



Hispanic Heritage Award to Justice Joseph A. Zayas

BY TANGIER HARPER*

I had the privilege of attending the Queens District Attorney's celebration of National Hispanic Heritage Month on October 11, 2012. Judge Brown presented Justice Joseph A. Zayas with the District Attorney's 2012 Hispanic Heritage Award for his dedicated service to the legal and Latino communities. Justice Zayas who immigrated with his family from Barranquitas, Puerto Rico, graduated magna cum laude from Fordham University and from Columbia Law School where he was a Charles E. Evans Fellow. Justice Zayas who has presided in Criminal Court since 2003 and has recently served as an acting Supreme Court Justice in Queens County, was appointed by Governor Cuomo as a Judge of the Court of Claims in June, 2012. In addition to his judicial work, Judge Zayas presently serves on the Judicial Institute's Criminal Law Advisory Committee, as the Secretary of the Association of Judges of Hispanic Heritage and is on the advisory board of the Latino Lawyers Association of Queens County, which honored him in 2008 for his dedication and commitment to the Latino community in Queens County. He resides in Little Neck, Queens with his wife, Catherine and their three children.

National Hispanic Heritage week began in 1968 and was expanded to a month-long celebration in 1988 as a tribute to Latino-American culture and traditions. Past recipients on the D.A.'s Hispanic Heritage Award include Richard M. Gutierrez, Former Queens Bar Association President (2011), Mariela P. Herring, Chief of District Attorney Brown's Gang Violence and Hate Crimes Bureau (2010), Dr. Eduardo J. Marti, CUNY Vice Chancellor for



Hon. Richard A. Brown presented Justice Joseph A. Zayas with the Queens District Attorney's Hispanic Heritage Award.

Community Colleges (2009) and Justice Fernando M. Camacho, Administrative Judge, Criminal Term, Queens County (2008).

**Tangier Harper, is a Foreclosure Prevention Staff Attorney for the Queens Volunteer Lawyers Project, Inc.*

PROFILE OF: Presiding Justice Randall T. Eng

Appellate Division, Second Department

BY TOM PRINCIPLE



Hon. Randall T. Eng

"Randall T. Eng Appointed as the First Asian-American Presiding Justice of the Appellate Division for Second Department" was the caption on the press release from Governor Cuomo's office on October 1, 2012. This is only the most recent of many "firsts" in the life of Hon. Randall T. Eng, who has been a pioneer in diversity among Asian-Americans in New York State throughout his professional career:

- First Asian-American member of the Queens County Bar Association, which he joined 39 years ago in 1973.
- First Asian-American Assistant District Attorney in New York State.
- First Asian-American Inspector General in New York State for the Department of Correction.
- First Asian-American Judge in New York State when he was appointed to the Criminal Court by Mayor Ed Koch in September, 1983.
- First Asian-American State Judge Advocate in the New York Army National Guard.
- First Asian-American Judge to be elected to Supreme Court in New York State (Queens County) in 1990 and reelected in 2004.
- First Asian-American Administrative Judge of the Criminal Term of Queens County Supreme Court when he was appointed in 2007.
- First Asian-American Justice appointed to the Appellate Division, Second Department.
- First Asian-American Presiding Justice of the Appellate Division, Second Department

I have had the privilege of knowing Hon. Randall "Randy" Eng for over 40 years. We were trial part-

Continued On Page 10

Photo Corner: QCBA Installation

Stephanie Miller, Dean-CUNY Law School, Barbara Moses, then President-Elect, New York County Lawyers Association; Seymour James, then President-Elect, New York State Bar Association; Domenick Napoletano, then President-Elect, Brooklyn Bar Association; and Samuel Seymour, then President, New York City Bar Association ast the QCBA Installation Dinner. For more photos from the event see pages 6-7.



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THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:

The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

CLE Seminar & Event Listing

December 2012

Tuesday, December 4	Till Death or Divorce Do Us Part
Wednesday, December 5	Advanced Criminal Law Series - Pt 2
Tuesday, December 11	Lexis/Nexis Seminar 4:00 - 5:00 pm
Thursday, December 13	Holiday Party at Douglaston Manor
Monday, December 24	Christmas Holiday - Office Closed
Tuesday, December 25	Christmas Day - Office Closed
Monday, December 31	New Year's Holiday - Office Closed

January 2013

Tuesday, January 1	New Year's Day - Office Closed
Monday, January 21	Martin Luther King, Jr. Day - Office Closed
Wednesday, January 30	Family Law Seminar

CLE Dates to be Announced

- Civil Court
- Elder Law
- Insurance
- Juvenile Justice
- Professional Ethics
- Real Property
- Supreme Court & Torts Section
- Worker's Compensation

NEW MEMBERS

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Jeremy S. Hankin	Pamela Walitt
Rosemary Harnisher	Chris Zanelotti

NECROLOGY

Joseph A. Baum	Martin F. Keane	James M. Kruta
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If you or someone you know is having a problem with alcohol, drugs or gambling, we can help.

To learn more, contact QCBA LAC for a confidential conversation.

Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

**Lawyers Assistance Committee
Confidential Helpline 718 307-7828**

Volunteer for Sandy Relief

We are asking QCBA members to step forward and volunteer for our disaster relief initiative. Besides helping out at our clinic in the Rockaways, we will need lawyers to assist going forward in areas such as:

- Help with insurance and FEMA claims
- Landlord-tenant matters
- Foreclosures

Please contact us and add your name to our Sandy Relief pro bono volunteer panel.

To volunteer, please e-mail MWeliky@QCBA.org and indicate what type of assistance you could be available to help with.

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PRESIDENT'S MESSAGE

On behalf of the Queens County Bar Association I would like to extend our well wishes to our members and their families who were affected by the devastating destruction caused by Hurricane Sandy.

I thank our members who have volunteered to assist in providing legal services and advice to those members of our community who may have been impacted by this disaster and to those members who opened up their offices for colleagues displaced by this storm. I am honored that our members continue the long tradition the Queens County Bar Association has maintained to render legal help not only to our profession but to our entire community when called upon.

In the coming months there will be a great need by our community for assistance with legal issues. We hope that all our members consider offering their

support and assistance to those in need. Thank you for your support.

I wish to congratulate Justice Randall T. Eng on his recent appointment as Presiding Justice of the Appellate Division for the Second Department. Judge Eng has been a tremendous supporter of our Association for many years and we extend our best wishes as he assumes this new leadership role.

Congratulations to our newly elected Justices of the Supreme Court, Queens County: Charles S. Lopresto, Leslie J. Purificacion and Lawrence V. Cullen. Congratulations to our newly elected Judges of the Civil Court: Donna Marie Golia, Robert Caloras, Laurence Love and Ulysses B. Leverett.



Joseph Risi

The Queens County Bar Association is proud of our Judiciary and we look forward to working with all our newly elected Judges. I wish each continued health and success.

Congratulations to Judge Carol Ann Stokinger and to all Judges and staff of the Family Court in celebrating the 50th Anniversary of the Family Court.

Please take the opportunity and continue to visit our website www.QCBA.org to view upcoming events, register for CLE Programs and view articles published in our Bar Bulletin. The Queens County Bar Association Academy of Law continues to develop and offer outstanding programs to keep our practitioners current on ever-changing legal issues,

while satisfying CLE requirements. Please continue to support our Association and take advantage of the opportunity to meet and socialize with one another throughout the year to make our profession more enjoyable and profitable.

I urge our members to mark your calendar and attend our Holiday Party co-sponsored by many fellow Bar Associations to be held at Douglaston Manor on December 13, 2012.

I thank, once again, our members and sponsors for their continued support and look forward to working with all of you throughout the year.

If you have any concerns, suggestions or comments, please do not hesitate to contact me at josephrisi.esq@gmail.com or by calling the Queens County Bar Association at (718) 291-4500.

HISTORY CORNER

THE BERTILLON SYSTEM

A lawyer without history or literature is a mechanic a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.
— Sir Walter Scott

BY STEVEN S. FINK, ESQ.

In 1893 the New York State Prison Department was experiencing the difficulty faced by other criminal institutions throughout the world. Since it had no accurate way to identify recidivists, too many hardened criminals were being sentenced as first offenders.

At that time, fingerprinting was not a reasonable alternative. While it had begun as far back as 1858 when it was briefly utilized by a British Magistrate in India, experimentation in the use of fingerprint identification progressed slowly. During the 1870s a British doctor, Henry Faulds, took up the study of skin-furrows as a means of identification. By 1880, Dr. Faulds had created a system of classification. The use of fingerprints was eventually used to assist in identification by Scotland Yard, but only as a supplement to the Bertillon System.

Alphonse Bertillon

Alphonse Bertillon was a French police officer and biometrics researcher born in Paris in 1853. His system of identification of criminals was based upon physical measurements and was known as anthropometry. It was the first scientific system used by the police to identify criminals and was eventually supplanted by fingerprinting.

Bertillon's research was motivated by the rising French recidivism rate. In his free time he took measurements and pictures of his subject. He used the famous La Sante Prison in Paris to do his work. It was his research that we see today in the continued use of the so-called "mug shot."

By 1882, Bertillon was ready to show his research to the public. In the system, the person was identified by measuring the head and body. Tattoos, scars and other distinct markings were referred to in order to distinguish criminals. The measurements were made into a formula that would apply to only one person and would not change. In 1884, the French police used the Bertillon System to help capture 241 repeat offenders. This event established the system's effectiveness and began its widespread use. In contrast to fingerprinting, the system lent itself to the creation of what seemed to be a reasonable method of classification in contrast to the furrows of fingerprinting.



Alphonse Bertillon's system for identification of criminals was based on distinct measurements. It was eventually supplanted by fingerprinting.

The system began to be used in the United States in 1887, when it was introduced by the Warden of the Illinois State prison at Joliet. It was widely accepted and was the dominant criminal identification system for almost three decades.

In New York, the prison department encouraged its use to identify criminals. In June of 1893, an "indexer" was hired for the Bertillon System. A bureau was actually established to create the necessary files. It was initially housed in Room 111 of the State Capital building in Albany. In 1896, at Sing Sing, a program was established to teach the intricacies of the system. Prisoners were measured at each of the State's prisons and duplicate Bertillon cards were created so as to establish a central state index. By the end of the first year 16,000 Bertillon cards were on file and 131 criminals in the state prisons were found to be recidivists. Discussions began as to the need to establish a national system.

The use of the Bertillon System became common place in the New York State Courts. For example in *People v. Stielow*, 160 N.Y. Supp. 55 (Sup. Ct., Erie Cty. 1916) an affidavit by a Bertillon operator was submitted in support of a motion for a new trial. Fingerprint evidence was also utilized in conjunction with the Bertillon identification.

So, what happened to the use of the Bertillon System? Frankly, increased technology with fingerprinting led to its demise. Additionally, it was discovered that the system was actually flawed and this reduced its effectiveness.

In 1903, a man by the name of Will West was committed to the Leavenworth, Kansas penitentiary. He was photographed and measured using the Bertillon System. However, it was soon found that his measurements were almost identical to a convicted murder in the same prison by the name of William West. Even their photos showed a close physical resemblance. The prison therefore relied upon fingerprint evidence which proved to be more reliable.

With the onset of fingerprinting and the West incident, the Bertillon System never quite recovered. Bertillon himself was a controversial character. He even testified as a witness for the prosecution in the infamous Alfred Dreyfus affair in 1894 and again in 1899. His testimony as a handwriting expert (even though he was not one) led to one of the most famous miscarriages of justice.

Bertillon died in Switzerland in 1914. Today his primary legacy is the standardization of the criminal mug shot and the evidence picture. Bertillon also created other forensic techniques, including forensic document examination and the use of galvanoplastic compounds to preserve footprints.

Further Reading

As always there is lots of information to be found on the internet. The *Bertillon System* can be found in literature including a reference in the Sherlock Holmes story *The Hound of the Baskervilles*. Bertillon may also be found in Caleb Carr's novel *The Alienist*, and Ross MacDonald's, *The Drowning Pool*.

Also see: http://en.wikipedia.org/wiki/Alphonse_Bertillon; http://criminaljustice.state.ny.us/ojis/his-tory/bert_ny.htm; and <http://www.nleomf.org/museum/news/newsletters/online/november-2011/bertillon>.

EDITOR'S NOTE

Understanding the Queens DWI Court

BY PAUL E. KERSON

Driving While Intoxicated (DWI) and its cousin, Driving While Impaired, are crimes unlike any other. See New York Vehicle and Traffic Law Sections 1192, 1192-a, 1193, 1194, 1194-a, 1195, and 1196.

The main victim in these cases is often the defendant himself or herself. The drunk or high-on-drugs defendant can run his or her car off the road into a tree and wind up in the hospital. Passengers, passers-by and occupants of adjacent vehicles can also wind up seriously injured, even killed.

There is such temptation to commit this crime. Virtually every social gathering is "lubricated" with wine, beer and harder stuff. Even one glass of wine or one beer can slow a person's reaction time in getting one's foot from the gas pedal to the brake pedal. Slowing that time by just a few seconds is often the difference between a serious accident and an ordinary drive to the grocery store.

The simple answer is this: Only drink soft drinks at social gatherings. It turns out that this is not so simple. The soft drinker is mocked. "Ah, one drink won't hurt you," or "Can't you hold your liquor?" are statements directed at the person who tries to comply.

How about a "designated driver," one who will drive everyone else home and not drink? Try this among the people who work in Queens County who live all over the map, from Goshen to Riverhead.

So we will continue to be inundated with DWI cases. How to cope with them? The DWI defendant usually has no criminal record for any other crime.

We in Queens County are blessed with a District Attorney and Administrative Judge who understand all of the above considerations. Last year, the special Queens DWI Court was established. Justice Marcia P. Hirsch presides in this Part on the 3rd floor of the new wing of



Paul E. Kerson

the Kew Gardens courthouse.

Depending on the facts and circumstances, DWI can be charged as either a misdemeanor or a felony.

Thomson - West Publishing Co. has just issued a new book on DWI (also called DUI - Driving Under the Influence) called *Preparing a DUI Defense - A Practical Guide for Defending DUI Cases* by John Ingrassia and Kathleen V. Wells. It is well worth purchasing.

If you cannot get a misdemeanor plea in Criminal Court, consider the Queens DWI Court. It is designed for non-violent first felony DWI defendants who are 18 years of age or older, have alcohol or drug problems, no severe mental health issues and no associated physical injury to others.

In exchange for no jail time, the penalties are as follows: revocation of the drivers' license, placement on the Secured Continuous Remote Alcohol

Monitor (SCRAM) for a minimum of 90 days and completion of the DWI Victim Impact Panel.

The entire program is one year long and consists of three phases: beginning treatment, beginning a vocational-educational plan and re-entry into the community and graduation requirements.

Monthly appearances in the DWI Court are required to monitor the defendant's progress. If the program is successfully completed, the charge is reduced to a misdemeanor and the sentence is three years probation.

Justice Hirsch does a terrific job presiding in this Part. Defendants are literally applauded for meeting their goals and staying alcohol or drug free.

If only our Queens DWI Court's philosophy could be extended to other types of crimes, our society would take a great step forward. Criminal conduct of all types is based in some type of mental health problem, problems that can be dealt with successfully with the type of careful medical and educational approach utilized in the Queens DWI Court.

Irrevocable or Not?

BY: ANN-MARGARET CARROZZA, ESQ.

New York estate planners have more tools than ever before with which to revoke or amend existing irrevocable trusts. Trust settlors and drafters need to be aware of the ways trusts can later be changed in order to ensure that their original objectives are later carried out.

There are many reasons one may wish to revoke, modify or 'edit' an existing irrevocable trust. The trust may have been improperly drafted. Examples of this, unfortunately, abound in the waning weeks of 2012. This is because the current federal lifetime gift tax exemption of \$5.0 million¹ is set to expire as of December 31, 2012.² There seems to be a mad rush to utilize this credit in order to reduce one's gross taxable estate.³ Rather than make these gifts outright to individuals, it is usually advisable to make gifts to a trust. This gives families the advantage of protecting the gifted property from the future possible liabilities of the ultimate beneficiaries.⁴ In order for the gift into trust to remain outside of the settlor's gross taxable estate, there are certain technical requirements that must be met. The following are examples of trust provisions

that will thwart one's estate tax planning goals and should thus, be modified:

- The settlor retains an income interest in the property gifted into trust.⁵
- The settlor retains the right to use, or in the case of real estate, to occupy the gifted property.⁶

Alternatively, the trust may have been drafted perfectly but circumstances may have changed. A named beneficiary may have been discovered to have a developmental disability, substance abuse or other issue not apparent at the time the trust was created. The family may now wish to alter dispositions to that individual provided for in the original trust instrument.

E.P.T.L. §7-1.9

E.P.T.L. §7-1.9 provides the most efficient means of changing an irrevocable trust. It allows that the Settlor, upon written consent of all those beneficially interested in the trust property, to amend or revoke a trust in whole or in part.⁷ This relief is not available if any beneficiary is



Ann-Margaret Carrozza

unwilling or unable to give consent. If, for example, a beneficiary is a minor, under a disability or, in the case of a testamentary trust, the Grantor has died, then E.P.T.L. §7-1.9 will not be of use.

Relief under this section may still be had when a Settlor is incapacitated provided he or she has a Power of Attorney. In a recent decision, the Appellate Division, Second Department held that the Settlor's agent under a Power of Attorney may give the necessary E.P.T.L. §7-1.9 consent on his or her behalf.⁸ In light of this decision, a trust Settlor desirous of preventing future modification, may consider modifying his or her Power of Attorney to prevent an Attorney in Fact from giving E.P.T.L. §7-1.9 consent.

E.P.T.L. §10-6.6

If E.P.T.L. §7-1.9 relief is for any reason unavailable, certain trust Terms may be changed by decanting.

In 1992, New York became the first state to allow trust assets to be decanted

from one irrevocable trust into another trust. This allowed a Trustee with unlimited discretion to distribute principal to a beneficiary, to exercise this power in favor of a new trust for the benefit of that beneficiary. Thus, the terms of the new 'appointed' trust could be customized even though a necessary party was unable to give the consent required for amendment under E.P.T.L. §7-1.9.

New York's original Decanting statute seemed, to many, a logical extension of a Trustee's unlimited discretion. If a Trustee has such broad discretion that he or she may pay all, none, or some of the trust's principal, it wasn't really a radical game change for the law to allow the exercise of this discretion in favor of a trust for the benefit of the same beneficiary.

Relief under the original decanting statute was unavailable to a Trustee whose discretion to distribute principal was limited in any way. Even the commonly used 'Health, Education and Maintenance' standard prevented a Trustee from decanting. The new law remedies this-and then some...

In 2011, New York State expanded the decanting statute to give Trustees

Continued on page 10

NOTICE.....NOTICE.....NOTICE

The Queens County Bar Association is in receipt of funds which have accumulated pursuant to the termination of a Retention Agreement made, as of December 1, 2003, between US Life, JTL Services Corp. and several Bar Associations.

The purpose of the Retention Agreement was to protect the Group Term Life Insurance Program from adverse experiences and to allow individual Bar Association Members and Insurance Policy Certificate Holders to receive the benefit attributable to favorable experiences on a year to year basis. US Life agreed to limit rate increases or benefit changes and further agreed that no insured member, as long as otherwise eligible under applicable policy terms and conditions and as long as a member of a Participating Bar Association could not be non-renewed for any reason except non-payment of premium.

Upon termination of this Retention Agreement, remaining funds in the Claims Stabilization Reserve was held for 18 months to allow for claim run off, and any funds remaining were returned by US Life to the participating Bar Associations, including Queens County Bar Association as an "experience refund" for which each association agreed to indemnify each other from any liability.

Subsequently, in August, 2008, the Queens County Bar Association received from the servicing agent, AON Affinity Insurance Services a check drawn upon US Life for \$482,521.00. In April, 2009 a further check, drawn upon US Life, was received by the Queens County Bar Association in the amount of \$90,401.00.

On August 26, 2009 the Queens County Bar Association received notice that the US Life Agreement would be terminated by US Life as of April 1, 2010. Additional

funds in the sum of \$85,195.00 was received by the Queens County Bar Association on December 12, 2010, drawn upon by US Life.

Upon receipt of this notification, the Board of Managers requested our Administrator, Affinity Insurance Services to aid us in determining how we might distribute these funds. After researching the matter, Affinity advised us they were unable to provide information which would be of any help in determining the names of the insured parties nor any methodology by which same could be computed.

Accordingly, there appears to be no way to reconstruct any accurate accounting concerning the returned funds, who was covered during the specific months or years in question and what portion, if any, of this fund may apply to these persons.

The Queens County Bar Association seeks to utilize the Claims Stabilization Reserve

Funds that have accumulated as a result of the Retention Agreement for the overall benefit and use of our membership. Queens County Bar Association has long term plans to provide all our members enhanced benefits which will necessitate expenditures from these excess reserve funds.

In addition, the Queens County Bar Association seeks to provide at no cost to our members on line legal research, e-filing and enhanced website service by use of our members. The Queens County Bar Association intends to modernize the public portions of our facility for the members and the public use and enhance our community outreach.

These funds will be dedicated for the general good of the members of the Queens County Bar Association. Should you have any comment please do not hesitate to contact our Executive Director, Arthur Terranova.

New Pro Bono Requirements For Bar Admission

Pursuant to section 53 of the Judiciary Law, it is hereby

ORDERED, that Part 520 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law (22 NYCRR Part 520) is amended, effective January 1, 2013, or as soon thereafter as section 52 of the Judiciary Law is complied with, to add section 520.16 thereto. Section 520.16 provides as follows:

§ 520.16 Pro Bono Requirement for Bar Admission

(a) **Fifty-hour pro bono requirement.** Every applicant admitted to the New York State bar on or after January 1, 2015, other than applicants for admission without examination pursuant to section 520.10 of this Part, shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.

(b) **Pro bono service defined.** For purposes of this section, pro bono service is supervised pre-admission law-related work that:

- (1) assists in the provision of legal services without charge for
 - (i) persons of limited means;
 - (ii) not-for-profit organizations; or
 - (iii) individuals, groups or organizations seeking to secure or promote access to justice, including, but not limited to, the protection of civil rights, civil liberties or public rights;
- (2) assists in the provision of legal assistance in public service for a judicial, legislative, executive or other governmental entity; or
- (3) provides legal services pursuant to subdivisions two and three of section 484 of the Judiciary Law, or pursuant to equivalent legal authority in the jurisdiction

where the services are performed.

(c) **Supervision required.** All qualifying pre-admission pro bono work must be performed under the supervision of:

- (1) a member of a law school faculty, including adjunct faculty, or an instructor employed by a law school;
- (2) an attorney admitted to practice and in good standing in the jurisdiction where the work is performed; or
- (3) in the case of a clerkship or externship in a court system, by a judge or attorney employed by the court system.

(d) **Location of pro bono service.** The 50 hours of pro bono service, or any portion thereof, may be completed in any state or territory of the United States, the District of Columbia, or any foreign country.

(e) **Timing of pro bono service.** The 50 hours of pro bono service may be performed at any time after the commencement of the applicant's legal studies and prior to filing an application for admission to the New York State bar.

(f) **Proof required.** Every applicant for admission shall file with the appropriate Appellate Division department an Affidavit of Compliance with the Pro Bono Requirement, describing the nature and dates of pro bono service and the number of hours completed. The Affidavit of Compliance shall include a certification by the supervising attorney or judge confirming the applicant's pro bono activities. For each position used to satisfy the 50-hour requirement, the applicant shall file a separate Affidavit of Compliance.

(g) **Prohibition on political activities.** An applicant may not satisfy any part of the 50-hour requirement by participating in partisan political activities.

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PHOTO



CORNER

Annual Dinner & Installation, May 3, 2012



Henry and Stephanie Quintin, Joseph, Karen and Christopher Risi.



Hon. Allen Beldock, Hon. Nicholas Garaufis, Hon. Fred Santucci and Hon. William Mastro



Hon. Arthur Cooperman, Hon. Sid Strauss, Hon. Darrell Gavrin and Hon. Fernando Camacho



Hon. Fred Santucci, Hon. Gail Prudenti, Hon. Seymour Boyers, Hon. Richard Brown and Hon. Fernando Camacho.



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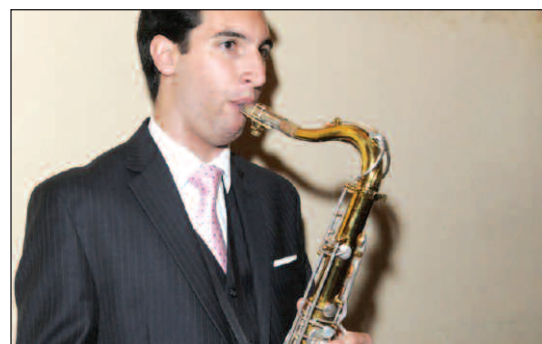
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Marital Quiz

BY GEORGE J. NASHAK JR.*

Question #1 - Is bonus awarded after the commencement of an action for divorce subject to equitable distribution?

Your answer -



George Nashak, Jr.

Question # 6 - May the trial court order the payer spouse to cover the payee spouse with health insurance beyond the period for which it awarded maintenance?

Your answer -

Question #2 - Maintenance is retroactive to the commencement date, does payer spouse receive a credit for voluntary payments made on behalf of emancipated children of the parties?

Your answer -

Question #7 - May the court order a spouse to provide health insurance for his or her spouse, if maintenance is not awarded?

Your answer -

Question #3 - When a judgment does not accurately incorporate the provisions of a stipulation of settlement, is the preferred remedy (1) to move in the trial court to resettle or vacate the judgment or (2) an appeal?

Your answer -

Questions #8 - Should the payer parent's Family Court petition to terminate his child support obligation be dismissed, because the parties' stipulation of settlement in their divorce action provided that he would not bring on any application to modify his child support obligation?

Your answer -

Question #4 - The parties' stipulation of settlement, which was incorporated in and survived their judgment of divorce, did not provide for a reduction in child support after one of their two children became emancipated. Was it proper for the Family Court to refuse to reduce the payer's child support obligation after one of the parties' children became emancipated?

Your answer -

Question #9 - Is a rent controlled leasehold property distributable for purposes of equitable distribution?

Your answer -

Question #10 - Does the Supreme Court have the authority to decide which party in a matrimonial action is entitled to possess nondistributable property (i.e. a rent controlled apartment)?

Your answer -

Question #5 - Is it possible for a parent who has custodial rights to a child to be guilty of kidnapping that child?

Your answer -

**Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a member of the firm of Ramo Nashak Brown & Garibaldi LLP*

ANSWERS APPEAR ON PAGE 11

Trials and Tribulations - Fifty Years of Family Court

BY MERYL KOVIT

This is the second of a series of articles on Queens County Family Court.

The Family Court opened its doors on September 1, 1962. Just seventeen days later, on September 17th, 1962, Father Knows Best went off the air.¹ It can be argued that the last episode of Father Knows Best was possibly the more memorable event of September 1962 for many New York City families. Both events foreshadowed the many changes in the family which were about to happen. Fifty years later, Kitten, Princess, and Bud,² their stay at home mom, and father who knew best, are just not recognizable as a typical American family.

To fully grasp the look and feel of the new Family Court on opening day in September, 1962, we need to rewind the history tape briefly. It's 1959, Judge John Warren Hill, is the Presiding Justice of the New York City Domestic Relations Court, the predecessor court to Family Court, and he is preparing to retire. Judge Hill's writing that year reflects a man who saw his retirement as an opportunity to blast city officials as to their treatment of the Court. His writing also provides an enlightening starting point for understanding how family issues have been treated in the court system and, as well, by the collective political powers of the day.

Judge Hill wrote, in his last annual report on the Court, about "the failure of the city government, over the years, even down to the present, to fully recognize the usefulness of this court and to provide this court with adequate staff and services."³ Judge Hill validated his argument with statistics showing that the "hearings and rehearings" increased by seventy percent from 1934 to 1958 — however, the court's staff during the same time had increased only thirty-five percent. He wrote about a grave need for more probation officers, typists, and clerks to handle the booming caseloads.⁴ Looking back from the vantage point of fifty years of Family Court, the most historically relevant statement made in his annual report was his specifically citing the need for a new space for the Queens court due to the following war story — perhaps one of the earliest recorded Family Court war stories of all time:

"Until a supervising probation officer was chased out of her small office to make room, girls in detention were obliged to

wait in the women's powder room pending disposition of their cases and their transfer to shelters."⁵

Judge Hill, as well, can also possibly be credited with beginning the Family Court tradition, which would be followed by so many over the next fifty years of regularly reciting the psalm regarding the need for more Judges.⁶

In 1961, New York State reorganized its entire court structure.

The Family Court was created. From September 1962 to August 1963, the first year of the new Family Court set up under the Court Reorganization Act,⁷ Queens Family Court held 27,296 hearings.⁸ Hundreds of other cases were settled by a "new" screening process. There was a "newly" set up marriage and conciliation service — deemed a "chamber of horrors" to both counselors and the "troubled" families seeking advice. It appeared that "constant yelling and screaming can be heard coming from the counseling rooms. There appeared to be a problem in that two counselors were using one room at the same time. The counselors were forced to confer with two troubled families and their attorneys at the same time in order to keep up with the caseload."⁹

This is what was happening on the inside. It was said, however, that from the outside the original Union Hall Street Courthouse, between Liberty Avenue and South Road, Jamaica, was reported as "impressive from the outside with its bright red brick and tall marble columns." However, once inside Judges and lawyers agree "once you walk through the front door, the place is "a snake pit."¹⁰

The Union Hall courthouse used to house the Family Court on opening day, September 1, 1962, had been built in 1932, and had been planned and built to house only Children's Court, for matters involving those under 16 years of age. Union Hall had one courtroom and one chamber for one judge. The Judge handled papers for about 6,000, cases.¹¹

In 1962, the Domestic Relations Court expanded to cover Children's court and non support cases, thus creating the Family Court, about 28,000 cases were processed together through the same courthouse building in Union Hall. At that time, in 1962, three makeshift courtrooms were set with three judges sharing one



Meryl Kovit

chamber.¹²

The Queens Family Court was still housed in the Union Hall Courthouse (a.k.a the snake pit) in 1964 and problems with the physical structure, never built to be a Family Court, as well as the expanding plethora of family problems, and related increase in caseload, perhaps related to the cancellation of Father Knows Best, or perhaps not,

continued.

Queens Family Court Senior Judge Peter M. Horn wrote a letter to Mayor Wagner, about 1964, in which he reported from the front lines that help was needed in the form of a new building to house the Family Court, as amongst the many problems, regarding space was that "the detention rooms where the young people are kept are illustrative of what happened in the Dark Ages. Parents and children, many of them troubled and disturbed sit in a dingy, cell-like room."¹³

About this same time Henry Eisenberg, the chairman of the Domestic Relations Law Committee of the Queens County Bar Association told the Queens County Bar Association President, Nat H. Hentel, that conditions in the Family Courthouse are "shocking." Eisenberg also reported that "There is obviously a crying need for a new building for the Family Court." The Chair of the Domestic Relations Committee, recommended that the Bar Association "add to its efforts for a new Civil Court, the obtaining of a new Family Court so desperately needed." A site large enough to house both courts under one roof or adjoining buildings was being suggested.¹⁴

The discussion as to where to house the new Family Court continued; a mini saga in the longer fascinating history of the Court itself. In 1965, the Queens County Bar Association supported the use of the Queensborough Central library in Jamaica, on Parsons Boulevard, as a temporary home for the Family Court — meanwhile, a centrally located complex for all courts was under consideration as a plan for the future. The Queens County Bar Association emphasized, referring to the library building that the association does not recommend "this temporary usage as a permanent solution" for the Family Court needs and urged that the City Planning Commission reject "piecemeal and dis-

jointed" solutions to Queens Family and Civil Courts "troubles" and urged consideration of "government facilities in a centrally-located complex."¹⁵

The Long Island Daily Press reported in December, 1964, that "Mrs. Martha K. Zelman, president of the Queens County Women's Bar Association," would be attending the planning commission meeting (which was to be held in the library on Parsons Boulevard) and Mrs. Zelman is credited with reporting to the press that the Family Court on Union Hall failed to "observe the basic rules of hygiene...." Mrs. Zelman said that "the children's lunch is prepared next to an open toilet. There is no other place to prepare food. This court has been described as a "snake pit" and as "out of a Dickens' tale."¹⁶

If this were a tale written by Mr. Dickens, he would now pause to fill the reader in on the following: the open toilet, while not hygienic, sat open, approximately four years after the conclusion of a lawsuit by counselor Marie A. Beary that resulted in her being granted permission to become a member of the Queens County Bar Association. Prior to the lawsuit, the QCBA membership policy was: NO GIRLS ALLOWED.¹⁷

Beary's success has lived on. This writer is a long term member of the Queens County Bar Association and had no problems getting my membership application approved even though the female box is checked on my birth certificate — and while women are regularly admitted to membership in the Queens County Bar Association, the Queens County Women's Bar Association also continues to flourish.

The many participants in the discussion regarding a new home for the Queens County Family Court failed to achieve a long term solution for the children serviced by the Queens County Family Court. In the end, the President of the Women's Bar, did go along with the "piecemeal and disjointed" solution which the President of the Queens County Bar Association spoke against.¹⁸ In doing so, Mrs. Zelman said in December, 1964, "we are looking for a way to meet... the immediate needs of Family Court... not for some new monumental building in the far distant future."¹⁹

Ultimately the Parsons Boulevard library came to be the new Family Court site — the library vacated about 1966,²⁰

Continued on page 11

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ARE WE NUTS?

Strange as it seems,
I must confess,
There's a certain excitement,
When living with stress.

Although it's a challenge
To function, with tension,
Such a lifestyle adds
A special dimension.

Most people prefer
The serene and mundane,
But some have a need
For an existence insane.

To run - to achieve -
At a pace most frenetic,
Leaving sitting and loafing
To those less energetic.



Bob Sparrow

To watch, in amusement,
Those indulging in leisure,
While action and pressure
Is their ultimate pleasure.

Again, it's strange,
That we successfully thrive,
But an occasional Gelusil
Helps us to survive!

JURY'S OUT

Alas said the foreman
It's time to decide,
That lawyer was sharp
And very wise

Oh yes pronounced another
So intuitive was he,
And kind can't you see?
His cause seemed so just
that is what I surely see

A third juror spoke up
And she declared,
Oh yes, I saw sincerity
In that lawyer's eyes,
A man you can trust
So clear to me

Alas said another
I am confused,
Which way should we turn?
Should the vote be yes?
Or should it be no?

Outside paced the lawyer
In the empty hallway so dim,
Walking up and down
And round and around



Joseph DeFelice

Inside to the courtroom
The lawyer paced,
As he looked to the clerk with a worried
face,
Has there been a question?
Did they send a note?

Oh no said the clerk
The jury is torn,
Who knows which way
This jury will turn

** Joseph F. DeFelice is President-Elect of the Queens County Bar and maintains his office for the practice of law in Kew Gardens*

Profile of:
Randall Eng

Continued from page 1

ners in the Homicide Bureau of the Queens County District Attorney's Office and trial partners again in the Supreme Court Trial Bureau, working the same Part before Supreme Court Justice Nicholas Ferraro in the late-70's. The life of Randall T. Eng has been a tapestry of diligence, perseverance and opportunity. Justice Eng had the powerful immigrant influence of hopes and dreams for a better life and a bonding with the Asian-American community, but personally, he had a desire to forge a career path for himself encompassing all communities and cultures. Justice Eng's 'roots' are in Queens and he has served from judicial benches and administrative chambers for decades in the venerable and esteemed courthouses of the complex web of cultures that is the Borough of Queens. Judge Eng's career has also been a role model for progress in civil rights through merit and achievement. Time and again, when each of the "Firsts" listed above came to pass, Randall T. Eng was the candidate best suited for that position. When Judge Eng was sworn in by Mayor Koch in 1983, THOUSANDS of people from the Asian-American community and their friends, came out to see the swearing-in. There were so many spectators thronging City Hall Park that instead of having the ceremony inside, Mayor Koch had to do it on the steps of City Hall!

Justice Eng has a thorough grounding in administrative practice as well as decades of courtroom and procedural experience. He has served as President of the Association of Supreme Court Justices of the City of New York and as a member of the Advisory Committee on Judicial Ethics. He is currently a member of the Permanent Sentencing Commission for New York State and the New York State Judicial Institute on Professionalism in the Law.

Justice Eng was a member of the New York Army National Guard from 1970 to 2004, retiring as the State Judge Advocate of that organization, holding the rank of Colonel. As State Judge Advocate, Colonel Eng supervised twenty JAG attor-

neys across New York State, a position he held for nearly ten years. As State Judge Advocate, Colonel Eng instituted many reforms, encouraging JAG officers to continue their military/legal education at The Judge Advocate General's Legal Center and School, located in Charlottesville, Virginia. He also organized the Eastern States JAG Conference, which was held every other year (alternating with the Western States JAG Conference) for the senior leadership in the JAG Corps of both the active and reserve components of the United States Army.

Justice Eng, aka Colonel (Retired) Eng is Second Vice President of the Veterans of the Seventh Regiment, located in the Park Avenue Armory in Manhattan as well as being a proud member of American Legion Lt. Kimlau Memorial Post 1291, which is headquartered on Canal Street in Manhattan.

With his devotion to education and alma mater, Justice Eng has served on the Board of Directors of St. John's University School of Law since the mid-1990's. He also taught Criminal Law as an Adjunct Professor to first-year law students at St. John's. He was recognized by the Armed Forces Alumni and Student Chapter of St. John's Law School Alumni Association with their Distinguished Veteran Alumni Award in 2010 and he was honored by the Asia Pacific American Law Students Association (APALSA) of St. John's Law School, in January, 2012.

In summary, the newly-appointed Presiding Justice of the Appellate Division, Second Department, Hon. Randall T. Eng is well grounded in both courtroom procedure and practice and court administration and this author believes you will find Presiding Justice Eng to be capable, personable, diligent, patriotic, innovative, a champion of education, and possessed of encyclopedic knowledge on a vast catalog of topics pertaining to the court system as well as many other areas.

About the Author: Tom Principe is a Partner at Kramer, Dillof, Livingston & Moore in Manhattan, is a former Assistant District Attorney in Queens County (1973-79), and a member of the Queens County Bar Association since 1974 where he currently serves on the Judiciary Committee.

Irrevocable or not?

Continued from page 4

greater power to modify existing trusts. Now, a Trustee with limited discretion may decant trust assets into a trust which can provide, among other things, for a longer term than the original trust. If, for example, a trust for the benefit of a minor was scheduled to terminate upon the child reaching 18, the new trust may extend the term to a later date. During the extended portion of the term, the Trustee's discretion can now be made to be unlimited.

The expanded decanting statute also permits a trustee to confer a presently exercisable or testamentary power of appointment, provided that marital deduction status is not thereby jeopardized. If, for example, a Settlor established a trust for the lifetime benefit of his surviving spouse, the trustee would not be able to later decant the assets into a new (appointed) trust giving the lifetime income beneficiary a presently exercisable power of appointment.^{1x} On the other hand, there appears to be no prohibition against giving the surviving spouse a testamentary power of appointment. This could result in substituting new remainder beneficiaries for those named by the Settlor. Drafters and Settlers of marital deduction trusts must now address this possibility. The new statute does enable one to 'opt out' of its provisions.¹⁰ The bigger question concerns trusts created prior to the enactment of § E.P.T.L. §10-6.6(b). How could a Drafter opt out of the provisions of a subsequently enacted yet retroactively effective statute? Perhaps a Trustee may now decant assets into a new trust for the sole purpose of ensuring that future decanting under the expanded statute is not permitted.

Decanting relief, though greatly expanded, is still not available to all trusts. The statute excludes Trustees with a present or future beneficial interest in the trust from being able to decant. This prohibition renders decanting relief unavailable to countless trusts which name the Settlor's child or other loved one as both a trustee

and ultimate remainder beneficiary.

Reformation

If statutory relief is unavailable, one may petition the Court for reformation. The Power of the Surrogate's Court to reform a trust rests in the Court's inherent equitable powers. In the case of a drafting error or change in circumstance, the Court will attempt to ascertain and then effectuate the intent of the Settlor.

Conclusion

Trust Settlers and drafters who do not wish for trust terms to be later amended need to create documents that are both unambiguous and flexible. This will reduce the likelihood of a need to interpret and/or modify trust terms later.

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Ann Margaret Carrozza is a member of the Queens County Bar Association and a practicing elder law and estate planning attorney.

1. NY does not currently have a gift tax
2. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub.L. 111-312, 124 Stat. 3296, H.R. 4853)

The federal estate tax threshold as of January 2013 is currently scheduled to be \$1.0 million with a top federal estate tax rate of 55%. This is on top of state estate tax with a partial deduction for state estate taxes paid.

Levels of protection afforded to trusts vary depending upon the jurisdiction

I.R.C. § 2036(a)

3. Id.

4. E.P.T.L. § 7-1.9(a).

5. *Matter of Perosi v. LiGreci*, 2012 NY Slip Op 05533, decided July 11, 2012

In order to qualify for the unlimited marital deduction, thereby preventing the assets from being includible in the first estate, no one other than the surviving spouse may have an interest in the trust assets during his or her life. I.R.C. § 2056(d)(2).

6. E.P.T.L. §10-6.6(b)

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ANSWERS TO MARITAL QUIZ ON PAGE 8

Question #1 - Is bonus awarded after the commencement of an action for divorce subject to equitable distribution?

Answer: No, the court found that the bonus was compensation for future services. *Ropiecki v. Ropiecki* 2012 NY Slip Op 2475 (2nd Dept.).

Question #2 - Maintenance is retroactive to the commencement date, does payer spouse receive a credit for voluntary payments made on behalf of emancipated children of the parties?

Answer: No, *Ropiecki v. Ropiecki* 941 N.Y.S.2d 650 (2nd Dept. 2012)

Question #3 - When a judgment does not accurately incorporate the provisions of a stipulation of settlement, is the preferred remedy (1) to move in the trial court to resettle or vacate the judgment or (2) an appeal?

Answer: Move in the trial court to resettle or vacate the judgment. *Ayrovainen v. Ayrovainen* 942 NYS2d 187 (2nd Dept. 2012)

Question #4 - The parties stipulation of settlement, which was incorporated in and survived their judgment of divorce, did not provide for a reduction in child support after one of their two children became emancipated.. Was it proper for the Family Court to refuse to reduce the payer's child support obligation after one of the parties' children became emancipated?

Answer: Yes, *Matter of Katz v. Dotan* 2012 NY Slip Op 4172 (2nd Dept.)

Question #5 - Is it possible for a parent who has custodial rights to a child to be guilty of kidnapping that child?

Answer: Yes, *People v. Leonard* 2012 NY

Slip Op 4206 (Court of Appeals)

Question #6 - May the trial court order the payer spouse to cover the payee spouse with health insurance beyond the period for which it awarded maintenance?

Answer: No, *Noto v. Noto* 94 A.D.3d 1069; 943 N.Y.S. 2d 183 (2nd Dept. 2012).

Questions #7 - May the court order a spouse to provide health insurance for his or her spouse, if maintenance is not awarded?

Answer: No, *Caso v. Caso* 205 A.D. 2d 866; 613 N.Y.S.2d 456 (3d Dept.1994) and DRL §236 (B) (8) (a).

Question #8 - Should the payer parent's Family Court petition to terminate his child support obligation be dismissed,

because the parties' stipulation of settlement in their divorce action provided that he would not bring on any application to modify his child support obligation?

Answer: Yes, *Matter of Singer v. Prizer* 2012 NY Slip Op 4761 (2nd Dept.)

Question #9 - Is a rent controlled apartment property distributable for purposes of equitable distribution?

Answer: No, *Cudar v. Cudar* 2012 NY Slip Op 4965 (2nd Dept.)

Question #10 - Does the Supreme Court have the authority to decide which party in a matrimonial action is entitled to possess nondistributable property (i.e. a rent controlled apartment)?

Answer: Yes, *Cudar v. Cudar* 2012 NY Slip Op 4965 (2nd Dept.)

Fifty Years of Family Court

Continued from 9

but the Family Court never moved in until sometime in the 1970's.²¹ Eventually there would be a "monumental building" to house the Queens County Family Court. The monument would require the intervention of another woman and the continuation of the telling of the Dickens' Tale, referenced by Martha Zelman, Esq.

Mr. Dickens would leave his readers wondering why and wanting to know more.

Next: the 1970's, more trials, more tribulations...

Editor's Note: Meryl Kovit regularly practices before the Family Court. She wants to thank Briana Hart and Julia Gonikman, Stony Brook University students, for their help in researching this article.

1. www.bristol45diner.com, October 5, 2012

2. www.wikipedia.org/Father_Knows_Best, October 5, 2012

3. Cites Critical Need for Family Court Building in Queens, Long island Daily Press, June 15, 1959.

4. id.

5. id.
6. id.
7. Family Court Building a "Snake Pit," Long Island Daily Press, Myron Becker, January 19, 1964

8. id.
9. id.
10. id.
11. id.
12. id.
13. id.
14. id.

15. Ask 1 Complex to House All Queens Courts, Sunday News, January 3, 1965.

16. May Use Library For Family Court, Long Island Daily Press, December 4, 1964

17. Beary v. Queens County Bar Ass'n, 25 Misc.2d 794, 207 N.Y.S.2d 324, see also Beary v. Queens County Bar Ass'n, 28 Misc.2d 448, 209 N.Y.S.2d 893. (1960)

18. Ask 1 complex, supra.
19. Family Court Takes Step to New Home, Long Island Daily Press, 12/12/1964.

20. \$1.6 Million Voted for Family Court, Long Island Daily Press, August 25, 1967; see also Ask 1 Complex to House All Queens Courts, January 3, 1965.

21. Court's New Home Almost Ready, Long Island Press, Sunday, October 31, 1971

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