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

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Proceeding to Vacate Probate Decree, File No. 2010-360166/A
Estate of
JOSEPH J. ABRAMAITIS, Dec. No. 27512

Deceased.

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In this proceeding to vacate a decree of probate, the respondent, Arlene Deech, moves for an order pursuant to CPLR 2221 (d) and (e) renewing and rearguing her motion for an order directing the petitioner, Veronica Falzon, and Joseph Abramaitis, Jr., to submit to a court admissible Sibling Full DNA Test at an established laboratory and provide a report of same to the attorneys for respondent Deech. The petitioner, Veronica Falzon, cross moves for an order pursuant to CPLR 2221 (d) and (e) granting renewal and rearguing this court's decision dated June 29, 2011 (Decision No. 27229), and upon renewal and rearguing, granting the petitioner's request that the court strike from said decision the language stating that it is conceded and undisputed that Joseph Abramaitis, Jr. is the decedent's son.

The decedent died a resident of Nassau County on February 14, 2010. A will dated October 12, 2006 was admitted to probate and letters testamentary issued to the respondent, Arlene Deech, on May 6, 2010. The will left the decedent's residuary estate in equal shares to his son, Joseph Abramaitis, Jr.; to his niece, the respondent, Arlene Deech; and to his nephew, Alexander Abramaitis.

Subsequent to the admission of the will to probate, the petitioner, Veronica Falzon, commenced a proceeding, by order to show cause, to vacate the probate decree on the ground that she is a child of the decedent who was not cited in the probate proceeding. The respondent Deech thereafter moved by order to show cause for an order directing Joseph Abramaitis, Jr. and

Veronica Falzon to take a Sibling Full DNA test. By decision dated June 29, 2011 (Decision No. 27229), this court denied respondent Deech's motion, without prejudice, as premature, until a notice for discovery and inspection is served upon Joseph Abramaitis, Jr., or until he consents to the test. On July 5, 2011, Joseph Abramaitis, Jr. was served with a notice for discovery and inspection for a Sibling Full DNA Test, and on July 6, 2011 he signed a written consent to such test.

While the respondent has denominated her motion as being for renewal and reargument, it is essentially a motion for renewal. A movant on a motion to renew must demonstrate a reasonable justification for not placing such alleged additional facts before the court on the original motion (CPLR 2221 [e] [3]). The Second Department has repeatedly held that the additional evidence offered on a motion to renew must be either newly discovered or have been unavailable to the movant at the time of the prior application (*Winograd v Neiman Marcus Group*, 11 AD3d 455 [2d Dept 2004]; *Seltzer v City of New York*, 288 AD2d 207 [2d Dept 2001]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636 [2d Dept 2000]).

Since this court's original decision denying, without prejudice, the respondent's motion that Veronica Falzon and Joseph Abramaitis, Jr. submit to a DNA test, Joseph has not only been served with a notice for discovery and inspection requesting such test, but he has also consented to the test. Thus, given these additional new circumstances since the respondent's initial motion, her motion to renew is a proper one.

The validity of DNA testing of two siblings or half siblings in an effort to determine parentage has been established by this court in *Matter of Gaynor* (13 Misc3d 331 [Sur Ct, Nassau County 2006]). While, as this court noted in *Matter of Gaynor, supra.,* the conclusiveness of a

siblingship test differs between different families, dependent on the types of genetic markers found on the individuals tested, there is generally no method to tell in advance how conclusive the results will be. A sufficient showing has been made to justify the minimally invasive nature of the DNA test sought by the respondent herein. The possibility that the DNA test to be conducted upon Veronica Falzon and Joseph Abramaitis, Jr. might ultimately prove to be inconclusive is not a valid reason to prevent the test from being conducted as part of the discovery process in this proceeding.

Admissibility is no longer the test to be applied in determining a motion for discovery. Pretrial disclosure of testimony or documents of questionable admissibility may be permitted if they may lead to the disclosure of admissible proof. The ultimate issue of admissibility should be left to the trial court to decide in the context of the trial (*Wiseman v American Motors Sales Corp.*, 103 AD2d 230 [2d Dept 1984]).

Disclosure in New York civil actions is guided by the principle of "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). The words "material and necessary" are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.,* 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Tower Ins. Co. of N.Y. v Murello,* 68 AD3d 977 [2d Dept 2009]). The Court of Appeals' interpretation of "material and necessary" in *Allen* has been understood "to mean nothing more or less than 'relevant'" (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:5).

Since the DNA test sought by the respondent may lead to information material and necessary in the defense of this proceeding, the respondent's motion is hereby granted. Upon renewal, this court grants the respondent Deech's motion and directs that the petitioner, Veronica Falzon, and Joseph Abramaitis, Jr. submit to a Sibling Full DNA Test at an established laboratory and provide a report of same to the attorneys for respondent Deech.

With regard to the petitioner's cross motion, which she denominates as one for renewal and reargument, it is really in the nature of a motion to reargue. A motion for leave to reargue is governed by CPLR 2221. A motion to reargue is not based upon any new facts, but seeks to convince the court that it overlooked or misapprehended the facts or the law on the prior motion (CPLR 2221 [d]). It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision (*Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey*, 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co.,* 99 AD2d 971 [1st Dept 1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]).

On her cross motion to reargue, the petitioner argues that the court should strike from its

June 29, 2011 decision the language stating that it is undisputed that Joseph Abramaitis, Jr. is a child of the decedent. This new argument by the petitioner is more than just a little disingenuous since the petition in this proceeding, which was verified by the petitioner herself, states, without qualification, that Joseph Abramaitis, Jr. was a child of the decedent and his first wife, Helen Abramaitis. This fact is again recited in the affirmation of the petitioner's attorney in opposition to the respondent's order to show cause to compel the petitioner to submit to the DNA test. The petitioner's attempt to revise this court's previous decision, in light of her own and her counsel's prior unequivocal admissions as to the parentage of Joseph Abramaitis, Jr. is unavailing and therefore, her cross motion is denied.

This constitutes the decision and order of this court.

Dated: September 12, 2011

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