Matter of Hassine
2022 NY Slip Op 34244(U)
December 14, 2022
Surrogate's Court, New York County
Docket Number: File No. 2009-3748/C
Judge: Nora S. Anderson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

New York County Surrogate's Court
DATA ENTRY
Date: December 14th 2022

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

---X

In the Matter of the Accounting of Samuel Hassine as Executor of the Estate of

File No. 2009-3748/C

DAVID HASSINE,

Deceased.

---X

In the Matter of the Application of Steven Hassine and Jaclyn Hassine, Individually and as the Sole Residuary Beneficiaries and First Substitute Executors of the Estate of

DAVID HASSINE,

File No. 2009-3748/D/E

Deceased,

For a Decree Revoking Letters Testamentary Issued to Samuel Hassine under the Last Will and Testament of David Hassine, Deceased, and Appointing Steven Hassine and Jaclyn Hassine as Successor Executors.

---X

A N D E R S O N, S .

In this consolidated proceeding consisting of a contested executor's accounting and removal proceeding in the estate of David Hassine, the court held an 11-day bench trial to determine whether the executor, decedent's brother Samuel Hassine (1) failed to account for funds allegedly owned by decedent but held in foreign bank accounts in the names of others; (2) should be surcharged for purchasing an estate asset in his individual capacity; and (3) should be removed for misconduct and replaced by the nominated successor executors, Steven and Jaclyn Hassine (decedent's two children).

Background

Decedent died on August 29, 2009, at age 53, survived by Steven and Jaclyn, the sole beneficiaries under his probated will. Letters testamentary issued to Samuel, the nominated executor, on October 14, 2009.

In 2013, Samuel commenced the instant proceeding to settle his amended account (the "Account"), which covers the period from decedent's death on August 29, 2009 to January 2, 2013. At about the same time, Steven and Jaclyn brought a removal proceeding, alleging that Samuel had engaged in improper conduct and was unfit to serve as a fiduciary (*see* SCPA 711). Steven and Jaclyn filed objections to the Account, and the court consolidated the two proceedings (*Matter of Hassine*, NYLJ, Apr. 3, 2014, at 25, col 4 [Sur Ct, NY County 2014]). After the court denied cross-motions for summary judgment (*Matter of Hassine*, NYLJ, Dec. 13, 2018, at 26, col 1 [Sur Ct, NY County 2018]), Steven and Jaclyn filed a Note of Issue.

As the trial date approached, the parties filed various pre-trial documents, including a joint statement of issues, a stipulation of undisputed facts, and numerous motions in limine. The latter were decided in a separate decision (*Matter of Hassine*, NYLJ, Dec. 2, 2022, at 7, col 3 [Sur Ct, NY County 2022]). About one week before the scheduled trial date, counsel for Steven and Jaclyn sought leave to withdraw and a 60-day

adjournment to allow for substitution of counsel. The court granted both requests, set a final date for trial, and ruled that no further adjournments would be granted (*see Matter of Hassine*, NYLJ, Nov. 25, 2019, at 29, col 2 [Sur Ct, NY County 2019]).

Nonetheless, on the eve of trial, Steven and Jaclyn, now represented by their current counsel, moved to adjourn the trial for an additional 90 days to allow them to re-open discovery. They also sought to vacate the prior joint statement of issues and the stipulation of undisputed facts. The court denied both requests (*Matter of Hassine*, NYLJ, Mar. 10, 2020, at 22, col 3 [Sur Ct, NY County 2020]), and the trial commenced as scheduled.

Objections to the Executor's Account

Decedent's Ownership of Foreign Bank Accounts

The first issue before the court is whether Samuel omitted from the Account decedent's purported ownership interest in what Samuel describes as the "family pot" of funds. There is no dispute that Fred Hassine, decedent's post-deceased father, had for decades managed the funds (the "Swiss Assets") which were held in Swiss bank accounts ("the Swiss Accounts"). Nor is it disputed that Swiss Assets were distributed to or used for the benefit of various members of the Hassine family, including Samuel, decedent, and Liliane Hassine (the sister of Samuel and decedent). It is also undisputed that the Swiss Accounts were not disclosed to taxing authorities until 2007, when various members

of the Hassine family, including Fred, Samuel, decedent, and Liliane, participated in an Internal Revenue Service ("IRS") Offshore Voluntary Disclosure Program ("OVDP"), an amnesty program for United States citizens who failed to declare income or earned interest from foreign bank accounts.

The bulk of Steven and Jaclyn's objections relate to the Swiss Assets. They claim that the Account does not reflect decedent's 30 percent ownership of the Swiss Assets, which they estimate at $6.9 million as of his date of death. Samuel contends that decedent did not own any portion of the Swiss Assets and that the Account is thus accurate and complete.

The burdens of proof in a contested accounting are clear. The party submitting the account has the burden of proving that he or she has fully accounted for all estate assets (*see Matter of Schnare*, 191 AD2d 859 [3d Dept 1993]). The accounting party makes out a prima facie case by submitting the account and supporting affidavit to the court (*see Matter of Rudin*, 34 AD3d 371 [1st Dept 2006]). Objectants then bear the affirmative burden of coming forward with evidence to establish that the account is neither accurate nor complete (*Matter of Schnare*, 191 AD2d 859). If that burden is met, the accounting party must then prove by a fair preponderance of the evidence that the account is accurate and complete (*Matter of Schnare,* 191 AD2d 859).

Here, Samuel established, prima facie, the accuracy and completeness of the Account (*Rudin*, 34 AD3d 371). In addition, Samuel testified on his direct case as to how the Swiss Assets were managed and distributed to Hassine family members. The court found Samuel's testimony to be consistent and credible. Following are the relevant facts.

In the 1970's, Samuel and Fred went into business together and founded a number of companies using variations of the moniker "Chelco." In 1976, they founded Chelco Sound Inc. ("Chelco Sound") which, although not profitable, functioned as an importer and reseller of consumer electronics until the early 1980's, when it ceased operations. In 1978, the two founded another company, Chelco Realty Corp. ("Chelco Realty"), which purchased property on which they would build a warehouse to house the inventory and offices of the family businesses. Finally, in the 1980's, Fred and Samuel founded Chelco Travel Agency Inc. ("Chelco Travel"), which was never operational.

Initially, Fred owned 52 percent of Chelco Sound, Chelco Realty, and Chelco Travel (the "Chelco Companies") and Samuel owned the remaining 48 percent of the companies. This ownership structure remained in place until 1994 when Fred reduced his 52 percent interest by giving 48 percent of the Chelco Companies to decedent. Thus, from 1994, decedent owned 48 percent of the Chelco Companies, Samuel owned 48 percent, and Fred owned four

percent.

In 1978, Fred and Samuel had founded another company in Hong Kong, called Chase Electronic Company Limited ("Chase Electronics"). The record does not identify the specific initial shareholders of Chase Electronics. Samuel testified that he believed that he and Fred each owned 50 percent of Chase Electronics. However, the Memorandum and Articles of Association of Chase Electronics, dated November 24, 1978, suggest that the actual shareholder was Chelco Sound, of which Fred owned 52 percent and Samuel owned 48 percent at the time. Regardless, the ownership of Chase Electronics did not change before the company was liquidated in 1984, *i.e.*, ten years before decedent became an owner of Chelco Sound. Samuel testified that during Chase Electronics' existence, decedent "had nothing to do with" the company.

Chase Electronics, acting as an electronics manufacturing broker, entered into what proved to be a lucrative deal for the manufacture of Atari products in the early 1980's (the "Atari Deal"). According to Samuel, as a result of the Atari Deal, Chase Electronics earned "millions of dollars," and Fred and Samuel had to decide what to do with the money. Fred explained to Samuel that there already existed a bank account in Switzerland valued at about $100,000. Fred's father (decedent's grandfather) had given the account to Fred with the understanding that Fred would

preserve the principal and distribute the income to Fred's children in the following manner: 50 percent to Samuel, 30 percent to decedent, and 20 percent to Liliane. Fred told Samuel that he wished to deposit the substantial profits from the Atari Deal into the Swiss Account and "continue the same tradition" that his father (decedent's grandfather) had initiated of using the money to "take care of the family." To this end, the profits from Chase Electronics were deposited into the account where the other Swiss Assets were held at the United Bank of Switzerland ("UBS"). Thereafter, no funds were transferred to the Swiss Accounts.

Fred managed the Swiss Accounts until he died in 2011. During the 1980's, Fred and Samuel were the only individuals whose names were on the Swiss Accounts. However, in 1996, the names of decedent, Liliane, and Mary Hassine (the mother of Samuel, decedent, and Liliane) were added. Also, around 1996, all of the existing UBS accounts were closed, and the Swiss Assets were transferred into three new UBS accounts in accordance with the percentage allocation that Fred's father had initiated. The account which held 50 percent of the funds named Samuel first; the account with 30 percent named decedent first; and the account with 20 percent named Liliane first, with the remaining four family members named thereafter.

The Swiss Accounts remained so titled until 2005, when Fred "removed [decedent's] name" from the Swiss Accounts and added the names of Samuel's two adult children in his place. Samuel did not testify as to the reasons Fred removed decedent's name. Steven and Jaclyn argue that their evidence suggests that this was done "behind [decedent's] back" and against his will in order to shield the Swiss Assets from the potential reach of decedent's companion with whom he was contemplating marriage at the time. In any event, decedent was not thereafter named on any of the Swiss Accounts. The Swiss Assets remained in UBS until 2008, when Fred transferred them to Pictet Bank in Switzerland ("Pictet"), where they remained after decedent's death in 2009.

During his life, Fred controlled all withdrawals from the Swiss Accounts. Although Samuel conceded that he or the others named on the Swiss Accounts had the right to withdraw Swiss Assets, they never withdrew any funds. Only Fred made or directed withdrawals. Fred would then distribute portions of the Swiss Assets to his family through what Samuel described as "curtains" that allowed Fred to bring the money from Switzerland into the United States undetected. He used Chelco Sound as a "conduit" through which he transferred money to pay "salaries" to Samuel, decedent, and Liliane. These "salaries" were actually distributions of the income generated from the Swiss Accounts. Such income was generally distributed as 50 percent to Samuel, 30

percent to decedent, and 20 percent to Liliane. Fred would also transfer funds from the Swiss Accounts into his personal bank account in the United States, which he would use to pay "out-of-the-ordinary expenses, such as education for the children or cars or apartments."

These distributions did not change after 2005 when decedent was no longer named on the Swiss Accounts. As he had before 2005, decedent continued to receive 30 percent of the income. Steven and Jaclyn also benefitted indirectly, before and after 2005, because Fred withdrew money from the Swiss Accounts to give to decedent to pay for "out-of-the-ordinary expenses" such as Steven and Jaclyn's private school education and their cars and apartments.

Fred's handling of the Swiss Accounts was based on an informal understanding within the family that Fred controlled the Swiss Accounts and "took care of the whole family." Throughout decedent's lifetime, there was no written trust agreement encompassing the arrangement. At no time were Swiss Assets distributed to decedent's estate, including at the conclusion of the family's participation in the OVDP in 2011.

Members of the Hassine family first applied to participate in the OVDP in 2007, when Fred was diagnosed with cancer. The family was prompted to seek such amnesty out of concern that, if Fred, who had always controlled how the Swiss Assets entered the

United States, were to die as a result of his illness, it would not be possible for the remaining family members to continue to transfer Swiss Assets into the United States. Samuel coordinated the OVDP process and hired attorneys and accountants. The case was handled by the IRS as a civil, not criminal, matter.

As part of the OVDP, certain family members, including decedent, filed with the IRS Reports of Foreign Bank and Financial Accounts ("FBARs"). In addition, Samuel, decedent, and Liliane amended their income tax returns for 2003-2007, and filed original tax returns for 2008, reflecting additional income resulting from their participation in the OVDP. Fred, however, did not file amended tax returns. The family ultimately decided that, given Fred's poor health, all of the undeclared income from the Swiss Accounts would be reported by Samuel, decedent, and Liliane on their tax returns.

In 2011, the IRS issued Form 906 closing agreements to Samuel, decedent, and Liliane. The agreements imposed an "accuracy" penalty on unpaid taxes on previously unreported income. Samuel's closing agreement also imposed an additional $8 million "miscellaneous" penalty on the entire value of the Swiss Assets. Samuel used the Swiss Assets to pay the IRS penalties, and the OVDP process was concluded.

Samuel's testimony, as described above, including his assertion that decedent did not own any portion of the Swiss

Assets, was subject to extensive cross-examination. However, Samuel's testimony regarding the Swiss Assets remained consistent, compelling, and supportive of his contention that decedent had no ownership interest in the Swiss Assets. Based on the foregoing, Samuel has made his prima facie case that the Account is complete and accurate.

The burden then shifted to Steven and Jaclyn to come forward with evidence that decedent owned at least some portion of the Swiss Assets. They submitted evidence that they contended established the following (1) decedent had an interest in the profits of Chase Electronics, which flowed into the Swiss Accounts; (2) decedent held legal title to a portion of the Swiss Assets but through a nominee; and (3) decedent's ownership of the Swiss Assets was demonstrated by two emails sent in the weeks prior to decedent's death, one from Samuel to his accountant and the other from Samuel's attorney to Samuel. However, although Steven and Jaclyn presented seven witnesses, including an expert accountant, and numerous tax and other documents, none of the evidence established that decedent owned any of the Swiss Assets at the time of his death.

Steven and Jaclyn maintain that decedent had an ownership interest in the profits of Chase Electronics because, according to them, at the time of the Atari Deal in the early 1980's, Chase Electronics was owned by Chelco Sound, and Chelco Sound was

partially owned by decedent. The record is not clear as to whether Chelco Sound, as opposed to Fred and Samuel individually, owned Chase Electronics at the time of the Atari Deal. Further, Steven and Jaclyn have not established that decedent was an owner of Chelco Sound prior to 1994, *i.e.*, 10 years after Chase Electronics was liquidated.

Although Steven and Jaclyn produced six witnesses, including themselves, none of the testimony was based on personal knowledge of the ownership of Chelco Sound or Chase Electronics in the 1970's and 1980's. Rather, the witnesses testified only that there was a noticeable increase in decedent's wealth after the Atari Deal and/or the fact that decedent worked as a manager of the Chelco Companies from their inception in the 1970's. However, this testimony is not probative of whether decedent was an owner of Chelco Sound or Chase Electronics during the relevant period. Moreover, the only documentary evidence of decedent's ownership in Chelco Sound is a stock certificate dated 1994, which is entirely consistent with Samuel's testimony that the first time Fred transferred any part of his interest in the Chelco Companies was 1994, *i.e.*, 10 years after the Atari Deal and the liquidation of Chase Electronics. Under these circumstances, the evidence that Steven and Jaclyn offered was insufficient to establish decedent's ownership of Chelco Sound or Chase Electronics at the time of the Atari Deal, and consequently, fails to support their

contention that decedent had any ownership interest in the profits generated from that deal.

As to the evidence Steven and Jaclyn offered to support their argument that at the time decedent died, he held title to the Swiss Assets through an unidentified nominee, the testimony of their expert accountant, who had no personal knowledge of the Swiss Accounts or any involvement in the Hassine's OVDP process, was unpersuasive.

The expert testified that certain documents pertaining to the OVDP, namely decedent's 2008 FBAR, his 2008 income tax return, and the Form 906 closing agreement that the IRS issued to decedent, show that decedent was an owner of the Swiss Assets in nominee name at his death. However, the court has previously addressed the lack of reliability of the tax documents in this case. In denying the parties' cross-motions for summary judgment, the court observed that "the truth of the statements [in the tax documents] regarding the nature of decedent's ownership interest cannot necessarily be assured where nothing in the record indicates that the nature of decedent's interest was relevant" to the OVDP process (*Matter of Hassine*, NYLJ, Dec. 13, 2018, at 26, col 1). The expert's testimony provided no further indicia that the statements in the tax documents upon which he based his opinion are a reliable basis on which to determine ownership. His testimony failed to show, in the context of the OVDP settlement

process, whether ownership of Swiss Assets was even relevant. Nor did the expert discredit Samuel's testimony that the income was reported by Samuel, decedent, and Liliane because of Fred's deteriorating health and not because the three siblings were the owners of the Swiss Accounts.

Moreover, the expert's testimony was speculative and ultimately not credible. He provided no actual proof that decedent was an owner of the Swiss Accounts in nominee name. For example, his "interpretation" of the language in decedent's IRS closing agreement is not a basis for finding that decedent was an owner of Swiss Assets in nominee name. Also unconvincing was the expert's speculative testimony that, because the term "beneficial owner" is, in general, "associated with" ownership in nominee name, the use of the that term in decedent's IRS closing agreement constituted some kind of acknowledgment by the IRS that decedent was an owner of Swiss Accounts in nominee name. In the end, the expert's conclusion that decedent owned the Swiss Assets in nominee name amounted to little more than speculation in the absence of other proof of ownership.

Finally, Steven and Jaclyn's assertion that two emails sent in the weeks prior to decedent's death demonstrate decedent's ownership of the Swiss Assets is simply wrong. In one email, Samuel writes to one of his accountants in the OVDP process that "in 2008 the total income is approximately ±2% on ±36 million . .

. please adjust the figures to reflect that, and also only in the Sam, [decedent], Liliane (50%, 30%, 20%) format." In the other email, one of Samuel's attorneys in the OVDP process writes to him requesting, among other things, "a balance sheet (even if it is a rough draft) indicating [decedent's] assets both on and offshore." Neither email supports a finding that decedent had an ownership interest in the Swiss Assets. Rather, the language in the first email is actually consistent with Samuel's position that decedent received 30 percent of the income from the Swiss Accounts, and neither email even references, let alone establishes, that decedent owned any of the Swiss Assets.

The court is, however, mindful of certain evidence which might support Steven and Jaclyn's objections regarding ownership of the Swiss Assets. There was testimony that decedent, as well as Steven and Jaclyn, may have believed that decedent was an owner of 30 percent of the Swiss Assets, and that Samuel gave "assurances" to Steven and Jaclyn, and perhaps even to decedent, that on the conclusion of the OVDP process, and after decedent's death, Steven and Jaclyn would receive outright 30 percent of the Swiss Assets. There is also a Quicken Register Report prepared by decedent in which he listed among his assets, $10 million "Swiss Pict," indicating he may have believed that he owned 30 percent of the Swiss Assets held at Pictet.

However, their beliefs as to decedent's purported ownership of 30 percent of the Swiss Assets are not dispositive, particularly when the record is replete with unrefuted evidence demonstrating decedent's lack of ownership. Decedent was not named on any of the Swiss Accounts at his death, and he had no interest in any of the funds deposited into the Swiss Accounts. Further, he exercised no control over the Swiss Assets or the Swiss Accounts throughout his lifetime. In this connection, Liliane provided important testimony which (contrary to Steven and Jaclyn's assertions) was against her interest. She corroborated Samuel's testimony that the Swiss Assets had always been held as a "family pot" controlled by Fred and that she too was never an owner of Swiss Assets. The court credits the testimony of Samuel and Liliane over the testimony of Steven, in particular, who the court found to be evasive and non-responsive on cross-examination.

Based on the foregoing, the court finds that Steven and Jaclyn have failed to meet their burden to come forward with evidence establishing that decedent owned any of the Swiss Assets at his death. Accordingly, the court finds that the Account is accurate and complete, and no surcharge is warranted. Therefore, Steven and Jaclyn's objections related to the Swiss Assets are dismissed.

The Asset Purchase

The second issue for determination is whether Samuel should be surcharged for purchasing from the estate decedent's 48 percent share of the Chelco Companies. The court previously determined that the sale, which was done without authority or court approval, was improper (*Matter of Hassine*, NYLJ, Dec. 11, 2018, at 26, col 1).

Samuel bears the burden to present evidence that the sale price of $504,000 was fair (*see Matter of Kilmer*, 187 Misc 121 [Sur Ct, Broome County 1946]). If he does not meet his burden, he will be surcharged the difference between the fair sale price and the actual price he paid (*see Kilmer*, 187 Misc 121).

It is undisputed that in purchasing decedent's 48 percent interest in the Chelco Companies, Samuel determined the sale price of $504,000 by calculating 48 percent of $1.4 million ($672,000), the independently appraised value of the warehouse owned by Chelco Realty, and discounting that amount by 25 percent ($168,000) on the advice of his long-time accountant, who also testified.

Samuel testified that no assets of the Chelco Companies other than the warehouse were taken into account in determining the sale price because, to the extent there were any additional assets, they were of di minimus value. According to Samuel, Chelco Sound's only asset was scrap inventory that was 30 years

old and worthless. As for Chelco Realty, it held no assets other than the warehouse, and Chelco Travel held no assets at all. To the extent the Chelco Companies had operating expenses for employees, and paid "salaries" to Samuel, decedent, and Liliane, such expenses were not paid out of Chelco Sound's revenue, but, rather, as previously noted, were paid from the Swiss Accounts. Based on the credible testimony, the court finds that Samuel met his burden to establish that the sale price was fair based on the independent appraisal of the warehouse and the advice of his accountant.

Steven and Jaclyn provided no evidence that the valuation was flawed or that the sale price should have been higher. They did not challenge the accuracy of the independent appraisal or offer proof that the discount taken was inappropriate under the circumstances (*see e.g. Levine v Seven Pines Assn. L.P.*, 156 AD3d 524 [1st Dept 2017] [applying 25 percent discount for lack of marketability to minority partner's interest in a partnership which held a building as its sole asset]). They also offered no evidence that there was additional revenue of the Chelco Companies that should have been considered or that would have necessitated a higher sale price. Nor did they provide an alternative valuation or even suggest what the sale price should have been.

Based on the foregoing, the court finds that the sale of the Chelco Companies was fair. Accordingly, there is no basis upon which to surcharge Samuel. Therefore, Steven and Jaclyn's objections to Samuel's purchase of decedent's interest in the Chelco Companies are dismissed.

Other Accounting Objections

The court considers as withdrawn any of Steven and Jaclyn's other objections to the Account because they were not included in the parties' pre-trial joint statement of issues or were improperly raised for the first time at trial.

Removal

The third and final issue for the court's determination is whether Samuel should be removed as executor. Steven and Jaclyn allege that Samuel (1) wasted estate assets, by allowing the value of the Swiss Assets to fall from $36 million at decedent's death to $8 million; (2) engaged in self-dealing with respect to the sale of the Chelco Companies; and (3) failed to timely distribute estate assets (SCPA 711[2], [3], [8]).

Steven and Jaclyn bear the burden of establishing grounds for removal (*see e.g. Matter of Krom*, 86 AD2d 689 [3d Dept 1982]). However, whether to remove an estate fiduciary is a matter within the discretion of the court (*see e.g. Stolz v New York Cent. R.R. Co.*, 7 NY2d 269 [1959]). As the Court of Appeals stated in *Matter of Duke* (87 NY2d 465, 473 [1996]), a fiduciary

chosen by the testator may be removed "only upon a clear showing of serious misconduct that endangers the safety of the estate; it is not every breach of fiduciary duty that will warrant removal."

Since the court has determined that the Swiss Assets are not assets of decedent's estate, any alleged waste of the Swiss Assets cannot be a basis upon which to remove Samuel.

With respect to the allegations of self-dealing in connection with the sale of the Chelco Companies, this court previously found that the sale itself was insufficient to warrant removal in the absence of proof that the estate had been harmed (*see Matter of Hassine*, NYLJ, Dec. 13, 2018, at 26, col 1). The court having now found that the sale price for the Chelco Companies was fair and therefore no surcharge is warranted, Samuel's purchase of the Chelco Companies also cannot be a basis for removal.

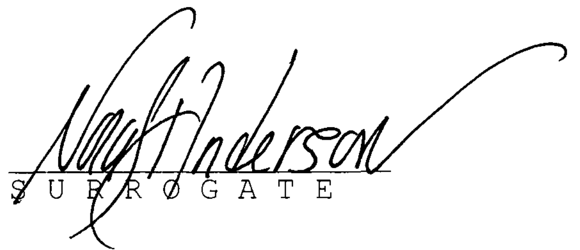
Finally, Steven and Jaclyn's unsupported assertion that Samuel should be removed for failing to distribute more than $50,000 to them is insufficient to warrant removal in the absence of proof that there were funds that should have been distributed to them. Here, the Account does not provide a basis for the court to make that determination. To the extent Samuel kept a small reserve to pay administration expenses given litigation over his Account, the court finds such reserve appropriate.

Based on the foregoing, Steven and Jaclyn's objections to the Account and their removal petition are hereby dismissed.

In view of the court's determination of the issues, the oral applications made at trial for judgment as a matter of law (CPLR 4401), on which the court previously reserved decision, are denied as moot (*see D.A. v B.E.*, 6 Misc 3d 1032[A] [Sup Ct, Queens County 2005]; *Steck v Sushkiw*, NYLJ, Feb. 15, 2018, at 26 [Civ Ct, NY County 2018]).

This decision constitutes the order of the court.

Dated: December 14, 2022



S U R R O G A T E