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

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Probate Proceeding, Will of

MARTIN SIEGEL
a/k/a MARTIN A. SIEGEL,

Deceased.

File No. 349552

Dec. No. 27060

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The preliminary executor, Deborah E. Siegel, moves by order to show cause for leave to reargue this court's decision and order dated December 21, 2010 (Dec. No. 26821), in which the court granted the motion of the decedent's two children, David I. Siegel and Deborah R. Siegel (hereinafter "Debbie"), to revoke the preliminary letters testamentary issued to Deborah and appoint David in her place.

Reargument

A motion for leave to reargue is governed by CPLR 2221. A motion for leave to reargue is based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221 [d] [2]). It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Andrea v E.I. du Pont de Nemours & Co.,* 289 AD2d 1039 [4th Dept 2001]*; Bolos v Staten Island Hosp.,* 217 AD2d 643 [2d Dept 1995]; *Schneider v Soloway,* 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis,* 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted

(*Giovaniello v Carolina Wholesale Off. Machine Co., Inc.,* 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt.,* 20 AD3d 388 [2d Dept 2005]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frislinda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche,* 68 AD2d 558 [1st Dept 1979]). Nevertheless, "[i]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision" (*Peak v Northway Travel Trailers,* 260 AD2d 840, 842 [3rd Dept 1999]). "Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate" (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept. 2005]).

Background

Martin Siegel died a resident of Nassau County on November 16, 2007, leaving a last will and testament dated May 2, 2006. Decedent was survived by his wife, Deborah, and two children from a prior marriage, David and Debbie. Preliminary letters testamentary issued to Deborah on February 29, 2008. Thereafter, David and Debbie moved to revoke Deborah's preliminary letters.

In considering the prior motion, the court based its decision on the following facts:

1. On November 11, 2007, Deborah deposited into her joint account with decedent, which account became solely Deborah's upon Martin's death five days later, two checks issued by Seligman Tri-Continental in the total amount of $5,763.69, which were payable to: (a) Martin Siegel as trustee f/b/o David u/a/d 8/3/83 and (b) Martin Siegel as trustee f/b/o Debbie u/a/d

8/3/83.

2. Four days after decedent's death, a check payable to Martin A. Siegel in the amount of $2,625.00 was issued by TIAA/CREF and mailed to the home that Martin and Deborah shared. Deborah signed Martin's name on the back of the check and deposited it into her personal bank account.

3. Shortly before Martin's death and continuing during the first four months thereafter, during which time period Deborah was granted preliminary letters, Deborah used decedent's log-in and password to make multiple on-line transfers from decedent's personal accounts at Chase Bank, two of which were to pay her personal bills and expenses.

4. Transcripts filed with the court reflect that when Deborah was deposed by David and Debbie's counsel, she denied having made certain statements to David, prior to Martin's death, with respect to Martin's financial arrangements for her and for his two children. Specifically, Deborah denied stating that (a) she and decedent held no accounts in joint name, none of decedent's money was in Deborah's name, and all of decedent's money was in decedent's name alone, or in the name of decedent jointly with his first wife or with David, and (b) decedent's children, David and Debbie, would inherit all of their father's money. In a separate transcript submitted by counsel for David of an October 31, 2007 meeting among Deborah, David and Henry Hertl, CSW, the deposed non-party who was decedent's therapist, the record reflects that Deborah did, in fact, make all of these statements on that day, some of them repeatedly.

The sole issue before the court on the prior motion was whether those combined acts and statements were sufficient to prove that Deborah "is unfit for office by virtue of dishonesty, improvidence, want of understanding or waste." This court determined that Deborah's

commingling of funds and withdrawals, combined with repeated dishonest self-serving statements, constituted actions "from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor" (*Matter of Martin*, 16 AD2d 807 [2d Dept 1962]). This court found that Deborah's conduct was sufficient to warrant her immediate removal without a hearing and the preliminary letters issued to her were revoked.

Deborah has now moved by order to show cause for reargument and contends that the court's December 21, 2010 decision and order should be vacated in its entirety, or at least modified to the extent of requiring the court to conduct a hearing before revoking her letters. First, according to Deborah, the court erroneously determined that her conduct endangered the safety of the estate. Deborah argues that she amply demonstrated in her opposition papers to the original motion that there was no merit to David and Debbie's claim that the funds of the estate would be unsafe in her hands. Second, Deborah argues that the findings of fact made by the court concerning her alleged commingling of funds and withdrawals and alleged dishonest statements were completely refuted by the facts and evidence presented by her or, at a minimum, were contested or disputed by her, thus requiring the court to conduct a hearing.

Specifically, Deborah argues that she refuted all of the allegations of commingling. Concerning the TIAA-Cref and Taylor Fall Institute checks (totaling $2,855.00), Deborah stated that she was trying to continue the decedent's prior practice at a time when she had not yet been appointed preliminary executor and that she did not intend to divert these funds. Deborah ultimately deposited the proceeds into the estate bank account on June 30, 2009. Concerning the payments from the Chase account which consist of sixteen transfers or on-line bill payments, Deborah argues that she began this practice on November 13, 2007 while the decedent was in

hospice. The transfers involved are all either transfers of funds to pay ordinary household bills or medical expenses. With respect to the two Seligman checks, Deborah points out that she explained in her affidavit that on November 11, 2007, she deposited two checks from an account called "Seligman Data Corp." into her and Martin's joint account. She did this because while Martin was in hospice, she had to deal with all of the household responsibilities, and she deposited them in their joint account because she assumed this is what Martin would have done.

In addition, concerning the meeting which took place on October 31, 2007 among David, Deborah and Henry Hertl, Deborah claims that the court disregarded her version of what occurred at the October 31, 2007 meeting.

David and Debbie oppose the application for reargument arguing that the court did not overlook or misapprehend the law or the facts and based its decision on four critical undisputed facts. David and Debbie's counsel argues that the four acts conceded by Deborah are each serious on their own. Moreover, Deborah is an attorney. Deborah cannot now rely on the "conclusory assertion" that fact issues exist. Counsel concedes, however, "that one could count on one hand the number of times this court has removed a fiduciary without a hearing." Counsel argues that there is undisputed evidence that Deborah is guilty of a series of acts - any one of which mandates removal.

Applicable Law and Conclusion

The decision to suspend or remove a fiduciary lies in the discretion of the surrogate (SCPA 713; *Matter of Simon*, 44 AD2d 570 [2d Dept 1974]). As the removal of the fiduciary constitutes a "judicial nullification of the testator's choice," it may only be allowed when "the grounds set forth in the relevant statutes have been clearly established" *(Matter of Duke*, 87

NY2d 465, 473 [1996]). Further, "the rule has long prevailed that courts are required to exercise the power of removal sparingly and to nullify the testator's choice [of executor] only upon a clear showing of serious misconduct that endangers the safety of the estate . . ." (*Matter of Duke,* 87 NY2d 465, 475 [1996] citing *Matter of Israel*, 64 Misc 2d 1035, 1043 [Sur Ct, Nassau County 1970] citing *Matter of Braloff*, 3 AD2d 912 [2d Dept 1957]; *affd* 4 NY2d 847 [1958]). The burden is on the party seeking to remove the fiduciary (*see Matter of Krom*, 86 AD2d 689, 690 [3d Dept 1982]). In view of the court's discretion in granting a motion for reargument, Deborah's motion for reargument is granted. Upon reconsideration, the court reverses its prior determination revoking Deborah's preliminary letters without a hearing.

The matter is scheduled for a hearing on April 18, 2011 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 18, 2011

EDWARD W. McCARTY III
Judge of the
Surrogate's Court