SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General for the State of New York,

Petitioner,

-against-

THE KERMIT GITENSTEIN FOUNDATION, INC.

Respondent.

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DECISION/ORDER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with Notice of Entry, upon all parties.

Index No. 604475/16
Motion Date: September 6, 2016

ONOFRY, A.J.S.C.

The following papers numbered 1-91 were read and considered on this Order to Show Cause and Petition of the New York State Office of the Attorney General pursuant, *inter alia*, Not for Profit Corporation Law §§ 112, 1102, 1107 and Estates Powers and Trusts Law § 8-1.1, for an Order: (1) dissolving the Kermit Gitenstein Foundation and distributing its assets via cy pres distribution to quality tax exemption charitable organizations engaged in activities similar or substantially similar to the Foundation's activities; (2) appointing a Receiver over the Foundation, pursuant to Not for Profit Corporation Law §§ 1102 and 1203; and (3) granting Petitioner such other and further relief as the Court finds necessary, appropriate and just; and on a motion by proposed intervenor Steven R. Schlesinger for an Order: (1) granting Steven R. Schlesinger leave to intervene in the pending dissolution proceeding pursuant to CPLR §§ 1012 and 1013; (2) removing the four (4) accounting proceedings currently pending before the Nassau County Surrogate's Court under Surrogate File Nos. 357003/A, 346141/V, 301202/D and 138481/A and consolidating said accounting proceedings with the instant dissolution proceeding, pursuant to CPLR § 602; and (3) amending the caption in the instant proceeding to reflect that it has been consolidated with the aforementioned accounting proceeding; and (4) granting such other and further relief as the Court deems just and proper; and upon the application of court appointed referee/examiner Joseph W. Ryan, Esq., for an Order granting approval of his request for compensation and attorney's fees for his duties as such.

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Upon the foregoing papers, it is

ORDERED, that the branch of the motion of Proposed Intervenor Steven R. Schlesinger Esq., which seeks permission and authority to intervene pursuant to CPLR § 1013, is granted and the Intervenor's proposed answer, which is appended to his moving papers, is deemed served; and it is further

ORDERED, that the branch of the motion which seeks permission to intervene as a matter of right, pursuant to CPLR § 1012, is denied has having been rendered moot by the foregoing determination; and it is further

ORDERED, that the branch of the motion which seeks removal and consolidation of the four (4) accounting proceedings under Surrogate File Nos. 357003/A, 346141/V, 301202/D and 138481/A with the pending dissolution proceeding [Nassau Supreme Court Index No. 604475-2016] pursuant to CPLR §602, is granted; and it is further

ORDERED, that in conformity therewith, the caption of the instant proceeding be, and the same shall be, amended to reflect such removal and consolidation; and it is further

ORDERED, that the branch of the petition, which seeks an Order dissolving the Foundation and a direction that its assets be distributed pursuant to the *cy pres* doctrine to qualified tax exempt charitable organizations engaged in similar or substantially similar activities to the Foundation, is granted; and it is further

ORDERED, that in conformity with the foregoing, the Kermit Gitenstein Foundation, Inc. (the "Foundation") be, and the same is hereby, dissolved, the Certificate of Incorporation of the Foundation annulled, and the corporate existence of the Foundation is terminated; and it is further

ORDERED, that the branch of the Petition which seeks the appointment of a successor receiver to effectuate the dissolution of the Foundation, to marshal its assets, pay and discharge its liabilities and distribute its remaining assets as set forth herein, is granted; and it is further

ORDERED, that Howard Protter, Esq., Jacobowitz & Gubits, P.O. 367, Walden, New York, (845)-778-2121, Fiduciary No. 436362, be, and is hereby, appointed successor receiver of the assets and property of the Foundation, with the usual and customary powers and duties according to the laws of the State of New York including, but not limited to, New York Not for Profit Corporation Law (N-PCL) § 1206.

Introduction

By Administrative Order dated September 29, 2016,[1] the undersigned Justice was assigned to preside over this pending Not-for-Profit Corporations Law (N-PCL) dissolution proceeding commenced by the Office of the Attorney General of the State of New York (hereinafter sometimes referred to as the "Attorney General" or "OAG"), a proceeding that emanates from, and is a by-product of, the lengthy and detailed Nassau Surrogate Court Decision and Order dated May 26, 2016

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[1]Pursuant to Administrative Order dated September 29, 2016, issued by the Honorable Michael V. Coccoma, Deputy Chief Administrative Judge, the undersigned was assigned to the Supreme Court, Nassau County, Tenth Judicial District, to hear and determine the matter of *The People of the State of New York -against- The Kermit Gitenstein Foundation, Inc. Index No. 604475/2016.*

The undersigned currently serves as Surrogate for the County of Orange [2009-Present], Acting Surrogate for Westchester County [2015 to Present], and Acting Supreme Court Justice, Orange County, Ninth Judicial district [2009-Present].

(Hon. Margaret C. Reilly, Nassau Surrogate), which Decision and Order, by its terms, chronicled the near 47 history of the Gitenstein family siblings, their collective dispositive schemes, the procedural aspects of their respective estates, and the resulting formation, funding, and management of the Kermit Gitenstein Foundation, Inc. (the "Foundation"). It is a case which, by the very nature of the allegations and issues presented, has engendered a considerable amount of public notoriety, notoriety not only for the parties, but the judiciary.

The Decision and Order, by its terms, also ended the approximate 9 year tenure of Attorney Steven R. Schlesinger (hereinafter sometimes referred to as "Schlesinger") as Receiver of the Foundation, and as fiduciary for the Estates of Shirley Gitenstein, Aaron L. Gitenstein, and Kermit Gitenstein.

In relevant part, the Surrogate Court ordered Schlesinger's removal as: (1) Receiver of the Foundation; (2) Administrator c.t.a. of the Estate of Shirley Gitenstein; (3) Administrator c.t.a of the Estate of Aaron L. Gitenstein; and (4) Successor Trustee of the Testamentary Trust created under the Estate of Kermit Gitenstein.

Based upon the same, the court also appointed the Public Administrator for Nassau County (hereinafter sometimes referred to as 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 of the Kermit Gitenstein Testamentary Trust.

That removal was coupled with the court's determination that while it believed that the Foundation could no longer discharge its statutory function due to, *inter alia*, the absence of any governance structure, and that dissolution of the Foundation and the distribution of its remaining assets, pursuant to the *cy pres* doctrine [*See,* Estate Powers and Trust Law (EPTL) §8-1.1; *In re Trust*

Co. Bank, 37 Misc.3d 1045, 976 N.Y.S.2d 70 (2012), *affirmed,* 112 A.D.3d 1099 [3rd Dept. 2013]) was warranted, it nevertheless lacked the requisite jurisdiction to effectuate the same, relying instead on the Attorney General proceed with the formal dissolution of the Foundation in Supreme Court, pursuant to the applicable provisions of the Not-For-Profit Corporation Law (N-PCL), and to distribute the Foundation's remaining assets via the *cy pres* doctrine, to various qualified charitable entities.

The Attorney General has now commenced a proceeding to dissolve the Kermit Gitenstein Foundation, pursuant to its statutory authority under, *inter alia,* Not-For-Profit Corporation Law (N-PCL) §§112, 1102,1107, 1202, and 1203, and its statutory charitable supervisory and enforcement powers, under Estate's Powers and Trust Law (EPTL) §8-1.1. As an incident thereto, it further seeks to marshal the Foundation assets, satisfy and discharge its obligations and liabilities, and distribute its remaining assets to qualified charitable entities, pursuant to the *cy pres* doctrine. To effectuate the same, the Attorney General further seeks the appointment of a Successor Permanent Receiver.

In response to the commencement of the dissolution proceeding, former Foundation Receiver, Attorney Steven R. Schlesinger, seeks permission, pursuant to CPLR §1012 and 1013, to intervene in the dissolution proceeding and further seeks, pursuant to CPLR §602, the removal of four accounting proceedings, currently pending in Nassau Surrogate's Court under File Nos. 357003/A, 346141V, 301202D, and 138481A, from the Nassau Surrogate's Court and the consolidation of those proceedings with the pending Supreme Court dissolution proceeding.

The Nassau Public Administrator supports the Attorney General's application for dissolution, and for the appointment of a successor Permanent Receiver. It opposes Schlesinger's request for intervention, removal and consolidation.

Intertwined in the motions *supra*, is the Letter Application of Court Appointed Court Examiner/Referee, Joseph W. Ryan, Jr., who not only supports the Attorney General's application, but who seeks an order approving his compensation for services rendered in preparing and filing three distinct reports for the court's guidance and information. It is an application presented to this court in the nature of a renewal application based on the deferral of the approval by Surrogate Reilly.

The Attorney General's petition and Attorney Schlesinger's motion to intervene are presented to the Court in the context of a Non-profit [I.R.C. 501(c)(3)] Foundation which is devoid of any governance structure [and has been so for the past nine years] and four unresolved accounting proceedings each of which are currently pending before the Nassau Surrogate Court and are the subject of four distinct appeals to the Appellate Division, Second Department.[2]

Factual Background/Procedural History

As a threshold matter, the Court takes judicial notice of all prior proceedings and filings under Nassau Surrogate File Nos. 357003/A [Accounting Proceeding in the matter of Kermit Gitenstein Foundation, Inc. Steven R. Schlesinger, as Receiver of the Foundation], 346141/V [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], 301202/D [Accounting by the Kermit Gitenstein Foundation, Inc. c/o Steven R. Schlesinger, Receiver, as Administrator C.T.A., of the Estate of Aaron L. Gitenstein] and 138481/A [Accounting by the Kermit Gitenstein Foundation, Inc.,

[2]On June 29, 2016 Notices of Appeal were filed by Attorney Steven R. Schlesinger with respect to each of the pending accounting proceedings, all of which emanate from Surrogate Reilly's Decision and Order of May 26, 2016.. The asserted basis for each of the appeals is the Court's alleged abuse of discretion in its *sua sponte* removal of Schlesinger as fiduciary, without an evidentiary hearing and without a showing of misconduct, and the resulting denial of substantive and procedural due process.

c/o Steven R. Schlesinger, Receiver, as Successor Trustee of the Trust created under the Last Will and Testament of Kermit Gitenstein.

Surrogate Margaret C. Riley, in her Decision and Order of May 26, 2016, provided a detailed analysis and chronology of the various Gitenstein estates as well as the origin and current status of the Kermit Gitenstein Foundation, Inc., a chronology which provides the procedural framework within which this proceeding, and the pending motions, have been presented. While a verbatim recitation of the factual background is not required, a summary of certain aspects of the Decision is nevertheless warranted based upon their relevance to the issues presented.

Initially, it is noted that the funding and governance of the Foundation is a byproduct of the common dispositive plans of Kermit Gitenstein, Ruth Gitenstein, Annette Gitenstein, Aaron L. Gitenstein and Shirley Gitenstein (the "Gitenstein siblings").

The dispositive schemes effectuated by the Gitenstein Siblings, subject to minor variations, were consistent in both their content and their timing. In relevant part, each directed legacies to his, her or their siblings or, alternatively, to the Kermit Gitenstein Foundation, by a gift over through renunciation/disclaimer, or alternate disposition in event of a siblings' prior death. Indeed, with the exception of Kermit Gitenstein's Will, each of the Wills was executed within a matter of weeks or months of the other. Ruth Gitenstein's Will was executed on March 11, 1989, Annette Gitenstein's Will was executed on March 13, 1989, Aaron L. Gitenstein's Will was executed on March 11, 1989, and Shirley Gitenstein's Will was executed on October 7, 1989.

Kermit Gitenstein died a resident of Nassau County on January 4, 1969, leaving a Last Will and Testament dated March 28, 1968, that was duly admitted to probate by the Nassau County Surrogate's Court on March 3, 1969.

Pursuant to paragraph SIXTH of his Will, Kermit Gitenstein provided for a pre-residuary $200,000.00 cash legacy to be given to a charitable organization yet to be established by his executor. To that end, Kermit's executor [his brother Aaron L. Gitenstein] was directed to, and did in fact, establish a charitable Foundation in accordance with Internal Revenue Code § 501(c)(3).

The Will also provided for the creation of four separate and distinct Testamentary Trusts for the benefit of his four siblings, Annette, Ruth, Shirley, and Aaron, and Letters of Trusteeship thereupon issued to his brother Aaron L. Gitenstein for the purpose of administering the same.

Thereafter, and on April 17, 1969, the Kermit Gitenstein Foundation, Inc. was established under and pursuant to the New York Membership Corporation Law.

The stated corporate purposes, for which the Foundation was established, was set forth in paragraph SECOND of the Certificate and provided, in relevant part, for the following:

> (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 reinvest 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 by the bylaws 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.

The Certificate of Incorporation further provided that:

> (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.

Paragraph FIFTH of the Certificate of Incorporation provided that there "shall not be less than three nor more than five" directors. The original directors of the Foundation consisted of the Gitenstein siblings: Aaron L. Gitenstein; Shirley Gitenstein; Ruth Gitenstein; Annette Gitenstein; and Max J. Weintraub.

It is unclear from the record when Max J. Weintraub ceased being a director in the Foundation. The Foundation nevertheless continued to be administered, and its governance supervised, by the Gitenstein siblings until 2007 when Shirley Gitenstein, the last of the Gitenstein siblings, died.

On September 18, 1991, Ruth Gitenstein died leaving a Last Will and Testament dated March 11, 1989, which was duly admitted to probate by the Nassau Surrogate's Court on December 3, 1991.

Thereafter, and on March 3, 1996, Annette Gitenstein died leaving a Last Will and Testament, dated March 13, 1989, that was duly admitted to probate on April 1, 1996.

Thereafter, and on April 18, 1997, Aaron L. Gitenstein died leaving a Last Will and Testament, dated March 11, 1989, that was duly admitted to probate by the Nassau Surrogate's Court on September 4, 1997. Aaron Gitenstein's reported estate totaled $1,938,545.00 of which $1,244,633.00 passed to the Kermit Gitenstein Foundation, Inc.

Thereafter, and on March 14, 2007, Shirley Gitenstein [the last of the Gitenstein siblings] died a resident of the County of Nassau leaving a Last Will and Testament dated October 7, 1988. Pursuant to paragraph SECOND thereof, and consistent with the common Gitenstein dispositive plan, Shirley left her entire estate to her sisters. Based upon their predecease, and pursuant to

paragraph FOURTH, her entire residuary estate passed to the Kermit Gitenstein Foundation. Notably, however, the Will did provide for, or nominate, an executor.

Based upon the same, and on April 5, 2007, Letters of Temporary Administration were issued to the Public Administrator of Nassau County (the "Public Administrator"). Shirley Gitenstein's estate had an initial reported value of $9,953,902.56.

Despite the successive deaths of the Gitenstein siblings, none were replaced as directors of the Foundation. Thus, upon Shirley Gitenstein's death, the Foundation had no members, no governing Board of Directors, or any method of governance.

Based upon the same, and on November 1, 2007, the Attorney General, as New York statutory representative for charitable beneficiaries under EPTL § 8-1.1, and the Public Administrator of Nassau County filed a "joint petition" with the Nassau Surrogate's Court, a petition which sought an Order appointing a "Permanent Receiver" for the Foundation. The petition, by its terms, expressly contemplated that the receivership would be of limited duration. In relevant part it provided for the following:

> "after the Foundation receives final distribution from the Estate of Shirley Gitenstein, pursuant to [her] Will, the Attorney General intends to seek judicial dissolution of the Foundation."

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

Thereafter, and on November 25, 2008, Temporary Letters of Administration for the Estate of Shirley Gitenstein were duly issued to the Kermit Gitenstein Foundation, Steven R. Schlesinger Receiver, which Temporary Letters remained in full force and effect until February 9, 2011, when they were revoked, upon the issuance of a decree admitting Shirley Gitenstein's Last Will and

Testament to probate. By and under the same, the Kermit Gitenstein Foundation, Steven R. Schlesinger was duly appointed Administrator c.t.a. of the Shirley Gitenstein.

Thereafter, and on August 2, 2011, the Kermit Gitenstein Foundation, Steven R. Schlesinger Receiver, was appointed Successor Administrator c.t.a. of the Estate of Aaron L. Gitenstein. Schlesinger was also appointed Successor Trustee [in Aaron's place and stead] for the Kermit Gitenstein Testamentary Trust.

It was not until October of 2015, based upon published reports in Newsday, that any significant activity surfaced with regard to any of the Gitenstein Estates or the Foundation.

By Order dated October 9, 2015 issued by the Nassau Surrogate, the Foundation, through its Receiver, was directed to, and did, file Interim Accountings for not only the Foundation but the three Gitenstein Estates.

On December 7, 2015, a Petition for the Judicial Settlement of the Interim Account of the Receiver of the Foundation, for the period January 1, 2009 to October 31, 2015, was filed by Schlesinger as Receiver. The Accounting has not been judicially settled and is currently pending.

On December 7, 2015, the Foundation, through its Receiver, filed an Interim Accounting for the Estate of Shirley Gitenstein, as Administrator c.t.a., for the period November 28, 2008 to October 31, 2015. The Accounting has not been judicially settled and is currently pending.

On April 21, 2016 an Interim Accounting for the Estate of Aaron L. Gitenstein was filed by the Foundation, Steven R. Schlesinger Receiver, as Successor Administrator c.t.a., for the period August 11, 2011 to April 1, 2016. The Accounting has not been judicially settled and is currently pending.

On April 22, 2016, an Accounting by Steven R. Schlesinger, Receiver of the Kermit

Gitenstein Foundation, Inc., as Successor Trustee of the Kermit Gitenstein Testamentary Trust was filed. The Accounting has not been judicially settled and is currently pending.

In the intervening period, and by Decision and Order, dated December 10, 2015 [Amended December 18, 2015], based upon, *inter alia*, "an article in the public media concerning Mr. Schlesinger's performance as Receiver", the Court suspended Schlesinger's authority to disperse funds from the Foundation and appointed attorney Joseph W. Ryan as Court Examiner/Referee to "Hear and Report". Pursuant to the same, Court Examiner Ryan thereafter filed three Reports: One on January 11, 2016; one on February 10, 2016; and one on March 15, 2016.

Thereafter, and by Decision and Order dated May 26, 2016, as noted *supra,* Surrogate Margaret C. Reilly, based upon a review of "numerous documents filed in the Estates of the Gitenstein family and the Kermit Gitenstein Foundation": (1) removed Steven R. Schlesinger as Receiver of the Foundation; (2) removed Receiver Schlesinger as Administrator c.t.a of the Estate of Shirley Gitenstein; (3) removed Receiver Schlesinger as Successor Administrator c.t.a of the Estate of Aaron Gitenstein; and (4) removed Receiver Schlesinger as Successor Trustee of the Kermit Gitenstein Testamentary Trust.

Consistent therewith, Surrogate Reilly appointed the Public Administrator of Nassau County, Successor Administrator of the Estate of Shirley Gitenstein, Successor Administrator c.t.a. of the Estate of Aaron L. Gitenstein, and Successor Trustee of the Kermit Gitenstein Testamentary Trust.

In effectuating the foregoing relief, Surrogate Reilly concluded, *inter alia*, that Schlesinger had exceeded his authority as Receiver and had disbursed 8.1 million dollars in distributions to purported charitable beneficiaries, without court approval.

In addition, she concluded that by reason of the death of the Gitenstein family members, and

the resulting absence of any directors or governance structure, the Foundation was no longer able to carry out its stated purpose and should therefor be dissolved, dissolution that was not only contemplated by the stated intent in the Certification of Incorporation itself, but consistent with the thrust of the "joint petition" filed by the Attorney General and the Public Administrator in 2007.

Furthermore, she held that although she lacked the jurisdictional basis to effectuate the dissolution, the Attorney General was nevertheless vested with the statutory power to petition for the dissolution and distribution of the remaining assets of the Foundation to various charitable beneficiaries, pursuant to the *cy pres* doctrine, and encouraged the Attorney General to proceed accordingly.

The Dissolution Petition and The Motion to Intervene

Based upon the foregoing, and by Verified Petition dated June 15, 2016, the Attorney General seeks a judgment, pursuant to N-PCL §§1101, 112(a)(7) and 1102(a)(2)(e) and its statutory powers of charitable oversight under EPTL §8-1.1, to dissolve the Foundation and to distribute its remaining net assets to otherwise qualified charitable beneficiaries, pursuant to the *cy pres* doctrine.

For the purpose of effectuating the same, and pursuant to N-PCL §1202, the Attorney General also seeks the appointment of a successor Permanent Receiver.

The Public Administrator and the Court Examiner/Referee join in and support the petition and the relief requested by the Attorney General.

In response to the petition, former Receiver and Estate Fiduciary Attorney Schlesinger moves to intervene in the pending proceeding, pursuant to CPLR §§1012 and 1013, and further seeks, pursuant to CPLR §602, the removal and consolidation of the four Accounting proceedings, currently pending in the Nassau Surrogate's Court, with the current dissolution proceeding.

In so moving, he asserts that intervention, removal and consolidation are warranted under CPLR §§1012, 1013, and 602 based upon: (1) the existence of common questions of law and fact which justify both intervention and consolidation; (2) that judicial economy will be promoted thereby; (3) that the Nassau Surrogate lacks jurisdiction over the dissolution proceeding; and (4) that retention of the Accounting proceedings in the Nassau Surrogate's Court is improper due to the demonstrated bias of the Surrogate toward Schlesinger.

As to the first basis, Schlesinger argues that his accountings as both Receiver and as fiduciary for the Gitenstein Estates are intertwined with, and "inextricably linked" to, the dissolution process itself, since the dissolution proceeding, by its very nature, contemplates the marshaling and collection of the assets and the payment of the Foundation's liabilities. Moreover, he asserts, the appointment of a successor Permanent Receiver will trigger the necessity for the filing of a final accounting on his part.

On the issue of jurisdiction, he points to Surrogate Reilly's own determination that she lacks requisite subject matter jurisdiction over the governance and dissolution of the Foundation.

As evidence of bias, Schlesinger points to the Surrogate's alleged stated goal of "ending the era of the gentlemen's court of congenial insiders" which is directed at him [22 NYCRR 100.3(E)(1)], his *sua sponte* removal by the Surrogate, without a hearing, and her purported *ex parte* discussions with the Public Administrator and the Attorney General [22 NYCRR 100.3(B)(6)].

These factors, he asserts, when considered in light of the pending appeals, removes any semblance of the Accountings being conducted and adjudicated before an impartial tribunal.

The Attorney General and the Public Administrator both oppose Schlesinger's motion to intervene on virtually identical grounds.

First, the Attorney General asserts that Schlesinger's remedies for his disagreement with Surrogate Reilly's Decision are reargument and appeal, not intervention in this proceeding.

Second, they assert, Schlesinger, by reason of his removal as Receiver and Administrator c.t.a., of the Gitenstein Estates, lacks the requisite standing to even make the motion.

Third, they assert, intervention is neither warranted as a matter of right, under CPLR §1012, nor on a discretionary basis, under CPLR §1013.

As to the former, they assert, Schlesinger has satisfied neither of the two required prongs: (1) that the representation of his interest is or may be inadequate; or (2) that he will or may be bound by any judgment or determination in the proceeding. In any event, they assert, Schlesinger's interest will be adequately protected by his status as a "creditor" or "claimant".

As to the latter, they assert, there are no common questions of law or fact, which is a prerequisite for permissive intervention. Furthermore, permissive intervention, under CPLR §1013, requires consideration of whether the intervention will unduly delay resolution of the pending action and/or proceeding and whether it will cause substantial prejudice to the rights of any party. In this instance, they assert, it will result in both.

Indeed, the Attorney General argues that, the issues raised by Schlesinger have nothing to do with "the discrete and undisputed questions of fact and law that are before the Court, i.e. the absence of a governance structure for the Foundation which leaves the Foundation unable to fulfill its purpose and serves as the legal basis for dissolution".

Fourth, they assert, Schlesinger's attempt for removal and consolidation is simply "blatant forum shopping". At best, they assert, the expeditious resolution of the Dissolution and Accounting proceedings require loose coordination only between the two courts, not consolidation and removal.

Lastly, they argue, the institutional depth of knowledge of the Surrogate, in presiding over Accounting proceedings, will only enhance the efficiency of the dissolution proceeding.

In reply, Schlesinger argues that the underlying basis for intervention, consolidation, and removal, as originally advanced, is only enhanced by the arguments and "fatal concessions" proffered by the Attorney General and the Public Administrator, i.e. they concede that the accountings will be an integral part of the dissolution process and that the jurisdiction of the Surrogate over certain aspects is problematic. The mere suggestion that, and reliance upon, the Surrogate being appointed as an Acting Supreme Court Justice, is an implicit, if not explicit, acknowledgment that jurisdiction over the proceeding is a problem.

Thus, it is on these facts and these arguments that the Attorney General and Public Administrator seek a judgment of dissolution, the appointment of a Permanent Receiver, and the denial of Schlesinger's motion for intervention, removal and consolidation, and on which Attorney Steven R. Schlesinger seeks leave to intervene, and that the Accounting proceedings be removed from Surrogate's Court and consolidated with the pending Dissolution proceeding.

Discussion/Legal Analysis

At the outset, the Court is compelled to observe that in rendering its determinations, the Court, by necessity, has been compelled to rule on and analyze the prior proceedings that have preceded the current motions and have led up to, and shaped, the present factual context in which these issues have been presented.

The issues presented for determination include the extent to which, if at all, Attorney Schlesinger possesses the requisite standing to even move to intervene, based upon his prior removal as Receiver and as Estate fiduciary, and if so, the extent to which, if at all, he is entitled to intervene

in the pending dissolution proceeding, either as a matter of right or permissively, whether removal and consolidation are warranted, whether the judgment of dissolution sought should be summarily granted, whether a Permanent Receiver should be appointed, and the scope of review to be applied in resolving the issues presented, issues that will be addressed by the Court, *in seriatim.*

The Issues of Standing, Intervention and Joinder

The concept of "standing", in its purest sense, is a threshold issue that requires an inquiry into whether a litigant has a sufficient interest in the lawsuit such that the law will recognize that interest as a sufficient predicate for the determining the issue at the litigant's request. In order to have standing, the party must demonstrate an injury, or the potential for injury, which falls within the relevant zone of interest sought to be protected by the law. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 926 N.Y.S.2d 532 [2nd Dept. 2011]; *Carper v. Nussbaum*, 36 A.D.3d 176, 825 N.Y.S.2d 55 [2nd Dept. 2006]; *Bernfeld v. Kurilenko*, 91 A.D.3d 893, 937 N.Y.S.2d 314 [2nd Dept. 2012]; *Brown-Jodin v. Pirrotti*, 138 A.D.3d 661, 29 N.Y.S.3d 426 [2nd Dept. 2016]. The rules governing the concept of standing assist the courts in differentiating a tangible injury from the abstract or speculative. In short, the litigant must demonstrate that he is, or may be, genuinely aggrieved. *Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 901, 798 N.E.2d 1047 (2003); *Sharrow v. Sheridan,* 91 A.D.3d 940, 937 N.Y.S.2d 320 [2nd Dept. 2012]; *Ramm v. Allen*, 118 A.D.3d 708, 987 N.Y.S.2d 99 [2nd Dept. 2014].

Here, the Court determines, as a threshold issue, that in view of Schlesinger's nexus to the case and the issues presented, his removal as Receiver of the Foundation, or as Estate fiduciary, does not, in and of itself, divest him of the requisite standing to bring the instant motion to intervene.

That does not, however, resolve the issue of whether his intervention in the pending

dissolution proceeding is warranted, either as a matter of right, under CPLR §1012, or on a discretionary basis, under CPLR §1013.

Pursuant to CPLR §1012(a), intervention, as a matter of right, is permitted in a pending action when: (1) a statute of the state confers an absolute right to intervene; or (2) when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or (3) the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

In order for a movant to be granted the right to intervene, as matter of right under CPLR §1012(a)(2), the movant must satisfy two conditions: (1) that the person "is or may be bound by the judgment"; and (2) representation of the person's interest "is or may be inadequate".

A demonstration by the movant that the "practical effect" of the judgment may prejudice the proposed intervenor's position is not enough; a more stringent standard is applied. The prejudice suffered by the intervenor, as contemplated by the language of CPLR §1012(a)(2), is determined by the actual *res judicata* effect of the judgment against the intervenor, not by its practical effect. *See, Vantage Petroleum v. Board of Assessment Review of the Town of Babylon*, 61 N.Y.2d 695, 460 N.E.2d 1088, 472 N.Y.S.2d 603 (1984); *Subdivisions, Inc. v. Town of Sullivan*, 75 A.D.3d 978, 905 N.Y.S.2d 367 [3rd Dept. 2010]; *Yuppie Puppy Pet Products, Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 906 N.Y.S.2d 23 [1st Dept. 2010].

Furthermore, even the prospect of the *res judicata* effect of the judgment may not be enough where there is a finding that the person's interests have been, or will be, adequately represented, i.e. where there is a finding that "privity" exists between the intervenor and a party to the action or where

it is determined that that such party has more than a passive interest in the litigation. *See, e.g., Green v. Santa Fe Industries, Inc.,* 70 N.Y.2d 244, 519 N.Y.S.2d 793, 514 N.E.2d 105 (1987); *Gramatan Home Investors Corp. v. Lopez,* 46 N.Y.2d 481, 414 N.Y.S.2d 308, 386 N.E.2d 1328 (1979); *St. Joseph's Hospital Health Center v. Department of Health,* 224 A.D.2d 1008, 637 N.Y.S.2d 821 [4th Dept. 1996].

In contrast to the stringent requirements of CPLR §1012, CPLR §1013 allows a court, in its discretion, to permit a person to intervene in a pending action when the person's claim or defense and the main action have common questions of law or fact. In exercising that discretion, the court must consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party. *American Home Mortgage, Inc. v. Sharrocks,* 92 A.D.3d 620, 938 N.Y.S.2d 202 [2nd Dept. 2012], *citing Wells Fargo Bank, N.A. v. McClean*, 70 A.D.3d 676, *at* 677, 894 N.Y.S.2d 487 [2nd Dept. 2010]. In addition, the Court must consider whether the proposed intervenor has demonstrated a "real and substantial interest in the outcome of the [case]". *American Home Mortgage, Inc. v. Sharrocks, supra; Wells Fargo Bank, N.A. v. McClean, supra; Berkowski v. Board of Trustees of Incorporated Village of Southampton,* 67 A.D.3d 840, 843-844, 889 N.Y.S.2d 623 [2nd Dept. 2009]; *Matter of Bernstein v. Feiner*, 43 A.D.3d 1161, 1162, 842 N.Y.S.2d 556 [2nd Dept. 2007].

Notably, while CPLR sections 1012 and 1013 clearly distinguish between the ability to intervene as a matter of right and on a discretionary basis, the Second Department has minimized that distinction. "Whether intervention is sought under CPLR 1012(a) or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the

outcome of the proceeding". *Wells Fargo Bank, N.A. v. McClean supra, at 676-677; Berkowski v. Board of Trustees of Incorporated Village of Southampton, supra at 843; Sieger v. Sieger,* 297 A.D.2d 33, 35-36, 747 N.Y.S.2d 102 [2nd Dept. 2002].

Here, the proposed intervenor Attorney Steven R. Schlesinger has demonstrated a "real and substantial interest in the outcome of the proceeding". The discharge of his duties and his actions and/or omissions as both Receiver of the Foundation and as fiduciary for the Gitenstein Estates, lie at the very heart of, and are intertwined with, the dissolution proceeding itself. In fact, it is hard to imagine a situation where a litigant has a more direct stake in the outcome of the proceedings than Schlesinger does in this instance. He is the target, and his actions and/or omissions as Receiver and fiduciary are the direct focus, of each of the Accounting Proceedings that are pending.

In this regard, the issues presented by the dissolution proceeding are considerably broader than the "discrete" issues, characterized by the Attorney General, i.e. the absence of a governance a structure and the resulting inability of the Foundation to fulfill its corporate purpose.

While the dissolution process requires a number of procedural steps and filing requirements, for the purposes of this motion, the proposed dissolution can be broken down into three essential parts: (1) a judgment that dissolution is required; (2) the marshaling of the assets and liabilities of the Foundation; and (3) the distribution of the remaining assets to eligible charitable beneficiaries under *cy pres.*

The decision to grant dissolution is but one step in the process. On this record, however, it is the one with the most clarity. *See discussion Infra.* The Attorney General is correct in asserting that Schlesinger has nothing to do with, and is not an integral part of, that threshold determination. However, Schlesinger is "inextricably linked" to the Accounting proceedings themselves which, in

turn, drive the second phase of the dissolution proceeding, i.e. the marshaling of the assets.

The Court's findings pertaining to the same will in turn drive the determination of other critical issues which relate to the marshaling of the Foundation's assets, the determination of its liabilities, and the necessity for the joinder of additional indispensable parties (*See discussion, Infra*) all of which are an integral part of any dissolution proceeding.

Those considerations are particularly relevant in light of Surrogate Reilly's determination that charitable distributions totaling 8.1 million dollars were made without Court approval. The magnitude of that issue alone is sufficient to justify the necessity for requiring limited issue submissions and/or a limited issue hearing, or both, concerning the extent to which, if at all, those distributions may remain intact or whether the Successor Permanent Receiver will be vested with the responsibility of recouping those distributions. Suffice to say, Attorney Schlesinger's conduct will play an integral part in that determination.

Furthermore, permitting such intervention will neither delay nor impede the Court's ability to proceed with the dissolution in a timely, methodical, and expeditious fashion. On the contrary, it will expedite the resolution of the proceeding and the ultimate distribution of its remaining assets to the charitable beneficiaries ultimately determined by the application of the *cy pres* doctrine.

Lastly, the Court can discern no demonstrable prejudice to a substantial right of any party by permitting Attorney Schlesinger to intervene. None has been alleged by the remaining parties nor is any apparent from the record when viewed as a whole, and that includes any potential prejudice to the ultimate charitable beneficiaries who have yet to be determined.

For essentially the same reasons, as noted *supra,* Schlesinger's joinder as a necessary and indispensable party would also be warranted.

"A necessary party is one that must be brought into the action when joinder is necessary to accord complete relief between the parties or when the interest of the person might be inequitably affected by a judgment in the action". CPLR §1001(a); *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 819, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (2003). The guiding principle in determining whether an absent party is "indispensable" is whether the party has such an interest in the subject matter of the litigation that their interests must be passed on and adjudicated if the controversy is to be settled and brought to closure. *See, e.g., Henshel v. Held*, 13 A.D.2d 771, 216, N.Y.S.2d 41 [1st Dept. 1961]; *New Delhi Television Limited v. Nielsen Holdings, N.V.*, 111 A.D.3d 437, 975 N.Y.S.2d 7 [1st Dept. 2013] [determined joinder was required where the unnamed party's conduct was at issue in virtually every cause of action asserted]. Moreover, the mere "possibility that a judgment rendered without [the omitted party] could have an *adverse practical effect* [on that party] is enough to indicate joinder". *Hitchcock v. Boyack*, 256 A.D.2d 842, 844, 681 N.Y.S.2d 659 [3rd Dept. 1998] (Emphasis supplied); *New York County Lawyer's Association v. State of New York,* 192 Misc.2d 424, 745 N.Y.S.2d 376 (2002).

The underlying basis for the compulsory joinder rules is designed to serve the three fold purpose of: (1) preventing duplicative litigation; (2) eliminating the possibility of inconsistent judicial determinations; and (3) protecting the the rights of persons who may be adversely affected by the outcome of the litigation, the primary consideration being the latter, i.e. the possibility of prejudice that may accrue to an absentee party. *Saratoga County Chamber of Commerce v. Pataki, supra; Buechel v. Bain*, 275 A.D.2d 65, 713 N.Y.S.2d 332 [1st Dept. 2000]; *Fasoldt v. Bugbee*, 65 A.D.3d 806, 885 N.Y.S.2d 134 [3rd Dept.2009].

Furthermore, while joinder of an indispensable party is a discretionary determination that must

be made by the trial court, it is an issue that is deemed of such magnitude that it may be brought up at any stage of a proceeding. *See, City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 496, 399 N.E.2d 538, 423 N.Y.S.2d 651 (1979); *Censi v. Cove Landings, Inc.*, 65 A.D.3d 1066, 885 N.Y.S.2d 359 [2nd Dept. 2009].

Therefore, and based upon the foregoing, the branch of Attorney Schlesinger's motion, which seeks permission to intervene in the pending dissolution proceeding pursuant to CPLR §1013, is granted and the answer annexed to his submissions is deemed served.

Having concluded that Schlesinger's intervention is warranted under CPLR §1013, the necessity for determining Attorney Schlesinger's application to intervene as a matter of right, under CPLR §1012, has been rendered moot and is denied on that basis. As such, the branch of the motion which seeks to intervene, as a matter of right under CPLR §1012, need not and will not be addressed.

Consolidation and Removal

For essentially the same reasons, as noted *supra,* the branch of Schlesinger's motion which seeks the removal of the four Surrogate Accounting proceedings and their consolidation with the pending dissolution proceeding is granted.

Schlesinger, in asserting the necessity for removal and consolidation, relies on essentially the same considerations as those relied upon as the basis for intervention, i.e., common questions of law and fact, the lack of prejudice, judicial economy, jurisdiction, and the adjudication of the issues before an impartial tribunal.

CPLR §602(a) provides, in relevant part, that a court "upon motion may order . . . that the actions [be] consolidated, and make such [other] order concerning the proceedings therein as may tend to avoid unnecessary costs or delay".

The determination of whether two or more actions should be consolidated lies within the sound discretion of the trial court, discretion that may be exercised only after consideration of the following factors: (1) whether common questions of law or fact exist; (2) whether a substantial right of an opposing party will be prejudiced; (3) whether it will result in confusion for the trier of fact; and (4) whether judicial economy will be served thereby. *Viafax Corp. V. Citicorp Leasing, Inc.*, 54 A.D.3d 605, 822 N.Y.S.2d 295 [2nd Dept. 2008]; *Perini Corp. v. WDF, Inc.*, 33 A.D.3d 605, 822 N.Y.S.2d 295 [2nd Dept. 2006]; *Hanover Insurance Group v. Mezansky*, 105 A.D.3d 1000, 964 N.Y.S.2d 201 [2nd Dept. 2013].

The actions sought to be joined must have common questions of law or fact and the party seeking such consolidation bears the burden of proving such commonality. The test typically applied is whether the evidence that is relevant and admissible in one action would also be relevant and admissible in the other. *Beerman v. Morhaim*, 17 A.D.3d 302, 791 N.Y.S.2d 854 [2nd Dept. 2005]; *RCN Construction Corp. v. Fleet Bank, N.A.*, 34 A.D.3d 776, 825 N.Y.S.2d 140 [2nd Dept. 2006].

Thus, absent a showing of prejudice to a substantial right of the opposing party, a motion to consolidate should be granted where common questions of law or fact are determined to exist. *Perini Corp. v. WDF, Inc.*, 33 A.D.3d 605, 822 N.Y.S.2d 295 [2nd Dept. 2006]; *Moor v. Moor,* 39 A.D.3d 507, 835 N.Y.S.2d 593 [2nd Dept.2007]; *Alizio v. Feldman*, 97 A.D.3d 517, 947 N.Y.S.2d 326 [2nd Dept. 2012].

Here, consolidation and removal are warranted for several reasons.

First, and as noted *supra,* common questions of law and fact exist; the actions and/or omissions of Schlesinger as Receiver and fiduciary of the Gitenstein Estates are "inextricably linked" to the present dissolution proceeding, particularly with respect to determinations that will be made

concerning the marshaling of assets, the joinder of additional parties, and the *cy pres* distributions. The evidence that is admissible and relevant in the Accounting proceedings will be admissible and relevant in the Court's determination as to whether the assets of the Foundation have been appropriately marshaled and accounted for.

Second, in this Court's view, there are jurisdictional, severe jurisdictional, considerations that date back to 2007, which warrant, or may warrant, global adjudication of the issues by the Supreme Court, not the Surrogate.

In so concluding, and as a preliminary matter, this Court concurs with Surrogate Reilly's analysis of the jurisdictional impediments that exist concerning the assumption of jurisdiction over the dissolution process itself and her conclusion that matters which involve the administration and governance of the Foundation are internal corporate matters, not issues that affect the administration of the Estates at issue. SCPA §201; New York State Constitution, Article VI, §12(d); *Matter of Piccone,* 57 N.Y.2d 278, 442 N.E.2d 1180, 456 N.Y.S.2d 669 (1982); *In re* Askin, 113 A.D.3d 72, 976 N.Y.S.2d 492 [2nd Dept. 2013]; *Lincoln First National Bank*, 173 A.D.2d 65, 579 N.Y.S.3d [4th Dept. 1991].

A logical extension of that determination is the issue of whether distributions which are effectuated from the Foundation to various charitable beneficiaries [after it receives the distributions from the various Estates and is therefore a part of the Foundation's asset base], involves a matter of internal corporate governance which is typically handled by the board of directors, or one in which the Surrogate has continuing jurisdiction. In that regard, research has not revealed any case which vests in the Surrogate continuing jurisdiction to dictate and monitor how a beneficiary spends an outright gift or legacy.

In sum, the jurisdictional issues presented are considerably broader than those limited to the prospective oversight of the dissolution of the Foundation; these potential jurisdiction impediments impact not only on what needs to be done, but what has been done, considerations that are crucial to the finality and binding nature of the Foundation's activities, past, present, and future.

As a general proposition, the underpinnings of subject matter jurisdiction are constitutional and statutory in nature. Subject matter jurisdiction is never waivable. A judgment rendered without subject matter jurisdiction is void and the defect may be raised at any time. *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976); *Morrison v. Budget Rent A Car Systems, Inc.*, 230 A.D.2d 253, 657 N.Y.S.2d 721 [2nd Dept. 1991]; *Manhattan Telecom Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 969 N.Y.S.2d 424, 991 N.E.2d 191 (2013); *Paulus v. Christopher Vacirca, Inc.*, 128 A.D.3d 116, 6 N.Y.S.3d 572 [2nd Dept. 2015].

The Surrogate Court is vested with subject matter jurisdiction over the affairs of decedents, the administration of their estates and all actions and proceedings arising thereunder. SCPA §201; New York State Constitution, Article VI, §12(d). In that regard, the Court of Appeals has noted that, while the history and trend of asserting jurisdiction "is one of steadily expanding jurisdiction" (*Matter of Piccone, supra, at 287*), . . . "[f]or the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy . . . in no way affects the affairs of the decedent or the administration of his estate" (*Matter of Piccone, supra at 288,* quoting from *Matter of Young,* 80 Misc. 2d 937, 939).

Relevant to the same, and for the very same considerations previously noted, it is unclear what the Accounting proceeding of the Receiver of the Foundation, for the Foundation [File No. 357003A], has to do with the administration of the Gitenstein Estates. The propriety of the charitable distributions

effectuated by the Receiver, whether they comport with the stated corporate purpose and mission of the Foundation, and their consistency with the distributions effectuated by the Gitenstein family during their lifetime [issues that are clearly relevant with respect to the *cy pres* distributions contemplated] are corporate matters. The certificate of incorporation and the by-laws contemplate, and provide, that these decisions are to be made by the board of directors as a part of their governance responsibilities. These are internal corporate matters that require adjudication by the Supreme Court, not issues which relate to the Gitenstein Estates.

Moreover, reconciliation of the statutory and constitutional underpinnings of the Surrogate's Court's jurisdiction, as noted *supra,* with the statutory provisions relating to, *inter alia*, corporate dissolutions under the Not-For-Profit Law only serve to buttress the conclusion, indeed the necessity, for the resolution of these issues in the Supreme Court.

As a general rule statutes are to be strictly construed. It is equally true, however, that statutory provisions, to the extent possible, are to be construed in a manner so as to avoid conflict with each other and to preserve the intent of the legislature. In short, it is the duty of the court to read and construe all parts of a statute and, where possible harmonize their respective provisions. *See, Statutes,* §§97,98; *Carney v. Philippone*, 1 N.Y.3d 333, 774 N.Y.S.2d 106, 806 N.E.2d 131 (2004); *Matter of Yolanda D,* 88 N.Y.2d 790, 651 N.Y.S.2d 1, 673 N.Y.S.2d 1228 (1998). Furthermore, the court may not, in discharging its interpretive function and by implication, supply a provision which it is reasonable to assume that the legislature intended to omit. Such an omission is typically construed as an indication that its exclusion was intentional and not one of oversight. *See, Statutes* §§74, 240; *See also, Pajak v. Pajak*, 56 N.Y.2d 394, 452 N.Y.S.2d 381, 437 N.E.2d 1138 (1982); *Bayshore Family Partners v. Foundation*, 239 A.D.2d 373, 658 N.Y.S.2d 326 [2nd Dept. 1997].

The Not-for-Profit Corporation is replete with references which require Supreme Court oversight and require corporate entities, to the extent they seek judicial relief, to seek such relief in the Supreme Court of the County in which the corporate entity is situate, not in the Surrogate Court. Nor is there anything in the statutory language that suggests that the Surrogate's Court enjoys concurrent jurisdiction in these matters. *See, generally e.g.* N-PCL §§114, 404, 510, 511, 1008, Articles 10, 11, and 12.

Surrogate Reilly in her May 26, 2016 Decision and Order noted, *inter alia*, that Schlesinger had effectuated 8.1 million dollars in charitable distributions as Receiver of the Foundation without Court approval. But the identification of this issue only scratches the surface. The determination of the propriety of those distributions will require, as a minimum, an examination of the Foundational corporate purposes, examination of the I.R.C. compliance and distribution requirements for charitable entities, the charitable status of the recipients, the extent to which, if at all, Schlesinger exceeded his statutory and court ordered powers, the extent to which those distributions conformed with the Gitenstein family members' actions, *as directors*, and whether recoupment and reclamation of those distributions by the Permanent Receiver will be required. These issues are squarely within the corporate domain for jurisdictional purposes; they are not estate issues. The manner in which those issues are resolved will dramatically impact on both the complexity and the longevity of the dissolution process itself. Moreover, to the extent that jurisdictional deficiencies exist in the prior determinations [and their finality called into question], they can be rectified in the context of the Dissolution proceeding itself.

In addition to the foregoing, removal and consolidation of the Accounting proceedings with the Dissolution proceeding now pending in the Nassau Supreme Court is also warranted in the interest

of judicial economy. Their removal and consolidation will neither prejudice the substantial rights of any party, including the prospective charitable beneficiaries, nor adversely impact the trier of fact in determining the remaining issues in a timely fashion.

Although the Attorney General cites to the institutional depth of knowledge of the Surrogate as a basis for retention, and while noting that this Court has the benefit of retrospective analysis, the vitality of that argument is belied by what has transpired, on multiple levels, in the prior Surrogate proceedings.[3] Compounding the 8.1 million dollars in distributions effectuated without court approval are the $3,235,000.00 in distributions that were purportedly approved by the Court, without opposition from the Attorney General, but were "subject to the reservation of a right to object on a final account". Setting aside for the moment any jurisdictional impediments, that reservation clearly means they are "fair game" on a final accounting.

The efficacy of interim applications is typically two-fold: (1) they involve the adjudication of a particular issue on the merits; and (2) they streamline the final accounting by reducing the number of contested issues. Neither purpose has been accomplished in this instance.

Furthermore, and as argued by Attorney Schlesinger, the Attorney General's suggestion that the Surrogate could be appointed an "Acting Supreme Court Justice", is, at a minimum, a tacit admission that jurisdictional problems exist. That issue, however, appears to have been remedied by the Administrative Order issued on September 29, 2016, and while it is true, as the Attorney General asserts, that the specialized nature of estate accountings typically makes Supreme Court review considerably more problematic, no such impediment exists for this Court. *See Footnote 1, supra.*

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[3]The Court recognizes that Surrogate Reilly inherited this case when she was elected Nassau Surrogate in 2015 and commenced her duties on January 1, 2016.

Thus, having concluded that removal and consolidation are warranted, under CPLR §602, based upon a finding that common questions of law and fact exist, a finding based upon jurisdictional considerations, a finding that judicial economy will be served thereby, a finding that no corresponding prejudice will accrue to any party or potential party, and a finding that such removal and consolidation will neither impede nor impair the ability of the trier of fact to adjudicate the issues presented in a timely fashion, the movant's remaining basis for removal, i.e. adjudication before an impartial tribunal, has been rendered moot. As such it need not, and will not, be addressed by the Court.

The Dissolution

Turning to the substance of the Attorney General's petition, and based upon the Court's review of the pleadings and the record as a whole, the Court can discern no genuine material issues of fact that would warrant denial of its application for a judgment of dissolution, the appointment of a Permanent Receiver, or the ultimate distribution of the net assets of the Foundation pursuant to the *cy pres* doctrine. That determination also takes into consideration the content of Schlesinger's answer which the Court does not read as disputing the total absence of any internal governance structure for the Foundation.

Pursuant to N-PCL §§112 and 1101, the Attorney General is authorized and empowered, *inter alia*, to maintain any action or proceeding which seeks to annul the existence or dissolve a corporation that has acted, or is acting, beyond its powers, to dissolve a corporation under Article 11, or to enforce any right conferred upon members, director or officers of a charitable corporation. N-PCL §112(a)(1),(5),(7).

Pursuant to N-PCL §1101(2), the Attorney General may also bring an action for dissolution where the corporation has exceeded the authority conferred upon it by law.

Pursuant to N-PCL §1102(a)(2)(E), the members and directors of a Not-for-Profit Corporation are authorized and empowered to seek judicial dissolution where the corporation is no longer able to carry out its corporate purpose.

Here, the record is clear that the Gitenstein Foundation has no members, officers, or directors. It therefor has no internal governance structure which can manage the affairs of the Foundation or fulfill its corporate mission and purpose. Indeed, the record is also undisputed that the Foundation has been devoid of any such governance structure since 2007 when Shirley Gitenstein, the last of the Gitenstein siblings, died. Thus, since the Foundation is no longer able to carry out its corporate purpose, dissolution is warranted and so ordered.

For essentially the same reasons, and Pursuant to N-PCL §1202, a Successor Permanent Receiver shall be appointed for the purpose of marshaling, collecting, and preserving the corporate assets, and to guide and oversee the Foundation during the dissolution process.

Thus, the branches of the Attorney General's petition which seek a judgment dissolving the Foundation and the appointment of a Permanent Receiver of the Foundation, for the limited purpose of safeguarding the Foundation's assets, administering its affairs, and effectuating the dissolution, is granted.

The Attorney General further seeks, based upon the foregoing, permission and authority to distribute the remaining assets of the Foundation to eligible charitable beneficiaries, pursuant to the statutory and equitable *cy pres* doctrine.

Estates Powers and Trust Law (EPTL) §8-1.1(a) is a codification of the *cy pres* doctrine and provides, in relevant part, that "no disposition of property for religious, charitable, educational or benevolent purposes, otherwise valid under the laws of this state, is invalid by reason of the

indefiniteness or uncertainty of the persons designated as beneficiaries".

Pursuant to the same, before a court may exercise its *cy pres* powers, it is incumbent upon the petitioner to establish three required elements: (1) that a charitable gift or bequest has been made; (2) that the testator, in effectuating the gift or bequest, has demonstrated a general, as opposed to a specific, charitable intent; and (3) that circumstances have changed in the period subsequent to the gift or bequest so as to render literal compliance impractical or impossible. *In re Wolseley*, 10 Misc.3d 1077A, 814 N.Y.S.2d 893 (Surr. Ct. Suffolk Co. 2005); *In re Trust Co. Bank*, 37 Misc.3d 1027, 954 N.Y.S.2d 411 (Surr. Ct. Schenectady Co. 2012) affirmed, 112 A.D.3d 1099, 976 N.Y.S.2d 70 [3rd Dept. 2013]; *In re VanTauber Revocable Trust dated October 28, 1993*, 33 Misc.3d 1224A, 943 N.Y.S.2d 795 (Surr. Ct. Nassau Co. 2011).

Here, the Attorney General has established each of the requisite elements warranting the application of the *cy pres* doctrine upon distribution.

In so concluding, the Court begins its analysis with the well settled principle that the court's fundamental role in will interpretation is to ascertain the true intent of the testator and the best evidence of that intent is derived from the words so utilized by the testator in expressing that intent. A companion, and equally important, interpretative principle is that the words so utilized are to be accorded their ordinary and natural meaning, unless a different and specified meaning is intended. *In re Villalonga*, 6 N.Y.2d 477, 190 N.Y.S.2d 372 (1959); *Matter of Cord*, 58 N.Y.2d 539, 462 N.Y.S.2d 622 (1983); *Matter of Walker*, 64 N.Y.2d 354, 486 N.Y.S.2d 899 (1985); *Matter of Gustafson*, 74 N.Y.2d 448, 548 N.Y.2d 625 (1989).

Here, construction of ¶SIXTH of Kermit Gitenstein Will, when read in conjunction with ¶SECOND of the April 17, 1969 Certificate of Incorporation of the Kermit Gitenstein Foundation, Inc.,

establish two of the three required elements, i.e. that a gift or bequest was made and that the gift or bequest demonstrated a general, as opposed to a specific, dispositive intent; it directed that gifts be bestowed on I.R.C. §501(c)(3) organizations which are organized and operated exclusively for general religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to children.

The necessity for the dissolution itself serves as the basis for the establishment of third requirement. The death of the Gitenstein siblings, the absence of a governance structure for the Foundation, and the resultant inability of the Foundation to fulfill its corporate purpose and mission serve as a sufficient predicate to establish that circumstances have changed in the period subsequent to the gift or bequest so as to render literal compliance of the gift impractical or impossible.

The Application for Attorney's Fees

Court Examiner/Referee Joseph W. Ryan, Jr., Esq., also seeks by way of renewal application, an order, pursuant to CPLR §8003, for an award of attorney's fees for the approximately 193 hours expended in compiling his three reports, together with a companion award of $18,524.50 for the services rendered by forensic accountant Gregory Hagarty on behalf of the investigative firm, ALPHA GROUP.

The determination as to the amount and reasonableness of attorneys fees lies within the sound discretion of the trial court, discretion that is typically arrived at after an assessment of the time and labor expended, the complexity of the issues presented, the customary fees charged for the same or similar services in the locale, the results obtained and the size of the estate under consideration. SCPA §2110; *In re Rappaport*, 15 A.D.2d 779, 542 N.Y.S.2d 215 [2nd Dept. 1989]; *In re Barich*, 91 A.D.3d 769, 937 N.Y.S.2d 112 [2nd Dept. 2012]; *In re Askin*, 113 A.D.3d 72, 972 N.Y.S.2d 492 [2nd Dept. 2013]. Implicit in such a determination is a finding that the services rendered were "necessarily incurred". *In re Jones*,

168 A.D.2d 448, 562 N.Y.S.2d 568 [2nd Dept. 1990]; *Matter of Stern*, 227 A.D.2d 636, 643 N.Y.S.2d 395 [2nd Dept. 1996].

In this instance, and by necessity, final determination of the fee application must be, and is hereby, held in abeyance pending receipt of the Surrogate files at issue which are being removed and consolidated with the pending dissolution proceeding.

In most instances, the Court that presided over the matter which served as the basis for the fee application is in the best position to render a determination as to amount and reasonableness of the fees requested. In this instance, no formal determination was made by the Surrogate Court. Although, it is argued that no objection has been made, the current submissions of all parties are essentially silent on that issue.

While noting that a final determination on the application is being held in abeyance pending further review, it is with reluctance that the Court does so, particularly in light of the time that has elapsed since the reports were first generated and filed with the Court.

Upon receipt of the files, the Court will endeavor to expedite and bring to closure the application.

Court Orders, Further Directive and Other Considerations

Due to the number of requirements that will need to be addressed in the appointive order of the Receiver, and for the purpose of the effectuating the same, the Attorney General is directed to, and shall, submit to the Court, on notice, a separate proposed Order, which Order should provide for and address, as a minimum and in addition to ordering the dissolution, the following: vest the Receiver with the usual and customary powers [N-PCL §1206]; the required oath and bonding, in an amount not less than $1,000,000.00 [N-PCL §1204]; notice and publication [N-PCL §1207], the establishment of the proposed depository for the Foundation funds, the turnover and assumption of the assets and notice to

the Attorney General; the necessity for, and timing of, any interim accounting and/or plan for the proposed of distribution of the Foundation's assets; and any other provision which the Attorney General deems appropriate and consistent with its role of oversight and supervision for the charitable beneficiaries.

The Court shall further retain continuing jurisdiction over all matters relating to the dissolution of the Foundation including, but not limited to, approval of all distributions to the ultimate charitable beneficiaries.

Lastly, and in view of the prior history of the case and the notoriety it has engendered, the Court is compelled to comment on the manner in which the proceedings will be conducted and the scope of review to be applied in adjudicating the issues presented.

A notion appears to have been perpetuated in the prior proceedings that because of the notoriety that has attached to this case, that notoriety somehow warrants a greater level of scrutiny [a different legal standard] than would otherwise apply to a case that does not "enjoy" such notoriety. It does not. The degree of notoriety, or lack of notoriety, which attaches to a particular case, neither enhances nor reduces the level of scrutiny required nor the legal standard to be applied. Complex issues require complex findings and analysis, while matters of a more mundane nature do not. The integrity of our judicial system requires that to be the case.

The issues that are adjudicated must be [and will be] done so in accordance with established legal principles, consistently applied, so as to insure a legally sound result that is fundamentally fair to all parties involved.

The Court is also compelled to note that lay jurors are consistently, and without exception, substantively instructed on these very same principles. They are instructed that in rendering their verdict

they are to consider only the evidence [both the testimony and the exhibits] as it presented to them in the court and nothing more. *See,* PJI 1:25. They are further admonished that in reaching their verdict they are not to be affected by their sympathy for any of the parties, what the reaction of the parties or the public to the verdict will be, whether it will please or displease anyone, be popular or unpopular, or indeed any consideration outside the case as it has been presented to them in the courtroom. PJI 1:27. They are further admonished to apply the law as it is given to them whether they agree with it or not. PJI 1:38. These fundamental principles are no less binding on the Court as the trier of fact.

Accordingly, and based upon the foregoing, it is

ORDERED, that the branch of the motion of Proposed Intervenor Steven R. Schlesinger Esq., which seeks permission and authority to intervene pursuant to CPLR §1013, is granted and the Intervenor's proposed answer, which is appended to his moving papers, is deemed served; and it is further

ORDERED, that the branch of the motion, which seeks permission to intervene as a matter of right pursuant to CPLR §1012, is denied as having been rendered moot by the foregoing determination; and it is further

ORDERED, that the branch of the motion, which seeks the removal and consolidation of the four (4) Accounting proceedings, currently pending in the Nassau Surrogate Court under File Nos. 357003/A, 346141/V, 301202/D and 138481/A, with the pending dissolution proceeding [Nassau Supreme Court Index No. 604475-2016] pursuant to CPLR §602, is granted; and it is further

ORDERED, that in conformity with the foregoing, the caption of the instant proceeding be, and is hereby, amended to reflect such removal and consolidation; and it is further

ORDERED, that the branch of the petition, which seeks an Order/Judgment dissolving the

Foundation and a direction that its assets be distributed pursuant to the *cy pres* doctrine to qualified tax exempt charitable organizations engaged in similar or substantially similar activities to the Foundation is granted; and it is further

ORDERED, that in conformity with the foregoing, the Kermit Gitenstein Foundation, Inc. (the "Foundation") be, and the same is hereby, dissolved, the Certificate of Incorporation of the Foundation annulled, and the corporate existence of the Foundation is terminated; and it is further

ORDERED, that Howard Protter, Esq., Jacobowitz & Gubits, P.O. Box 367, Walden, New York (845)-778-2121, Fiduciary No. 436362, be, and is hereby, appointed Successor Permanent Receiver of the assets and property of the Foundation, with the usual and customary powers and duties according to the laws of the State of New York including, but not limited to, New York Not-For-Profit Corporation Law §1206; and it is further

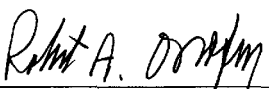
ORDERED, that in conformity with, and for the purpose of effectuating, the foregoing, the Attorney General of the State of New York is directed to, and shall, submit a proposed Order, in form and content satisfactory to the Court and in conformity with the requirements of this Decision, on notice to the parties, within fourteen days of the date hereof; and it is further

ORDERED, that the application for compensation, filed by the Court Examiner/Referee, be, and the same is hereby, stayed and held in abeyance pending further review by the Court and the formal undertaking of the Receiver of his duties; and it is further

ORDERED, that the parties, through respective counsel, are directed to, and shall, attend a Status/Scheduling Conference, which Conference is hereby scheduled for, and shall be conducted on, Thursday November 17th, 2016, at 1:30 P.M., at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 18th Floor, Courtroom 1806.

This constitutes the Decision and Order of the Court.

Dated: November 3, 2016



HON. ROBERT A. ONOFRY, ACTING SUPREME COURT JUSTICE

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