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Queens Bar Bulletin

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Kinship Proceedings: Proving the Family Tree

BY DAVID N. ADLER

David N. Adler

Kinship remains a subject of keen interest to our society. A recent bestseller, *In Praise of Nepotism*, analyzes the historical, sociological and political aspects of kinship networks.[1] Thousands of families have traced their genealogical roots to locate family origins. State-of-the-art medical technology and genetic engineering may be on the verge of altering our traditional understanding of next of kin. When legal issues arise, kinship proceedings provide the formal mechanism to determine blood relatives and establish proof of heirship.

In cases that require intestate administration, the accounting proceeding is the stage at which all activities and issues must be finally resolved. As part of the accounting, the fiduciary must make a final determination of who the decedent's heirs were so that assets can be distributed and the fiduciary can be discharged.[2]

In many estates, the heirs have either been known to the fiduciary or have been established through affidavits at early stages of the administration. When some questions of lineage do remain, the fiduciary has usually done preliminary research and made reference to "alleged heirs" or to heirs who may exist but are "unknown."

Typically, "alleged heirs" often consist of cousins who have come forward with a claim, but the validity of their status is not clear and questions remain about whether there may be other heirs with equal or superior claims. (See page 4 for a description of the statutory standards.) The relative remoteness of their lineage, coupled with their potential right to inherit requires a formal kinship proceeding to confirm their status.

At this point, counsel representing "alleged heirs" objects to the fiduciary's proposed accounting, asserting that the "alleged heirs" are, in fact, the heirs and are entitled to inherit their appropriate percentages of the estate.[3] The interested parties are any alleged claimants (heirs), other claimants, the fiduciary, and the attorney general of New York State because the state maintains an interest in the outcome of this proceeding.[4] If heirship is ultimately unproven or partially proven, a certain fraction of the estate may pass to New York State.[5]

As a matter of course, the Court appoints a guardian *ad litem* to represent the interests of any potential unknown heirs.[6] In many kinship matters, the fiduciary is often the counsel to the public administrator, either because no one else has taken the initiative to resolve the estate, or the heirs involved are sufficiently distant.[7] As part of his relief, the claimant requests a kinship hearing to determine the identity of the distributees.

The burden of proof is at all times on the claimant, or alleged heir. The standard of proof is a preponderance of the evidence. This standard is based upon a degree of probability and has been defined as "persuading the triers of fact that the existence of the fact is more probable than its non existence."[8] Ultimately, a claimant must demonstrate that he/she was either the closest blood relative to the decedent, or among a class of equally close blood relatives as defined in the parameters of EPTL § 4-1.1.[9]

Discovery

Once issue has been joined, the matter is traditionally referred to a referee who conducts a hearing and reports to the Surrogate's Court.[10] The referee is normally a member of the Law Department, and is required to conduct the proceeding in the same manner as a court trying an issue without a jury.[11] Initially, the referee may set up a pretrial conference, grant time for discovery, if necessary, and set a date for a hearing.[12] The date set for a hearing is crucial, because all proof must be completed by the claimant within one year of that date or objections will be dismissed.[13] Often, kinship proceedings take more than one day and may run over many months. Still, that hearing date starts the running of the one-year statute.

The Civil Practice Law and Rules (CPLR) apply as they would in any civil trial.[14] The discovery devices are also fully available, yet, practically speaking, are extremely limited. This is not a traditional hearing or trial. Often, all other interested parties have absolutely no knowledge regarding any aspects of a claimant's lineage. Thus, discovery here is often not focused on the adversary but consists of a thorough investigation of family information and relationships from a variety of sources. The admissibility of this evidence is discussed below, but the key element is that the focus should be on searching both for individuals who know the claimant's family history, and for various documents reflecting that history.

The personal effects of the decedent are usually an excellent starting point. Normally, these are in the possession of the fiduciary, often the public administrator. Once the authority of counsel to represent a claimant is established, these effects must be made available for review. They may consist of letters, photographs, address books, personal notes, vital statistics records, or other important memoranda. Further, counsel's own investigation is often more effective. The search for those with knowledge of the family may include relatives, neighbors, clergymen, business associ-

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Democracy Derailed

BY - ARNOLD H. RAGANO

Mighty oaks now fallen again
Political giants struck by sexist probes
Lions bereft of their tawny mane
Salacious tidbits, the media crows

Ill befits these cerebral louts
To represent our moral civil base
We tolerate their feisty verbal bouts
In pursuit of their heralded political race

To regret their supposed peccadillo
Which destroys their untarnished
public name
Nights spent on an adulterous pillow
Contributes to their
now infamous fame

Closeted behind their lurid trysts
Unthinkingly shorn of the
status exempt
No longer from their precarious
former heights
Lusterless again, reputation unkempt

Save The Date

Queens County Bar Association
HOLIDAY PARTY

"Passing the Torch"

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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:

2011 Winter CLE Seminar & Event Listing

October 2011

Tuesday, October 4	Recent Significant Decisions from our Highest Appellate Courts
Monday, October 10	Columbus Day - Office Closed
Thursday, October 27	Stress & Sanity III (Lawyers Assistance Comm)

November 2011

Tuesday, November 8	Election Day - Office Closed
Wednesday, November 9	Landlord/Tenant Seminar
Friday, November 11	Veteran's Day - Office Closed
Wednesday, November 16	Ethics Seminar

CLE Dates to be Announced

Elder Law Insurance

NEW MEMBERS

Jennifer Allim	Vincent Cuocci	Teresa Girolamo
Virginia Alvarez	Renu Dalessandro	Matthew L. Goldberg
Roman Aminov	Avish Dhaniram	Richard J. Gottlieb
Ashkan Arastehmanesh	Michael DiGiaro	Ehsanul Habib
Angelo J. Bongiorno	Joseph James DiPalma	Mark L. Hankin
Annette Lorraine Brockett	Benjamin Josef Doscher	Nicholas Keelin Harris
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NECROLOGY

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George Campos Thaddeus S. Gorycki

Rocco S. Varlese

EDITOR'S NOTE

Inside the Mind of Magistrate Justin Sheffield

BY PAUL E. KERSON

Paul E. Kerson

This is a work of fiction. Any similarities to any person, living or dead, is purely coincidental.

Justin Sheffield was a freshly appointed Magistrate in St. Andrew's, an American town 35 miles from Megacity. He was 50 years old, with 17 years as a part-time Public Defender, following eight years' full time work as a County Prosecutor.

He had left prosecution for defense because of what he saw – overzealous prosecutors who viewed the world only in black and white with no shades of gray.

He welcomed the Robe. He would store it in his closet with a profound sense of accomplishment. After 25 years of daily courtroom struggle, it would be he who would embody Justice Itself. He would put his sense of right and wrong into action. No longer would Supervisors second guess his decisions. Only Appellate Courts could do that now, and appeals were a rare event.

It was only two months ago that he was appointed by the elected Mayor of St. Andrew's, and confirmed by a unanimous vote of the elected St. Andrew's Town Board. He was the very embodiment of a democratic and meritocratic society – interviewed and chosen by an elected Mayor for his 25 years of unblemished courtroom experience, and confirmed without any objection by the elected representatives of the Town.

So far, in the eight weeks that had gone by so quickly, he had passed judgment on several dozen misdemeanors, traffic offenses, small commercial dis-

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President's Message

It is hard to believe that the summer of 2011 is over.

It has been a summer filled with bizarre weather conditions that included extreme heat, a hurricane, earthquake and torrential rain storms.

Despite these seemingly apocalyptic events, the QCBA building is still standing and waiting for you to visit.

With the advent of fall, it's time for me to report on the state of the QCBA. But before I do so, I want to again thank everyone who attended the Annual Installation Dinner on May 5, 2011. Also, I want to thank the members of the Nominating Committee for giving me the opportunity to serve this wonderful association and for their confidence in my ability to do so.

On June 1, 2011, I officially became the 115th President of the QCBA and the first Latin American to hold this position in its history. What a great honor!

Now let me tell you what has occurred since I took office. At the first Board meeting, on June 6, 2011, we decided to support legislation to make Same Sex Equality the law in New York State. Three weeks later, while I was at the New York State Bar Association summer meeting in Cooperstown, New York, with Joseph J. Risi, Jr., Guy Vitacco, Jr., David Cohen and Zenith Taylor, Same Sex Equality became law in New York State.

In addition, your Board of Managers, consisting of some of the most dedicated, hardworking and intelligent people I have ever served with, supported legislation that would preserve the indigent defense system as it currently stands. The Lentol/Dendekker bill, named after its sponsors, would, if passed, amend Section 722 of the County Law to add language that would set requirements for governing bodies for their plans, to provide counsel to indigent persons and clarify the manner in which counsel for criminal conflict cases are furnished.

Richard Michael Gutierrez

To those of you who practice criminal law in Queens County and are members of the 18-B panel, if you are not a member of the QCBA, its time to join. Support is a two-way street and the Bar Association has done its part, now its time to do yours.

In August of 2011, the Bar Association was asked to support judicial pay increases, which it did. I drafted a letter recommending to the Commission on Judicial Compensation that New York State Judges receive an immediate increase in salary together with a-cost-of-living increase. Shortly thereafter in September 2011, New York State Judges finally obtained a pay raise, albeit not as much as they deserve.

The Bar Association understands the financial strains Judges have endured over the last 12 years and will continue to support them when called upon.

An important and critical goal of mine is to increase membership. As I mentioned in my President's message at the Annual Dinner, we need to attract new members. Membership is the lifeblood of this association and unless it increases we will suffer financially. Please do whatever you can to attract new members. We need your help.

As a way to increase membership, Joseph DeFelice and I met with the Dean of St. John's Law School, Michael Simons, Associate Dean for Student Services, Larry Cunningham, and Victoria Brown-Douglas, Assistant Director of the Professional Skills Program. At this meeting we discussed the benefits of second and third year law students joining the Queens County Bar Association. Items such as mentoring, internships (paid), externships (credit), and even attending CLE programs were addressed.

In my opinion this meeting went extremely well and our relationship with St. Johns, going forward, will be stronger and more significant.

Another initiative was to revamp some of the QCBA Committee's. I consolidated some and terminated others to try and make them more effective and relevant. Also, appointments were made so that there would be a mixture of youth and wisdom to make the exchange of ideas more diverse and inclusive.

If you have not joined a committee yet, please do. Your support and participation is crucial to the relevancy of the Bar Association. Collectively, we must continue to make this association a place where camaraderie, collegiality and scholarship flourish.

Please find the time to join your fellow members at the CLE programs, Stated meetings and other bar events throughout the year. Your commitment and involvement is needed.

Finally, don't forget Hispanic Heritage month starts September 15 and ends October 15. This month long national celebration recognizes the histories, cultures and contributions of American citizens whose ancestors came from Spain, Mexico, the Caribbean and Central and South America.

During this month long celebration, take the time to reflect on the contributions made by Latinos in the communities we work in and serve. Use this time to revisit the importance of diversity and inclusion in our legal system and ways to make it more effective. And remember to eat some of our good food.

Richard Michael Gutierrez
President

Immigration Law Update: The H-1B Visa

BY MARIE-ELEANA FIRST, ESQ.
AND JOSEPH F. DEFELICE, ESQ.

The H-1B is a non-immigrant visa that allows United States ("U.S.") employers to temporarily employ foreign workers for a period up to six years in specialty occupations, fashion models of distinguished merit and ability, or persons providing service related to Department of Defense (DOD) cooperative research and development project or co-production project. The H-1B category is the primary visa for persons entering the United States for professional work or specialty occupations under the Immigration and Nationality Act ("INA")[1] and is the most commonly used visa of all of the seven categories currently available under the H Visa category.[2]

Specialty occupations require professional knowledge and at least a bachelor's degree or equivalent in a professional field as a minimum for entry into the occupation in the U.S. This requirement can usually be met by having a 3-year degree and 3 years' relevant post-graduate experience. INA 101(a) (32) contains a list of specialty occupations although the list is not inclusive.[3] The following positions have been deemed to be specialty occupations by United States Citizenship and Immigration Services: (Engineers, accountants, lawyers, scientists, librarians, psychologists, financial analysts, systems analysts/engineers, architects, teachers/professors, journalists/editors, technical publications writers, management consultants, and market research analysts).[4]

In cases where a potential employee either did not attend or did not complete college, they may be deemed to have sufficient credentials where they have a three years of specialized training or work experience for each year that they lack towards the bachelor's or higher degree required for that field (this is called the "three for one" rule).[5] All education and work experience of the foreign national must be evaluated by a professional evaluator. Regulations and case law set forth specific terms for an evaluator to be deemed qualified for evaluation purposes including authority, recognition, experience, and expertise.[6] The evaluation is submitted along with the H-1B petition. Professionals such as lawyers, doctors, accountants may be sponsored under the H-1B visa category but must be licensed to practice in the state of intended employment. In many instances, a person can perform work that requires a license under a licensed professional.Only a U.S. employer may petition for the entry of the employee; individuals can not apply for an H-1B visa to allow them to work in the U.S. H-1B visas are subject to annual numerical limits of 65,000 per category; 6,800 of these visas are reserved for citizens of Chile. Persons previously issued H-1B visas within the past 6 years are not subject to the yearly cap. As of May 6, 2011, 10,200 H-1B applications had been submitted to United States Citizenship and Immigration Services ("USCIS") for processing.[7]

Marie-Eleana

U.S. workers are permitted to stay in the United States for a period of 6 years total in the United States. An employee who has filed an application for a green card or an I-140 Immigrant Visa Petition within the first five years of having H-1B status can receive indefinite one-year extensions while the application is being processed. Also, if a labor certification has been pending for at least 365 days before the beginning of the permitted six-year limit of stay, the H-1B visa may be extended until a decision is made on the petition.[8]

Joseph F. DeFelice

The doctrine of dual intent is recognized by USCIS for H Visa Categories.[9] The Dual Intent Doctrine states that even though a nonimmigrant must demonstrate genuinely that his or her intent is to remain in the U.S. temporarily, he or she may have both a short-term intent to leave and a long-term intent to remain permanently.[10]

Interestingly, the free trade agreements between Chile and Singapore carve out different H-1 processes and quotas for citizens of those countries as an option to the standard H-1B processing. No petition is required. The petition can only be approved for one year at a time. Further, unlike beneficiaries of standard H-1B petitions, beneficiaries under the free trade agreements can be denied H-1B status or visa on the basis of a lack of nonimmigrant intention[11]. There is a limit of 1,400 annually under the agreement with Chile and 5,400 annually under the agreement with Singapore. Labor applications are required[12].

Additionally, before an H-1B application can be submitted, an employer must obtain certification of a Labor Condition Application ("LCA") from the Department of Labor[13]. The LCA effectively creates a level playing field for U.S. and foreign workers, by removing the incentive to hire foreign workers at lesser wages than U.S. workers.[14] The LCA is an attestation signed by the employer which affirms that: prevailing wage rate for area of employment will be paid or the employer's actual wage, whichever is higher; the same benefits offered to U.S. workers are offered to nonimmigrants; working conditions of position will not adversely affect conditions of similarly employed American workers; the place of employment is not experiencing labor dispute involving a strike or lockout; and notice to union or to workers has been or will be provided in the named occupation at the place of employment.[15]

However, it is interesting to note that a study by John Miano of the Center for Immigration Studies (Washington, D.C.) has concluded that H-1B workers are paid significantly less than their American counterparts.[16] The 2005 study found that computer programmers on H-1B visas were paid an average of $13,000.00 per year less than similarly employed Americans. In addition, 85% of H-1B visa holders were found to earn below the median wage of equivalent employed Americans.

Employees on H-1B visas may begin working for a new H-1B employer upon the filing of a "nonfrivolous"[17]petition by the new employer; provided the nonimmigrant is in a lawful status at the time of the filing of the second petition and has not engaged in unauthorized employment since his or her

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Kinship Family Tree

Continued From Page 1

ates, friends, or employees. Not every individual is expected to have a full and thorough knowledge of the entire family, maternal and paternal sides. Yet, to the extent that isolated areas of knowledge can be acquired from sufficient people, an entire family portrait may be pieced together.

The search for documentary evidence is equally important. Documents can establish tangible proof of the existence and identification of decedent's blood relatives, thereby providing the necessary link in the genealogical chain to the claimant. This evidence includes vital statistics records (birth, death, and marriage), census records, cemetery (burial) records, naturalization and immigration records, Court records (surrogate, matrimonial, adoption), church records, Holocaust records, and military records. The nature of records essential to an individual case varies, but it is only limited by one's imagination.

Many records can be obtained by a letter requesting such records containing the reasons for request, and payment of the appropriate fee. In the event that records are not forthcoming or sealed, a court order may be issued and will often produce the records. It may be advisable to retain a certified genealogist to assist counsel in their search. A genealogist is acutely aware of the necessary steps in establishing heirship, may have more ready access to difficult to reach sources of information, and can ordinarily complete a search within a set time frame. Upon all evidence, both oral and documentary, constituting proof of kinship being marshaled, the hearing can proceed.

Manner of Proof — Testimonial Evidence

The admissibility of oral testimony offered as proof of any aspect of family relationship is subject to two severe limitations. The first, generally referred to as the Dead Man's Statute, is codified at CPLR 4519. It provides that a party or person interested in an event is incompetent to testify concerning any personal transaction or communication with the decedent.[15] A kinship hearing is clearly within the parameter of events covered by the statute;[16] the claimants or individuals seeking to inherit are clearly interested in the event because they stand to gain or lose by operation of the judgment.[17]

Unfortunately for the claimant, the concept of transaction or communication is broadly defined. It applies to a wide range of behavior involving the claimant and the decedent, including all forms of conduct and language. It embraces every "variety of affairs which can form the subject of negotiations, interviews, or actions between two persons."[18] Thus, the claimant cannot testify to *any* conversation or correspondence between the decedent and himself.

Individuals not interested in the event (those who do not stand to inherit) are not barred from testifying. For example, a claimant's spouse or friends, if present at a certain conversation between the claimant and the decedent, can provide admissible testimony about their personal knowledge of an event. If the decedent constantly refers to the claimant as his "favorite cousin" or his "sole surviving cousin," the claimant cannot testify but friends or a spouse would be able to substantiate that statement.

The second limitation concerns the concept of hearsay. Hearsay consists generally of statements made out of court that are offered for the truth of their contents.[19] Much information pertaining to one's family history may be received this way as a function of word of mouth. Hearsay evidence is traditionally excluded unless the particular hearsay falls within one of the exceptions to the general rule of exclusion. Fortunately, one exception to the hearsay rule concerns declarations of pedigree or family descent.[20]

The conditions of admission for pedigree declarations consist in the fact that the original declarant is dead, was related by blood or marriage to the family of whom he spoke, and made these pedigree declarations before this kinship proceeding arose.[21] Further, these declarations may be written as well as oral. A proper foundation must be laid to incorporate all of these criteria before testimony is received.[22] In the simple most direct case, the submission of a death certificate, birth certificate and/or marriage certificate should suffice. Here, a witness could testify about family information he or she received from a predeceased relative of the family.

Finally, any individual, interested or not, may testify regarding their own heirship status.[23] For example, if asked to identify one's parents, siblings, grandparents, uncles, aunts, etc., one may testify as to their *own* personal knowledge of family relationships. Yet, for the claimant, such testimony stops at identifying any relationship with the decedent. Any third party not interested in the event has extremely wide latitude with respect to testimony including transactions or communications with the decedent, or declarations of pedigree overheard from predeceased individuals. This underscores the importance of an investigation to locate a variety of disinterested individuals who can freely and openly provide links in the family chain.

Manner of Proof — Documentary Evidence

The admissibility of documentary evidence offered to establish any facet of heirship is geared to its authenticity. There is a preference for original documents. The Best Evidence Rule is reflective of historical case law that whenever parties seek to prove the contents of a writing, they must produce the original or satisfactorily account for its absence.[24] In the absence of original documents, the problem of reliability becomes an issue.

Public documents may be received into evidence if they are properly authenticated.[25] It is acknowledged that originals of public documents are extremely impractical to procure and that validated copies by the appropriate custodian or authorized agent are the equivalent of the originals. CPLR 4540 sets out the applicable methods of authentication of copies, certified, exemplified and sworn.[26] Birth, death, marriage, court, voter registration, naturalization and military records are of this type.

A range of documents may be better described as semipublic. They are not official public documents but are issued by institutions containing a mechanism by which an authorized agent can certify them. These include church, cemetery and baptismal records. Census records may be admitted on judicial notice.

Private documents contain a greater possibility of inaccuracy because there is no formal mechanism for authentication in place.[27] These documents often consist of material found among the decedent's personal effects such as letters, telephone books, holiday cards, and personal notes. These documents may be admitted into evidence along the following guidelines. The means of authenticating private documents consist of the testimony of a witness who saw that person write/sign the document, as an admission made by an adversary, by circumstantial evidence, or by proof of handwriting.[28] For handwriting proof, a lay witness may be used.[29] Photographs may also be authenticated by the testimony of a witness familiar with the subject portrayed.[30]

Finally, the ancient document rule operates as a presumption of authenticity and greatly aids in the admission of older documents in kinship proceedings.[31] It states that when the writing is 30 or more years old, is in the possession of the natural custodian, and is free from indications of fraud or invalidity, it proves itself.[32] Essentially it is self-authenticating. A natural custodian in this type of proceeding could be any range of institutions or agencies, including the decedent, if documents of this type were found among the personal effects in the decedent's household. Physical review of the document for tampering or damage is a condition precedent to its admission.

Foreign documents also require authentication in accordance with CPLR 4542. One primary feature of this statute consists in the affixation of a apostille, which is a certification of validity practiced in a variety of European countries and approved in U.S. courts.[33]

Closing the Class

Despite extensive discovery and marshaling of evidence, certain aspects of the family tree may remain open. An alleged distributee may be missing (whereabouts unknown) or it may not be sufficiently proven that the heirs before the court are in fact the *only* heirs. This situation occurs commonly in dealing with holocaust survivors or severely fragmented families. Years ago, this often created an insurmountable problem to establishing the right to inherit the entire estate: a fraction of said estate pertaining to the "open," not sufficiently proven side of the family might have been payable to New York State under the theory of escheat.

Fortunately, the legislature chose to rectify this situation in Surrogate's Court Procedure Act § 2225. This section creates a presumption that "the distributees before the court are the only distributees" (the only ones entitled to inherit) if certain conditions are met.[34] The conditions are two-pronged and they specifically pertain to the time elapsing from decedent's death coupled with an appropriate search for existing heirs.

Part A of SCPA 2225, in dealing with a single alleged heir, requires that at least three years must elapse from the death of the decedent along with a diligent search having been conducted to discover the status of said missing heir.[35] If no evidence has been found, that individual may be presumed dead. Here, presumption of death is defined as one predeceasing the decedent without issue.[36]

Part B of SCPA 2225 pertains to a determination that no other distributees, other than those already before the Court, exist. This also involves the three-year time period elapsing from the date of death of decedent, but requires a more exhaustive diligent search, using all available sources.[37] Because this section provides a broader-based exclusion of any and all heirs not before the court, it requires a higher degree of proof.

The sources comprising the diligent search consist of all aspects of attempts to locate, including the discovery devices referred to above. An abbreviated definition of due diligence is contained in the Uniform Rules.[38] Although specifically applicable to probate in that context, it encompasses the most basic elements of a diligent search including interviewing friends, relatives and neighbors, inspecting personal effects, and reviewing motor vehicle, post office and voter registration records. The use of the internet as an inventory of last names and addresses is also noted and continues to expand as a research option. The degree of diligence required is often analyzed in relation to the size of the estate.[39] Generally, the greater the value of the estate, the more comprehensive the diligence required by the Court in efforts to locate the missing/alleged heirs and satisfy the statutes. Finally, the use of a genealogist as an expert in matters of kinship is often indispensable to completing a truly diligent search. The genealogist may marshal all forms of evidence and provide opinion testimony regarding heirship status.[40]

In conjunction with SCPA 2225, EPTL § 2-1.7 also creates a presumption of death if after three years of continuous *unexplained* absence, a diligent search fails to locate a particular individual. The unlocated individual is presumed to have died three years after the unexplained absence, or less than three years if it can be established that the individual was exposed to a specific peril.[41] Other presumptions may also aid in the proof of aspects of family status, to wit: every person is presumed legitimate or born in wedlock;[42] a marriage ceremony is presumed to have been legally performed;[43] a male under the age of 14 and a female under the age of 12 are presumed not capable of having children;[44] a person who would have been more than 100 years old at the time of decedent's death is presumed to have predeceased the decedent.[45]

These statutes provide a means to prove a negative, the non-existence of other distributees. They are useful tools for reaching a final resolution and determination of heirs. The three-year statutory period from death should always be kept in mind before initiating proceedings so that its application is not limited. Upon proof that no heirs exist other than those before the court and in the record, the class of heirs may be closed.

Overview

The kinship proceeding itself is generally referred to as a hearing, although it contains elements of a trial. It functions as an end in itself, retains the full force of judicial sanction, and may be set up by filing a Note of Issue and Certificate of Readiness in certain counties.

The venue for such a proceeding is normally the Surrogate's Court in the county of the decedent's domicile.[46] Occasionally, the hearing or any part of it may be conducted outside this venue upon application to the court. The grounds for this removal, referred to as a commission, are covered by CPLR 3108 and are geared to the unavailability of witnesses within

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In Memoriam - Carolyn DiBella

Carolyn DiBella, Bruna DiBiase and Wyatt Gibbons.

BY BRUNA L. DIBIASE*

Carolyn DiBella was my friend. She was smart, tough and reliable. She was a great lawyer and a loyal friend. I first met her, almost 20 years ago, when I was in private practice and we had a real estate matter together. She represented the purchaser and I represented the seller. I knew her name because we were listed closely together in the phone directory and I was curious about meeting this other female, Italian-American, Queens solo practitioner. We spent much time talking on the phone negotiating the deal and by the time we met in person at the closing, I had grown to like and respect her. I found that I could trust her and that she was true to her word. Her practice focused primarily on real estate while mine was on criminal law. I learned so much about real estate closings from interacting with her on that one matter. She questioned every clause in the contract, made sure all forms were accurate and complete and kept me on my toes. While we were at the closing, I was about to turn to her and tell her how I felt, but instead she turned to me and said in front of our clients, "it has been such a pleasure, I learned so much from working with you." I was so taken aback. It was really the other way around. She was the real estate master and I was just a novice. That was the beginning of our friendship.

As my friend, she became part of my extended family. My closest friends became her friends. She came to family events and my family embraced her warmly. When I left private practice, she took over some of my real estate matters. I never had to worry about any case that she took over from me. She was the kind of lawyer that returned all her calls on the same day that she received them and worked hard to protect the interests of her clients. She was punctual, reliable and dedicated to her practice, her clients and those close to her.

She became very close to one of my former clients and their family. At their first meeting, "Vinny" called her "honey" and without pause, she retorted" I'm not your honey, I'm your lawyer." When he replaced "honey" with "baby," I started to get that sick feeling in my stomach. When he realized that she was serious, he apologized and never called her by an inappropriate term again. He respected her mettle and felt confident that she would fight for him. Carolyn went on to become dear friends with his wife and family, as she did with many of her clients. To know Carolyn was to know that you had someone who had your back.

True to form, she didn't want anyone to know she was ill. Although she suffered with cancer for the past few years, she kept her illness very private. She worked until she absolutely had to be brought to the hospital. Her strength, through such a difficult time, humbles me. I know that I am not alone when I say that I will miss her. She touched the lives of many people and all of us who had the good fortune to know her will miss her dearly.

**Editor's Note: Bruna L. DiBiase is Chief of Staff at the Office of the Chief of Policy and Planning for the New York State Courts and is a long time member of the Queens County Bar Association*

Inside the mind

Continued From Page 3

putes and several disputed leases. He enjoyed the work immensely, and began to imagine a judicial career that might take him all the way to the State of New Scotland's highest court, the Court of Appeals in the capital city of New Edinburgh.

His thoughts were changed around by a series of events that started when a St. Andrew's Town Police Department squad car showed up at his house at 2:00 a.m. one night the following week.

A very polite police officer came to his door. "We are so sorry to wake you, Your Honor, but we have just taken a rape suspect into custody and we must take you to the Courthouse right away to preside at the Bail Hearing."

He dressed quickly. He kissed his sleeping wife on the forehead and told her he must go to the Courthouse right away with the waiting police officer to do his duty to the Town, the County and the State. She wished him good luck. He thought about waking his sleeping teenage daughter and his son to tell them what he was going to do, but he thought better of it. They need their sleep. He will tell them all about it tomorrow.

The ride to the Courthouse took less than 10 minutes. Actually, the courtroom was located in the Town Hall, shared with the Town Manager, Police and Fire Departments. But everyone called it the Courthouse, because of its four large white pillars, war memorials and United States, New Scotland, Bannockburn County and St. Andrew's Town flags that flew from its four flagpoles every day.

Once in the Courthouse, he went quietly to his Chambers. He put on his long black judicial robe, zipping it up slowly. Alone among his colleagues, he actually knew what it meant. He had always been interested in the origin of everything. While at Megacity University Law School, 27 years ago, he had been permitted to spend one semester at Oxford University in England studying "The Origin of the Common Law".

That semester undoubtedly made him a better lawyer, prosecutor, public defender and now, Magistrate. He knew in his bones how the system got started. He had lived at Merton College that semester. He saw the ancient law books chained to the wall of the College Library, unmoved since 1264. He had studied in the Old Christ Church College Library, the one not even open to its own current students. He had been granted access to this inner sanctum of Oxford because of his special student status.

Megacity University had been founded as "The Prince's College" by the British Crown in 1750. It was to be the Royal seat of higher learning for the American colonies. After the American Revolution of 1776-1783, its name had been changed to Megacity College, and then, in 1870, to Megacity University. But its roots remained. Every year, Oxford would welcome back two or more students from Megacity University to celebrate this common origin.

The young and curious Justin Sheffield had the time of his life. He found the original Laws of New Scotland in Oxford's Bodleian Law Library. In Duke Humfrey's Library he found the biographies of the Scholars sent by Oxford to found The Prince's College in the New World. No one in Megacity had cared to locate these items or read them in more than 200 years.

When he returned to America with photocopies of these treasures, his Professors were overjoyed at the research job he had done. His paper on the Original Laws of New Scotland and the Origin of Megacity University had earned him Honors at graduation. His papers were preserved in the permanent collection of the Megacity University "Princiana" section, all about the early days of the University and of the United States.

So when Justin Sheffield put on his judicial robes in the St. Andrew's Town Courthouse that night, he felt the weight of Anglo-American History on his shoulders. He knew, from his time in the Oxford University and College Libraries, that these robes came from the best tradition of England, Scotland, Wales and Ireland – the robes of the parish church minister, who was supposed to dispense justice with compassion and mercy to his flock, who was supposed to temper the King's Statutes to fit the human condition.

In America in the 21st century, the job was certainly wholly secular, but the spirit of the British ecclesiastical robe remained. He wore it with dignity and pride, and a sense of history and humanity that was as pure as he could muster at 2:00 a.m.

As a prosecutor and defense counsel for 25 years, he had gone to trial in every type of common law crime – murder, assault, rape, robbery, burglary, trespass to land, trespass to chattels (then, animals; today, automobiles). He had been on both sides in serious felony cases. He thought he knew everything there was to know about the right way to handle a felony charge in New Scotland.

But from the high bench, with the Magistrate's formerly ecclesiastical robe enveloping his entire body, a felony charge looked completely different. As he looked down on the prosecutor, Randolph Whitfield; the public defender, Susan Walker; and the defendant, her client, Geoffrey Harper, his sense of confidence faded away completely.

Geoffrey Harper stood before him in handcuffs. The defense lawyer, Susan Walker, stood beside him. Immediately behind both of them were two tall and burly, armed, uniformed St. Andrew's Town Police Officers.

He stared at the papers before him – the St. Andrew's Town Police Department Complaint and the Supporting Affidavit of Jennifer Melbourne, the Complaining Witness. These official court documents had been hurriedly prepared by Mr. Whitfield just moments before.

Jennifer Melbourne was not present in Court that night. Mr. Whitfield spoke for her. "Judge, our Complaining Witness was violently raped by the defendant, Mr. Harper, just hours ago in the St. Andrew's Motel down the street. We ask that he be held on $15,000 bail for the Bannockburn County Grand Jury to consider this case. Under no circumstances do we wish for him to do this to some other woman while out on bail. The Bail must be high enough to insure he stays in the Bannockburn County Jail pending the disposition of this case."

Ms. Walker spoke next. "Judge, this was no rape. My client, Mr. Harper, is a well respected musician, a piano player. He regularly plays at weddings and private parties all over St. Andrew's and Bannockburn County. Until tonight, Ms. Melbourne was his girlfriend. She loved his piano playing. She came to every one of his "gigs" (private concerts). She lovingly turned the pages of his printed sheet music as he played for audiences who adored his music. And then they would regularly stay together at the St. Andrew's Motel. I have hotel receipts showing they stayed together at least 10 times in the past two months. Whatever went on between them tonight can never be proved or disproved by Mr. Whitfield beyond a reasonable doubt. Mr. Harper has long roots in this community. He has been playing weddings and private parties in this town and this county for more than 10 years. He has no prior criminal record. I ask that he be released on his own recognizance pending the Grand Jury's decision as to whether or not to indict him for a felony."

"Can I speak? Can I speak? Judge, I want to tell you what really happened," Mr. Harper was shouting. The police officers moved closer to restrain him and forced him to sit down.

"Mr. Harper," Magistrate Sheffield said in his calmest, most soothing voice, "You have the right to remain silent. Anything you say tonight will be used against you by Mr. Whitfield in later proceedings. You have an excellent lawyer, Ms. Walker. I strongly

"Can I speak? Can I speak? Judge, I want to tell you what really happened," Mr. Harper was shouting. The police officers moved closer to restrain him and forced him to sit down.

"Mr. Harper," Magistrate Sheffield said in his calmest, most soothing voice, "You have the right to remain silent. Anything you say tonight will be used against you by Mr. Whitfield in later proceedings. You have an excellent lawyer, Ms. Walker. I strongly suggest you speak privately to her and not on the record to me, where Mr. Whitfield is entitled to hear your every word."

The Magistrate thought to himself that the Bill of Rights was timeless in its critical importance at this moment – the right to counsel, the right to remain

Continued On Page 15

MARITAL QUIZ

BY GEORGE J. NASHAK JR.*

Question #1 - Does an appeal lie from an order denying a motion for resettlement of decretal paragraphs of a judgment?

Your answer -

Question #2 - Can future collection of child support through the Child Support Collection Unit be waived in a stipulation of settlement?

Your answer -

Question #3 - The father filed a petition for sole custody of the parties' child. After a hearing, the Family Court concluded that the father was not entitled to sole custody. Was it proper for the Family Court to summarily award the mother sole custody in the absence of a petition or motion by the mother?

Your answer -

Question #4 - Is the court permitted to reduce child support arrears accrued prior to making application for modification, where payor parent's income is less than Poverty Income Guidelines amount?

Your answer -

Question #5 - Is it proper for a judgment of divorce to provide for child support and order the payor spouse to pay one-half of the mortgage, one-half of the real estate taxes and one-half of the cost of repairs in excess of $750.00?

Your answer -

Question #6 - In Question 5 above do you see anything else wrong with the judgment?

Your answer -

Question #7 - Does a statute of limitations bar the issuance of a QDRO more than six years after the parties entered into a stipulation of settlement, providing for the issuance of a QDRO and which stipulation was incorporated and survived their judgment of divorce?

Your answer -

Questions #8 - In applying the Child Support Standards Act, is it error not to deduct from income the amount the payor spouse is obligated to pay for child support of his children from his former marriage?

Your answer -

Question #9 - A stipulation of settlement provided that both parents would provide child support until the happening of an emancipating event, which included the child moving his permanent residence away from the mother's home. The child moved from the mother's home to the father's home. Is the father precluded from seeking child support from the mother?

Your answer -

Question #10 - The parents of the child were never married but were in a committed relationship. The child was given the father's surname, as reflected on the birth certificate and the acknowledgment of paternity. Thereafter, the parties separated. The mother maintained physical and legal custody of the child and the father visited regularly. The mother sought to change the child's surname to a hyphenated name, her last name hyphen father's last name. Supreme Court said no, did the Appellate Division, Second Department, affirm?

Your answer -

ANSWERS APPEAR ON PAGE 12

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

PHOTO CORNER

Annual Dinner & Installation - May 5, 2011


Brunhilda Sanders Lane saying the invocation


Chanwoo Lee - Outgoing President


Chanwoo Lee with newly elected Judge Dennis Lebwohl


Guest Speaker Hon. Reinaldo E. Rivera

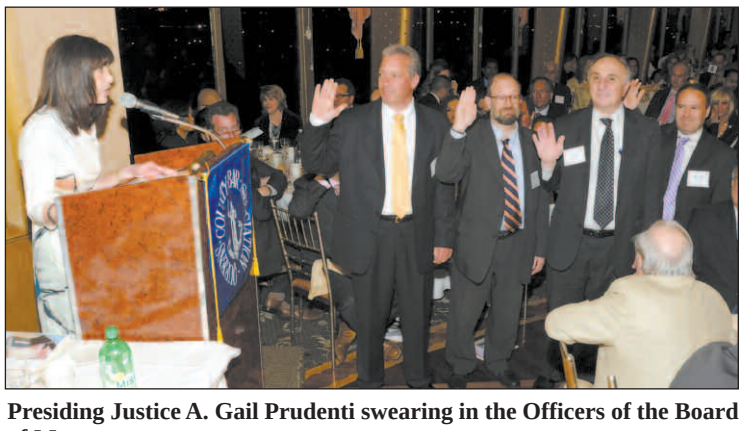

Hon. Marguerite Grays with Law Student Scholarship winner Viviana Salcedo


Mark Weliky with Ned Kassman, 2011 NYSBA President's Pro Bono Service Award Winner


Master of Ceremonies Hon. Sidney Strauss


Hon. Martin E. Ritholtz giving the benediction


Mayor Bloomberg conversing with incumbent Richard Gutierrez.


Presiding Justice A. Gail Prudenti swearing in the Officers of the Board of Managers


Presiding Justice A. Gail Prudenti swearing in Richard M. Gutierrez as President with wife Yvette

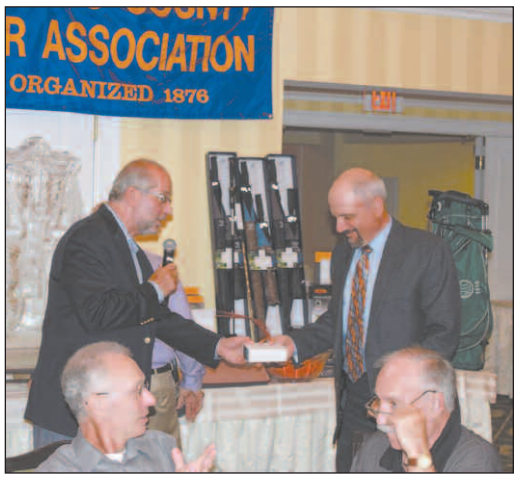

Mayor Michael Bloomberg addressing the congregants.


Presiding Justice A. Gail Prudenti swearing in the Board of Managers.

Photos By Walter Karling

PHOTO CORNER

Golf Outing - September 12, 2011



The Annual Queens County Bar Association Golf and Tennis Outing was held on September 12, 2011, at the Garden City Country Club. Over 90 golfers, tennis players and dinner guests had a most enjoyable day. The weather cooperated and the staff at the Club made sure that a great time was had by all.

We are most grateful to our sponsors whose participation enables us to run a first class outing. Sterling National Bank sponsored the dinner. We are most grateful to Sterling National Bank for their generous support. Our Tee Sponsors were: Steve Orlow, Esq., Scott Kaufman, Esq., Signature Bank, Grassi Consulting, Big Apple Abstract, Duffy & Posillico, Court Bond Agency, Sterling National Bank, Eric Bauman-DWI and Psychological Evaluations, Robson Forensics, Campos & Pavlides, Esqs., NAM, and East Coast Appraisals.

Thanks also goes to Big Apple Abstract, HSBC Bank, Signature Bank, Sterling National Bank, George Nashak, and Joe Baum for their kind donation of raffle prizes. We at the QCBA, and all those who attended the outing thank you all for your continuing support of this event.

The Golf Committee offers a special thank you to Joseph Risi who arranged for the spirits on the course, and the putting contest.

Our prize winners were:

President's Cup - Low Gross Member - John Steigler
Low Gross Guest - Richard Kerins
Closest to the Pin - Lee Mayersohn and Marie Zito
Long Drive - Mark Schfler and Pat Collella

I hope you all had a wonderful time and we look forward to seeing you next year on September 10, 2012 - Garden City Country Club.

David Louis Cohen
Golf Outing Chair

THE CULTURE CORNER

BY HOWARD L. WIEDER

My column this month focuses on two young Italian film makers who live in Manhattan and who are earning a lot of attention as director-writers: **MARCO CHIAVARELLI** and **ANTONIO PADOVAN**. Even though they both trained at New York Film Academy in Manhattan, they are separate film makers and have not collaborated on any project. Both have a lot in common, aside from being born in Italy, both **MARCO CHIAVARELLI** and **ANTONIO PADOVAN** are fluent in English, they are creative individuals, and they have spurned other careers in order to focus on their true passion and calling in life - - movie-making. Both of them have recently won prestigious awards for their films. Both of them shun the dependency to rely on special effects to grab an audience's attention in favor of doing films that concentrate and depict individuals encountering life's situations.

MARCO CHIAVARELLI, who has also done films of crime drama and documentaries, specializes in writing and directing films that depict the absurdist comedy and poignant irony of life's situations. **ANTONIO PADOVAN** also likes to take individuals encountering slices of ordinary life and favors the romantic comedy genre.

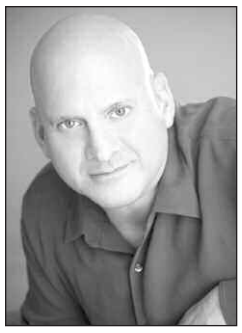
MARCO CHIAVARELLI

Born in Rome, Italy, to affluent and educated parents, **MARCO CHIAVARELLI** resisted the invitation and easy temptation to go into the family's hotel business. Instead, after working on films in Europe, he came to New York City, without knowing anyone, and enrolled in **NEW YORK FILM ACADEMY**. Living modestly in a basement apartment, **MARCO CHIAVARELLI** took the classes seriously and then took other classes, including acting, in order to familiarize himself with every area that a director should know.

MARCO CHIAVARELLI is determined to write and direct scripts that focus on the absurdist comedy inherent in life. **MARCO CHIAVARELLI**'s most recent short film **BUBBLEGUM** is a case in point. **BUBBLEGUM**, starring young and dynamic actor **ANDREW CHAMBERLAIN** is about a boy who craves a piece of bubblegum, despite the sharp resistance by his well-meaning mother, who does not want to expose her son to sugary sweets. **BUBBLEGUM** is a bittersweet comedy with a surprise ending. **BUBBLEGUM** was a hit at the **NEW HOPE FILM FESTIVAL**, known internationally as a cutting edge film festival, in New Hope, Pennsylvania, where **BUBBLEGUM** won the coveted Audience Prize.

MARCO CHIAVARELLI recently did a 30 minute documentary, **THE BIRD MAN**, interviewing the individual known as "the bird man" of Washington Square Park in Manhattan. The subject of the documentary has received a lot of media attraction because of the way pigeons flock to him. Most New Yorkers, by reflex, would steer a mile away from this man. Yet, the genius of **MARCO CHIAVARELLI**'s interview shows a man who is not a "looney," but a thoughtful individual who has a fondness for birds and a low tolerance for religious fanaticism. Labels of "crazy" may thus be in the eyes of the beholder, and the point of the documentary, at least to my mind, is that one ought not to be making snap judgments about persons without first talking with them. Again in T**HE BIRD MAN**, **MARCO CHIAVARELLI** reveals a profound and humanist understanding that life has bittersweet elements - - a characteristic feature that runs through all of **MARCO CHIAVARELLI**'s films, regardless of genre.

MARCO CHIAVARELLI has been working with Korean director **HYOJIN AN** on their film **THE LUCKY DAY**, a crime drama regarding corrupt businessmen, crooked cops, and a hapless immigrant working long hours to support his family as a taxi driver in New York City. A scene for that film was recently shot on a weekend in the Law Offices of **KIM, PATTERSON & SCIARRINO**, on Bell Boulevard, in Bayside, Queens County, New York.



Howard L. Wieder

Director-writer Marco Chiavarelli with the star of his hit short film Bubble Gum, at the New Hope Film Festival, accepting award as audience's favorite film.

MARCO CHIAVARELLI is a versatile writer-director. His creative versatility is astonishing, and his knowledge about the history of European and American filmmaking is astonishing. **MARCO CHIAVARELLI** is a humble individual, whose knowledge of the great film directors is extraordinary. He could have easily succumbed to a life of ease, but instead has pursued his passion, even at self-sacrifice. I have great admiration for both **MARCO CHIAVARELLI** as a person and for his talent and artistry.

Talking with **MARCO CHIAVARELLI** is an engaging process. He is funny, intelligent, outgoing, and caring. He has great love for his family, especially for his parents. MARCO CHIAVARELLI's next step is to form a production company.

ANTONIO PADOVAN

Arriving in New York in 2007, the original goal of **ANTONIO PADOVAN** was to work in architecture. He soon landed a job at a New York architectural firm, where he worked on several high profile projects. Not content with architecture, **ANTONIO PADOVAN** decided to learn film-making, enrolling at the New York Film Academy, earning a scholarship.

ANTONIO PADOVAN's first film **SOCKS AND CAKES**, went on to win a Golden Ace Award at the 2010 Las Vegas Film Festival. **ANTONIO PADOVAN**'s next film **PERRY ST.** starring Catherine Mary Stewart, has been accepted by fifteen film festivals across the United States, earning four awards, and one honorable mention. PERRY ST. screened in New York City at the International Film Festival in August. Last year, the film first screened as a Best New York City Film winner at the Village East Cinema. A few days later, the film screened in the Big Apple Film Festival at the Tribeca Cinemas.

His latest film **MIA**, a 20 minute short romantic comedy, is opening now at major film festivals. The film was shot in New York's West Village.

The following is a portion of my interview with **ANTONIO PADOVAN**:

Question: What age were you when you arrived to the USA?

Antonio: 21

Question: What are your plans in film - - I'm sure to persist as a writer director?

Antonio: I am about to finish a film called TILLMAN, shot between Queens and Long Island. I have a couple of possible little projects in China for October that could lead to a bigger project. And I just finished the first draft of a New York based story for a feature that I intend to film next year.

Question: What genre of films would you like to specialize in?

Antonio: Romantic Comedies. Or any kind of film that deals with situations that I can relate to.

Question: What film-makers, if any, inspire you the most and why?

Antonio: Billy Wilder, [Federico] Fellini, Woody Allen, Alexander Payne, [Roberto] Rossellini, Ferzan Ozpetek. More that a specific director I am inspired by a type of films.

Question: What three films do you like and why?

Antonio: THE TERMINAL - I think for the acting mostly but also for something else that I've never been able to describe, probably the mood that creates; HANNA & HER SISTERS - for the storytelling structure and the acting; [and] HOWARD THE DUCK - that's a guilty pleasure from when I was young.

Question: Do you see a difference between European filmmakers and American filmmakers, and what do you like about both?

Antonio: Yes, I see differences about film in general and therefore directors as well. In the US there is a more specific and well known "structure", that leads most of the time to an excellent result in terms of quality. Unfortunately, sometimes the story is not worthy.

In Europe, probably a director is more like an "author" sometimes, meaning - - he has more control over the final result. Still, I don't think that anyone can make a film by themselves, so I always feel funny when someone writes "a film by . . ." In Europe, we are closer to that approach.

Most people have the wrong idea that if something is generated from money or makes money is not art anymore. But how can you make the point that a film like **TRANFORMERS** (which I didn't like) is less art than any indie film that they will play at the Angelika? People that work on big Hollywood productions are usually more experienced and talented.

Question: The New York Times recently ran an article on the glut of film students on the market. What does Antonio see about the present market of filmmakers?

Antonio: Film-making is the most competitive business in the world, for everybody involved, from director to actors, to AC or producers. We are all in the same boat, or trying to get in the same boat.

Director, Writer
ANTONIO PADOVAN

On Wheels Production's An Enemy of the People

This summer, I attended the **ON WHEELS PRODUCTION of HENRIK IBSEN's AN ENEMY OF THE PEOPLE**. The company, **ON WHEELS PRODUCTION**, was founded by physically challenged actor **TONY PALMIERI,** who played the lead role of Dr. Thomas Stockman [sometimes spelled as "Stockmann"].

For those readers not familiar with **IBSEN**, a great nineteenth century Norwegian playwright, his plays were remarkably ahead of their time. In **A DOLL'S HOUSE**, for example, **IBSEN** was a forerunner of feminism and the women's movement. In **AN ENEMY OF THE PEOPLE**, published in 1882, IBSEN explored whistle-blowing and their shaking consequences on the lives of individuals whose morals lead them to expose corruption over concerns of their own physical comfort.

In **AN ENEMY OF THE PEOPLE**, Dr. Thomas Stockman has been appointed as the doctor to the baths of a town by his brother, Peter, the town's Mayor. The town's mineral bath is its greatest source of income, luring customers and tourists from far away. Dr. Thomas Stockman discovers that the baths are infested with some unhealthy germ or parasite and must be shut down for further tests and remedial action. Of course, doing so would pose economic disaster for the townspeople. Does one remain silent and enjoy a lucrative position or should the truth be spoken at great personal sacrifice?

IBSEN explored these whistle-blower themes 100 years before films like **SILKWOOD** (1983) with **MERYL STREEP** and **CHER** or **THE INSIDER** (1999) with **RUSSELL CROWE** and **AL PACINO.**

Famous actors have played the role of Dr. Thomas Stockman, including **KONSTANTIN STANISLAVSKI**, considered "the Father of Method Acting," Oscar-winner **FREDRIC MARCH**, and Tony Award winner **SIR IAN MURRAY McKELLEN**. It takes a great actor to do justice to this role, especially with the long stretches of monologue in the second half of the play. The long passages by IBSEN can sound terribly didactic unless well-acted. Unfortunately, **TONY PALMIERI** was not right for the role of Dr. Thomas Stockman, and, as a consequence, the text came off as didactic, and numbingly so.

Here is an example of **IBSEN**'s text

———————Continued On Page 12

GRIEVANCES

BY JOSEPH F DEFELICE*

Joseph DeFelice

To all the new lawyers
so foolish and young,
and even the old ones
who thought law was fun

Beware of your client
so friendly and nice,
will turn on you softly
if you are not nice,
or if you should lose the case
that the client does like
The client will send you
to that license door,
and bar you from Court
forever more

You'll be called to a building
so tall and so high,
the twenty-fourth floor is where you must fly
and this is where your destiny lies,
So remember the rules
lest you go thru the door

Should you not know the subject of law that you need
or be able to handle it well,
then stay away from the case or a legal friend you should get,
because rule One Point One Sub B will find that you are
not competent then to handle it all
and in trouble you'll be and that won't be all

Then always remember
to tell client all,
and don't fail to advise or even apprise
lest rule One Point Four Sub A Sub Three
will surely be found,
this clause itself will do you in
and turn you around till your head's in a spin

Oh and yes never join
with your client at work,
cause a joint business deal
is what you may see
and this of course a conflict will be,
and rule One Point Eight Sub A
you will see
will tell you a violation it is,
a caution or admonition you'll find

And then there are lawyers
who fail to be fit
who fail to pay judgments
or return unearned fees,
cause then you will see
Rule Eight Point Four Sub H
oh yes, what a clause and
whoa is your faith

Consult with your clients
the objectives they want,
or you may find
rule One Point Four
Sub A and Sub Two,
and abide by those choices
regarding those goals,
or you must beware
of rule One Point Two Sub A
these clauses will tell you
you should really abide

And when holding the money
entrusted to you,
beware that you do not convert this to self,
no cash withdrawals
and funds kept separate to keep,
or checks, books and ledgers
you will need to show,
and oh yes, oh how the questions will flow,
if you should just falter in this you will see
that rule One Point One Five Sub A
will show you the door
and a license no more

So there should be no need
to say any more

**Joseph F DeFelice is an appointed member of the Grievance Committee for the 2nd, 11th and 13th Judicial Districts and practices Criminal and Immigration law from his office in Queens County.*

The Queens County Bar Association,
Brandeis Association, Hellenic Lawyers Association,
Latino Lawyers Association of Queens County,
Macon B. Allen Black Bar Association, Queens County Women's Bar Association
and St. John's Law School Alumni Association of Queens County

HOLIDAY PARTY

THURSDAY, DECEMBER 15, 2011

6:00 p.m. to 10:00 p.m.

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A suggested voluntary contribution of $10.00 or a new, unwrapped toy will be collected at the door and presented to Forestdale, Inc., a non-for-profit foster care agency located in Queens on behalf of our Bar Associations.

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Name: _____
Address: _____

Inside the mind

Continued From Page 11

released, a man who might do it again?

This all happened some years ago. But similar facts happen every day in every Magistrate's Court in the Common Law world – England, Scotland, Wales, Ireland, Canada, India, Australia, the United States and assorted other Commonwealth countries and former British colonies.

So Magistrate Sheffield decided to share his innermost thoughts with readers – judges, lawyers, law students, voters and taxpayers, so all can debate this situation for years to come and to decide how justice should be done. Magistrate Sheffield hopes that readers will think he did the right thing under all these facts and circumstances.

Marital Quiz

QUIZ ON PAGE 7

Question #1 - Does an appeal lie from an order denying a motion for resettlement of decretal paragraphs of a judgment?

Answer: No, Carrano v. Carrano 2011 NY Slip Op 2616 (2nd Dept.).

Question #2 - Can future collection of child support through the Child Support Collection Unit be waived in a stipulation of settlement?

Answer: Yes, the stipulation provided for direct payments of child support to the mother, unless the father defaulted in his child support obligation. Matter of Bederman v. Bederman 2011 NY Slip Op 1653 (2nd Dept.).

Question #3 - The father filed a petition for sole custody of the parties' child. After a hearing, the Family Court concluded that the father was not entitled to sole custody. Was it proper for the Family Court to summarily award the mother sole custody in the absence of a petition or motion by the mother?

Answer: No, Matter of Goetz v. Donnelly 2011 NY Slip Op 3849 (2nd Dept.).

Question #4 - Is the court permitted to reduce child support arrears accrued prior to making application for modification, where payor parent's income is less than Poverty Income Guidelines amount?

Answer: No, Matter of Fisher v. Nathan 920 N.Y.S.2d 726 (2nd Dept. 2011).

Question #5 - Is it proper for a judgment of divorce to provide for child support and order the payor spouse to pay one-half of the mortgage, one-half of the real estate taxes and one-half of the cost of repairs in excess of $750.00?

Answer: No, this was an improper double shelter allowance. Mosso v. Mosso 2011 NY Slip Op 3818 (2nd Dept.).

Question # 6 - In Question 5 above do you see anything else wrong with the judgment?

Answer: Yes, the provision concerning repairs was an open ended obligation. The obligation to pay for repairs should state a maximum monthly or annual amount. Mosso v. Mosso 2011 NY Slip Op 3818 (2nd Dept.).

Question #7 - Does the statute of limitations bar the issuance of a QDRO more than six years after the parties entered into a stipulation of settlement, providing for the issuance of a QDRO and which stipulation was incorporated and survived their judgment of divorce?

Answer: No, in fact, motions to enforce the terms of a stipulation of settlement are not subject to a statute of limitations. Denaro v. Denaro 2011 NY Slip Op 4409 (2nd Dept.).

Questions #8 - In applying the Child Support Standards Act, is it error not to deduct from income the amount the payor spouse is obligated to pay for child support of his children from his former marriage?

Answer: No, Matter of Lisa Macari v. Marichal 2011 NY Slip Op 3242 (2nd Dept.).

Question #9 - A stipulation of settlement provided that both parents would provide child support until the happening of an emancipating event, which included the child moving his permanent residence away from the mother's home. The child moved from the mother's home to the father's home. Is the father precluded from seeking child support from the mother?

Answer: Yes, but the child could file his own support petition. The child was not bound by the parties' stipulation. Wakefield v. Wakefield 2011 NY Slip Op 4481 (2nd Dept.)..

Question #10 - The parents of the child were never married but were in a committed relationship. The child was given the father's surname, as reflected on the birth certificate and the acknowledgment of paternity. Thereafter, the parties separated. The mother maintained physical and legal custody of the child and the father visited regularly. The mother sought to change the child's surname to a hyphenated name, her last name hyphen father's last name. Supreme Court said no, did the Appellate Division, Second Department, affirm?

Answer: No, Matter of Eberhardt 2011 NY Slip Op 2668 (2nd Dept.).

Culture Corner

Continued From Page 10

from **AN ENEMY OF THE PEOPLE**:

"Lack of oxygen dulls the conscience. And there must be a woeful dearth of oxygen in the houses of this town, it seems, if the entire solid majority can numb their consciences enough to want to build this town's prosperity on a quagmire of duplicity and lies."

SIR IAN MCKELLAN would make that text soar. **KONSTANTIN STANISLAVSKI**, who cherished the role of Dr. Thomas Stockman as his favorite, lived at a time of political unrest, and **AN ENEMY OF THE PEOPLE** was very popular with the Russian pre-revolution populace. People yearned for a hero who could tell the truth strongly and bravely. **AN ENEMY OF THE PEOPLE** became the favorite play of the revolutionists, despite the fact that Dr. Thomas Stockman himself despised the majority and believed in individuals. The appeal of the play was, and still remains, that Dr. Thomas Stockman protests injustice and duplicity and that he told the truth.

In the last act, Dr. Thomas Stockman, rearranging his room which has been stoned by the crowd, finds his black coat in the general chaos. Seeing a tear in the cloth, he says to his wife: "One should never put on a new coat when going to fight for freedom and truth."

That line by **HENRIK IBSEN** - - "One should never put on a new coat when going to fight for freedom and truth" - - regarding the mud that will be thrown at any honest person fighting for a greater good, in a ruthless effort to sully and ruin his reputation - - are words to be relished by actor and audience. The opportunity, however, was lost and the words were uttered as mundane and ordinary in **TONY PALMIERI**'s rote, unexciting, and unmoving performance. As my mind wandered during Palmieri's recitation of lines, I started imagining funny cast changes, such as having **JACKIE MASON**, gifted, Jewish-accented comedian, play the lead role of Dr. Thomas Stockman. I was yearning for **IBSEN**'s lines to have flesh, embodiment, meaning, vitality, and power.

TONY PALMIERI does deserve recognition for showing that actors with physical disabilities do have significance in the theater, and his production company provides opportunities for a cast composed of those without disabilities performing alongside those who are physically challenged. MR. PALMIERI, however, needs to learn that a role as a producer is significant and reward enough. He does not need to perform the lead role, especially when he is not up to its several demands and challenges.

Several performances of this production of **IBSEN**'s **AN ENEMY OF THE PEOPLE** deserve mention: **KATIE LABAHN**, a wheelchair-bound actress, made a formidable and convincing Katherine Stockman, wife of Dr. Peter Stockman. **FRANK HENDRICKS** was a solid, ruthless character as Mayor Peter Stockman. **DAVID CONKLIN** was wonderful and genuine as Captain Horster, the strong, dependable, true, and only friend of the Stockman Family when they became pariahs. **DAVID CONKLIN** had an exciting stage presence and showed real depth in his role.

* * * * * * * * * * * * * * * * * *

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Kinship Family Tree

Continued From Page 4

New York State. Here, the court travels to the witness if the witness cannot travel to the court. Common reasons justifying unavailability consist of age, infirmity, and political barriers.[47] The coordination and production of witnesses who are often from different parts of the country or the globe, should be confirmed as early as possible. Travel factors and living accommodations pending the duration of the hearing should be anticipated before scheduling.

The preparation of a detailed family tree is essential to success in the world of kinship. The family tree consists of an outline from a chronological perspective of all family relationships.[48] It should contain names, name changes, dates of birth, death, marriage, and issue produced per person. The tree proceeds both downward from the oldest common ancestor and laterally incorporating those with equal degrees of lineage. It should provide a clear, unbroken connection from one generation to another and among members of the same generation. It is traditionally offered into evidence at the beginning of the hearing, not for the truth of its contents which remain to be proven, but for identification purposes. It is an invaluable tool in consolidating the objects of a claimant's proof, and thus it should accurately reflect the testimonial and documentary evidence. As a practical matter, all interested parties at the hearing rely on the family tree as a physical guideline to the claims.

The order of testimony may provide distinct advantages in attempting to prove elements of the family tree. The burden of going forward is always on the claimant. Disinterested witnesses are often viewed as possessing the highest degree of credibility, particularly those not married to nor children of the claimant. Yet, disinterested witnesses may only be able to provide testimony concerning limited aspects of the family. This, when coupled with other factors, can be sufficient and highly influential.

Many practitioners believe it is most beneficial to open with strong disinterested witnesses to confirm various aspects of the family tree. It is always advisable to have the claimant appear and testify. If multiple claimants exist, are all part of the same nuclear family, or on the same generational level and possess the same knowledge, it may only be necessary to produce one claimant. Although claimants are limited in testifying about their relationship to the decedent, they may testify about their own pedigrees. The genealogist is often used as a clean-up hitter to fill in any holes in the family framework, close the class, if required, and possibly provide a summary and confirmation of prior testimony. The above is merely suggestive, in that any order that counsel deems most appropriate for proving the case at hand may be used.

As with any hearing or trial, the depth and certainty of knowledge and its lucid presentation are most effective as an offer of proof. In kinship, precise testimony is particularly crucial, because the nature of the proceeding incorporates specificity of names and dates, not merely general descriptions.

Documentary evidence may be submitted and offered for proof at various phases of the proceeding, but it is often most advisable to submit all documents at the end of testimony, as exhibits. It is prudent to have all documents numbered and have numbered copies, in addition to a copy of the family tree, distributed to all interested parties at the outset. The Court normally requests copies of all documents approximately one to two weeks before the hearing. Only originals or copies with the appropriate authentication will be accepted into evidence after all interested parties have reviewed them and declined to object.

At the completion of all testimony and offers of proof, all parties rest and the referee typically reserves decision. Within 30 days of the hearing, the referee is required to issue a report indicating the findings of fact and conclusions of law.[49] The report specifies the identity and relationship of the decedent's heirs based upon the evidence submitted. Any interested party may then make a motion either confirming or denying, in whole or in part, the findings of the referee. If no motion or objection is made, the report is deemed confirmed. At this point the Surrogate reviews the report, and if it is found legally sufficient, the Surrogate issues a decree reflecting the report's findings and conclusions.[50]

Finally, funds are distributed to the appropriate individuals in the amounts or percentages dictated in the decree, and in accordance with the rules for intestate succession. The legal determination of the heirs at law of a particular decedent has thus been established. The question of who maintains the right to inherit has been answered.

1. In Praise of Nepotism, Adam Bellow, First Anchor Books, 2003.
2. Surrogate's Court Procedure Act § 2215 (1) (SCPA).
3. Uniform Rules for Surrogate's Court § 207.41.
4. SCPA § 316.
5. SCPA § 2222 (1) (2) (3). In the event that property has already passed to New York State, and heirs are subsequently located, a kinship hearing may be initiated by a petition for withdrawal of funds from the State Comptroller.
6. SCPA § 315 (2) (iii).
7. SCPA § 1001; 1112.
8. *See* Richardson on Evidence, § 3-206 (11th Edition); Uniform Commercial Code § 1-201 (8) (UCC).
9. *See* Professor Turano, *McKinney's Commentary* to EPTL § 4-1.1 (2003).
10. SCPA § 506 (1).
11. SCPA § 506 (3) (6) (a).
12. SCPA § 510.
13. Uniform Rules for Surrogate's Court § 207.25 (a).
14. SCPA § 506 (3).
15. CPLR § 4519. For an in-depth analysis, See Professor Radigan, "New Rules on Surrogate's Court Assignments Prompt Review of Issues in Dead Man's Statute," New York State Bar *Journal*, June 2003.
16. *Matter of Christie* 167 Misc. 484; 4 N.Y.S.2d 484 (1938).
17. *Hobart v. Hobart*, 62 N.Y. 80, 81, 83 (1875).
18. *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884).
19. *See* Richardson on Evidence, § 8-101 (11th Edition).
20. *See* Richardson on Evidence, § 8-901 (11th Edition).
21. *See* Richardson on Evidence, § 8-903 (11th Edition); *Aaholm, v. People* 211 N.Y. 406, 412, 105 N.E. 647, 649 (1914).
22. *See* Richardson on Evidence, 8-904 (11th Edition) *Young v. Shulenberg* 165 N.Y. 385, 59 N.E. 135 (1901).
23. *See* Richardson on Evidence, § 8-911 (11th Edition).
24. *See* Richardson on Evidence, § 10-101 (11th Edition); *Schozer v. William Penn Life, Ins.*, 620 N.Y.S.2d 797, 644 N.E. 2d 1353, 84 N.Y. 2d 639 (1994).
25. *See* Richardson on Evidence, § 10-108 (11th Edition).
26. CPLR § 4540; *see* Richardson on Evidence, § 9-202 (11th Edition).
27. *See* Richardson on Evidence, § 9-101 (11th Edition).
28. *See* Richardson on Evidence, § 9-103 (11th Edition).
29. *See* Richardson on Evidence, § 7-318 (a) (i) (ii) (11th Edition).
30. *See* Richardson on Evidence, § 4-212; (11th Edition); *Moore v. Leaseway Transp. Co.*, 426, N.Y.S.2d 259, 402 N.E.2d 1160, 49 N.Y.2d 720 (1980).
31. *See* Richardson on Evidence, § 3-124 (11th Edition); *Fairchild v. Union Ferry Co.*, 121 Misc. 513, 518, 201. N.Y.S. 295, 300, aff'd, 212 App. Div. 823, 207 N.Y.S. 835, aff'd, 240 N.Y. 666, 148 N.E. 750 (1923).
32. *Matter of Brittain*, 54 Misc.2d 965 (1967).
33. NYLJ October 9, 1992, p.1, Weinschenk, An Update on Kinship Proof in Surrogate's Court.
34. *See* Professor Turano, *McKinney's Commentary* to SCPA § 2225 (2002).
35. SCPA § 2225 (a).
36. SCPA § 2225 (a).
37. SCPA § 2225 (b).
38. Uniform Rules for Surrogate's Court § 207.16 (d).
39. *Matter of Whelan*, 461 N.Y.S.2d 398, 93 A.D. 891, aff'd, 476 N.Y.S.2d 290, 62 N.Y.2d 657, 464 N.E.2d 988 (1983).
40. *See* Richardson on Evidence, § 7-301 (11th Edition).
41. EPTL § 2-1.7 (b).
42. *See* Richardson on Evidence, § 60 (11th Edition); *Matter of Matthews*, 153 N.Y. 443, 47 N.E. 901 (1897).
43. *See* Richardson on Evidence, § 65 (11th Edition); *Fisher v. Fisher*, 250 N.Y. 313, 165 N.E. 460 (1929).
44. EPTL § 9-1.3 (e) (1) (2).
45. *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901).
46. SCPA § 205 (1).
47. CPLR § 3108; *Kelleher v. Mazzars*, 572 N.Y.S.2d 429; 175 A.D. 2d 352 (1991).
48. Uniform Rules for Surrogate's Court § 207.16 (c).
49. SCPA § 506 (3).
50. SCPA § 506 (4) (6) (a); 2215 (1).

Statutory Foundation for Kinship Proceedings

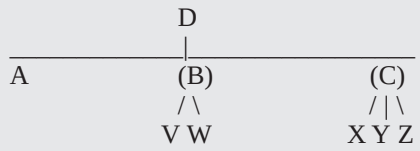
The framework for analyzing kinship issues is provided by the Estates Powers and Trusts Law, specifically EPTL § 4-1.1, which identifies the priorities among claimants who seek to inherit from an estate and specifies formal rules for the inheritance process.

The statute effectively describes how to build a "family tree," providing a schemata for the proximity of family ties and identifying the "distributees" who qualify as heirs of the decedent.[1]

Spouses and children have the highest priority. The spouse receives the first $50,000 and half the balance of the net estate after deducting traditional debts, taxes and expenses.[2] Issue of the decedent receive the other half. "Issue," by definition, are descendants from a common ancestor.[3] They are often the decedent's children. If there are no issue, the spouse receives everything. If there is no spouse, the issue inherit everything.[4]

If no spouse and no issue survive, the priority for inheritance consists of, in descending order, parents, siblings/nieces/nephews, grandparents, uncles/aunts/first cousins, and first cousins once removed.[5]

If issue inherit, they generally take "by representation," which essentially means an equal distribution at each generational level.[6] Suppose that the decedent, D, is survived by one child A; V and W, who are children of predeceased child B; and X, Y and Z who are children of predeceased child C. A chart for this scenario would look like this:



There are three lines of inheritance. If all children (A, B, C) survive the testator, each is entitled to one-third of the net estate. At A's generational level, only A survives, so A takes his one-third share. The next complete surviving generational level is that of the testator's grandchildren, V, W, X, Y and Z. The remaining two-thirds is divided equally among each member of that level, so that V, W, X, Y and Z each take two-thirds divided by five units or two-fifteenths of the net estate each.

A decedent's relatives of the half blood are treated as if they were relatives of the whole blood.[7] Thus, siblings who share just one parent may inherit as if they were full siblings.

If grandparents or their issue (cousins of the decedent) are the only survivors, the maternal and paternal sides are divided in half with respective issue sharing only their respective half.[8] In the absence of issue on one side, the other side's issue could share in the whole. These rules of intestate succession provide the numerical guidelines for distribution of the decedent's property, and they further place a legislative imprimatur on the priority of the familial relationships.

1. Estates, Powers and Trusts Law (EPTL) § 1-2.5; § 2-1.1.
2. EPTL § 4-1.1(a)(1).
3. EPTL § 1-2.10.
4. EPTL § 4-1.1 (a) (2) (3).
5. EPTL § 4-1.1 (a) (4) (5) (6) (7).
6. EPTL § 1-2.16.
7. EPTL § 4-1.1 (b).
8. EPTL § 4-1.1 (6) (7). See Professor Turano, *McKinney's Commentary* to EPTL § 4-1.1 (2003).

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Immigration Law

Continued From Page 3

last lawful admission.[18] In cases where the second petition is eventually denied, then the authorization to accept the new employment ends.

After the Department of Labor has certified the Labor Condition Application, the H-1B petition can be filed with USCIS. The H-1B petition consists of three forms: form I-129 Petition for a Nonimmigrant Worker; Form I-129 Supplement H and Form I-129 H-1B Data Collection Supplement. The petition also must contain a letter written by the employer describing the nature of the petitioner's business, the position offered and the beneficiary's qualifications with respect to the position offered. The H-1B petition must be accompanied by the certified LCA.

In addition to forms, there are a number of filing fees that must be paid with this petition. The basic fee for the I-129 form is $320. The employer must also pay a training fee to the United States government so that U.S. workers can be trained for the position. That fee costs $750 for employers with 25 workers or less, or $1500 for employers with more than 25 workers.[19] In addition there is a one-time fraud fee of $500.[20] The employer is responsible for paying the training and fraud fees and may not charge the payment of these fees to the worker.

While H-1B visas are adjudicated by USCIS, it is actually the Custom and Border Protection (CBP) that will interview the beneficiary of the approved visa petition at the airport and will ultimately approve the person to work in the U.S.

According to longstanding government policy, if you travel abroad while your H-1B petition and request to change status are being processed, the change status portion of your case will be considered abandoned. USCIS could still approve the H-1B petition itself, but you would either need to leave the United States again and apply for an H-1B visa at a U.S. Consulate or, if otherwise permitted, have your employer submit a new petition to change status to H-1B after your return. If you apply for an H-1B visa abroad, you could be subject to a long wait overseas during the visa application process, which could delay your return to the United States and your ability to begin your H-1B employment on time.

Immediate family members (spouse and children) accompanying H1B visa holders will be issued H-4 visas. The six-year limit on admission and extensions for an H-1 applies to spouses and dependents in H-4 Status.[21]

[1] INA §101(a)915)(H)(i)(b), 8 U.S.C. sec. 1101(a)(15)(H)(i)(b).

[2] Seven Categories of H Visas H-1B: Specialty occupation, H-1B1: Fast Track H-1Bs, H-1C: Professional Nurses Working in Health Professional Shortage Areas (HPSAs), H2A: Temporary agricultural workers, H-2B: Skilled/unskilled workers provided USCs/LPRs unavailable, H-3: Trainees, H-4: accompanying family members (spouse/children), Kurzban, Ira, Kurzban's Immigration Law Sourcebook, 11th Edition, American Immigration Law Foundation: Washington, D.C. 2008, p. 675, citing INA§101(a)(15)(H), 8 U.S.C. §1101(a)(15)(H)

[3] Lawline.com: An Overview of H1 Visas; Faculty: Phil Kleiner

[4] Fragomen, Austin T. and Bell, Steven C.: Immigration Law Library, H-1B Handbook, 2005 (Thomson West: Danvers, MA) 2005, p- 1-37

[5] Fragomen, Austin T. and Bell, Steven C.: Immigration Law Library, H-1B Handbook, 2005 (Thomson West: Danvers, MA) 2005, p- 1-43-1-44

[6] Kurzban, Ira, Kurzban's Immigration Law Sourcebook, 11th Edition, American Immigration Law Foundation: Washington, D.C. 2008, p. 685, at 3

[7] There are certain categories that are exempt from the 65,000 cap such as and it is important to check regulations to see which ones are excluded.

[8] Fragomen, Austin T. and Bell, Steven C.: Immigration Law Library, H-1B Handbook, 2005 (Thomson West: Danvers, MA) 2005, p- 1-29, 1-30

[9] 8 C.F.R. §214.2(H)(16), (l)(16), (o)(13), (p) 15

[10] Kurzban, Ira, Kurzban's Immigration Law Sourcebook, 11th Edition, American Immigration Law Foundation: Washington,

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Immigration Law

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D.C. 2008, p. 617, citing Matter of H-R-, 7 I&N Dec. 651, 654 (R.C. 1958)

11 22 C.F.R. §41.53

12 20 C.F.R. § 655(d)(5)(6).

13 Kurzban, Ira, Kurzban's Immigration Law Sourcebook, 11th Edition, American Immigration Law Foundation: Washington, D.C. 2008, p. 676, citing INA §212(n)(1), 8 C.F.R. §214.2(h)(4)(i)(B)(1). Memo, Weinig, Asst. Comm., Adjudications, CO 214h-P (Mar. 5, 1992), reprinted in 69 No. 12 Interpreter Releases 378, 390 (Mar. 30, 1992).

14 Fragomen, Austin T. and Bell, Steven C.: Immigration Law Library, H-1B Handbook, 2005 (Thomson West: Danvers, MA) 2005, p-2-4

15 Labor Condition Application, ETA Form 9035/9035E, p. 3

16 John Miano, CTR FOR IMMIG. STUDIES, "The Bottom of the Pay Scale; Wages for H-1B Computer Programmers" (Dec. 2005), available at http://www.cis.org/articles/2005/back1305.pdf.

17 See Memorandum, Michael A. Pearson, INS Executive Associate Commissioner for Field Operations (Jan. 29, 2001), as reported in 78 INTERPRETER RELEASES 365-66 (Feb. 12, 2002)(defining a nonfrivolous petition simply as a petition without a basis in law or fact)

18 INS Issues Guidance to Ports of Entry on Processing H-1B Applicants for Admission Pursuant to AC21 as reported in 78 INTERPRETER Releases 365(Feb. 12, 2002

19 INA §214(c)(9)

20 INA §214(c)(12)

21 Kurzban, Ira, Kurzban's Immigration Law Sourcebook, 11th Edition, American Immigration Law Foundation: Washington, D.C. 2008, p. 702, citing 8 C.F.R. §2142(h)(9)(iv)

Inside the mind

Continued From Page 6

silent, the right not to be forced to make incriminating statements. No matter how many times he informed people of these rights in high stress moments, he was ennobled by the experience.

But what do to now? The choice was his, and he had only moments to decide. The prosecutor, Mr. Whitfield; the defense counsel, Ms. Walker; the defendant, Mr. Harper, the two police officers and the court reporter were all anxious to go home. It was now 3:30 a.m.

Does Mr. Harper get to go home tonight? The Magistrate so wished he knew more. Where was the rape kit? (medical report of Ms. Melbourne's physical condition). Did the rape actually happen? Was this a lover's quarrel? Did Ms. Melbourne say "no, not tonight" and Mr. Harper forced himself on her anyway?

New Scotland Law was harsh – If she said no and he forced himself on her anyway, the sentence was 20 years to life imprisonment. New Scotland State prisons were brutal places – plenty of assault and rape by the prisoners against each other while ineffectual prison guards refused to get involved, or worse, participated. Everyone in the "system" knew this, and no one, from the New Scotland Governor on down, ever did anything about it. "Lock 'em up and throw away the key" was thought to be the public attitude.

But wearing the black ecclesiastical robe surrounding the body was supposed to give every Magistrate a very different view – the view of justice tempered with compassion and understanding of the human condition.

But democracy also features a free press. In New Scotland, this meant a tabloid press. If a defendant committed a new crime while out on bail, the Magistrate who set the bail too low was sure to be hung out to dry in a banner headline. No Magistrate ever got reappointed who appeared in a headline like that.

He studied Mr. Harper's appearance. The defendant seemed a most unlikely rapist. Mr. Harper appeared to be about 55 years old, with white hair. He was stooped. He hardly looked capable of committing a rape. But looks can be deceiving, the Magistrate told himself.

The Magistrate spoke: "Mr. Whitfield, how old is the Complaining Witness, Ms. Melbourne?"

"Just 21, Your Honor. She needs to be protected from this defendant."

This key fact told the Magistrate volumes. She was what is called in St. Andrew's, a "groupie" – a young woman who throws herself at older musicians, musicians who might very well get the wrong message. Distasteful as her conduct may have been, Mr. Harper's may have been far worse – he may well have raped her.

The Magistrate spoke again, "Mr. Whitfield, were drugs or alcohol involved in this incident?'

"We don't know, Your Honor. Our investigation is only three hours old, and it is ongoing."

How he wished he knew more. How he wished he had the rape kit, how he wished he knew who had how much to drink or what drugs who took. But he could not know any of this in the next five minutes.

To pass judgment on this situation in five minutes at 3:30 a.m., the Magistrate had to do something few human beings ever have to do – he had to imagine himself to be both Ms. Melbourne and Mr. Harper. If Ms. Melbourne was really penetrated against her will, this was a terrible crime. But if Mr. Harper thought she was consenting, because she did before, or because of drugs or alcohol taken by him or her or them both, well this was a different story.

And then of course there was the Law Itself - Could Mr. Whitfield ever prove, beyond a reasonable doubt, exactly what happened here? Was Ms. Walker right – even if a terrible crime was committed, could the County Prosecutor ever meet his burden of proof before a jury composed of 12 citizens just like Ms. Melbourne and Mr. Harper? Would they ever agree on what happened here?

But the Magistrate had his doubts. What if Mr. Harper ignored the next groupie's "no, not tonight". He thought of his own teen-age daughter, sleeping at home. She loved to go to concerts. The horror of the next thought was too much for the Magistrate.

But then he thought of his own teenage son, also sleeping at home. His son played the guitar in the St. Andrew's High School band. On the weekends, the Magistrate drove the family van to concerts with his son, his fellow band members, and their equipment. Could his son ever act like Mr. Harper? Then the Magistrate remembered his own days at Merton College, Oxford, and at Megacity University. How close did he himself come to being in Mr. Harper's situation?

The Magistrate thought and thought and thought. He only had five minutes. The churches of Oxford came to his mind. The bells, the constant ringing of the bells; the bells meant that justice and mercy and compassion must be considered together all the time.

And his black ecclesiastical judicial robe – the robe that has meant justice in the Anglo-American world for 900 years – his robe surrounded his body and its weight began to overwhelm him.

So he did what judicial officers have been doing for many thousands of years, since the time of King Solomon of the Old Testament – He would try to split the difference between the parties. "Ok," the Magistrate said, "Mr. Harper is remanded on $7500 bail," precisely half of what the county prosecutor requested. The Magistrate hoped Mr. Harper would spend the night in jail, reflect upon his actions, and perhaps get bailed out by his friends and family before he could be assaulted by prisoners or guards. He knew from experience that rape suspects frequently get "street justice" in county jails in New Scotland.

The job of St. Andrew's Town Magistrate was part-time. Magistrate Sheffield usually presided two evenings a week, and maintained his law office in Megacity with his partners the rest of the time.

The Harper case would not leave his mind. Did he do the right thing? He himself, on his own authority, took away a man's liberty and confined him in a dangerous place, the Bannockburn County Jail. He did it to protect Ms. Melbourne, and any other women who might come in contact with Mr. Harper. Preventive detention was not allowed in New Scotland. But Mr. Whitfield's arguments and the threat of a tabloid press compelled the Magistrate to err on the side of caution.

Every day the following week, he wanted to telephone Mr. Whitfield to find out about the investigation – where was the rape kit, and were there drugs or alcohol? But the New Scotland Judicial Code of Ethics forbade such a call. The Magistrate could only find out about the County Prosecutor's investigation in open Court, when the Public Defender could find out as well.

The Harper case was on the Magistrate's calendar one evening two weeks later. Mr. Whitfield informed the Magistrate that Mr. Harper had suffered a heart attack in the Bannockburn County Jail, that he was treated at the County Hospital and sent back to jail, that Ms. Melbourne had visited him, and that she was refusing to cooperate with the County Prosecutor's investigation. He was offering Mr. Harper a chance to plead guilty to misdemeanor assault and receive "time served" or two weeks in jail retroactively for his crime.

"Well, Ms. Walker, what do you have to say to this offer?" the Magistrate inquired of the Public Defender.

"Judge, my client thinks this is the greatest thing to happen since the invention of sliced bread," said Ms. Walker. And so it was done. Magistrate Sheffield took Mr. Harper's misdemeanor plea with the County Prosecutor's consent, and Mr. Harper was released.

But now it was the Magistrate who was in agony. Did he cause a man a heart attack with an erroneous bail decision? Or was a dangerous rapist wrongfully