [1885] and *Matter of Union Trust Company*, 80 Misc 394, *affd* 219 NY 514 [1916]).

“Where moneys have been misapplied and have been used as a portion of a larger amount which has been invested in other property, the property thus acquired does not as a whole belong to the owner of the of the moneys misapplied. It does not belong to him because it has not been purchased or acquired solely with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it” (*Holmes v Gilman*, 138 NY 369, 378 [1883]).

Respondents’ invocation of *Holmes* can be translated into a request that the court declare a constructive trust for the benefit of the Annette G. Siegel Trust and its beneficiaries in the real property acquired by Martin and his second wife using, in part, the monies purportedly misappropriated by Martin. In other words, Respondents seek the imposition of a constructive trust by virtue of Martin’s fiduciary relationship to the Annette G. Siegel Trust, claiming he obtained money or property in derogation of his duties as a trustee and family member (*Harrington v Schiller*, 231 NY 278 [1921]; *Ahrens v Jones*, 169 NY 555 [1902]).

“[C]onstructive trust doctrine is not rigidly limited” (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Simonds v Simonds*, 45 NY2d 233, 241 [1978]). It has been repeatedly held that the elements needed for the imposition of a constructive trust are (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment (*see Rogers v Rogers*, 63 NY2d 582, 586 [1984]; *Simonds v Simonds*, 45 NY2d 233, 241-242 [1978]; *Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Rose v Rose*, 72 AD3d 1060 [2d Dept 2010]).

“A constructive trust is the formula through which the conscience of equity finds expression” (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 [1919]; *Equity Corporation v Groves*, 294 NY 8, 13 [1945]). “A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it...A constructive trust is not based upon the intention of the parties, but is imposed in order to prevent one of them from being unjustly enriched at the expense of the other” (*Equity Corporation v Groves*, 294 NY 8, 13 [1945]).

As part of this proceeding and under the rubric of finding issues (*Matter of Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178 [1994]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]), this court must accordingly determine whether Martin was unjustly enriched by reason of his transfer of assets of the Annette Trust for his own benefit. The analysis is complicated by the provisions of the Annette Trust which make Martin the primary beneficiary and the evidence of possible or even likely acquiescence by at least David, who was the co-trustee and one of the residual beneficiaries. In the context of Respondents’ summary

judgment motion, the court must also give the benefit of every inference to the party opposing the motion (*Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]; *Schuhmann v McBride*, 23 AD3d 542 [2d Dept 2005]; *Louniakov v M.R.O.D. Realty Corp.*, 282 AD2d 657 [2d Dept 2001]).

The court concludes that sufficient elements have been alleged as to Martin's actions as co-trustee of the Annette G. Siegel Trust so as to state a claim, but they have not been sufficiently established for a grant of summary judgment. In addition, the court concludes that different inferences may be drawn from the facts that are undisputed, requiring that the case must go to trial and summary judgment be denied (*Sodexo Management, Inc. v Nassau Health Care Corp.*, 23 AD3d 370, 371 [2d Dept 2005]; *Shea v Johnson*, 101 AD2d 1018, 1019 [4th Dept 1984]).

Here, the record is ambiguous as to whether Martin's draw down of Annette Trust assets or the proceeds thereof constituted a distribution, a loan or a misappropriation. Even were it concluded to be a misappropriation, the funds have not been clearly traced into the Roslyn Harbor property (*Maged v Bank of United States Broderick*, 234 AD 295, 298 [2d Dept 1932]), inasmuch as there is no documented evidence that Martin and Petitioner did not purchase the Roslyn Harbor property solely with their own funds.

Partial summary judgment respecting the claim for repayment and restitution is accordingly denied.

C. Fixing the Amount. Based upon the court's denial of Respondents' request for partial summary judgment of the portion of their motion seeking repayment and restitution, the request for the fixing of the amount allegedly misappropriated is premature and this branch of the motion is denied without prejudice.

D. Directing a Further Accounting Respecting Alleged Missing Assets and Income from the Vanguard Account. There is an insufficient foundation for the existence of unlisted assets and partial summary judgment on that request is accordingly denied without prejudice.

E. Surcharging Petitioner. Respondents seek to surcharge Petitioner for the legal and other expenses incurred by both sides in litigating this motion. The purpose of a surcharge is to compensate distributees for loss caused by want of due care, and for money or other property coming into the personal representative's hands for which such representative fails to account (42 NY Jur2d Decedent's Estates §2243 [2010]; 31 Am Jur 2d Executors and Administrators §888 [2010]).

“A fiduciary owes a duty of undivided and undiluted loyalty to those whose interest the fiduciary is to protect” (*Birbaum v Birbaum*, 73 NY2d 461, 466 [1989]). Moreover, a trustee is required to administer the trust solely in the interests of the beneficiary (*see Astro Mechanical Contracting, Inc. v Fleet Bank, N.A.*, 1 NY3d 324 [2004]). Furthermore, a trustee is required to act reasonably and in good faith in attempting to carry out the terms of the trust even when the trust instrument vests the trustee with broad discretion to make decisions regarding distribution of the trust funds (*see Matter of Wallens*, 9 NY3d 117 [2007]).

Petitioner is not the fiduciary in the context of this estate. She appears in this proceeding as the preliminary executor, i.e., legal representative, of Martin, who was a co-trustee of the Annette G. Siegel Trust. While Martin's estate may be liable for those of Martin's actions complained of by Respondents, Respondents have not established any loss caused by want of due care by Petitioner, or the existence of money or other property coming into Petitioner's hands in

her capacity as Martin's executor for which such representative has failed to account.⁶ No surcharge is warranted with respect to the Annette G. Siegel Trust as against Petitioner and the claim for such is denied.

F. Petitioner's Claim for Legal Fees. Both Petitioner's claim for legal fees [Schedule C-1 lists unspecified attorneys' fees due to Marchese and Maynard, LLP for the accounting] and Respondents' attempt to deny them are premature and not ripe for summary judgment. Respondents motion for partial summary judgment in regard thereto is accordingly denied without prejudice.

G. The Cross Motion. The cross motion is grounded upon the fact that the Roslyn Harbor property was acquired by Martin and Petitioner as tenants by the entirety and that upon Martin's death, the tenancy by the entirety conferred a right to absolute ownership of the Roslyn Harbor property on Petitioner as the surviving spouse (*V.R.W., Inc. v Klein*, 68 NY2d 560, 564 [1986]; *Lequerique v Lequerique*, 60 AD3d 504, 505 [1st Dept 2009]).

EPTL § 6-2.2 (b) states that: "A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common." It provides that when husband and wife take title to real property, they take it as tenants by the entirety unless the disposition instrument specifies that they take as tenants in common or joint tenants. It is uncontested and the deed to the Roslyn Harbor property clearly established that Martin and Petitioner obtained title to that property as tenants by the entirety.

⁶ The latter issue, to the extent supportive facts exist, is properly litigated in the context of Martin's estate.

Thus, upon Martin's death, Petitioner was the surviving 100% owner of the Roslyn Harbor property. The legal rationale is relevant to the underlying question. As stated in *Kahn v Kahn*, 43 NY2d 203, 206-207 [1977]:

At common law husband and wife were incapable of holding property as joint tenants or tenants in common. (*Barber v Harris*, 15 Wend 615, 617.) In contemplation of the law, husband and wife were but one person. (*Matter of Klatzl*, 216 NY 83, 85.) Thus, a conveyance to them by name was a conveyance to only one person. (*Stelz v Shreck*, 128 NY 263, 266; 15 NY Jur, Domestic Relations, § 145.) Because of the marital relationship they were said to be seized of the estate in its entirety: each being seized of the whole rather than of any undivided portion. (*Bertles v Nunan*, 92 NY 152, 156; *Stelz v Shreck*, 128 NY, at p 266, supra.;; *Hiles v Fisher*, 144 NY 306, 312; 15 NY Jur, Domestic Relations, § 145.) At death, the survivor took the estate not because of a right of survivorship, but because the survivor remained seized of the whole. (*Bertles v Nunan*, 92 NY, at p 156, supra; *Jackson v McConnell*, 19 Wend 175, 178; *Stelz v Shreck*, 128 NY, at p 266, supra.)

Petitioner contends that since Martin's death extinguished his interest in the Roslyn Harbor property, as distinguished from transferring Martin's interest to Petitioner, it terminated any lien claim Respondents or the Annette G. Siegel Trust might have in that property based upon Martin's alleged wrongdoing. Thus assuming Respondents can establish a legal basis for the imposition of a lien or constructive trust on the Roslyn Harbor property, such claim attached to Martin's interest only and terminated upon Martin's death.

Petitioner's memorandum of law submitted in opposition to respondent's motion and in support of her cross-motion recites that nowhere in respondent's motion papers do they submit evidence or even allege that Petitioner had any knowledge of the source of funds used by decedent for the purchase of the Eden Way property. Those allegations are contained in counsel's affirmation in opposition to the cross-motion wherein he alleges that Petitioner had full

knowledge that the source of the funds for the purchase was the Annette Trust and that decedent's intent was to borrow from the trust, temporarily. While Petitioner may object that the court should not consider counsel's affirmation because he did not have personal knowledge of the facts, it is only her own self-serving affidavit in support of the cross-motion that she had no knowledge of the source of the funds decedent used to purchase Eden Way. On this record, petitioner has not established her right to judgment as a matter of law, therefore, the cross-motion must be denied, regardless of the sufficiency of the opposing paper (*Winegrad v New York Univ. Med. Ctr*, 642d 851, 853 [1985]).

Settle order.

Dated: September 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court