

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
LEONARD GOLD,

Petitioner,

- against -

IRA SHIVITZ and ELMONT CEMETERY, INC.,

Respondents.  
\_\_\_\_\_

TRIAL/IAS PART 13  
NASSAU COUNTY

INDEX NO. 20124/10

MOTION SUBMISSION  
DATE: 4/18/11

MOTION SEQUENCE  
NO. 1

The following papers read on this motion:

- Notice of Motion and Affidavits.....   X
- Affirmation in Opposition.....   X
- Reply Affirmation.....   X

The petitioner moves for an order pursuant to the Rules of Professional Conduct, NYCRR §1200 (1.7(a)(2)) disqualifying counsel for the respondent Ira Shivitz, requiring respondent, Ira Shivitz, to pay for all costs and attorney's fees associated with bringing and litigating this action. The respondent, Ira Shivitz, submits opposition. The plaintiff submits a reply affirmation.

The petitioner, Leonard Gold, seeks an order disqualifying his son, Frederic M. Gold, a member of the firm, Frederic M. Gold, P.C., counsel for the respondent, Ira Shivitz, from representing Ira Shivitz in this matter.

The petitioner, by way of the instant action, seeks equitable relief for a declaration allowing petitioner, Leonard Gold, to place his family name "Gold", on a monument that is on a plot in the Beth David Cemetery, owned by co-respondent, Elmont Cemetery, Inc. Petitioner submits that the plot was originally owned by Sol Jacobs and Bessie Jacobs, husband and wife, whereby the plot passed to their heirs, their children, Ethel Jacobs, (Ethel Shivitz by marriage), and Phyllis Jacobs, (Phyllis Gold by marriage). Ethel Shivitz predeceased Phyllis Gold. The respondent Ira Shivitz is the sole surviving child of Ethel Shivitz, who became owner of her interest in the plot upon her death.

The petitioner, Leonard Gold, now 92 years old, is the surviving spouse of Phyllis Gold, married for 64 years until her death on November 8, 2009. Leonard Gold and Phyllis Gold had four children, one being Frederic M. Gold, counsel for respondent, Ira Shivitz. The petitioner intends to be interred in the plot next to his late wife upon his death and seeks to exercise his right to place his family name "Gold" on the monument that stands on the subject cemetery plot. The petitioner provides that respondent, Ira Shivitz, as well as his son, Frederic M. Gold, object to such request.

Frederic M. Gold, counsel for respondent, Ira Shivitz, submits that there is no conflict or different interests between himself and his client. Although Frederic M. Gold acknowledges that prior to the commencement of the instant lawsuit he had given the respondent, Elmont Cemetery, Inc., written consent to changes for the plot, annexed to petitioner's motion as Exhibit "D", Frederic M. Gold avers that he "only gave the written consent after being threatened with physical harm and violence by petitioner". Frederic M. Gold further provides that he spoke with his brother and "in the interests of safety for my family" he agreed to give the written consent. The petitioner denies the allegations made by his son and provides, essentially, that his relationship with his son has broken down over his intention to place the family name "Gold" on the monument. And so, the plot thickens.

The Rules of Professional Conduct, NYCRR §1200 1.7(a), provides:

"a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, *property or other personal interests.*" (emphasis added).

The appearance of a conflict of interest is forbidden, and "[v]iewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit ..." (*Faustini v. Palladino*, 280 AD2d 291, citing *Greene v. Greene*, 47 NY2d 447). "Any doubts as to the existence of a conflict should be resolved in favor of disqualification." (*Chang v. Chang*, 190 AD2d 311). "An attorney must not only avoid impropriety, but even the mere appearance thereof." (*Id.*).

The Code of Professional Responsibility, 22 NYCRR 1200.20(b), prohibits a lawyer from representing a client where "the lawyer knows, or it is obvious that the lawyer ought to be, called as a witness on behalf of the client."

In the instant action concerning petitioner's desire to place his family name, "Gold", on a monument upon the subject plot, whereby his son provided consent, under alleged duress, and now, upon litigation, withdraws such consent, it would be egregious to allow his son to represent the respondent, Ira Shivitz. The possible adverse impact upon the adversary system is too great here where the son, counsel for petitioner, avers that he gave his consent to the relief requested, under the threat of violence, and will proceed in litigation, to depose and cross-examine petitioner, regarding

the subject plot, of which he has an interest in, whether it be a "personal" interest or an interest in the property. Additionally, it is obvious that Frederic Gold ought to be called as a witness with respect to his withdrawal of his written consent to the relief requested.

In light of the foregoing, it is hereby

ORDERED that counsel, Frederic M. Gold, is disqualified from representing the respondent, Ira Shivitz, in the above matter, and it is hereby further

ORDERED that this action is hereby stayed up and until June 17, 2011 to allow respondent, Ira Shivitz, time to obtain new counsel, and it is hereby further

ORDERED that on June 17, 2011 the parties shall fully comply with the terms of the Preliminary Conference Order, including, but not limited to, conducting the court-ordered depositions scheduled for July 13, 2011, whereby any dates provided in the Preliminary Conference Order from the date of this order, up and until June 17, 2011, are hereby extended to July 1, 2011.

ENTER:



J.S.C.

Dated: May 17, 2011

cc: Frederic M. Gold, P.C.  
Friedman, Levy, Goldfarb & Green, P.C.

**ENTERED**  
MAY 20 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE