EXHIBIT 2.
JUL 20 2009
New York County Surrogate's Court
DATA ENTRY DEPT.
Date: July 17, 2009

SURROGATE'S COURT : NEW YORK COUNTY
--X
Probate Proceeding, Will of

JULIA ELIZABETH TASCHEREAU,

Deceased.
--X

File No. 1042/98

W E B B E R, S .

Before the court in this hotly contested probate proceeding are five motions: 1) objectant's motion to dismiss the probate petition as a sanction for proponent's failure to appear for a court-ordered deposition (CPLR 3126), 2) proponent's cross-motion for an order setting a date for a "trial by jury," 3) proponent's motion seeking a jury trial, 4) objectant's cross-motion to sanction proponent for failure to provide discovery (CPLR 3126) and 5) proponent's motion to compel discovery responses.

The long history of this matter is detailed in prior decisions and will not be repeated here (Matter of Taschereau, NYLJ, June 20, 2007, at 27, col 4; Matter of Taschereau, NYLJ, July 31, 2006, at 36, col 1; Matter of Taschereau, NYLJ, May 18, 2006, at 30, col 5; Matter of Taschereau, NYLJ, Nov. 8, 2005, at 28, col 3); Matter of Taschereau, NYLJ, Aug. 18, 2005, at 24, col 2). However, the following background is necessary to put the motions in context.

Testatrix died on March, 16, 1998, at the age of 84, survived by twin daughters, Elizabeth Combier and Julia Danger. The day after her mother's death, Ms. Combier propounded an instrument dated November 21, 1997, under which she inherits the

entire estate and is appointed executrix. Preliminary letters issued to her on April 13, 1998.

Following motion practice and the settlement of certain issues concerning SCPA 1404 examinations, Ms. Danger filed objections, alleging lack of due execution, lack of testamentary capacity and fraud and undue influence on the part of Ms. Combier and the draftsman. She also demanded a jury trial in accordance with SCPA 502. Over the next several years, continuous and contentious motion practice followed.

By January 2005, there were only a few discovery issues which had to be resolved prior to trial. However, Ms. Combier abruptly discharged her fourth attorney. She also refused to sign the documents necessary to permit him to formally withdraw. Her refusal appears to have been prompted by her attorney's assertion of retaining and charging liens as security for approximately $22,000 in legal fees that she had incurred from September 2003 through January 2005. These fees had been incurred in the proceedings in Surrogate's Court as well as a second unrelated action in Supreme Court (New York County).[1]

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[1]In such action, Ms. Combier, in her individual capacity, had sued, among others, a church and two of its clergymen for, *inter alia*, defamation and intentional infliction of emotional distress allegedly caused by the church's brief delay in returning decedent's ashes. Most of such claims were dismissed on summary judgment. The trial of the remaining claims ended in a mistrial; a second trial resulted in a verdict for the defendants. The denial of Ms. Combier's motion to set aside the verdict was affirmed (Combier v Anderson, 26 AD3d 269, rearg denied, 2006 NY Slip Op 71015).

After months of attempting to resolve the impasse over fees, the attorney moved to withdraw. The application was granted, but the proceeding was stayed for 30 days to allow Ms. Combier the opportunity to retain new counsel (Matter of Taschereau, NYLJ, Aug. 18, 2005, at 24, col 2, supra). She failed to do so, and instead has proceeded *pro se*.

During a later conference with the court, Ms. Combier made certain statements that gave cause for concern that she had distributed estate assets to herself in violation of SCPA 1412(3)(a) and her basic fiduciary duty to be impartial. In order to address such concerns, the court, *sua sponte,* directed Ms. Combier to account (Matter of Taschereau, NYLJ, Nov. 8, 2005, at 28, col 2, supra). Instead of filing a judicial accounting, however, she submitted a lengthy letter to the court setting forth her purported reasons for not accounting, none which constituted a basis for failing to adhere to the court's order.

Based upon Ms. Combier's failure to account as well as her admissions concerning distributions to herself, Ms. Danger petitioned to revoke her sister's preliminary letters. As Ms. Combier had failed to adhere to a court order and had engaged in other conduct suggesting a lack of understanding of her fiduciary obligations, the court suspended her preliminary letters pending a hearing (Matter of Taschereau, NYLJ, May 18, 2006, at 30, col 5, supra). The court appointed the nominated successor

fiduciary as preliminary executor and gave him an opportunity to qualify. It was noted that, if he failed to do so within 30 days of notice of the decision, the Public Administrator would be appointed temporary administrator (id.).

Ms. Combier proceeded to file "objections" in the revocation proceeding to which she appended a purported accounting, which was not in the form of a judicial accounting. In addition, such "accounting" contained numerous inconsistencies with the New York State Estate Tax Return (ET-90) that Ms. Combier had filed as well as many facially improbable administration expenses.

After the nominated successor fiduciary failed to qualify, letters of temporary administration issued to the Public Administrator on June 21, 2006. Ms. Combier did not appeal her suspension or the appointment of the Public Administrator, although in various submissions to the court she has made the erroneous claim that the appointment was improper and constituted a finding by the court that her mother died intestate.

Shortly after the appointment of the Public Administrator, the court issued a decision, dated July 19, 2006, disposing of all outstanding motions and setting a date for the completion of all discovery (Matter of Taschereau, NYLJ, July 31, 2006, at 36, col 1, supra). It is noted that several of the outstanding motions concerned Ms. Combier's fee dispute with the attorney referred to above. As discussed in more detail in the court's

July 19, 2006 decision, Ms. Combier sought, *inter alia,* a stay of the probate proceeding on the ground that she could not proceed to trial without the files subject to the retaining lien and, by separate application, the immediate return of such files. The stay was denied as was Ms. Combier's request that her former attorney be directed to turnover the files subject to the lien. Instead, in order to permit the matter to proceed to trial without further delay and to avoid the possibility that Ms. Combier's position in the probate contest would be compromised by disclosure of privileged information in a hearing to determine whether the attorney's discharge was for cause (which would invalidate the lien), the court provided for Ms. Combier to obtain access to the files by posting a bond in the amount of $7,567. Such amount represented the portion of the bill that her former attorney asserted was related to the proceedings in Surrogate's Court. Ms. Combier's former attorney was directed to turn over the files upon receipt of notice and proof that such bond had been posted (id.).

Shortly before the discovery deadline set by the court was to expire, Ms. Danger moved for additional time to complete discovery, including a continuation of Ms. Combier's deposition. Ms. Combier sought an order compelling her sister to respond to discovery demands that she had made just before the discovery cutoff date. The court extended the discovery deadline to August

21, 2007, and directed Ms. Combier to appear for a one day continuation of her deposition at the courthouse on July 31, 2007. It also directed Ms. Danger to respond to all outstanding discovery demands (Matter of Taschereau, NYLJ, June 20, 2007, at 27, col 4, supra).

When Ms. Combier failed to appear for the deposition as directed, Ms. Danger moved to dismiss the probate petition as a sanction (CPLR 3126). Although she had yet to file a note of issue, Ms. Combier cross-moved asking for the court to set a date for a "trial by jury" and a "pre-hearing conference." Both matters were placed on the September 7, 2007 calendar and, at Ms. Combier's request, adjourned to October 16, 2007. At the call of the calendar on October 16, 2007, Ms. Combier appeared and the court gave her another opportunity to be deposed. She was directed to appear for her deposition on October 26, 2007. The deposition went forward on that date.

Thereafter, Ms. Danger filed a note of issue in which she withdrew her demand for a jury trial. Before a trial was scheduled, the Surrogate who had presided over all matters relating to this estate retired and I was appointed Acting Surrogate on January 28, 2009. A pre-trial conference was scheduled for April 1, 2009, to address all outstanding issues and to set a date for trial. At the conference, the parties raised numerous matters. The salient issues were 1) the parties'

contention that discovery remained outstanding and 2) the determination as to whether there would be a jury or bench trial.

Both parties asserted that discovery had not been completed, notwithstanding that Ms. Danger had filed a note of issue and Ms. Combier had submitted a motion asking the court to set a date for trial. Ms. Danger's attorney asserted that he had not completed his review of certain documents that were currently subject to the retaining lien by Ms. Combier's prior counsel. Such documents, he argued, were relevant to his objections and necessary for trial preparation. Ms. Combier conceded that, in the more than 2 and 1/2 years since the decision providing her with a mechanism to obtain possession of such documents, she had not attempted to obtain a bond and had not obtained the documents. She argued, however, that opposing counsel had previously been afforded the opportunity to review and copy all the documents at issue. This contention was disputed by Ms. Danger's counsel.

Ms. Combier's claim to discovery was more in the nature of a comment on what she perceived as a lack of proof in the case and the fact that she did not believe that her sister had provided any "documentation" in support of her position, i.e., that the propounded instrument is, in fact, invalid. This court directed Ms. Combier to take the steps necessary to obtain her files from her former attorney and to provide non-privileged responsive

documents to opposing counsel "within 30 days." If she was unable to obtain the documents, she was directed to promptly ~~inform the court. Similarly~~, to the extent that Ms. Danger's counsel had not provided the requested discovery, he was also directed to do so within the same period of time.

As to the question of whether the matter was to be tried before a jury, Ms. Danger's counsel reiterated that the jury demand had been withdrawn. He also stated that he was unaware of a proper jury demand having been filed by Ms. Combier. Ms. Combier asserted that this was the first time that she had been made aware that her sister had withdrawn her jury demand.[2] Further, she argued that her previous counsel had definitely demanded a jury trial.

Although neither the court nor Ms. Danger's counsel had any record of a jury demand having been made, this court allowed Ms. Combier the opportunity to submit an application in support of her contention that she was entitled to a jury trial. At the same time, in recognition that the completion of discovery was imminent and the issue of whether the matter would be tried before a jury would be brought before the court in short order, the court set July 13, 2009 as the date for trial.[3]

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[2] The affidavit of service attached to the note of issue suggests otherwise.

[3] Following the conference, Ms. Danger's attorney advised the court of a scheduling conflict and the trial date was adjourned to August 4, 2009.

Thereafter, on April 30, 2009, Ms. Combier filed a motion, which she styled as one to preserve her right to a jury trial. Ms. Danger opposed the motion and cross-moved, pursuant to CPLR 3126, for an order resolving in her favor the issue of Ms. Combier's financial motive to unduly influence her mother as a sanction for, among other things, Ms. Combier's failure to provide the discovery directed at the pre-trial conference. Approximately 3 weeks later, on May 26, 2009, Ms. Combier filed a motion to compel a response to discovery demands which she stated had been outstanding since 2006.

Prior to resolving the outstanding motions stated above, this court will first address Ms. Combier's claim that the court has demonstrated a lack of impartiality and is biased and prejudiced against her. Although not properly noticed as a recusal motion, it appears Ms. Combier intended her papers to constitute such and, accordingly, the court will treat them as such.

Section 14 of the Judiciary Law sets forth the grounds for disqualification of a judge and provides in pertinent part that,

> [a] judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding to which he is a party, or in which he has been an attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

In the absence of a legal disqualification under the Judiciary Law, "a Trial Judge is the sole arbiter of recusal" (People v

Moreno, 70 NY2d 403, 405). However, Canon 3 of the Code of Judicial Conduct provides relevant guidance by stating that a judge should disqualify herself when her "impartiality might be reasonably questioned, including but not limited to instances where ... the judge has a personal bias or prejudice concerning a party; or ... personal knowledge of disputed evidentiary facts ..." (Rules Governing Judicial Conduct [22 NYCRR] § 100.3[E][1]).

Within this framework, there exists no basis for recusal. Ms. Combier does not allege any statutory ground for recusal and, indeed, there are none. As for Ms. Combier's allegations of bias and prejudice, they are not grounded in fact and are belied by the record since my appointment.[4] That this court made certain rulings at the pre-trial conference that Ms. Combier believes are adverse to her interests cannot be viewed reasonably as a demonstration of bias or prejudice. If such were the standard, every litigant unhappy with a particular ruling or decision would have grounds to seek recusal. While this court need not defend its rulings or decisions, it notes that there were rulings made in Combier's favor. Further, the court afforded Ms. Combier the

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[4] To the extent that Ms. Combier's allegations of bias and prejudice are directed toward the attorney in the Law Department assigned to this matter, they also have no basis in fact and, in any event, the allegations against such court attorney are not attributable to the undersigned (see Matter of Morrison, NYLJ, Oct. 22, 2002, at 23, col 3). Further, it is the undersigned and not the court attorney who determines the outcome of the issues in this matter.

opportunity to present argument and documentation in support of her position that she was entitled to a jury trial.

Ms. Combier has also commenced a *pro se* action in the Southern District of New York, against myself, the court attorney assigned to this matter, Ms. Danger's attorney and Ms. Danger herself. Ms. Combier asserts various claims, including a violation of her civil rights in connection with the pre-trial conference. Whether one of Ms. Combier's goals in initiating this action was to force my recusal is unclear. What is clear, however, is that, notwithstanding my disagreement with the premise of the lawsuit, I harbor no enmity toward Ms. Combier as a result of it and therefore the existence of such action will in no way affect my obligation to be impartial. It is well-established that a judge is obliged to continue in a proceeding under circumstances such as this. To do otherwise would encourage litigants to bring unfounded claims against judges in order to facilitate the unsavory practice of judge shopping (see e.g. Robert Marini Builder, Inc. v Rao, 263 AD2d 846; Spremo v Babchik, 155 Misc 2d 796, modified on other grounds 216 AD2d 382, lv denied 86 NY2d 709, cert denied 516 US 1161). For these reasons, recusal is denied.

We now turn to the pending motions. In view of Ms. Combier's compliance (albeit belated) with the court's direction to appear for deposition as discussed above, Ms. Danger's motion

to dismiss the probate petition as a sanction under CPLR 3126 is denied. Ms. Combier's "cross-motion" asking the court to set a date for a "jury trial" and "pre-trial conference", is moot, in that said conference was held and a trial date was set.[5] Moreover, although Ms. Combier refers to a "jury trial" in her motion, that issue was not in dispute at the time because Ms. Danger had not yet withdrawn her jury demand. Nonetheless, since the substance of Ms. Combier's motion papers can be viewed as bearing on the issue of her right to a jury trial, the court will consider them (along with Ms. Danger's opposition papers) in connection with Ms. Combier's subsequent motion styled as one to preserve her right to a jury trial, to which we turn now.

The law is clear that the right to a jury trial in a probate proceeding is circumscribed by the statutory requirements of SCPA 502 (Trial by jury; waiver or withdrawal). SCPA 502(2)(a) requires that an objectant demand a jury trial in his or her objections and that a proponent "who desires a jury trial must, without regard to whether or not [an objectant] has made such a demand," serve and file his or her own jury demand "within 6 days after service" upon him or her of the objections. A party is deemed to have waived the right to a trial by jury by failing to make a proper demand (SCPA 502[5][a][i]). In addition, a party

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[5] The court acknowledges that even when a party has filed a note of issue (which was not the case at the time the motion was filed), such a scheduling request would not be made by motion.

who has filed a jury demand is permitted to withdraw it "without the consent of the other parties" (SCPA 502[5][b]).

Here, Ms. Danger made a proper jury demand as part of her objections, but has now withdrawn such demand. There is nothing in the record indicating that Ms. Combier preserved her right to a jury trial by making her own demand. The court has no record that Ms. Combier, who was represented by counsel at the time, filed a jury demand (and paid the requisite fee) within the six-day period or anytime thereafter. Moreover, although given the opportunity to provide documentation showing proof of compliance with SCPA 502, Ms. Combier has failed to do so.

Ms. Combier offers no proof, documentary or otherwise, that she ever filed a jury demand in accordance with SCPA 502(2). Instead, in her papers, she improperly relies on the existence of her sister's jury demand, which now has been withdrawn, as well as the court's files, which do not contain a jury demand made by her or, for that matter, any document or notation to suggest the existence of such. The fact that Ms. Combier has often referred to an eventual jury trial in various motions throughout the course of this litigation does not confer upon her the right to a jury trial, particularly since at that time she was relying, at her own peril, on her sister's jury demand.

Finally, although Ms. Combier does not specifically seek to be relieved of the effect of failing to comply with the

requirements of SCPA 502, which she is entitled to do under CPLR 4102(e), the court will nonetheless review her papers in the light most favorable to her and examine the record to determine if there is a basis for such. CPLR 4102(e), which has been held to be applicable to Surrogate's Court under SCPA 102, allows the court to relieve a party from its failure to file a timely jury demand "if no undue prejudice to the rights of another party would result." However, such relief is discretionary and, in construing CPLR 4012(e), courts generally have allowed the filing of a late jury demand only when the length of the default is *de minimus* (see e.g. Matter of Mirsky, 81 Misc 2d 9 [13 day delay]; Matter of Beatty, 205 Misc 962 [10 day delay]). In contrast, where the period of default is not *de minimus*, courts have generally denied such applications without regard to actual prejudice to the other party (see Matter of Bosco, 141 AD2d 639 [18 month delay]; Matter of Toran, NYLJ, Dec. 30, 1997, at 28, col 1 [six and 1/2 month delay]; see also Fils v Diener, 59 AD2d 522 [excusing five month delay was an abuse of discretion]; Matter of Halsband, NYLJ, Oct. 26, 1992 [two and 1/2 year delay]; Matter of Waltemade, NYLJ, Dec. 18, 1998, at 38, col 2 [two year delay]).

Here, the period in which Ms. Combier was required to file a timely jury demand expired more than nine (9) years ago. At the time Ms. Combier was required to preserve her right to a jury

trial, and, for approximately fourteen months thereafter, she was represented by counsel. Moreover, even if this were not the case and Ms. Combier had appeared *pro se* throughout this litigation, she would not now be entitled to claim ignorance of procedure and file a late jury demand (see e.g. Matter of Labita, NYLJ, June 18, 2008, at 29, col 1; Matter of Fruchtman, NYLJ, June 11, 1999, at 34, col 3).

Finally, apart from the fact that Ms. Combier's delay in filing a jury demand is closing in on a decade, it cannot be ignored that Ms. Danger, who followed the well-established procedures regarding jury demands, no longer wishes to have a jury trial. Under these circumstances, this court cannot conceive of a justifiable basis for foisting a jury trial upon her. As one noted commentator, David D. Siegel, observed, "[t]he warning to all, petitioners and respondents alike, is not to rely on the jury demand put in by another party because if that party later withdraws it, there will be no jury" (Practice Commentaries, McKinney's Consolidated Laws of NY, Book 58A, SCPA 502). Based on the foregoing, the court is constrained to deny Ms. Combier's application for a jury trial.

We next turn to Ms. Danger's cross-motion, pursuant to CPLR 3126, for an order resolving in her favor the issue of Ms. Combier's financial motive to unduly influence her mother to execute the propounded instrument. As discussed above, the

basis for the motion is Ms. Combier's alleged failure to provide the discovery directed at the pre-trial conference, i.e., the non-privileged responsive documents subject to the retaining lien. According to Ms. Danger, among the documents subject to the lien are those that would establish that Ms. Combier was more than $150,000 in credit card debt at the time the propounded instrument was prepared and executed.

It is noted initially that, at the pre-trial conference, Ms. Combier was directed to obtain the documents "within 30 days" or notify the court if she could not do so. When six weeks had passed and Ms. Combier had not provided access to the documents at issue, Ms. Danger filed the instant motion. On the return date, May 26, 2009, Ms. Combier conceded that she had not obtained the documents, but claimed that she had not been told exactly when to do so. Although the record clearly demonstrated otherwise, Ms. Combier was nonetheless given until June 9, 2009 to meet her discovery obligations and the motion was held in abeyance.

The date for Ms. Combier to produce the discovery directed at the pre-trial conference has now passed. The court has not been informed by Ms. Danger's counsel that Ms. Combier has failed to meet her obligations. Nor, has the court been informed by Ms. Combier that she has been unable to obtain the documents. These facts, however, are not dispositive of the issue of whether Ms.

Combier has now produced the documents. Accordingly, the motion is denied without prejudice to renewal if circumstances warrant.

The next issue before the court is Ms. Combier's motion to compel discovery responses. It appears that Ms. Combier is demanding that her sister respond to a document demand dated August 24, 2006. However, a response to such document demand had previously been furnished to Ms. Combier. Indeed, attached to Ms. Combier's opposition to her sister's motion to dismiss (the first of the motions discussed above) is a copy of the document demand at issue as well as Ms. Danger's response dated July 25, 2007.

Apparently, however, Ms. Danger's counsel did not recall having been served with the document demand or preparing a response because annexed to his opposition papers is a new response to the document demand dated June 5, 2009. Such response is substantially the same as the one dated July 25, 2007. Under these circumstances, the motion is denied as moot.[6]

Finally, two other issues raised in Ms. Combier's various motion papers warrant brief comment. First, one overriding theme in Ms. Combier's submissions is that she does not believe that her sister has turned over all of the documents in her possession or control that are responsive to Ms. Combier's

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[6] To the extent that Ms. Combier is also seeking sanctions against her sister and sister's counsel, there is no basis in the record to award sanctions.

discovery demands. This contention is flatly denied by Ms. Danger's counsel. The record is devoid of any indication that evidence is being withheld. In any event, Ms. Combier will have a remedy at trial if opposing counsel seeks to introduce evidence that should have been produced. In addition, to the extent that Ms. Combier believes that the record does not prove that the propounded instrument is invalid, the trial will provide her with the opportunity to establish such.[7]

Second, Ms. Combier claims that the objections are invalid and that opposing counsel is prosecuting them without authority. The probate file contains a Notice of Appearance by the attorney with a proper authorization signed by Ms. Danger on March 27, 1998 (SCPA 401). Thus, there can be no question that Ms. Danger authorized her attorney to appear on her behalf. However, it appears that Ms. Combier is correct that her sister's objections were not verified as required. The issue is what is the effect of an unverified pleading.

SCPA 303 provides that "[a]ll pleadings [defined in SCPA 302[1][a] as a petition, answer or objection and account] shall be verified in the manner provided by CPLR 3020." Since there is no provision in the SCPA governing the effect of an unverified

[7] Although Ms. Combier has frequently claimed that she desires an immediate trial, her failure to obtain for more than 2 and 1/2 years the documents subject to her former attorney's retaining lien - documents that she asserted in 2006 were essential in order for her to proceed to trial - suggests otherwise.

pleading, we must look to the CPLR (see SCPA 102). CPLR 3022 provides that "[w]here a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects to do so."

Here, not only did Ms. Combier, at a time when she was represented by counsel, fail to reject the unverified pleading as set forth in CPLR 3022, but she waited more than nine (9) years to raise the issue of the defect. Such a delay can hardly be considered "notice with due diligence" (see e.g. State v McMahon, 78 Misc 2d 38). In any event, it is well established that the lack of a verification should be treated as a technical defect or irregularity, which in the absence of prejudice to a substantial right of a party, should be disregarded (CPLR 2001; CPLR 3026; Matter of Garfinkle, 119 AD2d 911; Matter of Johnson, 88 Misc 2d 364).

Ms. Combier has not been prejudiced in any way by the existence of the unverified objections. Indeed, her conduct in litigating the validity of the objections demonstrates that she never considered the pleading a nullity or deficient in any way. More importantly, it demonstrates that she did not consider it a bar to the litigation. Although Ms. Combier has long since waived her right to consider the pleading a nullity under SCPA

3022, the SCPA does require a verified pleading and therefore she is entitled to be served with one. Accordingly, under these circumstances, Ms. Danger is directed to verify her pleading in accordance with CPLR 3021 within 20 days of the date of this decision (see Matter of Fordham, NYLJ, Mar. 10, 1999, at 28, col 4; see also Matter of Faile, NYLJ, Oct. 2, 1997, at 34, col 5).

As for Ms. Combier's related contention that the unverified objections prove that her sister's attorney is prosecuting the objections on his own without the consent of his client, who no longer wishes to pursue them, Ms. Danger's attorney denies such. However, to the extent that Ms. Danger signs the verification herself, Ms. Combier's concerns should be put to rest. In the event her attorney signs the verification as he may do in certain circumstances under CPLR 3021, then the issue will be resolved once and for all when the trial begins and Ms. Danger does or does not default.

The parties are to appear for trial ready to proceed on August 4, 2009 in Room 509 of this Court at 10:00 a.m. The Clerk of the Court is directed to send a copy of this decision, which constitutes the order of the court, by certified mail, to Elizabeth Combier, Kenneth Wasserman, Esq. (counsel for Julia

Danger) and Peter Schram, Esq. (counsel for the Public Administrator).

SURROGATE

Dated: July 17, 2009