To be Argued by:
ROBERT ABRAMS

New York County, Surrogate's Court File No. 1982-5053/D

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of ANN C. MCCORMACK
by her Special Guardian and Attorney-in-Fact CAROL BAMONTE,
concerning the Estate of KATHLEEN DURST,

Absentee and Alleged Deceased,

and for a decree judicially declaring that the above-named absentee is deceased, pursuant to New York Estates, Powers and Trusts Law Section 2-1.7, together with other and further relief.

CAROL M. BAMONTE, as Executor of the Estate of ANN C. MCCORMACK,

Petitioner-Appellant,

– against –

ROBERT DURST,

Non-Party Respondent.

BRIEF FOR PETITIONER-APPELLANT

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QUESTIONS PRESENTED

I. Should the Surrogate's Court have determined the Absentee and Alleged Deceased's date of death to be January 31, 1987, when the clear and convincing evidence presented established that January 31, 1982 is the most probable date of death?

The Surrogate's Court answered in the affirmative.

II. Should the Surrogate's Court have determined the Absentee and Alleged Deceased's date of death to be January 31, 1987, when the evidence presented established by a totality of the circumstances that the Absentee and Alleged Deceased was exposed to a specific peril of death, to wit: Respondent-Respondent Robert Durst, on January 31, 1982?

The Surrogate's Court answered in the affirmative.

III. Should the Surrogate's Court issue a Decision and Order that fails to include any rational basis, findings of fact or findings of law?

The Surrogate's Court issued such a Decision and Order.

IV. Should the Surrogate's Court decline a Petitioner's Order to Show Cause, wherein Petitioner made allegations of the appearance of impropriety and where all parties having appeared in the matter sought an opportunity to submit responsive papers?

The Surrogate's Court declined such an Order to Show Cause.

NATURE OF THE CASE

The following undisputed facts required Surrogate Nora S. Anderson ("Surrogate Anderson") to find not only that the absentee and alleged deceased, Kathleen McCormack Durst ("Kathie"), was a deceased person, but that her date of death was January 31, 1982:

1. Kathie was last seen on January 31, 1982 (R. 72, 75, 100, 102-103, 896);

2. The last person to see her alive was her husband, Robert Durst ("Durst"), who admitted that he had a physical confrontation that evening with Kathie in their home located in South Salem, New York (R. 40);

3. Durst also admitted to routinely physically abusing Kathie, including, but not limited to, an incident where Kathie escaped to their neighbor's terrace to seek refuge from Durst's violent assault, interfering with the investigation into Kathie's disappearance and committing numerous felonious acts (R. 39-40, 66-68, 73, 106, 117-118, 130, 371-379, 380-381, 453-464, 465-468, 495-496, 505-516, 517-521, 894);

4. Durst and Kathie's relationship was riddled with incidents of adultery, including, but not limited to, Durst's prolonged affair with Prudence Farrow, who was intent on dismantling Kathie and Durst's marriage (R. 132-133, 910-916);

5. Several weeks prior to her disappearance in January of 1982, Durst physically abused Kathie so severely that Kathie required hospitalization (R. 130, 132);

6. Durst intentionally lied to the police regarding his and Kathie's whereabouts on the evening of January 31, 1982 to specifically obstruct the police from locating Kathie and investigating Durst's involvement in her disappearance (R. 66-67, 895-897);

7. That, according to a sworn Affidavit Durst submitted to the Westchester County Supreme Court in support of his Verified Complaint seeking an *ex parte* divorce from Kathie, neither he nor Kathie's friends and family ever saw Kathie again after January 31, 1982 (R. 100, 102-103); and

8. Durst is a violent individual, with an extensive criminal record, who admitted to killing at least one other person and is currently in custody, awaiting trial for killing his best friend and confidante, Susan Berman ("Berman"), because, according to the Probable Cause Arrest Warrant issued by the Los Angeles County District Attorney's Office ("LADA"), Berman had evidence that inculpated Durst in Kathie's disappearance and death and was going to release same to law enforcement officials, The People of the State of California v. Robert Durst, Case No. SA089983 (the "California Proceeding") (R. 371-379, 517-521).

Moreover, the undisputed facts presented below also demonstrate that there was absolutely no explanation for Kathie's disappearance other than that she died on the evening of January 31, 1982:

1. Even Durst himself acknowledges that Kathie was close with her friends and family, especially her mother and her siblings and was in constant contact with the people she loved. (R. 72, 75, 100) There was no evidence presented as to why Kathie would inexplicably cut off communication with her loved ones;

2. At the time of her disappearance, Kathie was in her final semester of medical school. She was about to realize her dream of becoming a pediatrician (R. 76, 327). There was no evidence presented as to why Kathie would inexplicably drop out of medical school and voluntarily disappear; and

3. Prior to Kathie's disappearance, she had made plans to meet with her close friend, Gilberte Najamy within hours after her disappearance.

Not even a scintilla of evidence was presented to Surrogate Anderson by any party (i.e., Durst or the Public Administrator) or the Court-appointed Guardian ad Litem, Charles Capetanakis ("Capetanakis" and/or "GAL"), to explain or otherwise present alternatives as to why Kathie would have abruptly severed all communication with the people she loved, especially her mother and siblings and,

further, why she would terminate her medical school studies in her last semester, other than the fact that she was killed on January 31, 1982 by Durst. (R. 592-609).

Surrogate Anderson, however, without any explanation, determined Kathie's date of death to have occurred on the statutory default date[1] of January 31, 1987. (R. 8). Given that not even the rankest of speculation was presented to the Surrogate's Court as an alternative explanation that Kathie did not die on the date of her disappearance, January 31, 1982, Surrogate Anderson's failure to articulate and support her inconceivable decision to select the default date of death is impossible to decipher.

Even more troubling, Surrogate Anderson's Decision and Order, dated March 24, 2017 ("Decision"), which is less than one page and most of which includes a not-so-thinly-veiled threat against Petitioner-Appellant for raising serious concerns regarding the thirty-five year history of this case, ignores instructive and precedential cases such as Estate of Klein, N.Y.L.J., January 22, 2015, at 33, col. 1 (Surr. Ct. Suffolk Cnty. 2015) and this Court's In re Philip, 50 A.D.3d 81 (1st Dep't 2008). (R. 8). Had Surrogate Anderson followed these cases and the applicable statutory mandates, she most definitely would have concluded that Kathie died on January 31, 1982.

[1] At the time of Kathie's disappearance, pursuant to EPTL § 2-1.7, the statutory default date was five years rather than the current three-year period.

In light of such failures of Surrogate Anderson, this Court must either exercise its authority to: (i) reverse Surrogate Anderson's Decision and declare Kathie deceased as of January 31, 1982; or, in the alternative, (ii) reverse Surrogate Anderson's Decision, remand the proceeding to the New York County Surrogate's Court, appoint a new Guardian ad Litem for Kathie and assign the matter to a different Surrogate[2] to determine Kathie's date of death; and (iii) grant such other and further relief as this Court may deem just, proper and equitable.

[2] The New York County Surrogate's Court is presided and administered by two Surrogates, Surrogate Nora S. Anderson and Surrogate Rita Mella.

STATEMENT OF THE CASE

BACKGROUND

Durst and Kathie were married on April 12, 1973. (R. 102). Throughout their relationship, Durst, by his own admissions, physically, emotionally and financially abused Kathie. (R. 39-40). Such abuse was so pervasive that Kathie confided to her family and friends on multiple occasions that she feared Durst would hurt and possibly kill her. (R. 117-118, 130). Within three days before her disappearance, a fearful Kathie told two friends, one on the evening of Friday, January 29, 1982 and the other within hours of her disappearance, that if anything happened to her, Durst is responsible. (R. 117-118).

Durst admitted that he was the last person to see Kathie alive. (R. 896). Durst also admitted to physically assaulting Kathie immediately prior to her disappearance. (R. 40). Durst waited five days before reporting Kathie's disappearance to the police and, subsequently, to Kathie's family and friends. (R. 898-901).

In the missing person report to the police, Durst intentionally lied about his relationship with Kathie and about his and Kathie's whereabouts on the night she disappeared. (R. 66-67, 868, 894-895). Durst also lied to the police about his whereabouts subsequent to Kathie's disappearance, especially regarding the period between January 31, 1982 – the date of Kathie's disappearance – and February 5,

1982, when Durst finally filed a missing person report with the police. Moreover, Durst subsequently refused to cooperate with the police investigation because he feared prosecution.

Within months, the New York City Police Department terminated the investigation into Kathie's disappearance. (R. 314). Approximately fifteen years later, however, the New York State Police in cooperation with the Westchester County Office of the District Attorney, in response to a tip, initiated their own investigation. (R. 326-332).

According to the LADA, Durst feared that the Westchester County District Attorney would successfully convict him for the disappearance and murder of Kathie. (R. 371-379, 517-521). The LADA also believes that Durst killed his best friend, Berman, on or about December 23, 2000, because Durst believed Berman was about to provide evidence to the Westchester County Office of the District Attorney that Durst killed Kathie. (R. 371-379, 517-521). Durst is currently in a Los Angeles prison awaiting trial for the special circumstances murder of Berman. (R. 371-379, 517-521).

Shortly after Berman was murdered, at the end of December 2000, Durst moved between, *inter alia*: New York; Dallas; Houston; Galveston, Texas; New Orleans; Florida; and California. (R. 335-336). Durst, however, spent a significant

amount of his time in Galveston, Texas, where he sometimes disguised himself as a mute woman and used multiple aliases. (R. 335-336).

On September 28, 2002, Durst killed his neighbor, Morris Black ("Black"), in Galveston, Texas. After killing him, Durst dismembered Black's body and dumped his remains into the Galveston Bay, all of which was recovered except his severed head. Durst was ultimately tried for murder and acquitted on self-defense grounds. (R. 337, 449-452). Durst was, however, found guilty of bail jumping and tampering with evidence and was sentenced to five years in prison. (R. 337, 455-468).

Subsequent to his 2003 conviction, Durst remained silent regarding Kathie's disappearance and murder until he participated in an HBO documentary titled *The Jinx: The Life and Deaths of Robert Durst* ("*The Jinx*"), which premiered on February 8, 2015. *The Jinx* presented overwhelming evidence that Durst killed Kathie, Black and Berman. After being presented with such evidence, Durst was recorded on a hot microphone uttering the following words "I killed them all." (R. 67).

Moreover, after Durst was arrested on March 14, 2015, one day prior to the airing of the final episode of *The Jinx*, for the murder of Berman, he voluntarily participated in a recorded interview with Los Angeles County Deputy Assistant District Attorney, John Lewin ("Lewin"), where he made admissions that he was

involved in Kathie's disappearance and murder. (R. 867-869, 880-881, 885, 894-920, 961). Further, in a sworn deposition conducted in connection with a civil action that Durst commenced against a former private investigator, Tim Wilson,[3] Durst invoked his Fifth Amendment right against self-incrimination, when asked, *inter alia,* questions regarding his involvement in Kathie's disappearance and death. (R. 867-869, 880-881, 885, 894-920, 961).

PROCEDURAL HISTORY

On November 11, 1982, Kathie's mother, Ann McCormack, commenced a proceeding in the Surrogate's Court of New York County, seeking, *inter alia*, Letters of Temporary Administration for Kathie's Estate. (R. 94-98). After opposition was submitted by Respondent-Respondent Durst, Surrogate Marie Lambert, in her March 20, 1983 Decision and Order, ultimately declared Kathie an Absentee and granted Letters of Temporary Administration to the Public Administrator of New York County. (R. 82-85). In rendering her decision, Surrogate Lambert relied on Affidavits submitted by Durst and his former lawyer, who months earlier served as a Surrogate of the very same Court, that Durst subsequently admitted was replete with lies, misrepresentations and omissions. (R.123-128, 139-140, 143-152, 153-154).

[3] Robert Durst v. Tim Wilson, No. 2015-02521 (Dist. Ct. Harris Cnty. 2015).

Prior to the underlying proceeding, the Public Administrator of New York County in connection with their 1998 Voluntary Accounting brought a Petition on May 15, 1998 to have Kathie declared deceased pursuant to EPTL § 2-1.7. The Public Administrator offered a proposed stipulation to declare Kathie a deceased person. Respondent-Respondent Durst refused to sign the stipulation. (R. 320-322, 323-324). On November 23, 2001, Surrogate Renee R. Roth, settled the Accounting of the Public Administrator but refused to address the declaration of death requested in the Voluntary Accounting. (R. 86-89).

Petitioner-Appellant filed her Verified Petition, and accompanying documents on March 30, 2016 ("Petition"), seeking, *inter alia,* an order pursuant to EPTL § 2-1.7 declaring Kathie deceased as of January 31, 1982. (R. 28-551). The Petition was accompanied by numerous (66) exhibits, containing overwhelming evidence supporting Petitioner-Appellant's position, that Kathie should be declared deceased as of January 31, 1982, rather than the statutory default date. (R. 77-532).

On April 29, 2016, Surrogate Anderson signed Petitioner-Appellant's Order for Publication of the Citation, issued on May 3, 2016, with a return date of July 13, 2016.[4]

[4] Pursuant to the order of the Surrogate's Court, the Citation was thereafter published in the New York Law Journal on May 24, 2016 and May 31, 2016.

Thereafter, counsel for Respondents-Respondents, Durst and the Public Administrator of New York County ("Public Administrator"), filed Notices of Appearance.[5]

On July 7, 2016, Petitioner-Appellant and Respondents-Respondents stipulated that there were to be no appearances on the Citation return date, July 13, 2016, and that the proceeding was to be decided on submission with no oral argument. (R. 551.1-551.2). Respondent-Respondent Durst interposed opposition papers to Petitioner-Appellant's Petition, dated July 11, 2016.[6] (R. 552-609). Notably, the Public Administrator did not oppose the relief sought in the Petition. Petitioner-Appellant thereafter interposed her Reply on July 13, 2016. (R. 610-630).

On September 14, 2016 – more than two months after the Petition was deemed fully submitted – Surrogate Anderson appointed Capetanakis as GAL for Kathie. (R. 813). On October 4, 2016, Capetanakis filed his Appearance and

[5] The Court should take judicial notice that Durst signed an Authorization for his attorneys to act, but yet failed to submit an Affidavit in the declaration of death proceeding. At no time during the pendency of the underlying proceeding did Durst personally contest the facts as presented therein, nor did any witness challenge said facts for and/or on behalf of Durst.

[6] Counsel for Durst informed counsel for the Petitioner-Appellant that Durst's Response in Opposition could not be filed on July 11, 2016 as it was rejected by the Surrogate's Court because it was not verified by Durst. While counsel for Durst stated it intended to obtain a Verification from Durst and file a Verified Response, as of the submission of Petitioner-Appellant's Reply and to date, counsel for Petitioner-Appellant has not been served with a Verification or Verified Response.

Consent of Guardian ad Litem, falsely indicating that he had no conflict with the parties in the proceeding. (R. 810-812).

On January 19, 2017 Petitioner-Appellant forwarded Capetanakis copies of a then-recently released interview of Durst, conducted by Lewin. (R. 664-667, 857-966). At the time of the interview, Durst was in jail following his arrest by the FBI in New Orleans during his attempted flight from the United States to avoid being prosecuted for the murders Durst committed (i.e., Berman and Kathie). This interview further inculpated Durst in Kathie's death, as he again made statements against his own interest regarding his involvement in Kathie's disappearance and murder. (R. 664-667).

On February 2, 2017, concerned that the GAL had yet to conduct an independent investigation, although he was appointed nearly five months earlier, Petitioner-Appellant, on notice to all parties, forwarded the GAL copies of the case law that was cited in the respective pleadings, as well as copies of the legislative enactment documents surrounding EPTL § 2-1.7. (R. 668-693).

Approximately six months after the GAL had been appointed, counsel for Petitioner-Appellant attempted to contact Capetanakis numerous times to no avail for an update regarding his investigation. On March 7, 2017, counsel further informed Capetanakis that if Petitioner-Appellant did not receive an update by March 8, 2017, he would be required to inform the Surrogate's Court of his lack of

communication and failure to conduct a meaningful and timely investigation. (R. 978).

On March 8, 2017, Capetanakis filed his Guardian ad Litem Report ("GAL Report" and/or "Report") with the Surrogate's Court.[7] (R. 9-27). Capetanakis' Report lacked any credible independent research and meaningful analysis and evidenced a misapplication of the applicable law. Most disturbing, the GAL Report confirmed that Capetanakis failed to conduct any factual investigation and applied incorrect legal standards applicable when declaring an individual deceased. (R. 9-27). Upon the discovery of such errors and inaccuracies, Petitioner-Appellant's counsel conducted an independent investigation in which they uncovered the appearance of impropriety.

On March 10, 2017, the Petitioner-Appellant informed the Surrogate's Court, by letter, of the numerous inaccuracies and misrepresentations within the GAL Report. (R. 694-744).

After receiving no response from the Surrogate's Court, the Petitioner-Appellant, on March 20, 2017, brought an Emergency Order to Show Cause ("Proposed OSC") seeking, *inter alia*, the removal of Capetanakis as GAL and striking his GAL Report. (R. 631-1026).

[7] Parenthetically, the GAL Report is dated, verified and notarized as of March 8, 2017, while the Court's receipt stamp on the first page is dated March 7, 2017. (R. 9-27).

On March 24, 2017, Surrogate Anderson refused to sign Petitioner-Appellant's Proposed OSC, striking out the proposed order and writing "declined" across the first page. (R. 1027-1029). On the very same day, March 24, 2017, Surrogate Anderson issued her one-page Decision and Order (the "Decision"), determining Kathie's date of death to be the statutory default date of January 31, 1987. (R. 8). The Decision not only disregards the great weight of the evidence but is both procedurally and substantively deficient, as Surrogate Anderson failed to include any rationale for her determination.

ARGUMENT

The Decision flies in the face of basic legal principles and the jurisprudence of this jurisdiction. Surrogate Anderson and her Court-appointee, Capetanakis, have created a mockery of the New York Court System, failing to properly discharge their obligations and duties. As Capetanakis' GAL Report is replete with legal and factual inaccuracies and Surrogate Anderson's Decision fails to adequately provide a basis upon which Kathie's date of death was determined, the Petitioner-Appellant respectfully requests this Honorable Court exercise its authority to: (i) reverse Surrogate Anderson's Decision and declare Kathie deceased as of January 31, 1982; or, in the alternative, (ii) reverse Surrogate Anderson's Decision, remand the proceeding to the New York County Surrogate's Court, appoint a new Guardian ad Litem for Kathie and assign the matter to a different Surrogate to determine Kathie's date of death; and (iii) grant such other and further relief as this Court may deem just, proper and equitable.

Point I

THE SURROGATE'S COURT FAILED TO REVIEW THE ENTIRE RECORD IN REACHING ITS DECISION AND ERRONEOUSLY RELIED UPON DOCUMENTS NOT IN THE COURT'S RECORD IN REACHING ITS DECISION

Surrogate Anderson failed to review all relevant portions of the Record in reaching the determination in the Decision. The Decision states that the Court read the "voluminous record and papers filed in this proceeding," but then went on to specifically state that the Court only reviewed: "1. The March 8 Report of the Guardian ad Litem; 2. The March 20, 2017 Petitioner's Memorandum of Law; 3. The March 20, 2017 Petitioner's Affirmation of Emergency; 4. The March 20, 2017 Petitioner's Affirmation in Support." (R. 8).

By its own admission, the Surrogate's Court contradicts itself and confirms that it failed to review the entire "voluminous" record in reaching its determination. (R. 8). The incomplete review of the Petition was compounded by the complete lack of any findings of fact in the Decision.

Surrogate Anderson enumerated the documents that she relied on and, as such, it must be construed that she only reviewed those enumerated documents, notwithstanding her statement to the contrary that she reviewed the "voluminous record." (R. 8).

Construction of a judicial decision can, at least in some respect, be analogized to construing a contract. In the context of contract construction, the rule

of *ejusdem generis* is applied, which states where comprehensive words in a contract are followed by an enumeration of specific things, the things coming with the comprehensive words will be limited to those of a like nature to those enumerated. Traylor v. Crucible Steel Co. of America, 192 A.D. 445 (1st Dep't 1920), aff'd, 232 N.Y. 582 (1922); Thaddeus Davis Co. v. Hoffman-La Roche Chemical Works, 178 A.D. 855 (1st Dep't 1917).

By applying the rule of *ejusdem generis* to Surrogate Anderson's Decision, the Decision is construed as an enumeration, which is coupled with a comprehensive description. The comprehensive description must be construed to only include what was enumerated in the list, identifying the list as exhaustive. Under this interpretation, through Surrogate Anderson's choice of language where she stated that she reviewed the "voluminous record" and then enumerating specific documents, it must be construed that she only reviewed the enumerated documents.

Thus, Surrogate Anderson failed to provide the Petitioner-Appellant with a fair and comprehensive review of the pleadings and accompanying documents. [8] Notably, three of the four documents Surrogate Anderson purportedly relied upon

[8] Moreover, based on Surrogate Anderson's deficient Decision, Petitioner-Appellant cannot even be sure if Surrogate Anderson confined her review to documents of the current proceeding. Kathie's Estate has been involved in numerous other proceedings in New York County Surrogate's Court stemming back to the initial 1982 Petition for Letters of Temporary Administration.

in rendering her Decision are not even a part of the Surrogate's Court's record and by extension cannot be considered by the Court in reaching its Decision.

As this Court is aware, an Order to Show Cause in its initial stages is an *ex parte* proceeding and remains *ex parte* until the presiding Judge signs the Order, which is then served on all parties. If the Order to Show Cause is not signed, or, as in this case, is declined, it is never served on the other parties and it remains *ex parte*.

A judge is not permitted to rely on *ex parte* documents in reaching a determination as it would deprive all interested parties a fair opportunity to respond to documents that have been submitted to assist in reaching a determination. DAVID SIEGEL, NEW YORK PRACTICE § 248 (West Publishing eds. 5th ed. 2011). CPLR § 2214, *practice commentary,* CPLR § 403, *practice commentary*; Gerald Lebovits, *Drafting New York Civil-Litigation Documents: Part XXXVI – Motions to Reargue and Renew,* 86 Oct. N.Y. St. B. J. 64, 57 (Oct. 2014) (stating that a declined order to show cause effectively "kills the motion" and such is not treated as part of the court record) (citing MICHAEL BARR, MYRIAM J. ALTMAN, BURTON N. LIPSHIE & SHARON S. GERSTMAN, NEW YORK CIVIL PRACTICE BEFORE TRIAL § 16:322 (2006; Dec. 2009 Supp.).

Therefore, it is apparent from the face of the Decision that Surrogate Anderson improperly relied on documents, including the Proposed OSC, and failed

to review the entire record in reaching her determination. Thus, the Decision is procedurally and substantively deficient and must be reversed.

Point II

THE GAL REPORT WAS REPLETE WITH LEGAL AND FACTUAL ERRORS AND INACCURACIES

As it appears that Surrogate Anderson relied solely upon the GAL Report, a discussion of the inaccuracies and failure of the GAL to adequately discuss the applicable law is required.

A. CAPETANAKIS' REPORT IGNORES THE LAW AND FACTS

The Surrogate Court is empowered with the authority to declare a missing person deceased pursuant to EPTL § 2-1.7, which provides:

> (a) A person who is absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed, in any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death or the administration of his or her estate, *to have died three years after the date such unexplained absence commenced, or on such earlier date as clear and convincing evidence establishes is the most probable date of death.*
>
> (b) *The fact that such person was exposed to a specific peril of death may be a sufficient basis for determining at any time after such exposure that he or she died less than three years after the date his or her absence commenced.*
>
> …

N.Y. Est. Powers & Trusts Law § 2-1.7 (emphasis added).

The statute permits the Court to fix a default and arbitrary date of death if the petitioner, after a diligent search, is able to prove that the person is missing as of a certain date, but unable to satisfactorily explain to the Court the probable date of the person's death; however, the Court must fix an earlier date when the petitioner presents clear and convincing evidence that establishes that the earlier date is the most probable date of death or the petitioner establishes that the absentee was exposed to a specific peril of death by a totality of the circumstances. (See EPTL § 2-1.7; Estate of Klein, N.Y.L.J., January 22, 2015, at 33, col. 1 (Surr. Ct. Suffolk Cnty. 2015); Matter of Cosentino, 177 Misc. 2d 629 (Surr. Ct. Bronx Cnty. 1998)).

Thus, it can be inferred, although not stated in Surrogate Anderson's Decision, that by granting the default date Surrogate Anderson is implying that Petitioner-Appellant did not meet her burden of proving that an earlier date was Kathie's most probable date of death by clear and convincing evidence or proving that Kathie was exposed to a specific peril of death: to wit, Respondent-Respondent Durst. EPTL § 2-1.7; EPTL § 2-1.7 1966 et al. Bill Jacket; 1966 Temporary Commission on Estates Report. However, since Surrogate Anderson failed to provide any basis for her determination, it is impossible to attempt to understand same.

As an initial matter, there has been another case where a murder victim was declared deceased on the date they disappeared even though the killer was not criminally prosecuted and the body was never recovered. See Estate of Klein, N.Y.L.J. Jan 22, 2015 (Surr. Ct. Suffolk Cnty. 2015). The Court in Estate of Klein held that the petitioner had satisfied her burden of proving that the decedent died on an earlier date rather than the presumptive date under EPTL § 2-1.7. Id. However, rather than apply the holding in this case to the uncontradicted facts alleged in the Petition, Capetanakis and the Surrogate's Court completely ignored this decision in issuing the GAL Report and Decision, respectively.

On January 22, 2015, more than eleven years after Mr. Klein disappeared, the Suffolk County Surrogate's Court, citing, *inter alia*, evidence initially provided by Klein's girlfriend to the police, found that Michael Klein was last seen or heard from on November 26, 2003 and that it was declared that he died on November 26, 2003, when he was likely murdered.

In Klein, the decedent disappeared after he voluntarily agreed to conduct a walk-through with the purchaser of a home that he was selling after the closing. After such date, the decedent was never heard from again and any search into his whereabouts provided no conclusive evidence. Prior to his disappearance, the decedent maintained a close relationship with his family and girlfriend. One of the purchasers of the home, Yakovlev, the purchaser that the decedent was conducting

a walk-through with, was involved in numerous criminal acts, including murder, forgery, bank fraud, and identity theft. Yakovlev was subsequently arrested and charged with forgery and bank fraud, involving the crimes committed against Klein and others, and murder, involving the deaths of two *other* people. Moreover, during the investigation, Klein's girlfriend, approached Yakovlev and asked him if he knew about the decedent's death, in which Yakovlev told her "get over it, he's not coming back, stop asking or I'll make you disappear to."

Klein and the instant case are extraordinarily similar in several key respects. First, both absentees, Kathie and Klein, were last seen with known criminals on the date of their disappearance. Second, both criminals, Durst and Yakovlev, took actions and made statements that implicated them in the absentees' disappearances. Third, the remains of Kathie and Klein have never been recovered. Fourth, none of the absentees' friends or family ever heard from or saw the absentees again after the date of his/her disappearance. Fifth, the petitions for declaration of death were made more than a decade after the date of the absentees' disappearance, years after the default date accrued. Finally, neither absentee returned to regular activity after the date of their disappearance, including speaking with friends and family or returning to work/school.

Rather than meaningfully address Klein, at paragraph 17 of the GAL Report, Capetanakis states "the general rule in these situations is as follows . . ." and then

proceeds to reference In re Katz's Estate – a 1930 Kings County case that pre-dates the relevant statute (EPTL § 2-1.7) and subsequent (and substantial/significant) amendments thereto. (R. 14). See In re Katz's Estate, 135 Misc. 861 (Surr. Ct. Kings Cnty. 1930). Interestingly, neither Petitioner-Appellant nor Respondent-Respondent Durst cited to this case in their underlying papers – because both Petitioner-Appellant and Respondent-Respondent Durst know that such a reference is incorrect, misleading and improper.

Capetanakis cites Katz using the holding as his primary premise for the application of EPTL § 2-1.7, stating "no presumption of death from disappearance will be indulged, short of [the statutory period] . . . except in those cases where the irresistible inference from the facts demonstrates that death occurred in some clearly identified disaster . . . ." (R. 14). However, such holding was stated in 1930, when the declaration of death statute was part of the Civil Practice Act, rather than the EPTL; therefore, such holding is irrelevant when applying EPTL § 2-1.7.

At the time of Katz, the statute did not provide that the Court was to fix a date of death and did not provide a mechanism for the Court to fix an earlier date, as allowed under the current statutory scheme. Capetanakis' erroneous reliance on Katz is highlighted by the fact that he added to the holding of the case "[the statutory period]" because at the time of Katz the seven-year period contained within the statute applied for purposes of establishing absenteeism, not for fixing a

date of death. (R. 14). In contrast, EPTL § 2-1.7 was enacted and subsequently amended to provide the Surrogate's Court with statutory authority to: (1) fix the absentee's date of death as of the default date; or (2) to fix an earlier date of death when: (a) there is clear and convincing evidence that establishes that such date is the most probable date of death; *or*, (b) the absentee was exposed to a specific peril of death. By (mis)applying the holding in Katz as the basic premise and "general rule," Capetanakis has disregarded the intent of the legislature in abrogating prior declaration of death statutes and enacting EPTL § 2-1.7, which had a completely different purview and application and was "substantially revised" from the antecedent Decedent Estate Law ("DEL") statute. See Report No. 1.12A, Leg. Doc. (1966) No. 19.

In addition, not only did Capetanakis incorrectly use an outdated case in applying EPTL § 2-1.7, he also misapplied the two distinct standards in the statute. EPTL § 2-1.7 provides two mechanisms for determining an earlier date of death, prior to the default period: (i) when the petitioner establishes "such earlier date [of death] as clear and convincing evidence establishes is the most probable date of death" or (ii) the fact that the petitioner was exposed to a specific peril of death based on a totality of the circumstances "may be a sufficient basis" for determining an earlier date of death. EPTL § 2-1.7. The two methods of determining an earlier date are separate and distinct and must be analyzed independently.

Further, Capetanakis' GAL Report is so outlandish and conclusory, that at paragraph 32 thereof, he seeks, without any legal basis, to create precedent and have the Surrogate's Court "legislate from the bench" by shockingly stating, "[w]hile the Legislature separated the applicable statute to provide two separate tests for relief, I respectfully submit that both standards (clear and convincing evidence and specific peril) should be evaluated in conjunction with one another." (R. 22). In reaching such a misplaced and erroneous conclusion, Capetanakis completely disregards the statute and intent of the Legislature, despite Petitioner-Appellant's counsel providing said legislative history to Capetanakis. Equally outrageous, the GAL ignores the Court's holding in In re Philip, which found that the standard of proof for a specific peril of death is a totality of the circumstances and not clear and convincing evidence. In re Philip, 50 A.D.3d 81, 83 (1st Dep't 2008); Estate of Primavera, N.Y.L.J., Oct. 27, 1989, col. 4, pg. 25 (Surr. Ct. Westchester Cnty. 1989); Matter of Lafuente, 191 Misc. 2d 577 (Surr. Ct. Dutchess Cnty. 2002).

Prior to 2000, EPTL § 2-1.7 provided that an earlier date of death could only be determined when the absentee was exposed to a specific peril of death. Based upon Surrogate Holzman's holding in Matter of Cosentino, the Legislature modified EPTL § 2-1.7 in 2000 and provided that the Court could fix an earlier date of death, either when the decedent was exposed to a specific peril of death *or*

when *clear and convincing* evidence proved an earlier date of death. See L, 2000 c. 413. § 1; N.Y. Bill Jacket, 2000 A.B. 10421, Ch. 413; Matter of Cosentino, 177 Misc. 2d 629 (Surr. Ct. Bronx Cnty. 1998). Capetanakis, in stating that the standards must be viewed "in conjunction" with each other, has misapplied and/or misconstrued EPTL § 2-1.7, as the two schemes must be viewed separately and each contain a different burden of proof (i.e. totality of the circumstances for specific peril and clear and convincing evidence for a "most probable" earlier date).

For example, the Court in Matter of Cosentino held that the petitioner had satisfied his burden of proving by clear and convincing evidence that the absentee died on the date of his disappearance, even though there was no specific peril of death.[9] Matter of Cosentino, 177 Misc. 2d 629 (Surr. Ct. Bronx Cnty. 1998). In such case, the absentee, a city fireman, disappeared one evening while answering a call relating to a beverage route he owned in the Bronx, taking with him no extra money or clothes, and leaving a pregnant wife and three children. His car was found abandoned and none of his friends or family heard from the absentee after such date, even though they had regularly communicated. In Cosentino, unless he

[9] The Surrogate reached this decision, even though, at the time, the clear and convincing evidence provision was not yet codified.

had been declared dead, the widow could not have collected his benefits,[10] and the Court declared him dead as of the date he had disappeared. Such case is analogous to the instant matter, as Kathie had disappeared one night, leaving behind all of her personal property, and failing to communicate with her friends and family after January 31, 1982, notwithstanding the fact that she regularly communicated with them, and was in her final semester of medical school.

Capetanakis argued that the Court in Matter of Cosentino made an equitable decision; however, there is no discussion of same therein. (R. 22). Moreover, putting aside the fact that the GAL need not make a specific recommendation of the absentee's date of death, Capetanakis had a duty to represent Kathie's interests and, as such, should have argued the equities on behalf of Kathie.

Moreover, Capetanakis applied an incorrect quantification of the clear and convincing evidence standard in reaching his determination. (R. 22). Evidentiary burdens, including preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt, cannot and should never be quantified. Sara H. v. Bart D., 121 Misc. 2d 425 (Fam. Ct. Kings Cnty. 1983). As long as the burden is satisfied, the person that bears such burden has satisfied his pleading and proof

[10] Such considerations are what primarily led to the substantial revisions to the declaration of death statute, when the statute was moved from DEL § 80-a to EPTL § 2-1.7. See 1966 Temporary Commission on Estates Report, citing, WIGMORE ON EVIDENCE, 3d Edition § 2531-b.

requirements, as there are not different gradients of each individual burden/standard. Id.

However, in paragraph 32 of his GAL Report, Capetanakis stated "it does not appear that circumstances surrounding My Ward's disappearance provide *enough* clear and convincing evidence." (R. 22) (emphasis added). By his own admission, Capetanakis' conclusion concedes that although the Petitioner-Appellant met her burden of proving that Kathie disappeared on January 31, 1982 by clear and convincing evidence, there was just not "enough" clear and convincing evidence to satisfy Capetanakis. (R. 22).

With regard to the specific peril provision, interestingly, Capetanakis spent nearly two full pages (of a fifteen-page GAL Report) (R. 20-22) citing to all of the case law involving instances where the courts have shortened the statutory period and established a date of death as of the date of absence, which cases involve totally dissimilar fact patterns, yet he somehow arrived at the opposite conclusion. As more fully detailed in the underlying Petition and the supporting papers (R. 28-551), the evidence presented in this proceeding far exceeds that which was presented in most, if not all, of the cases submitted by Petitioner-Appellant and cited to by Capetanakis.

For example, in In re Estate of Downes, the Court declared the missing person deceased on the date of his disappearance even though there was no proof

that he drowned or even went into the Peconic Bay. In re Estate of Downes, 136 Misc. 2d 1031 (Surr. Ct. Suffolk Cnty. 1987). The Downes Court simply concluded it was highly probable that the decedent, who suffered from Alzheimer's disease, was exposed to a specific peril of death – the Peconic Bay. To summarize, the Downes Court concluded that it was highly probable that decedent was exposed to a specific peril of death because of his location near the Peconic Bay; however, Capetanakis, herein, is confronted with factual circumstances involving a knowingly violent criminal who, at a minimum, admitted in Court to killing at least one individual and chopping up his body and disposing of it in Galveston Bay in Texas, and admitted in out-of-court statements[11] to killing two others (Kathie and Berman), but Capetanakis provides no explanation to distinguish how the instant facts do not "fit within the purview of the line of cases finding a specific peril. . . ." (R. 22).

Similarly, in In re Philip, this Court based its decision that the decedent was killed during the terrorist attacks on the World Trade Center despite the fact that there was no specific proof that she was physically in or near the Twin Towers when the attacks occurred. This Court made the following observations:

[11] Interestingly, in his GAL Report Capetanakis makes a passing statement admonishing the evidence presented by the Petitioner-Appellant, claiming that many of these statements are "inadmissible" hearsay. (R. 22). Nonetheless, Capetanakis inaccurately portrays Respondent-Respondent Durst's statements, as most, if not all of Durst's statements, would qualify as an exception to the rule against hearsay.

> [e]ven without direct proof irrefutably establishing that her route that morning took her past the World Trade Center at the time of the attack, the evidence shows it to be highly probable that she died that morning, and at that site, whereas only the rankest speculation leads to any other conclusion . . . [and] [w]hile it is logically possible that the decedent died by some other means on that date, either by random violence or at the hands of someone she met the night before, there is no factual basis in the evidence for that conclusion, while the demonstrated facts strongly support the inference that her death occurred in the context of the World Trade Center attack.

In re Philip, 50 A.D.3d 81, 83 (1st Dep't 2008). In the instant matter, unlike the decedents in Downes and Philip, it is known where Kathie was and who she was with when she disappeared, as Respondent-Respondent Durst himself has confirmed this on many occasions. (R. 896). Furthermore, Durst repeatedly admitted to lying to law enforcement regarding the circumstances of Kathie's disappearance for the specific purpose of hindering their investigation and precluding the police from securing evidence that could be utilized to charge Durst with Kathie's murder. (R. 66-67, 868, 895-897).

Notwithstanding the ***undisputed*** facts and the clear and convincing evidence presented in the underlying Petition, and the Affidavits of Kathie's sisters, Mary Hughes and Virginia McKeon, Capetanakis seemingly went out of his way to determine that the facts and circumstances alleged therein did not satisfy the clear and convincing standard, sufficient to support a recommendation that Kathie disappeared on January 31, 1982 and, further, that it was not more than highly

probable that Kathie was killed by Durst, in a specific peril of death. Moreover, Capetanakis' GAL Report effectively supports a highly improbable conclusion, to wit: that Kathie, an intelligent, personable, educated and family-oriented person voluntarily ceased all communication with her family and friends, especially her mother and siblings, on and after January 31, 1982.

The LADA and others believe that Respondent-Respondent Durst, or his representatives, may seek to kill witnesses and others who possess information that is material and relevant to homicide prosecutions of Durst, so much so that conditional examinations[12] have taken place in the California Proceeding. Notably, Capetanakis' incomplete and inaccurate GAL Report omits the fact that Nathan Chavin was authorized by the Court to testify in a conditional examination as he was the subject of round-the-clock SWAT team protection to prevent his possible and feared murder by Durst. (R. 648-649, 696).

In that regard, Capetanakis states in his GAL Report that he is aware of recent testimony in the California Proceeding; however, Capetanakis fails to cite any of the testimony in his GAL Report. (R. 22). This omission is troubling as the testimony related to admissions of Durst and his co-conspirator, Berman, wherein

[12] Under the California Penal Code, when a Defendant has been charged with a "serious felony," the prosecution and defense are permitted to engage in conditional examinations of witnesses. Conditional examinations are essentially criminal depositions. The defense and prosecution are permitted to call witnesses, who are unlikely to survive until trial (i.e. the witness is over a specific age or threats have been made on the witness' life) to preserve their testimony for trial.

they admitted that Durst murdered Kathie and that they have been concealing evidence of the murder to prevent Durst's prosecution. (R. 648-649, 696).

Nevertheless, notwithstanding the foregoing examples of Durst's undisputed violent nature, Capetanakis – through his proverbial "rose-colored glasses" – states at paragraph 18(e) of his GAL Report that Durst is "allegedly a dangerous person who has been charged with several felonies, including murder." (R. 15). His use of the words "allegedly" and "charged" are gross mischaracterizations of the undisputed facts. Examples of such violence and danger include: (i) Durst acknowledged that he had a physical confrontation with Kathie in the South Salem home on the evening of January 31, 1982 (R. 40); (ii) Durst has been charged with committing many violent and petty crimes, including, but not limited to, murder, bail jumping, tampering with physical evidence, criminal trespass, and illegal firearm possession (R. 371-379, 380-381, 453-464, 465-468, 495-496, 505-516, 517-521); (iii) Durst admitted to killing his neighbor and friend, Black (R. 449-452); (iv) after killing Black, Durst admitted to dismembering Black's body and then dumping his remains in Galveston Bay in Texas to evade responsibility for killing Black (R. 449-452); (v) Durst was charged with killing Berman because he believed prosecutors would call Berman as a witness in connection with Durst's involvement in the disappearance and murder of Kathie (R. 371-379, 517-521); and (vi) in *The Jinx*, which aired on HBO from February 8, 2015 through March

15, 2015, Durst made the following statements: (a) "I am complicit in Kathie's not being here;" and (b) "What the hell did I do? Killed them all, of course." (R. 67, 70). This begs the question: why did Capetanakis go so far as to minimize Durst's violent behavior and criminal acts?

As a further example of the potential adverse consequences of Capetanakis' incompetent and inaccurate GAL Report, Capetanakis – sounding more like a Judge than a Guardian Ad Litem[13] – states the following in his Report:

> 35. Last, I cannot but note that the Westchester County District Attorney's office, at the time of My Ward's disappearance, conducted an investigation yet failed to bring any criminal charges against any party. Thus, I am unwilling to recommend that this Court substitute its own judgment for that of the District Attorney. Toward that end, should different evidence arise in subsequent court proceedings, I would invite Petitioner to submit evidence to supplement the instant Petition.[14] (R. 23).

This paragraph is yet another example of Capetanakis' blatant incompetence and complete misunderstanding in that he confuses and attempts to blur the standards of proof in a criminal context with the civil standards applicable herein.

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[13] "The functions of a guardian ad litem appointed to protect the interests of a [Ward] are purely ministerial and not judicial or quasi-judicial and he should submit to the court for its consideration every question involving the rights of the [Ward] . . . The guardian ad litem is an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed." De Forte v. Liggett & Myers Tobacco Cnty., 42 Misc. 2d 721, 722–23 (Sup. Ct. NY Cnty. 1964) (internal citations omitted).

[14] This is a further example of Capetanakis' utter incompetence and/or erroneous review of the Record, as the Westchester County District Attorney's Office did ***not*** conduct an investigation into Kathie's disappearance until 2000. In 1982, the investigation was only conducted by the New York City Police Department.

First of all, to even suggest that Capetanakis' recommendation would in any way impact or have the Surrogate's Court "substitute" its own judgment for that of the District Attorney is utterly ridiculous and indicative of the GAL's complete failure to comprehend the applicable burdens herein. Secondly, neither the GAL nor the Surrogate's Court is tasked with making a determination that Durst killed Kathie. Instead, the Court is tasked with making a determination as to Kathie's date of death. See Estate of Klein, N.Y.L.J., January 22, 2015, at 33, col. 1 (Surr. Ct. Suffolk Cnty. 2015).

Apparently, Capetanakis does not understand the paramount distinction between the criminal standard of proof and the lower civil standards of proof. This is not a criminal prosecution, where the burden of proof is proof beyond a reasonable doubt. Instead, with regard to the request to fix a date of death pursuant to EPTL § 2-1.7(a), the burden is to establish, by clear and convincing evidence, the most probable date of death for Kathie. Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened. See People v. Mingo, 49 A.D.3d 148, 151 (2d Dep't. 2008); see also In re Amirah L., 37 Misc.3d 1003 (Fam. Ct. Queens Cnty. 2012) ("Clear and convincing proof is '[p]roof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.' Clear and convincing evidence is evidence that is 'entirely satisfactory' and creates a genuine belief' that

the respondent committed or omitted the acts alleged in the petition.") (internal citations omitted). With regards to EPTL § 2-1.7(b), the burden of proof is to establish a peril of death in the totality of the circumstances. See In re Philip, 50 A.D.3d 81, 82 (1st Dep't 2008); Estate of Primavera, N.Y.L.J., Oct. 27, 1989, col. 4, pg. 25 (Surr. Ct. Westchester Cnty. 1989); Matter of Lafuente, 191 Misc. 2d 577 (Surr. Ct. Dutchess Cnty. 2002).

Given that the undisputed evidence clearly confirms, *inter alia*, that Durst lied about his and Kathie's whereabouts on and subsequent to January 31, 1982 and that Durst, a confessed killer, was and remains a specific peril of death, there is, therefore, no other reasonable explanation for Kathie's disappearance other than she was killed by Durst on the evening of January 31, 1982. Accordingly, this Court must, as a matter of law, determine that Kathie is a deceased person who died on January 31, 1982, as Petitioner-Appellant met her burden of proving that an earlier date was Kathie's most probable date of death by clear and convincing evidence or proving that Kathie was exposed to a specific peril of death: to wit, Respondent-Respondent Durst. The Surrogate's Court's authority to render such a decision was confirmed by the New York State Court of Appeals in the seminal case of Butler v. Mut. Life Ins. Co. of New York, 225 N.Y. 197 (1919):

> Whenever, however, the evidence [of a person's disappearance at a designated time] is without contradiction and incapable, whether without or with contradiction, of creating, in reasonable minds,

> conflicting inferences, the question is one of law for the trial justice to decide.

Almost a hundred years after the Court of Appeals decided Butler, Justice Saxe provided us with additional guidance and clarity: "the standard does not require an absolute certainty; it merely requires that the evidence make the conclusion 'highly probable.'" In re Philip, 50 A.D.3d 81, 82 (1st Dep't 2008), citing, PJI 1:64. Ironically, Capetanakis fails to distinguish or otherwise reference the Butler case in his GAL Report.

B. CAPETANAKIS VIOLATED HIS DUTY OWED TO KATHIE

Capetanakis has utterly failed to comply with his duty owed to his ward, Kathie, in that he failed to perform any meaningful investigation, failed to conduct a single interview, failed to contact any witnesses and/or parties to the proceeding and misrepresented the applicable law and facts.

"A guardian ad litem is not a party to the proceeding but is an officer appointed by the court to prosecute or defend, represent, or otherwise look after the interests of the ward whose rights may be affected by a decree. As an officer of the court, the guardian ad litem is entitled to fully and fairly investigate the circumstances of the case." N.Y. Jur. 2d Decedents' Estates § 1103 (2016).

The role of the GAL is to represent the interests of the absentee in a presumption of death proceeding. See In re Estate of Putterman, 38 Misc. 2d 1219(A) (Surr. Ct. Nassau Cnty. 2013). Further, a GAL in a presumption of death

proceeding will investigate on behalf of the Court, conduct hearings and interviews, and make a recommendation to the Court whether the petitioner has satisfied the requirements to allow the Court to presume the death of the absentee (see In re Phillip, 50 A.D.3d 81 (1st Dep't 2008)), not necessarily recommend the specific date of death.

In a Surrogate's Court proceeding, the GAL must be an attorney admitted to practice law in the State of New York (see SCPA § 404(1)). Once the GAL has been appointed and prior to commencing his or her duties, the attorney must file a consent to act, and a statement which provides that they have "no interests adverse or in conflict" with their ward (see SCPA § 404(2)). The GAL must also file an appearance which states that they shall "take such steps with diligence as deemed necessary to represent and protect the interests of the person under disability and file a report of his activities together with his recommendation upon the termination of his duties . . ." (see SCPA § 404(3)). Capetanakis' diligence was certainly lacking herein, taking him nearly six months to issue his GAL Report from the date of the Order appointing him (to wit: September 14, 2016).

In Estate of Helen Dwyer, the Court held that the "role of a [GAL] in a surrogate court matter is a unique one and the appointment of an attorney to serve in such capacity is an important responsibility of the court." Estate of Helen Dwyer, N.Y.L.J. Dec. 20, 1989, pg. 29, col. 1 (Surr. Ct. N.Y. Cnty. 1989). The

GAL in such a matter has a dual role; he or she "must give his or her ward undivided loyalty" but also as an officer of the court "must act fairly and honestly with all parties involved in a proceeding." Id. The Court further stated that the GAL "must act according to the highest standards of conduct and integrity, and when his or her conduct is challenged, it is rightfully subject to the closest scrutiny." Id.

In In re Wechsler's Estate, the Court held that the Special Guardian, a term used for a GAL under the abrogated DEL, is held to a "duty of strict and undivided loyalty to the [person under the disability's] interest." In re Wechsler's Estate, 152 Misc. 564 (Surr. Ct. N.Y. Cnty. 1934).

Accordingly, Capetanakis owed and breached a duty of loyalty to Kathie in the Surrogate's Court proceeding by virtue of the conflict of interest (see discussion *infra*) and his conclusory, self-serving and unreliable GAL Report.

A GAL is an officer of the Court appointing him only in the limited sense, his duties being not to pass on merits of the controversy, but to protect interests of Court's wards solely as their attorney. In re Schrier's Will, 157 Misc. 310 (Surr. Ct. Kings Cnty. 1935).

Moreover, notwithstanding Capetanakis' overzealous and misplaced advocacy, a GAL does not have a duty to make a specific recommendation as to the date of death. Instead, generally, in a declaration of death matter, under EPTL

§ 2-1.7, the GAL will normally file a report stating whether the petitioner has satisfied his or her burden and recommend to the court whether the absentee should be declared deceased. In re Estate of Putterman, 38 Misc. 3d 1219(A) (Surr. Ct. Nassau Cnty. 2013).

Further, the Surrogate's Court in In re Roe's Estate found that,

> [t]he guardian ad litem . . . is under a duty to make a report to the court of his activities. This would include a report of facts and statements of witnesses which are material to the issues even in the absence of objections. It is the duty of the guardian ad litem to examine into the facts and to make a thorough and fair report of information obtained. The statute requires that he 'file a report of his activities together with his recommendations.'

In re Roe's Estate, 65 Misc. 2d 143, 146 (Surr. Ct. Suffolk Cnty. 1970). Capetanakis failed to conduct such independent investigation.

Nowhere in his GAL Report does Capetanakis specifically reject the facts submitted by Petitioner-Appellant. Instead, however, Capetanakis makes conclusory statements finding that the facts herein do not meet the clear and convincing standard or otherwise prove that Durst is the specific peril of Kathie's death.

Capetanakis ignores the fact that Durst failed to submit an Affidavit or otherwise refute any of the facts submitted by Petitioner-Appellant. As this Court is aware, and as Capetanakis should know, the omission of an Affidavit by Durst is

tantamount to acceptance of Petitioner-Appellant's allegations and/or contentions. Tortorello v. Carlin, 260 A.D.2d 201, 206 (1st Dep't 1999).

Durst did not dispute the facts presented in the Petition, facts supported by sworn Affidavits, Court records and even prior statements against his own penological interests made by Durst. Accordingly, facts accepted by and not challenged by Durst must be deemed admitted. Id. Further, rather than argue these undisputed facts in his opposition, Durst, through his counsel, put forth unsubstantiated legal arguments, which not only mischaracterized the law, but misrepresented the well-documented procedural history of Kathie's Estate. It is undisputed that Respondent-Respondent Durst's response is consistent with the lies, misrepresentations and omissions he has made to Surrogate's Court and other Courts, law enforcement and others over the past several decades.[15]

In the absence of an Affidavit from Durst, an adverse inference should have been drawn against Durst by the Surrogate's Court for not only failing to deny his involvement in Kathie's disappearance and/or death, but also for failing to rebut, object, oppose or otherwise address the numerous instances of lies,

[15] As more fully discussed in Petitioner-Appellant's underlying Reply papers, which includes a sworn Affidavit submitted to the Surrogate's Court by Durst in 1983, wherein Durst claimed to have never physically abused Kathie and to have fully cooperated with the investigation of law enforcement personnel into her disappearance. Durst has since admitted that these sworn statements to the Surrogate's Court were untrue, that he did, in fact, physically abuse Kathie and he affirmatively misled law enforcement personnel regarding Kathie and his whereabouts on January 31, 1982 and the following days. (R. 39-40, 66-68, 73, 106, 117-118, 130, 132, 895-897). These lies were intended to focus the investigation away from the marital home, where Durst admitted Kathie was last seen alive with him.

misrepresentations, deception and fraud perpetrated by Respondent-Respondent Durst over the last thirty-five years which are enumerated in the underlying Petition, and the Affirmation and Affidavits submitted in support thereof, all of which Capetanakis claims to have allegedly reviewed in conjunction with his appointment. Particularly, Capetanakis ignored the fact that Respondent-Respondent Durst, during a deposition in Robert Durst v. Tim Wilson, invoked his Fifth Amendment right against self-incrimination, when asked about his involvement in Kathie's disappearance and/or death. (R. 666-667).

Moreover, Capetanakis' GAL Report runs contrary to Kathie's rights and interests. To that end, rather than dispute the overwhelming evidence that Kathie should be declared a deceased person as of January 31, 1982, the opposition submitted by counsel for Respondent-Respondent Durst complains that this proceeding is little more than an attempt by Petitioner-Appellant to gain an alleged advantage in a right of sepulcher litigation, which is currently pending in the New York State Supreme Court, County of Nassau.[16] Capetanakis' GAL Report clearly adopts Durst's self-serving narrative, which is wholly adverse to Kathie's interests. Moreover, even if such was true, this must not be taken into consideration by the

[16] Carol Bamonte et al. v. Robert Durst et al., Nassau County Supreme Ct. Index No. 607688/2015. The complete electronically-filed docket can be accessed at https://iapps.courts.state.ny.us/webcivil/FCASMain.

Surrogate's Court in reaching a determination as to what date Kathie should be declared deceased.

Accordingly, Capetanakis clearly violated his duty of loyalty towards Kathie.

Point III

THE SURROGATE'S COURT'S DECISION IS DIRECTLY CONTRARY TO THE EVIDENCE PRESENTED

Surrogate Anderson's Decision is directly and entirely contrary to the evidence presented by Petitioner-Appellant. It appears as though, but cannot be confirmed as a result of Surrogate Anderson's deficient Decision, that Surrogate Anderson effectively accepted the findings within the GAL Report, essentially abdicating her judicial duties to a Court-appointee. Moreover, the Petitioner-Appellant has more than satisfied her burden of proving by clear and convincing evidence that January 31, 1982 is Kathie's most probable date of death or, in the alternative, that the totality of the circumstances demonstrate that Durst was a specific peril of Kathie's death.

A. SURROGATE ANDERSON IMPROPERLY *DE FACTO* ABDICATED HER DUTY TO RENDER A DECISION TO A PART 36 COURT-APPOINTEE

It is utterly improper for a Court to assign its responsibility and duty to review all documentation in the pleadings and make a well-reasoned thorough decision. Matter of Greenfeld, 71 N.Y.2d 389 (1988) ("[I]t is fundamental to the maintenance of an impartial and independent judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges."); N.Y. Jud. Advisory Opinion 15-127 (stating that a judge is permitted to delegate "ministerial functions" but not "judicial functions," which includes "judicial

decision making"); Matter of James Hopeck, 1980 WL 129350 (N.Y. Com. Jud. Cond. 1980) (The Commission on Judicial Conduct sanctioned a Town Justice for delegating his judicial decision making power to his court clerk.); Matter of Rider, N.Y. Com. Jud. Cond. 212 (1988) (The Commission on Judicial Conduct sanctioned a Town Justice for delegating his responsibility to write decisions to a town prosecutor.)

Given the Surrogate's Court's failure to write a meaningful decision (i.e., one containing any legal basis/rationale) it appears as though Surrogate Anderson delegated her duty to Capetanakis. As more fully discussed below, contrary to the GAL Report and Decision, the evidence presented by Petitioner-Appellant clearly established by clear and convincing evidence that Kathie died on January 31, 1982 and that Kathie was exposed to a specific peril of death.

B. THE PETITIONER-APPELLANT SATISFIED HER BURDEN OF PROVING THAT KATHIE DIED ON JANUARY 31, 1982 BY CLEAR AND CONVINCING EVIDENCE

As detailed in the filings submitted in the underlying proceeding, there is *undisputed* clear and convincing evidence that Kathie was killed and died on the date that she disappeared. Such evidence[17] includes, but is not limited to, the following:

[17] For a discussion of the appropriate indicia to be examined by a Court in a declaration of death proceeding, see In re Philip, 50 A.D.3d 81 (1st Dep't 2008); Estate of Klein, N.Y.L.J., January 22, 2015, at 33, col. 1 (Surr. Ct. Suffolk Cnty. 2015); In re Estate of Putterman, 38 Misc. 3d

(a) Kathie had a close and loving relationship with her mother and siblings. She had many close friends. Neither her family members nor her friends have had any communication with Kathie since January 31, 1982. (R. 72, 75).

(b) Both of Kathie's intestate distributees, her mother and Durst, agreed that Kathie was last seen or heard from on January 31, 1982. (R. 95, 100, 102-103).

(c) At the time of her disappearance, Kathie was in her final semester of medical school at the Albert Einstein College of Medicine. (R. 76, 327).

(d) At the time of her disappearance, there was no evidence that Kathie planned to leave her home. Her clothes and jewelry remained in her dresser drawers and closets. Her car remained parked outside her home in South Salem, New York. There was no evidence that there were any transactions made in her bank accounts. (R. 76, 109).

(e) On September 23, 1998, the Honorable Renee R. Roth, former Surrogate, appointed Jay B. Rabinowitz, Esq. to serve as Guardian Ad Litem on behalf of Kathie, an Absentee. In his report, the Guardian ad Litem made, *inter alia*, the following findings:

i. "Kathleen Durst, disappeared on January 31 1982 or February 1, 1982. Since that time she has not been heard from by her

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1219(A) (Surr. Ct. Nassau Cnty. 2013); Matter of Cosentino, 177 Misc. 2d 629 (Surr. Ct. Bronx Cnty. 1998); Matter of Merrill, N.Y.L.J., at 31, col. 6 (Surr. Ct. Westchester Cnty. April 3, 1990); Estate of Primavera, N.Y.L.J., at 31, col. 6 (Surr. Ct. Westchester Cnty. 1989); In re Estate of Downes, 136 Misc. 2d 1031 (Surr. Ct. Suffolk Cnty. 1987); In re Estate of Rice, N.Y.L.J., at 12, col. 5 (June 19, 1985); Chiaramonte v. Chiaramonte, 106 Misc.2d 822 (Sup. Ct. Nassau Cnty. 1981); In re Estate of Conrad, 109 Misc.2d 756 (Surr. Ct. Westchester Cnty. 1981); Estate of Cowan, N.Y.L.J., at 15, col. 1 (Mar. 31, 1980). The relevant indicia to be considered by a Court are indisputably and overwhelmingly present in the within matter.

relatives and has made no attempt to obtain, or to gain access to, her personal property." (R. 311).

ii. "My examination of all relevant materials regarding this matter, has produced no evidence that Kathleen Durst may still be alive today." (R. 312).

(f) Unbeknownst to Mary and the Guardian ad Litem in 1999, Durst would commit at least two murders in the next two years, at least one of which was to permanently silence a witness who could prove that Durst killed Kathie. (R. 371-379, 380-381, 517-521). Moreover, also not known to the participants in the Surrogate's Court proceeding, as of July 1999, the Westchester County Office of the District Attorney seized jurisdiction of the investigation of Kathie's disappearance from the New York City police and New York County District Attorney's office. (R. 326-333).

(g) In response to a variety of factors including the renewed investigation of Durst's involvement in Kathie's disappearance, Durst's arrest for the murder and dismemberment of Black, and Durst's fugitive status, the Surrogate's Court issued a decision on November 23, 2001 in connection with the Temporary Administrator's accounting and made, *inter alia*, the following findings:

> ". . . it appears that the investigation into the disappearance of the Absentee has not been completed and that the involvement of Robert Durst, who is currently missing, in the disappearance of the Absentee has not been finally determined; and it appearing that the Westchester County District

> Attorney continues to conduct her investigation into the disappearance of the Absentee. . . ." [18] (R. 87).

(h) At the conclusion of her decision, Surrogate Roth then directed the Temporary Administrator to deposit Durst's spousal share of Kathie's Estate with the Commissioner of Finance of the City of New York to be held pending the further order of the Surrogate's Court when the investigation into the disappearance of the Absentee is concluded by the authorities. (R. 89).

(i) Almost twenty years had passed since Kathie's disappearance, but Surrogate Roth provided proof for the first time to Kathie's family, as well as to Durst, that the investigation into Kathie's disappearance was still active but would now be focused in South Salem in Westchester County – the last known place that Kathie was seen on January 31, 1982 – and that Durst was considered a suspect in Kathie's disappearance and murder. (R. 86-89).

(j) Subsequent to Surrogate Roth's decision, Durst made two more futile attempts to persuade the Surrogate's Court that he should receive his spousal share of Kathie's Estate. These applications appear to be a poorly veiled attempt to use the Surrogate's Court proceeding to receive a status update on the investigation by the Westchester District Attorney into Kathie's disappearance. (R. 438-444, 479-492). Not only did the Surrogate's Court forcefully deny Durst's requests, the Surrogate's Court cited the seminal case of Riggs v. Palmer,

[18] While the Surrogate was addressing the issue of the accounting, Durst was a fugitive on the run. On October 9, 2001, Durst was arrested in Galveston, Texas for the murder of Black. (R. 336). After posting bail, Durst fled to New Orleans, failing to appear at his arraignment in Galveston on October 16, 2001. (R. 336). Thereafter, on November 30, 2001, Durst was arrested in Bethlehem, Pennsylvania for violating the terms of his bail conditions. (R. 336).

115 N.Y. 506 (1889), often referred to as the "slayer case," as authority for its decision to withhold any distributions to Durst pending a further investigation as to his involvement in Kathie's disappearance. (R. 90-93, 121-122).

(k) These prophetic decisions were validated by, *inter alia*, the following events:

i. Durst's admission that he killed and dismembered Morris Black. (R. 449-452).

ii. Durst's confessions on *The Jinx* where he confessed to being "complicit in Kathie's not being here;" admitted that he lied to the police regarding his and Kathie's whereabouts on and after January 31, 1982; and confessed to "killing them all", a reference to his murder of Kathie, Morris Black and Susan Berman. (R. 67, 70).

iii. Durst's arrest for the murder of Susan Berman because she had evidence that Durst killed Kathie. (R. 371-379, 517-521).

For a complete recitation of the evidence which proves that Kathie died on January 31, 1982, this Court is respectfully referred to the underlying pleadings. (R. 28-551).

There is no other logical conclusion other than Kathie died on the date she disappeared. See In re Philip, 50 A.D.3d 81 (1st Dep't 2008). Moreover, there has

never even been a suggestion by any party, or law enforcement official that would amount to the "rankest speculation" that Kathie could have died on another date or in another manner. Id. at 83. Yet, somehow, Capetanakis saw fit to write an inaccurate GAL Report concluding otherwise and Surrogate Anderson decided to ignore such compelling (*and uncontroverted*) evidence presented by Petitioner-Appellant. The GAL Report and the Decision not only disregarded the uncontested evidence submitted by Petitioner-Appellant but also ignored the prior findings of the prior GAL and the Surrogate's Court.

It is wholly inconceivable how Surrogate Anderson, supposedly concluded, that Petitioner-Appellant failed to meet her burden of proving by clear and convincing evidence that January 31, 1982 was Kathie's most probable date of death or, in the alternative, that the totality of the circumstances show that Durst was a specific peril of Kathie's death. Therefore, the Decision flies in the face of the evidence, as Petitioner-Appellant has satisfied her burden of proving by clear and convincing evidence that Kathie died on January 31, 1982, and that Durst was a specific peril of Kathie's death by a totality of the circumstances.

Point IV

THE SURROGATE'S COURT FAILED TO INCLUDE ANY EXPLANATION OR RATIONAL BASIS FOR THE COURT'S DECISION

The Decision states, in pertinent part, "the court declines to accept petitioner's proposed Order to Show Cause and determines the absentee's date of death to be January 31, 1987." (R. 8).

As an initial matter, in the Decision, Surrogate Anderson failed to declare Kathie deceased. Petitioner-Appellant in her Petition requested "a declaratory judgment to determine KATHLEEN DURST ("Kathie"), an Absentee, who was, at the time of her disappearance on January 31, 1982, domiciled in said County of New York and State of New York, be presumed dead . . . ." (R. 28). The Decision fails to explicitly grant the relief requested in Petitioner-Appellant's Petition.

Surrogate Anderson failed to provide *any* basis or reasoning in determining that Kathie's date of death should be set at January 31, 1987 and failed to state the facts the Court deems essential.

Simply put, the Court was obligated to provide more than a one-page Decision, completely devoid of findings of fact and conclusions of law, particularly where the extensive and complicated factual history of the matter spanned over thirty-five years, and the voluminous Record was comprised of hundreds, if not thousands, of pages.

The failure of Surrogate Anderson to provide Petitioner-Appellant with any reasoning or justification for her determination that Kathie's date of death should be set as January 31, 1987 is a blatant violation of her statutory and ethical obligations as a judge, particularly a Surrogate of the New York County Surrogate's Court.

A Judge has an obligation to provide all parties to a proceeding with a decision. CPLR § 4213 specifically states "[t]he decision of the court may be oral or in writing and shall *state the facts it deems essential.*" CPLR § 4213 (emphasis added).[19]

The Appellate Division, Second Judicial Department has stated "[t]he trial court, after a nonjury trial, is required to make appropriate findings and set forth its reasoning so that [an appellate court] may intelligently review its decision." In re Jeraldine, 14 A.D.3d 560, 561 (2d Dep't 2005). "However, when the record on appeal permits the reviewing court to make the findings which the trial court neglected to make, it may do so."[20] Id.

[19] Although the underlying proceeding is a Surrogate's Court proceeding and bound by the confines of the Surrogate Court Procedure Act, SCPA § 102 provides in pertinent part, "[t]he CPLR and other laws applicable to practice and procedure apply in the surrogate's court except where other procedure is provided by this act."

[20] The Second Department in reaching such Decision was reaffirming the power vested in the Appellate Division to decide issues of law and fact, while the Court of Appeals is only vested with the power to decide issues of law. See CPLR § 5501.

The Court of Appeals similarly held that "[a] trial court must state in its decision "the facts it deems essential" to its determination. Matter of Jose L. I., 46 N.Y.2d 1024, 1025 (1979). The Court of Appeals further stated that the Court "need not state evidentiary facts, but must state ultimate facts: that is, those facts upon which the rights and liabilities of the parties depend." Id. at 1025-26.

Surrogate Anderson has failed to comply with her judicial obligation, pursuant to CPLR § 4213, to inform all parties to this proceeding of her reasoning and the pertinent facts upon which she relied upon in reaching her Decision. Moreover, Surrogate Anderson not only failed to provide any reasoning within the Decision, she compounded such deficiency by failing to state the facts the Surrogate's Court deemed essential. It is clear upon review of the Decision, Surrogate Anderson did not state "the facts upon which the rights and liabilities of the parties depend." Id. at 1025.

Surrogate Anderson's Decision completely ignores the facts presented by the Petitioner-Appellant. This significant omission creates the appearance that the Decision was based on factors other than the evidence presented to the Surrogate's Court. No rational Court could accept the Petitioner-Appellant's facts (as required) and conclude that Kathie should be declared deceased on any date other than January 31, 1982.

Therefore, Surrogate Anderson's Decision is procedurally and substantively deficient.

Point V

THE SURROGATE ACTED IMPROPERLY IN FAILING TO CONSIDER THE ALLEGATIONS SET FORTH IN PETITIONER-APPELLANT'S DECLINED ORDER TO SHOW CAUSE

Petitioner-Appellant raised serious concerns as to the GAL's conflict of interest, the appearance of impropriety relating to Surrogate Anderson's appointment of Capetanakis and the factually deficient and legally inaccurate GAL Report, through her Proposed OSC.

Despite the serious allegations raised in the Proposed OSC, and the indisputable fact that it was the GAL's affirmative obligation to ensure he had no conflict of interest when he accepted the appointment, Surrogate Anderson failed to issue the requested temporary stay of proceedings and declined to sign the Proposed OSC in its entirety. Immediately upon the declination of the Proposed OSC, Surrogate Anderson rendered her Decision based upon the flawed GAL Report, without permitting Petitioner-Appellant, or Respondents-Respondents an opportunity to be fully heard.[21]

[21] Although the Petitioner-Appellant and Respondents-Respondents entered into a Stipulation, dated July 7, 2016, where the parties agreed "there will be no oral argument in connection with the Petition, and that the Court will make its determination with regard to the Petition based upon the papers submitted," such Stipulation was entered into prior to the appointment of Capetanakis. (R. 551.1-551.2).

A. THE CONFLICT OF INTERESTS OF CAPETANAKIS IN THE UNDERLYING PROCEEDING

Petitioner-Appellant's Proposed OSC sought, *inter alia*, to have Surrogate Anderson remove Capetanakis as GAL for Kathie and to strike the GAL Report from the Surrogate's Court's record. (R. 631-1026). When confronted with the serious allegations of a conflict of interest and the appearance of impropriety, Surrogate Anderson should have, at a minimum, signed the Proposed OSC and provided the parties with the opportunity to be heard and fully brief the application.

Petitioner-Appellant in her Proposed OSC, clearly outlined for the Surrogate's Court the conflicts that existed, including:

a. Respondent-Respondent Durst is married to Debrah Charatan ("Charatan"), who is living with and is the *de facto* spouse of Steven I. Holm, Esq. ("Holm") (R. 640-642). Charatan controls Durst's vast fortune, which has been estimated to exceed one hundred million dollars (R. 183-184, 187-223, 652);

b. Holm was a co-Defendant in a lawsuit along with Capetanakis' law firm, Davidoff Hutcher & Citron ("DHC"), where the Defendants were sued for in excess of ten million dollars (R. 815-851);

c. Capetanakis has received a disproportionate number of appointments from Surrogate Anderson, including non-list appointments (R. 650-651);

d. Members of Capetanakis' family, namely his wife, donated to Surrogate Anderson's election campaign (R. 976).

The evidence demonstrates that Surrogate Anderson did not address the conflict of interest and appearance of impropriety because of her relationship with/to Capetanakis.

Notably, all parties and Capetanakis consented to an interim stay and sought time to submit responsive papers. Capetanakis even sought leave to have counsel appointed for him to address the serious allegations raised by the Proposed OSC. These actions provide compelling evidence that the Proposed OSC raised a *bona fide* issue at least with regard to the conflict of interest. Moreover, the *sua sponte* determination of the Court denied any party the opportunity to respond to these allegations, which raises a wholly independent appearance of impropriety.

Capetanakis affirmed in his Appearance and Consent of Guardian Ad Litem, sworn to on October 4, 2017 that: (i) he appears and consents to be appointed "as guardian ad litem for KATHLEEN DURST, an absentee alleged to be [*sic*] deceased person, *for the sole purpose of appearing for and protecting her interest in the above-entitled matter*"; and (ii) "he has no interest in this proceeding adverse to that of said parties, and that he is *not connected in business* with any party to this proceeding *or with the attorney or counsel of any such party*." (Emphasis added.) (R. 810).

The significant business relationship between Holm – one of Durst's attorneys, and the *de facto* husband of Charatan, Durst's wife – and Capetanakis' law firm, DHC, existed for many years prior to and through the date of Capetanakis' appointment. In fact, in the matter of SK Greenwich LLC and Shahab Karmely v. Levy Holm Pellegrino & Drath LLP, Davidoff Hutcher & Citron LLP, Steven I. Holm and Larry Hutcher (Supreme Court of the State of New York, County of New York; Index No. 153228/2013), DHC, its Co-Founder and Co-Managing Partner, Larry Hutcher, Esq., Holm and Holm's law firm, Levy Holm Pellegrino & Drath, LLP ("Levy Holm") were named co-Defendants and sued for in excess of $10 million dollars. The Amended Complaint therein contains causes of action for, *inter alia*, legal malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and malpractice." (R. 815-851).

According to the Amended Complaint, Holm and Levy Holm committed legal malpractice and breached their fiduciary duty to their clients – the Plaintiffs therein – by representing individuals involved in the underlying transactions who had interests adverse to the Plaintiffs and by failing to exercise the ordinary care owed by an attorney to their client. The Amended Complaint further asserts that in the course of Holm and Levy Holm's representation of the Plaintiffs, Holm and/or Levy Holm recommended that Plaintiffs retain DHC to assist Holm and Levy Holm. It is further alleged that, once retained, DHC obtained knowledge of Holm

and Levy Holm's conflict of interest, which should have disqualified Holm and his firm, and aided and abetted Holm and his firm to further breach their professional/fiduciary obligations owed to their clients.[22]

As a Partner of DHC, Capetanakis should have immediately disqualified himself as GAL because even if the interests of the parties are not adverse, the *appearance* of conflicting/adverse interests is enough to warrant disqualification. See Matter of Dwyer's Estate, 93 A.D.2d 355, 361 (1st Dep't 1983); Sapienza v. New York News, Inc., 481 F. Supp. 676, 680 (S.D.N.Y. 1979).

Regardless of whether Capetanakis is directly involved with Holm, Charatan, or anyone else whose interests are clearly adverse to those of Kathie by virtue of their close connection with Durst, the appearance of impropriety renders Capetanakis unfit to serve as Kathie's GAL and so taints his GAL Report rendering same improper, unacceptable and inadmissible. Estate of Helen Dwyer, N.Y.L.J., Dec. 20, 1989, at 29, col. 1 (Surr. Ct. N.Y. Cnty. 1989); Matter of Dwyer's Estate, 93 A.D.2d 355, 361 (1st Dep't 1983); Sapienza v. New York News, Inc., 481 F. Supp. 676, 680 (S.D.N.Y. 1979).

[22] Petitioner-Appellant acknowledges that prior to Capetanakis' appointment as GAL for Kathie, the action was dismissed against his firm. (R. 852). However, Capetanakis' law firm continued to be listed as a Defendant in the case caption subsequent to Capetanakis' appointment; therefore, it appeared that his law firm was still an active Defendant in the matter at the time of his appointment. Further, Capetanakis has never disputed that his law firm was a Defendant through March 26, 2015, and that Levy, Holm, Pellegrino and Drath LLP referred the underlying matter therein to the GAL's law firm and the co-Defendants worked together to provide legal advice to the Plaintiff therein.

Petitioner-Appellant presented the Surrogate's Court with a plethora of evidence, which indicated that there was a conflict of interest between the GAL and Kathie. At a minimum, Surrogate Anderson could have signed Petitioner-Appellant's Proposed OSC, to permit the parties to submit papers and hold a hearing to determine the extent of such conflict. Rather, Surrogate Anderson, in an attempt to insulate Capetanakis, declined to sign the Proposed OSC and never determined the extent of Capetanakis' conflict. (R. 1027-1029). The decision to decline the OSC is particularly disturbing given the financial connection between Surrogate Anderson and the GAL.

As part of Petitioner-Appellant's counsel's investigation into the motivation for Capetanakis' improper behavior and biased GAL Report, it was discovered that he has personally received thirteen Part 36 Appointments from the Surrogate's Court since 2013, which includes three non-list Appointments, which is indicative that Capetanakis is well known to the Surrogate's Court. (R.650-651). To date, he has been awarded tens of thousands of dollars in connection with these appointments and is likely to receive tens of thousands of dollars more related to these and future appointments.

Assuming, *arguendo*, that Capetanakis contends that he had no knowledge of the relationship between his law firm and Holm, a conflict of interest would nonetheless exist, as same would be imputed to him, pursuant to the Rules of

Professional Conduct. Rule 1.10 ("Imputation of Conflicts of Interest) of the Rules of Professional Conduct states, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." NY Rules of Professional Conduct R. 1.10.

"We who are involved in the administration of justice must not only be fair and just in our dealings, but we must also be scrupulously careful that we avoid the appearance of any impropriety." Matter of Merrick's Will, 107 Misc. 2d 988, 990 (Surr. Ct. Suffolk Cnty. 1980).

Moreover, it was discovered that on October 2, 2008, Dena Capetanakis, the GAL's wife, who does not appear to be an attorney and does not appear to have any connection with the New York County Court system, made a campaign contribution of $1,000.00 to the campaign of Anderson for Surrogate. (R. 976). Interestingly, Capetanakis' law firm also made a campaign contribution to the campaign of Anderson for Surrogate in the amount of $2,500.00. (R.977).

Parenthetically, Petitioner-Appellant's counsel is not suggesting that the number of appointments Capetanakis has received by Surrogate Anderson, or the campaign contributions made to Surrogate Anderson by Capetanakis' wife and law firm mean that the Surrogate's Court is tainted by his conduct. Rather, given the history of this case, as the representative for Petitioner-Appellant and as an officer

of the Court, Petitioner-Appellant's counsel is deeply troubled and concerned as to the appearance of impropriety, particularly Capetanakis' failure to disclose any conflict in his sworn Appearance and Consent of Guardian Ad Litem.

It cannot be said that Capetanakis has been "scrupulously careful" to avoid the appearance of any impropriety as Capetanakis should have informed the Surrogate's Court of such conflict and/or recused himself upon discovery. Matter of Merrick's Will, 107 Misc. 2d 988, 990 (Surr. Ct. Suffolk Cnty. 1980).

CONCLUSION

For all of the foregoing reasons and based upon the Record submitted herewith, it is respectfully submitted that this Honorable Court exercise its authority to: (i) reverse Surrogate Anderson's Decision and declare Kathie deceased as of January 31, 1982; or, in the alternative, (ii) reverse Surrogate Anderson's Decision, remand the proceeding to the New York County Surrogate's Court, appoint a new Guardian ad Litem for Kathie and assign the matter to a different Surrogate to determine Kathie's date of death; and (iii) grant such other and further relief as this Court may deem just, proper and equitable.

Dated: January 2, 2018

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA, WOLF & CARONE, LLP

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APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 13,986.

Dated: January 3, 2018

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

In the Matter of the Application of ANN C. McCORMACK, by her Special Guardian and Attorney-in-Fact CAROL BAMONTE, concerning the Estate of **KATHLEEN DURST,** Absentee and Alleged Deceased, and for a decree judicially declaring that the above-named absentee is deceased, pursuant to New York Estates, Powers and Trusts Law Section 2-1.7, together with other and further relief.	:	File No. 1982-5053/D (Surr. Nora S. Anderson) **PRE-ARGUMENT STATEMENT**

1. **Title of the action:**

   In the Matter of the Application of ANN C. McCORMACK, by her Special Guardian and Attorney-in-Fact CAROL BAMONTE, concerning the Estate of

   KATHLEEN DURST,

   Absentee and Alleged Deceased,

   and for a decree judicially declaring that the above-named absentee is deceased, pursuant to New York Estates, Powers and Trusts Law Section 2-1.7, together with other and further relief.

2. **Full names of original parties and any change in the parties:**

   a. Petitioner: ANN C. McCORMACK, by her Special Guardian and Attorney-in-Fact CAROL BAMONTE. Carol Bamonte ("Carol"), the sister of Kathleen McCormack Durst and daughter of Ann C. McCormack ("Ann"), commenced the underlying declaration of death proceeding as Ann's Special Guardian and Attorney-in-Fact. Ann passed away on May 15, 2016 and Carol was granted Letters Testamentary by the Nassau County Surrogate's Court on July 13, 2016.

   b. Concerning the Estate of: KATHLEEN DURST, Absentee and Alleged Deceased.[2]

[2] On September 14, 2016, the Court issued an *Order Appointing Guardian ad Litem*, wherein Charles

c. Respondent: ROBERT DURST.

d. Respondent: Public Administrator of New York County.

3. **Name, address and telephone number of counsel for appellant or petitioner:**

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Capetanakis, Esq. was appointed Guardian ad Litem for Kathie, an absentee alleged to be deceased.

5. **Court and county, or administrative body from which the appeal is taken:**

Surrogate's Court of the State of New York, County of New York

6. **Nature and object of the cause of action or special proceeding:**

Declaration of death.

7. **Result reached in the court or administrative body below:**

The Court declined to accept Petitioner's proposed Order to Show Cause and determined the absentee's date of death to be January 31, 1987.

8. **Grounds for seeking reversal, annulment or modification:**

The grounds for seeking reversal, annulment or modification of this Decision and Order are that the Lower Court ignored allegations of the appearance of impropriety when declining to accept Petitioner's proposed Order to Show Cause, and made numerous errors of law and fact and disregarded the record, when determining the absentee and alleged deceased's date of death.

9. **Relation actions or proceedings:**

a) *ANN MCCORMACK, by and through her attorney in fact Carol Bamonte; CAROL BAMONTE; MARY HUGHES and VIRGINIA MCKEON, Plaintiffs, -against- ROBERT DURST, Defendant*, pending in the Supreme Court of the State of New York, County of Nassau (Hon. Roy S. Mahon; Index No. 607688/2015)

Status: Plaintiffs have sued Defendant, Robert Durst, one of the named Respondents for this appeal, alleging a cause of action based upon Robert Durst's violation of their right of sepulcher. Defendant's Answer to Plaintiffs' Verified Complaint, and Plaintiffs' Reply papers in connection with their Order to Show Cause seeking, *inter alia*, an Order for a prejudgment attachment and discovery in connection therewith, are due to be filed with the Court on Thursday, April 20th, 2017. The submission date of Plaintiffs' Order to Show Cause is Thursday, April 27th, 2017.

b) *People of the State of California v. Robert Durst*, pending in the Superior Court of the State of California, County of Los Angeles (Case No. SA089983)

Status: Robert Durst, a named Respondent in this appeal, was charged with killing his long-time friend, Susan Berman, to prevent her from testifying against him for the murder of Kathie, by the State of California. Recently, the Court permitted pre-trial conditional examinations of certain witnesses, including at least one witness who was the subject of round-the-clock police protection to prevent his possible and feared murder. The next Court date is scheduled for April 25, 2017, which is a Preliminary Setting Conference. The Preliminary Hearing is scheduled for October, 2017 and the trial is expected to being in 2018.

Dated: April 3, 2017

ABRAMS, FENSTERMAN, FENSTERMAN,
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