

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

FILE NO.: 502014CP003698XXXXSB

TED BERNSTEIN, as Trustee of the
Shirley Bernstein Trust Agreement
dated May 20, 2008, as amended,

Plaintiff,

v.

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN;
MICHAEL BERNSTEIN; MOLLY SIMON;
PAMELA B. SIMON, Individually and as Trustee
f/b/o Molly Simon under the Simon L. Bernstein
Trust Dtd 9/13/12; ELIOT BERNSTEIN,
Individually, at Trustee f/b/o D.B., Ja.B. and Jo.B.
under the Simon L. Bernstein Trust Dtd 9/13/12,
and on behalf of his minor children, D.B., Ja.B. and
Jo.B.; JILL IANTONI, Individually, as Trustee
f/b/o J.I. under the Simon L. Bernstein Trust Dtd
9/13/12, and on behalf of her minor child, J.I.;
MAX FRIEDSTEIN; and LISA FRIEDSTEIN,
Individually, as Trustee f/b/o Max Friedstein and
C.F. under the Simon L. Bernstein Trust Dtd
9/13/12, and on behalf of her minor child, C.F.,

Defendants.

**ANSWER AND AFFIRMATIVE DEFENSES TO
ELIOT BERNSTEIN'S PETITION TO REMOVE
THEODORE BERNSTEIN AS SUCCESSOR TRUSTEE**

Defendants, MOLLY SIMON, ALEXANDRA BERNSTEIN, ERIC BERNSTEIN and
MICHAEL BERNSTEIN, by and through their undersigned attorney, answer and affirmatively
defend against the Petition to Remove Theodore Stuart Bernstein as Alleged Successor Trustee
filed by Eliot Bernstein on or about December 5, 2014, and state:

Answer

1. Admitted that Eliot Bernstein ("Eliot") is over 18 years of age and a resident of Palm Beach County; otherwise denied.
2. Admitted that Eliot is the natural guardian of his three minor children; otherwise denied.
3. Admitted.
4. The referenced statute "speaks for itself;" otherwise denied.
5. Denied.
6. Admitted.
7. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
8. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
9. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
10. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
11. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
12. Denied.

13. Denied.
14. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
15. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
16. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
17. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
18. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
19. Denied.
20. Without knowledge and therefore denied.
21. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
22. Without knowledge and therefore denied.
23. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
24. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.

25. Denied.
26. Denied.
27. The referenced statute "speaks for itself;" otherwise denied.
28. Denied.
29. The referenced statute "speaks for itself;" otherwise denied.
30. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
31. Denied.
32. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
33. Denied.
34. Denied.
35. Denied.
36. Denied.
37. Denied that Theodore Bernstein ("Ted") has failed to properly account; otherwise denied.
38. Denied.
39. Admitted, with exception to the extent that this allegation attributes wrongful conduct on the part of Ted as Trustee.
40. The referenced statute "speaks for itself;" otherwise denied.

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41. Without knowledge and therefore denied.
42. Without knowledge and therefore denied.
43. Without knowledge and therefore denied.
44. Admitted that Simon Bernstein ("Simon") exercised a power of appointment;
otherwise denied.
45. The first sentence is denied. With respect to the second sentence, without
knowledge and therefore denied.
46. With respect to the first sentence, without knowledge and therefore denied. The
second sentence is denied.
47. The Court struck this allegation by Order entered on May 4, 2015; otherwise
denied.
48. Denied.
49. Without knowledge and therefore denied.
50. Denied.
51. Denied.
52. Admitted, with exception to the reference that the policy was "allegedly
payable."
53. Without knowledge and therefore denied.
54. Without knowledge and therefore denied.
55. Without knowledge and therefore denied.

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56. Without knowledge and therefore denied.
57. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
58. Admitted that Simon's estate would be entitled to the insurance proceeds if Simon's Irrevocable Trust was not entitled to those proceeds; otherwise denied.
59. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
60. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.
61. Any Memorandum of Law or other pleadings filed in the Illinois life insurance litigation "speaks for itself;" otherwise denied.
62. Any Memorandum of Law filed in the Illinois life insurance litigation "speaks for itself;" otherwise denied.
63. Admitted that Ted stands to benefit if it is determined that Simon's Irrevocable Trust is entitled to the life insurance proceeds; otherwise denied.
64. Admitted that Simon's estate was allowed to intervene in the Illinois life insurance litigation; otherwise denied.
65. Without knowledge and therefore denied.
66. Denied.
67. Denied.

68. With respect to the first sentence, the referenced statute "speaks for itself." The second sentence is denied.

69. With respect to the first sentence, without knowledge and therefore denied. The second sentence is denied.

70. Admitted, with exception to the extent this allegation suggests that Simon's estate and/or Trust are entitled to the insurance proceeds.

71. Denied.

72. Denied.

73. Admitted that Simon's estate was allowed to intervene in the Illinois life insurance litigation; otherwise denied.

74. Denied.

75. Admitted that Simon's estate and Trust will not benefit if it is determined that Simon's Irrevocable Trust is entitled to the life insurance proceeds; otherwise denied.

76. Denied.

77. Denied.

78. Denied.

79. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.

80. The referenced order "speaks for itself;" otherwise denied.

81. Denied.

82. Denied.
83. Without knowledge and therefore denied.
84. Admitted that Simon acted as Personal Representative of Shirley's estate and that Shirley's estate was reopened after Simon's death; otherwise denied.
85. Without knowledge concerning Robert Spallina's statements and therefore denied; otherwise denied.
86. Without knowledge concerning Ted's claims and therefore denied; otherwise denied.
87. Denied.
88. Denied.
89. The Court struck this allegation by Order entered on May 4, 2015; otherwise denied.

Affirmative Defenses

90. As and for a First Affirmative Defense, Eliot is not a beneficiary of the Shirley Bernstein Trust, and he therefore lacks standing to seek the relief requested in his Petition. F.S. § 736.0706(1) ("The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee"); *see also Palmer v. Horton*, 469 So.2d 903 (Fla. 3rd DCA 1985).

91. As and for a Second Affirmative Defense, Eliot alleges in his Petition that he is "legal guardian of this three minor children . . . alleged beneficiaries of the Shirley Trust." Eliot is not qualified to act for his children due to a conflict of interest. Eliot has (in a separate

action) challenged the validity of estate planning documents which would essentially eliminate any beneficial interests that his children may have in Simon's and/or Shirley's trust estates.

92. As and for a Third Affirmative Defense, Eliot essentially alleges that Ted should be removed as Successor Trustee of the Shirley Bernstein Trust on the ground that hostility exists between Ted and Eliot. Eliot is not a beneficiary of the Shirley Bernstein Trust wherein he seeks Ted's removal as Successor Trustee, so any purported hostility between Ted and Eliot is irrelevant and of no consequence. Furthermore, hostility or disharmony between a trustee and beneficiaries is not cause for the trustee's removal under Florida law. In *Parr v. Cushing*, 507 So.2d 1227 (Fla. 5th DCA 1987), the court held that friction between a trustee and contingent beneficiaries, without more, could not justify removal of the trustee. It has also been held that an "acrimonious relationship" between a trustee and a beneficiary, coupled with "questionable and vindictive" actions taken by the trustee, did not rise to a level justifying removal of a trustee selected by the settlor. *Parker v. Shullman*, 843 So.2d 960, 961 (Fla. 4th DCA 2003).

93. As and for a Fourth Affirmative Defense, Eliot has failed to allege (nor can he show) a sufficient basis in law or fact to remove Ted as Successor Trustee of the Shirley Bernstein Trust. The general rule is that removal of a trustee must be predicated on a "clear showing of abuse or wrongdoing in the *actual* administration of the trust." *Parr*, 507 So.2d at 1228. It is not enough to allege or show that there is a *potential* for mismanagement or conflict of interest by the trustee; rather, a plaintiff must allege and prove *actual* conduct by the trustee

amounting to a breach of trust. *Id.* Even then, minor mistakes or neglect of duty by a trustee will not justify removal unless the breach is serious enough to threaten loss or mismanagement of the trust property. *Nickels v. Philips*, 18 Fla. 732 (1882).

94. The aforementioned Defendants have retained the undersigned attorney to represent them in this action and are obligated to pay him a reasonable fee. These Defendants are entitled to an award of their attorney's fees and costs pursuant to F.S. §§ 736.1004, 736.1005, 736.1006 and all other applicable statutes.

WHEREFORE, the aforementioned Defendants respectfully request that this Court dismiss Eliot's Petition with prejudice, award attorney's fees to the aforementioned Defendants from the Shirley Bernstein Trust, to be assess against Eliot's and/or Eliot's children's shares pursuant to F.S. §§ 736.1004, 736.1005 and 736.1006, and grant such other and further relief as this Court deems proper and just.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail to: ALAN ROSE, Esquire, 505 South Flagler Drive, Suite 600, West Palm Beach, Florida 33401 (arose@pm-law.com); PETER M. FEAMAN, Esquire, 3615 West Boynton Beach Boulevard, Boynton Beach, Florida 33436 (service@feamanlaw.com); PAMELA SIMON, 950 North Michigan Avenue, #2603, Chicago, Illinois 60611 (psimon@stpcorp.com); JILL IANTONI, 2101 Magnolia Lane, Highland Park, Illinois 60035 (jilliantoni@gmail.com); LISA FRIEDSTEIN, 2142 Churchill Lane, Highland Park, Illinois 60035 (lisa.friedstein@gmail.com); BRIAN M. O'CONNELL, Esquire, 515 North Flagler Drive, 20th

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Floor, West Palm Beach, Florida 33401 (boconnell@ciklinlubitz.com); and ELIOT

BERNSTEIN, 2753 NW 34th Street, Boca Raton, Florida 33436 (iviewit@iviewit.tv), this

8TH day of May, 2015.

JOHN P. MORRISSEY, P.A.

By: 

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