IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D16-222

ELIOT BERNSTEIN

L.T. CASE NOS. 2014CP003698XXXXNB
2011CP000653XXXXNB

Appellant,

v.

TED S. BERNSTEIN, AS TRUSTEE,
et al.

Appellee.
_____/

ON APPEAL FROM A FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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# APPELLEE'S, TED S. BERNSTEIN, AS SUCCESSOR TRUSTEE, ANSWER BRIEF

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**Alan B. Rose**
Florida Bar No. 961825
e-mail: arose@mrachek-law.com
**MRACHEK, FITZGERALD, ROSE, KONOPKA, THOMAS & WEISS, P.A.**
505 South Flagler Drive, Suite 600
West Palm Beach, FL 33401
***Attorneys for Appellee***

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## III. PREFACE

### Parties

Most of the parties to this dispute are members of the extended Bernstein family, the children and grandchildren of Simon and Shirley Bernstein, as depicted in a family tree in evidence as PX 7 (R. 2049). The family members also are defined below in this Preface.

For simplicity, each of the five children will be referred to as the "Bernstein Children" or, if necessary, by their first names, Ted, Pam, Eliot, Lisa and Jill.

The ten grandchildren will be referred to as the "Bernstein Grandchildren."

The object of this lawsuit, the Shirley Bernstein Trust Agreement dated May 20, 2008, shall be referred to simply as the "Trust."

The settlor, Shirley Bernstein, shall be referred to as "Shirley."

The settlor's husband, Simon Bernstein, shall be referred to as "Simon."

Appellee, Ted S. Bernstein, as successor Trustee under the terms of Shirley Bernstein Trust Agreement dated May 20, 2008, shall be referred to as the "Trustee."

Appellant, Eliot Ivan Bernstein, shall be referred to as "Eliot."

**Record**:

References to the record will be shown as:

The Record of Case No. 502014CP003698XXXXNB: (R page)

Appellants' Appendix: (A Tab: page)

Trial transcript: (T. page)[1]

Plaintiff's Exhibits for Trial (PX #, R __)

**Quoted Materials:**

In all direct quotes and excerpts from cases and relevant hearing transcripts or trial exhibits, all emphasis is added and internal citations are omitted unless specifically noted otherwise.

[1] The Trial Transcript is included in Appellant's Appendix at A 23:7903-8201.

## IV. STATEMENT OF THE CASE

The probate final judgment under appeal upheld the last Wills and the last Trusts signed by Simon and Shirley Bernstein, both of whom are deceased. In so ruling, the trial court determined that distributions should be made from the Shirley Bernstein Trust to Simon's "then living grandchildren," into separate trusts created for each of them in the testamentary documents.[2] While that class of rightful beneficiaries includes Eliot Bernstein's three children, it does not include Appellant, Eliot Bernstein, individually. Simply put, Eliot is not a beneficiary.

That is critical in the overall case, because Eliot has no standing to participate in these trust proceedings. Eliot's constant and wild efforts as a veteran *pro se* litigant have caused these proceedings at times to more closely resemble a circus; however, that is of no issue in this appeal concerning only a bifurcated, one-day trial to determine the validity of five testamentary documents.

During the trial, the Trustee submitted self-proving documents, to which there was no counter-evidence. In addition, the Trustee presented live testimony from the testators' attorney explaining the stated intent of Simon and Shirley, and confirming the preparation and formal execution of documents. Although not required, the

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[2] The ruling is appealable under Rule 9.170(b)(5), Fla. R. App. P. because it "determine[d] the persons to whom distribution should be made."

Trustee's witnesses also confirmed that the final documents were consistent with Simon's final wishes, as stated to his lawyer and as told to Simon's family during a conference call a few months before his death.

Although Eliot has tried to challenge every piece of the Trustee's evidence – as he has "challenged" essentially everything that has occurred in these probate proceedings over the past four years – he presented no evidence of his own, and failed to refute in any way the validity of Shirley's and Simon's testamentary documents. In other words, stripped of any (evidentiary) support, Eliot's big top tent lies flat.

The Final Judgment under review should be affirmed in all respects.

## V. STATEMENT OF THE FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

Simon and Shirley Bernstein were married for over 50 years; and together they had five children – Ted, Pam, Eliot, Lisa and Jill – and ten grandchildren.[3] This appeal concerns the distribution of their remaining assets after the death of Simon, the surviving spouse.

[3] . Although not critical for the purposes of this appeal, a family tree starting with Simon and Shirley, followed by their five children (with spouses), and the ten Bernstein Grandchildren is in evidence as PX 7 (R. 2049).

In November 2007, Simon and Shirley became clients of the Tescher & Spallina, P.A. law firm. (PX 9, R2062; T.11) The lawyers were provided and reviewed their existing wills dated August 2000, and their revocable trusts, which were admitted into evidence. (PX 40(A)-(F), R1997-2048; T.15-16)

Over the course of the next 6 months, Simon and Shirley met with their new lawyers at least four times to "review and go over their existing estate planning and make changes to their documents"; they had meetings and discussions about Simon's and Shirley's testamentary intent; the lawyers sent drafts of new wills and revocable trust agreements, along with an explanatory cover letter; and ultimately they agreed upon and formally executed a final set of documents. (PX10, R.1961-69; PX 11, R.2056-60)

Over the course of these meetings, the lawyers engaged in discussion of a variety of different asset protection and estate planning issues. (PX 10; T.41-42) The lawyers' notes reflect they were told that Simon, who had been in the insurance business for many years, had accumulated some wealth. During a meeting with Shirley and Simon on November 11, 2007, the lawyer's notes reveal a net worth of approximately $18 million. (PX 10, R.1961; T.23)

Their testamentary plan was common and simple. Whoever died first would leave everything to the other in a tax advantageous structure to utilize the maximum

estate tax exemption. Specifically, the surviving spouse would receive outright ownership of all personal property (furniture, jewelry, cars), and the residuary of the estate transferred into his or her newly-created trust through a pour-over provision. This structure is explained in detail in a five-page letter sent by the lawyers to Simon and Shirley on April 9, 2008, enclosing drafts of their new wills and trusts. (PX11, R.2056-60; T.26–28)

Of significance here, the letter spells out the terms of a special power of appointment granted to the surviving spouse. The letter explains this provision under the Simon Trust, and then states that the two trusts are "virtually identical." (PX11, R.2057-58)[4] Specifically, the letter makes it clear that upon Simon's death, he has been given "a special power to appoint the remaining assets of both the Marital Trust and the Family Trust to any of your lineal descendants and their spouses (a power to redirect and reallocate)," and that any asset not appointed would be held in separate trusts for three of their children, Eliot, Lisa and Jill. (PX 2, R.2076-2104)

Six weeks after the letter was sent, on May 20, 2008, Simon and Shirley formally signed their new Will and their new revocable trusts. Each of their testamentary documents contains a self-proving affidavit in accordance with Florida

[4] This same structure – a power of appointment giving the surviving spouse the right to change the estate plan and decide who gets the money – was found in the prior set of documents from August, 2000. (T. 21, 30)

law. (PX1, R.2072; PX2, R.2103; T. 34-39) For Shirley, this would be her last Will and, but for a minor and inconsequential amendment, her last Trust Agreement.

As they had agreed, and as spelled out in the April 9th letter, Shirley's Trust provides that Simon would be the sole beneficiary during his lifetime, and upon Simon's death, he would have a Limited Power of Appointment to decide who would receive the remaining assets of the Shirley Trust. The dispositive provision of the Shirley Trust reads:

> My spouse (if my spouse survives me) may appoint the Marital Trust and the Family Trust . . . to or for the benefit of one or more of my [Shirley's] lineal descendants and their spouses." Article II.E.1 (PX2, R.2079)

Appellant, Eliot, was given a contingent remainder interest in Shirley's Trust solely in the event Simon did not exercise his power of appointment.[5] This contingency was set forth in Article II.E.2 , which sets forth an alternate dispositive provision for any part of the trust property for which ***Simon does not effectively exercise his power of appointment***. Under that default provision, Eliot was named as a 1/3 beneficiary. (T. 33)

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[5] Eliot's potential interest extinguished once Simon died having exercised his power of appointment. A remainder is be contingent if it is subject to a condition precedent as to the persons who are to take. *Story v. First Nat. Bank & Trust Co.*, 115 Fla. 436, 156 So. 101 (Fla. 1934). Here, Simon's exercise of the power of appointment through his Will decided who is entitled to the assets from Shirley's Trust.

Shirley Bernstein died on December 10, 2010. She was survived by Simon. Pursuant to the terms of the Shirley Trust, Simon became sole trustee and sole beneficiary, and as surviving spouse, had the power to appoint the assets in Shirley's Trust. Moreover, as Simon's Trust remained revocable until his death, he could change his beneficiaries anytime. According to the drafting attorney, who testified during the trial, the flexibility was intentional and is normal in a long-term marriage:

> Typically, you give the survivor of the spouse a power to appoint in the event that they want to change any of the estate planning of the first to die. Found in most first marriage documents with only children from that marriage. (T. 30)

After Shirley's passing, Simon developed a relationship with a girlfriend, who apparently wanted something from Simon's estate. (T. 50, 55) He also had communications with one of his children, Pam, who expressed displeasure with his current estate plan. (T. 54-55) On February 1, 2012, approximately 14 months after Shirley's death, Simon once again met with his lawyers at Tescher & Spallina. (PX 13, R.2074; T.45)

As revealed by the lawyer's notes and his trial testimony, Simon's finances had significantly declined since late 2007. (*Id.*) Simon lost millions of dollars as a result of the Great Recession and a failed investment in a Ponzi scheme, combined with a steep decline in his insurance business, which Simon believed was now worthless. (T.

51) In total, Simon's personal net worth was around $1.5 million and the assets in the Shirley Trust were believed to be around $6 million.[6] (PX13, R.2074; T. 49)

When Simon called the lawyer in early 2012, "he had been thinking about giving his estate and Shirley's estate to his grandchildren." (T. 56) After discussing various options, Simon decided to leave nothing to his new girlfriend. (T. 56) Instead, Simon and his lawyers developed a new estate plan, under which Simon would leave the entirety of a $1.6 million life insurance policy to his five children, and exercise his power of appointment over the remaining assets in the Shirley Trust in favor of his ten grandchildren. (T. 56-58)

In early May, 2012, Simon and his lawyer communicated this information on a conference call with all five children, and asked if any of them had any issue or problem with that plan. (T. 58-60) Although he had no legal obligation to do this, Simon and his lawyer wanted to explain the plan to avoid any family dissension after his death. None of his children objected or voiced any concern; instead, they told

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[6] According to the attorney, "clients have a tendency to overstate their net worth" (T. 53), and Simon was no different. His estimates of the fair market value of the Trust's real estate holdings was overly optimistic, as the sale of all Trust assets yielded significantly less than $2 million total. This is important for two reasons: one, it partially explains Eliot's anger and dismay, in that he apparently expected there would be $100 million; and two, this case does not involve substantial monies, to be split between 10 grandchildren, and the continued administrative expenses from prolonged litigation will only further diminish their modest inheritances.

Simon to do whatever he pleased.[7] Eliot responded to his father's announcement that he was leaving everything to the ten grandchildren by stating:

> I'm paraphrasing, but he [Eliot] said something to the effect of, Dad, you know, whatever you want to do, whatever makes you happy, that's what's important. (T. 60)

As the lawyers had done when preparing the 2008 documents, Simon's lawyers sent him drafts of his new Will and his Amended and Restated Trust Agreement, along with a cover letter explaining the changes, on May 24, 2012. (PX 15, R.1922-57; T. 64) The letter provides:

> In addition, you have exercised the special power of appointment granted to you under Shirley's Trust Agreement in favor of your grandchildren who survive you. Upon your death, the remaining assets of the Shirley [Trust] will be distributed in equal shares to the then serving trustees of the separate trusts establish for your grandchildren …. If you have any questions or if there are any changes you would like to make, please let us know. (PX15, R.1923; T. 65)

On July 25, 2012, Simon formally executed his new Will (PX 4, R.1904-12) and his Amended and Restated Trust Agreement. (PX 5, R.1971-95)

Each page of the Will is initialed by Simon. The Will was signed by Simon in the presence of his lawyer and the lawyer's paralegal, and contains a self-proving

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[7] The Trustee confirmed that there was a conference call where Simon told the family exactly what he was going to do, and that "the documents that we're looking at today do exactly what your father told everybody, including your brother, Eliot, he was going to do on the conference call in May of 2012." (T. 214-15)

affidavit. (PX4, R.1912) The notary in whose presence Simon, the lawyer and the paralegal signed the Will was Simon's administrative assistant/employee. (PX 4, R. 1911-12; T. 66-67, 70-71) Those same four people – Simon, his lawyer, the paralegal and Simon's administrative assistant – executed the Amended and Restated Trust Agreement with the same legal formalities. (PX5, R.1995; T. 71-72) The Trustee testified that he was present and witnessed the arrival of the lawyer and paralegal for the execution of the 2012 documents. (T. 214)

Under examination by the attorney for four of the grandchildren, the lawyer also confirmed that Shirley and Simon executed their new documents with all required formalities; understood the relationship of those who be the natural objects of their bounty; understood the practical effect of what they were signing; were not actively procured by anyone to make new documents; and were not unduly influenced by anyone. (T. 82-90)

The lawyer testified that, in 2012, Simon was "fully mentally sharp and aware and acting of his own volition," and appeared to be the "Si [Simon] we had known 2007." The lawyer "didn't see anything or observe anything or any behavior of Simon Bernstein during the course of any meeting you had with him that would call into question his competence or his ability to properly execute a testamentary document." (T. 193)

The day after Simon formally executed his 2012 documents, Simon's lawyer sent Simon a copy of his Will by letter dated July 26, 2012, reflecting that the original of the Will was being held in the lawyer's safe. (PX17; R. 1918)

The Will Simon exercised his Special Power in Article II in the Will of Simon's Will, which specifically references Shirley's Trust and the power given to him under subparagraph E.1 of Article II of Shirley's Trust. The relevant provision of Simon's Will reads:

> Under Subparagraph E.1. of Article II of the SHIRLEY BERNSTEIN TRUST AGREEMENT dated May 20, 2008, (the "Shirley Trust"), I was granted a special power of appointment upon my death to direct the disposition of the remaining assets of the Marital Trust and Family Trust established under the Shirley Trust. Pursuant to the power granted to me under the Shirley Trust, upon my death, I hereby direct the then serving Trustees of the Marital Trust and the Family Trust to divide the remaining assets into equal shares for my then living grandchildren and distribute said shares to the then serving Trustees of their respective trusts established under Subparagraph II.B. of my Existing Trust, as referenced below, and administered pursuant to Subparagraph II.C. thereunder. (PX4, R.1905)

In simple terms, as Simon's children were told he was going to do, Simon directed Shirley's Trustee to divide whatever assets remained in the Shirley Trust at his death into equal shares for his then living grandchildren.

Simon died unexpectedly less than two months later, on September 13, 2012. (PX 18, R 1959; T. 74) Under the express terms of Shirley Trust, their oldest child,

Ted, became successor Trustee. (T. 75)

Simon's Will was admitted to probate. (A19:7715) Initially, no one objected to Simon's Will or his designation of the ten grandchildren as beneficiaries. (T. 75)

Procedural History of this Litigation

For reasons unrelated to whether the Testamentary Documents are valid, Eliot began contesting, challenging and/or objecting to the administration of Simon's and Shirley's trusts and estates. Eliot questioned why he had been disinherited by his father, and also expressed concern as to why these trusts were so small, when he thought there should be $40 million to $100 million. (T. 81)

Among other things Eliot complained that Simon's Will was invalid, therefore rendering ineffective the power of appointment. Eliot complained alternatively that even if the power of appointment is valid, the assets could not be distributed to all ten grandchildren. Once these potential issues arose as to the validity and effect of Simon's exercise of the power of appointment, the Trustee filed the instant lawsuit. (R 13-65) Specifically, in his Complaint the Trustee asserted:

> The Trustee believes that there is a disagreement between and among the children and grandchildren of Shirley Bernstein as to effect of the exercise of the power of appointment by Simon L. Bernstein and which persons are entitled to receive a distribution from the Shirley Trust.

(R. 18, Complaint, ¶36)

The Trustee sued and served process on all necessary and indispensable parties, including every possible beneficiary or person interested in Shirley Bernstein's Trust. This included all five children and all ten grandchildren, individually or through the parents of minor grandchildren. Only Eliot, individually and purportedly as natural guardian for his children, opposed the Trustee.

Eliot filed an Answer (R 89-154) and a Counterclaim (R 155-233). The Counterclaim named as counter-defendants not only the Trustee and beneficiaries, but also the Trustee's lawyers, including the undersigned, and all of the witnesses to the signing of Simon's Will and Trust. In addition, Eliot named Judges Martin Colin and David French, personally and professionally, as "Material and Fact Witnesses who may become Defendants in any amended complaint." (R 156) A few days later, Eliot also filed a lengthy Petition to Remove the Trustee. (R 243-809).

Eliot's *modus operandi* is to remove those who oppose him, including the Trustee, the Trustee's counsel, witnesses and trial judges (twice filing motions to disqualify and petitions for writs of prohibition). Again, Eliot is an experienced *pro se* litigant who attempted to create a circus over which he presided as the ringleader.

On September 18, 2014, the trial court entered an order temporarily staying the case to prevent it from spiraling out of control. (R 810-12) At a status conference the following week, the trial court ordered that it would first determine which parties

were proper beneficiaries and which were not, as the latter simply lacked standing.

The trial plan, embodied in an Order signed October 6, 2014 (R 906-08), called for the Trustee to amend the Complaint to add Count II, to determine the validity or invalidity of the Testamentary Documents. Other than answering Count II, no additional counterclaims or amendments were permitted. The trial court "sever[ed] Count II from the remaining claims in this action; will set Count II for a hearing or trial consistent with the Court's schedule; and hereby stay[ed] all other proceedings, including the other counts of the complaint and any counterclaim, pending further order of this Court." (R 907)

The Trustee filed an Amended Complaint with Count II. (R 816, 828-29) Eliot filed an Answer. (R 914-20) Most of the beneficiaries chose not to answer, and were defaulted. (R 921-40) Once Count II was at issue, the Trustee served a Notice for Trial. (R 941-43)[8]

Before the case was set for a trial, some ancillary matters occurred regarding the Trustee's attempt to sell homestead property owned by the Trust. Eliot reacted by

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[8] Because Count II also determined the validity of Simon's Will, the Personal Representative of Simon's Estate moved for and was granted leave to intervene in the proceeding, to protect his interests. (R 1041-44; R 1045-47) The parties resolved that issue by agreeing the court-appointed Personal Representative, who was not nominated under any will, would continue to serve regardless of the outcome of trial. (R 1555-59) The Personal Representative then did not need to attend the trial.

filing a *lis pendens* (R 1094) in an ultimately unsuccessful, yet costly, effort to stop the sale. After Judge Colin entered a Final Order approving the sale (R 1320-25), Eliot moved to disqualify Judge Colin. (R 1337-87) The Motion was denied (R 1388-89), and then Judge Colin recused himself. (R 1390-91)[9] The matter was reassigned to Judge Coates, but he recused himself at Eliot's request during the first hearing. (R 1406-07) The case then came before Judge John L. Phillips. (R 1408-09)

At the first hearing before Judge Phillips, a status conference to bring the newly-assigned judge up to speed, Judge Phillips agreed with the Trustee to follow the original trial plan (R. 906-08), to decide the validity or invalidity of the documents. Thus, on September 24, 2015, Judge Phillips signed an *Order Setting Trial on Amended Complaint (DE 26) Count II*, scheduling a one-day trial for December 15, 2015. (R 1409-10)

Although the docket is lengthy, Eliot's only filings relate to his emergency petition to disqualify Judge Phillips (R 1429-86; R 1487-1544; and the Order denying that Motion, R 1553-54) and his Motion for Continuance filed the morning of the

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[9] Eliot filed a Petition for All Writs with the Florida Supreme Court, Case No. SC15-1077 (R 1403-05; A. 7728-7898), seeking to challenge Judge Colin's order denying mandatory disqualification. That petition was transferred to this Court under the dictates of *Harvard v. Singletary*, 733 So. 2d 1020 (Fla. 1999); assigned Case No. 4D15-3849; treated as a petition for writ of prohibition; and denied. Eliot moved for rehearing en banc (R 1717), and also sought discretionary review from the Florida Supreme Court in SC16-29, both of which were denied. (R 1709)

scheduled trial. (R 1560-68, 1569-77)

Eliot served no requests for production of documents; no interrogatories; no notices of deposition; and no witness list. The Trustee served a Witness List (A 22:7899) and Exhibit Lists. The Trustee served a Notice of Mediation (R 1416-18), and the parties completed mediation pursuant to the pretrial order.

The Trial

The trial was set to occur on December 15, 2015. Shortly before the trial, Eliot Bernstein engaged in a typical series of *pro se* hijinks, moving to disqualify the trial judge and then filing a last-minute motion for continuance on the morning the trial was to begin. Those motions were properly denied.

Thereafter, the trial took place as originally scheduled. The Trustee called Robert Spallina, Esq., Simon's and Shirley's primary trusts and estates lawyer. He testified as stated in the fact section above. His direct examination by the Trustee covered 70 pages of the transcript (T. 11-81); Eliot cross-examined Mr. Spallina for several hours and then recalled him as Eliot's first witness. In total, Eliot's examination of Mr. Spallina covered more than 100 pages of the transcript. (T. 92-185; T. 194-204) Eliot then called as his only other witness his brother Ted, the Trustee. (T. 206-13; 217-29)

The first time Eliot was asked if he had any other witnesses, he responded "No,

I don't. I was going to call some of their witnesses, but they're not here.' (T. 205) Then, after his questioning of his brother, Eliot again was asked by the trial court if he had any other witnesses, and responded:

MR. BERNSTEIN:· No.· I'm good.

THE COURT:· Okay.· So you rest?

MR. BERNSTEIN:· I rest.

(T. 231)

At the end of his closing argument, Eliot complained that the trial was unfair, he had been denied due process, and again moved to disqualify Judge Phillips. (T. 254) Judge Phillips recessed so Eliot could prepare a written motion for disqualification; received the written motion and took a further recess to consider it; and then denied it as legally insufficient. (T. 255-56) The motions to disqualify are in the record (T. 1585-1614, and 1615-44), as are the trial court's written orders denying the motions. (R 1583-84; R 1703-06; R 1709) Eliot then filed a Petition for Writ of Prohibition with this Court (4D16-64), which was denied.

The trial court entered a Final Judgment on Count II of the Amended Complaint on December 16, 2015. (R 1578-82) As a result of the Final Judgment, the three children of Eliot Bernstein prevailed, and are among the class of beneficiaries of the Trust. Eliot Bernstein did not prevail, as the Final Judgment

establishes that he is not a beneficiary of the Trust and lacks standing to participate further in these proceedings.

Eliot timely moved for a new trial (R 1645-76; 1677-1708), which was denied by Order dated January 7, 2016. (T. 1794-95) Eliot timely appealed twelve days later. (T. 1876-95)

Post-trial, the Trustee moved for the appointment of a Guardian ad Litem to protect the interests of Eliot's children. (R 1710-85) The orders addressing the appointment of Diana Lewis, a former circuit court judge, as the guardian as litem are the subject of a separate set of consolidated appeals. Cases No. 4D16-1449, 4D16-1476 and 4D16-1478.

## VI. SUMMARY OF ARGUMENT

The issue is whether there are sufficient grounds to reverse the trial court's Final Judgment, after a trial on the merits, upholding the validity of Shirley's 2008 Will and Trust, and Simon's 2012 Will and Trust. That ruling was proper under Florida law, and is supported by competent substantial evidence.

As a threshold matter, each of the Testamentary Documents is self-proving, which by itself is sufficient evidence. In addition, the Trustee presented testimony from the drafting lawyer (Simon's and Shirley's lawyer) who witnessed the formal execution of all documents. With that evidence in the record, the Trustee, as proponent, established a *prima facie* case, and shifted the burden to Eliot to establish grounds on which to revoke probate and invalidate the documents. Eliot presented no such evidence, which compels affirmance of the judgment.

Likewise, Eliot presented no evidence to establish that Shirley or Simon were unduly influenced by any beneficiary, as he failed to meet any of the requirements of Florida law. Although not required to do so, the Trustee presented evidence to refute any suggestion of undue influence, including presenting evidence that Simon had testamentary capacity in 2012 when he signed his new documents; fully understood his estate plan; explained it to his children before he died; and left the family's wealth equally to ten grandchildren, the natural objects of his bounty. (There is no issue as

to Shirley, as no one has suggested that Shirley lacked testamentary capacity or was unduly influenced in 2008.)

In addition to demonstrating that the Trustee's evidence compels the affirmance of the Final Judgment, the Trustee also addresses each of Eliot's specific grounds for reversal. As set forth below, these alleged grounds – that the trial court improperly scheduled a bifurcated trial on three months' notice; failed to enforce the Statewide Fraud Policy of the Courts; failed to grant several motions to disqualify himself or continue the trial; and failed to grant a new trial – have no merit whatsoever.

The trial court's Final Judgment is proper under Florida probate law and is supported by far more than substantial competent evidence. Moreover, the trial court did not abuse its discretion in denying Eliot's numerous motions, in properly limiting the scope of his cross-examination, and in not granting a new trial.

The Final Judgment should be summarily affirmed in all respects.

## VII. ARGUMENT

The Initial Brief is rambling and incoherent. To assist the Court's understanding of the issues, the Trustee: (1) explains the legal basis for the trial court's ruling that the documents are valid; then, (2) addresses Eliot's arguments.

### A. THE TESTAMENTARY DOCUMENTS ARE VALID

#### 1. The Testamentary Documents are Self-Proving, and Regardless, There Was Testimony from An Attesting Witness.

Simon's Will, as well as Shirley's Trust because it is testamentary in nature, must satisfy Florida's Will Act formalities. *Zuckerman v. Alter,* 615 So. 2d 661, 664 (Fla. 1993). Under Florida law, the will must be signed by the testator, and two attesting witnesses, all of whom sign in the presence of the testator and each other. § 732.502, Fla. Stat.[10]

Under section 733.107, "[i]n all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish *prima facie* its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes *prima facie* the formal execution and attestation of the will."

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[10] Any competent person may serve as witness to a will. § 732.504, Fla. Stat.

A testamentary document is "self-proving" pursuant to Florida Statutes section 732.503, if the testator and witnesses acknowledge by affidavit in front of a notary that the testator declared the instrument to be the testator's will; signed it in front of the witness; and both witnesses also signed the instrument as a witness in the presence of the testator and of each other. § 732.503, Fla. Stat. On their face, and as confirmed by the testimony of the drafting lawyer (who also acted as one of the subscribing witnesses), each of the Testamentary Documents contains a self-proving affidavit.

Even if these Testamentary Documents were not self-proving,[11] the documents were admitted into evidence, without objection, during the testimony of Simon's lawyer, who served as one of the attesting witnesses. The proponent can establish *prima facie* the formal execution and attestation of a Will or Trust by testimony of an attesting witness. Florida law was satisfied by the live testimony of Robert Spallina, Simon's lawyer, who witnessed each of the Testamentary Documents. (T. 214)

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[11] Although the notary properly indicated on most of the Testamentary Documents and the related documents (living wills, health care surrogates) that Simon was personally known, and although the evidence demonstrates that the notary of Simon's Will was Simon's personal assistant (who obviously personally knew him), the notary failed to denote on the Will itself that she personally knew Simon. The Will still is self-proving, because only substantial compliance is required for a certificate of acknowledgment to be valid. *See, House of Lyons, Inc. v. Marcus,* 72 So. 2d 34, 35 (Fla. 1954).

Once the Trustee met his burden, either through self-proof or Spallina's testimony, or both, the burden shifted to Eliot. Under the second part of section 733.107(1), once the *prima facie* case is established, "[t]hereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought."

Eliot presented no such evidence. Indeed, he presented no evidence at all, not even his own testimony. As a result, there is no basis in this record to revoke probate of Simon's Will, and the Final Judgment should be summarily affirmed.

**2. <u>There Is No Dispute Simon and Shirley Had Testamentary Capacity.</u>**

Even if Eliot had presented any evidence, which he did not, based upon the testimony at trial there is more than substantial competent evidence that Simon and Shirley had testamentary capacity.

There is a low hurdle under Florida law to show of testamentary capacity. Again, there is no evidence challenging Simon's mental faculties during his meetings with his lawyer, his conference call with his family, or his execution of the documents. And, there appears to be no challenge to Shirley's capacity. Regardless, the minimum requirements were expressed in *Diaz v. Ashworth*, 963 So. 2d 731 (Fla. 3d DCA 2007):

> To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed. *See In re Wilmott's Estate*, 66 So. 2d 465, 467 (Fla.1953).

Simon's and Shirley's attorney covered each of these issues, as to both Simon and Shirley. It is clear from Simon's discussions with his lawyers in 2008 and 2012 that Simon had knowledge of his net worth, including the makeup and approximate value of their assets. In addition, through questioning as to each of the Testamentary Documents, PX 1 through PX 5, Simon's lawyer confirmed that both Simon and Shirley understood the relationship of those who be the natural objects of their bounty and the practical effect of what they were signing. (T. 82-90)[12] That testimony alone requires affirmance of the Final Judgment.

### 3. <u>There Is No Evidence of Undue Influence</u>

The only thing that could have imposed any further burden on the Trustee would have been a competent showing of undue influence by Eliot. Under section

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[12] "Any person who is of sound mind... may make a will." *Neal v. Harrington,* 159 Fla. 381, 383-84 (Fla. 1947). "A testator at the time of making a will is presumed to be sane, and that 'the burden of rebutting this presumption and establishing incompetency to make a will...' rested upon the petitioner." *Gardiner v. Goertner,* 110 Fla. 377, 383 (Fla. 1932). Here, there is no proof by Eliot to establish lack of competency. Indeed, Eliot neither testified himself or presented any testimony or evidence to show incompetency.

733.107(2), in appropriate case there may be a "presumption of undue influence" which would shift the burden of proof to the Trustee.

Here, there was no evidence that anyone actively procured the testamentary documents or unduly influenced either Shirley or Simon, as confirmed by the lawyer. (T. 82-90) The lawyer went further, confirming that Simon was "fully mentally sharp and aware and acting of his own volition." (T. 193)

The leading case on undue influence is *In re Carpenter's Estate*, 253 So. 2d 697 (Fla. 1971), which held that "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises." Here, no evidence that any of the beneficiaries – Simon's grandchildren – occupied a confidential relationship with Simon or actively procured his 2012 Will. The evidence is totally to the contrary.

*Carpenter* sets forth factors to consider: (a) presence of the beneficiary at the execution of the will; (b) presence of the beneficiary on those occasions when the testator expressed a desire to make a will; (c) recommendation by the beneficiary of an attorney to draw the will; (d) knowledge of the contents of the will by the beneficiary prior to execution; (e) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (f) securing of witnesses to the will by the beneficiary; and (g) safekeeping of the will by the beneficiary subsequent to

execution. *Id*. at 702; *see also*, *Newman v. Brecher*, 887 So. 2d 384 (Fla. 4th DCA 2004), *rev. denied*, 911 So. 2d 792 (Fla. 2005).

None of those factors apply here. Indeed, of the seven factors identified in *Carpenter*, the only one remotely possible here is (d), and that is only because Simon insisted on having a call with his *children* to discuss his intent. There is no evidence that any of the *grandchildren* was on the call or ever learned the contents of Simon's last Will from someone who was on the call. Thus, none of the *Carpenter* factors are proven by Eliot in this case.

Another leading case is *Diaz v. Ashworth*, 963 So. 2d 731 (Fla. 3d DCA 2007), in which a presumption of undue influence was established by evidence that the sole beneficiary was present at the will's execution; recommended the attorney who drew the will; was aware of the will's contents before it was signed; brought the testator to the lawyer's office to sign the will; his wife was one of the subscribing witnesses; and he and he and his wife were active in caring for the testator after the will was signed. In such cases, the proponent of the will has the burden of proving the will was not the product of undue influence, which in *Diaz* was proven by showing the testator "was capable of making his own decision about who would receive his property"; had recently made similar wills; knew what a will was; and was clear about his wishes as to who should inherit his property.

Based upon the statute and case law, and despite Eliot's conclusory and unsupported accusations, there simply is nothing in this record to support a finding that anyone (1) occupied a confidential relationship with the testator; (2) was a substantial beneficiary under will; and (3) was active in processing the instrument. To the contrary, and although it was not the Trustee's burden, there is far more than enough evidence to prove by a preponderance of the evidence that neither Simon nor Shirley were in any way unduly influenced.

## B. NONE OF ELIOT'S ARGUMENTS HAVE MERIT

Eliot raises six points on appeal (condensed below into five points by combining his sections addressing disqualification of the trial judges). None of these arguments merits much attention.

### 1. The Trial Court Properly Handled the Pretrial Procedures Leading to the One-Day Trial, and Afforded Eliot Due Process.

First, it is important to note that this is an appeal from a full trial on the merits. In ordinary circumstances, given that the burden is on the contestant to overcome the Trustee's prima facie case, the Trustee should have prevailed on summary judgment. But given the strange nature of this case, and lower appellate standard when reviewing a summary judgment, the Trustee believed it was more economical and efficient to simply schedule a full evidentiary proceeding. Thus, there was a trial and

the focus of the appeal must be the trial exhibits and testimony in the record. Most of what Eliot Bernstein refers to is not in evidence and is far outside the trial record.

Eliot was granted all the process he was due, including the right to file an answer and defenses; to cross-examine the Trustee's witnesses and present his own witnesses; to testify himself if he chose; or to call an expert to challenge Simon's execution, capacity or mental health. He did none of the above, except attempting to impeach credibility by cross-examination.

The trial court's plan to sever the threshold issues of the validity of the documents and the determination of who had standing as a beneficiary was conceived by Judge Colin in October 2014. After the matter was reassigned twice to new judges, Judge Phillips implemented the trial plan on September 24, 2015, by entering an *Order Setting Trial on Count II* for December 15, 2015. (R 1409-10) Eliot had plenty of time to prepare for the trial.

The decision to sever issues and bifurcate the trial was within the sound discretion of the trial judge. *Roseman v. Town Square Ass'n, Inc.*, 810 So. 2d 516 (Fla. 4th DCA 2002)(trial court did not abuse its discretion in bifurcating trial of complex case). In *Roseman*, this Court stated:

> A judge's determination to bifurcate the proceedings is one which we review for an abuse of discretion. When we stated in our opinion that "we cannot determine that the issues are inextricably intertwined such

> that bifurcation prejudiced Roseman," we were not creating a standard test for the trial court to follow in determining whether or not to bifurcate but merely stating why we do not find that the trial court abused its discretion in ordering bifurcation. In order for us to hold that bifurcation was an abuse of discretion, we must conclude that no reasonable person would have allowed it under the circumstances. We simply stated that the issues were not so intertwined such that the trial court's discretionary decision can be overturned . . . .
>
> ***Like most discretionary decisions, one to bifurcate the proceedings is very difficult to overturn on appeal because of the degree of deference appellate courts give to the trial court's superior vantage point, having viewed all of the proceedings in the case.***

*Id*. at 523-24.[13]

Thus, that Eliot wanted to have different issues decided first is of no moment. It was the trial court's decision whether to bifurcate; the order in which issues would be tried; etc., and the trial court did not abuse its discretion. In fact, the plan followed here to determine validity and standing first is the only logical way to tackle this multi-faceted case. Standing is a threshold issue; so it tackling it first made imminent sense, and indeed, has greatly streamlined the litigation and attendant expense.

Also, if true, Eliot's argument that this is a complex case would favor bifurcation, not the other way around. There was no prejudice from bifurcation – it simplified the trial issues, and decided whether Eliot had standing. Indeed, the issues

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[13] Rule 1.270(b) permits the trial court to order a separate trial of any claim or issue.

were the exact opposite of intertwined – they were separate, discrete and sequential. If Eliot was determined to have standing, he could proceed to trial on his counterclaim, and the Trustee could avoid the need and expense of a trust construction trial on an invalidated document. On the other hand, if the court determined Eliot is not a beneficiary, all kinds of wasteful and unnecessary trial proceedings could be (and have been) avoided.

Finally, the Trustee notes that Eliot plays loose with the facts. In this section he suggests there was a "last minute" discovery of original will and trust documents. In fact, the documents were discovered when the Trustee was cleaning out the Trust's property, and Eliot was advised of the discovery immediately, by email dated May 20, 2015, which included scanned copies. (R 1573-75) In the seven month between that email and the trial, Eliot never asked that the originals be examined by a forensic handwriting expert, nor apparently did he have anyone review the scanned copies. At least we know no one so testified at trial. It was Eliot's burden to disprove the authenticity of these self-proving documents, and he failed.

### 2. The trial court did not violate the "Statewide Fraud Policy of the Courts and the Judicial Canons."

Second, Eliot argues that the trial court violated the Statewide Fraud Policy of the Courts. This argument makes no sense, as the Statewide Fraud Policy is designed

to prevent fraud in the internal workings of the court system, and is inapplicable here. Although the undersigned had never before heard of this Policy, it appears designed to prevent and detect fraud within the internal workings of the court, such as with vendors and contractors who enter into business relationships with the courts.

If Eliot had proof of fraud in the Testamentary Documents, he failed to present it at trial when he was given the opportunity to do so. Likewise, if Eliot wanted to take pre-trial depositions, he failed to notice them when he had the opportunity in the 16-months between the filing of this action and the initial trial on Count II. Eliot never noticed any deposition of any potential witness, not even after the trial was set with three months' notice. *See*, *e.g.*, *S&S Pharmaceuticals, Inc. v. Hirschfield,* 226 So. 2d 874, 874 (Fla. 3d DCA 1969)(no abuse of discretion in refusing to continue the trial set four months in advance because "if [the appellants] had used due diligence they could have completed their discovery some weeks prior to the trial date.").

Eliot's last argument in section II of his Initial Brief suggests it was an abuse of discretion to deny the need for experts in forgery will-trust cases. As noted above, contrary to Eliot's assertions, it was his burden to disprove the authenticity of these self-proving documents once the Trustee established a prima facie case. It was not the

trial court's role to hire an expert, and no one prevented Eliot from retaining an expert.[14]

### 3. Neither of the trial court judges erred in denying Eliot's repeated motions to disqualify, all of which were legally insufficient.

In Sections III and V of his Initial Brief, Eliot argues that "it was an abuse of discretion for Judge Phillips to deny disqualification" as set forth based upon events which occurred during a hearing on September 15, 2015. Because Eliot first moved for such disqualification on December 4, 2015, the motion was untimely. *See*, Rule 2.330(e), Fla. R. Jud. Admin. (motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the relevant facts); *Kozell v. Kozell,* 142 So. 3d 891, 894 (Fla. 4th DCA 2014)(motion was untimely).

Moreover, the issue already has been challenged by Petition to this Court, which was denied. In any event, the motions to disqualify on their face are all legally insufficient. "A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Philip Morris USA, Inc. v. Brown,* 96 So. 3d 468, 471 (Fla. 1st DCA 2012) *quoting MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So. 2d 1332 (Fla. 1990).

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[14] A civil litigant has no right to counsel or an advance of funds to hire experts. Here, on the face of the Testamentary Documents Eliot was not a beneficiary, and was not entitled to any distributions, interim or otherwise.

"A mere 'subjective fear' of bias will not be legally sufficient; rather, the fear must be objectively reasonable." *Arbelaez v. State,* 898 So. 2d 25, 41 (Fla. 2005). "A trial court's prior adverse rulings are not legally sufficient grounds upon which to base a motion to disqualify." *Areizaga v. Spicer,* 841 So. 2d 494, 496 (Fla. 2d DCA 2003).

Finally, "comments, made in the course of the judge's efforts to control the courtroom, are not legally sufficient to require disqualification." *Braddy v. State,* 111 So. 3d 810, 834 (Fla. 2012); *Liteky v. U.S.,* 510 U.S. 540, 555 (1994) (holding that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.").

Appellant argues that, "the Trial transcript shows bias and prejudice" because the trial court sustained objections to improper and repetitive cross-examination of Simon's lawyer. The trial judge has discretion in deciding evidentiary issues, including the scope of cross-examination. Section 90.612(1), Florida Statutes. Many of Eliot's questions were clearly improper under Sections 90.404 and 405 of the Florida Evidence Code. Even though the trial court afforded Eliot significant latitude, he continued to re-ask the same questions over and over again. This was, at best, an attempt to cumulatively impeach Simon's counsel, or at worst to simply harass him.

Eliot repeatedly pressed the lawyer for details as to an alleged conviction, which he denied, but could only properly ask if he was convicted and how many times.

The argument that the court improperly limited Eliot's cross-examination, which substantially exceeded in length the direct examination, misses the critical issue. Cross-examination and impeachment attack the credibility of a witness, who the trial court may believe or disbelieve.[15] Eliot still presented no witnesses or evidence of his own to prove his case, despite it being his burden.

### 4. The Trial Court did not abuse its discretion by denying Eliot's last-minute request for continuance.

Eliot next argues that the trial court abused its discretion in denying a continuance "to have Texas counsel admitted pro hac vice" to represent Eliot's children. First, and importantly, Eliot's children did not need counsel at trial. The Trustee was advocating their position – that the 2012 Will was valid, making them beneficiaries – and that position succeeded at trial. Eliot's children suffered no harm at trial. To the contrary, they won and now they have a guardian ad litem representing

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[15] *Siewert v. Casey,* 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012)("It is the role of the finder of fact, whether a jury or a trial judge, to resolve conflicts in the evidence and to weigh the credibility of witnesses. Great deference is afforded the finder of fact because it has the first-hand opportunity to see and hear the witnesses testify.").

their interests instead of their *pro se* father as natural guardian. Thus, this whole issue is a red herring.

Second, the trial court did not abuse its discretion in denying a motion for continuance filed the morning before the start of a long-awaited trial. Eliot did not exercise due diligence in obtaining counsel or preparing for trial for more than a year while this case was pending, nor in the three months after the order setting trial.

"The grant or denial of a continuance is a matter within the sound discretion of a trial judge ... The action of the trial court will not be disturbed by the appellate court unless there is clearly shown to have been a palpable abuse of judicial discretion." *Glades General Hospital v. Louis,* 411 So. 2d 1318, 1319 (Fla. 4th DCA 1981). Because there was no palpable abuse of discretion by the Trial Court in denying Appellant's motion, the Trial Court's ruling should not be disturbed.

Appellant's actions, or lack there of, in securing counsel is very similar to the actions taken by appellant in *Cole v. Heritage Communities, Inc,* 838 So. 2d 1237 (Fla. 5th DCA 2003). In *Cole,* appellants asserted that the trial court erred in failing to grant a continuance of trial. *Id.* at 1238. In 2001, appellants counsel moved out of town and did very little on the case for the next year. *Id.* Trial was then set for the trial period beginning April 29, 2002. *Id.* On March 5, 2002 appellants original lawyer was granted permission to withdraw from the case. *Id.* New counsel for the

appellants sought a continuance, stating it could not be ready for trial at that time and needed to conduct more discovery. The trial court denied the motion. On appeal, the denial of a continuance was affirmed: "the appellants must certainly have known that a trial was coming, yet they took no action to secure new counsel until the last moment. Finally, the appellee had a right to see the final conclusion of litigation that had lasted three years beyond the one year presumptively reasonable period to bring a case to non-jury trial." *Id.* at 1238-39.

Factors to consider in determining whether the trial court abused its discretion in denying the motion for continuance include, "(1) whether the denial of the continuance creates an injustice for the movant; (2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and (3) whether the opposing party would suffer any prejudice or inconvenience as a result of the continuance." *Krock v. Rozinsky,* 78 So. 3d 38, 41 (Fla. 4th DCA 2012). Each factor weighs against Appellant. First, no injustice was created. Appellant had been representing himself and his children for almost the entire time this case was pending. Second, as the court in *Cole* points out, it is not unforeseeable that a pending case would eventually go to trial, and Appellant was sure of the trial date almost three months before the trial. In fact, no Texas lawyer or

other lawyer ever moved to appear pro hac vice or otherwise, and there is no reason to believe a new lawyer would have appeared if the trial court had delayed the trial.

On the other hand, the Trustee, as well as the Trust and its rightful beneficiaries, would have suffered prejudice if Eliot's continuance was granted. This case had been pending for almost a year and a half. The Trustee and beneficiaries had the right to have the case heard, to determine the beneficiaries and enable the Trustee to make distributions and close the trust and estates proceedings. The trial court did not palpably abuse its discretion in denying Eliot's motion to continue the trial.

### 5. The Trial Court Did Not Abuse its Discretion in Denying Eliot's Motion for New Trial

Finally, Eliot argues that the trial court abused its discretion by failing to grant a new trial based on fraud that occurred in this case. While Rule 1.540(b)(3) permits a new trial in rare circumstances where there is fraud that could not have been discovered before or at trial, this is not such a case.

Here, most of Eliot's cross-examination during the trial centered on the alleged frauds he believes were committed by Simon's lawyers. There was no "new fraud" discovered after trial. This is merely rearguing the same issues already painstakingly presented during trial.

"To entitle a movant to an evidentiary hearing, a rule 1.540(b)(3) motion must specify the fraud." *Flemenbaum v. Flemenbaum,* 636 So. 2d 579, 580 (Fla. 4th DCA 1994). The "motion must clearly and concisely set out the essential facts of the fraud, and not just legal conclusions." *Id.* "The purpose of this specificity requirement is to permit the court 'to determine whether the movant has made a prima facie showing which would justify relief from judgment,' and is not merely rehashing maters explored at trial." *Dynasty Exp. Corp. v. Weiss,* 675 So. 2d 235, 239 (Fla. 4th DCA 1996). "Frequently, rule 1.540(b)(3) fraud motions are attempts to rehash a matter fully explored at trial. In many cases, the term 'fraud' is loosely used to label all conduct which has displeased an opposing party... If a motion on its face does not set forth a basis for relief, then an evidentiary hearing is unnecessary." *Flemenbaum,* 636 So. 2d at 580.

The standard of review for denial of a Rule 1.540(b)(3) motion is abuse of discretion. *Handel v. Nevel,* 147 So. 3d 649, 651 (Fla. 3d DCA 2014). Appellate courts "will not disturb that ruling unless no reasonable judge would have reached the same decision." *Id.* This case comes nowhere close to meeting that standard.

## VIII. CONCLUSION

For the foregoing reasons, the Final Judgment was proper and supported by competent substantial evidence, and the trial court did not abuse its broad discretion in handling the trial of this narrow yet significant issue. The Trustee respectfully request that the Final Judgment be AFFIRMED.

## IX. CERTIFICATE OF SERVICE

WE CERTIFY that a copy of the foregoing Answer Brief has been e-filed and furnished to all counsel and parties on the attached service list by e-mail service this 6th day of September, 2016.

## X. CERTIFICATE OF COMPLIANCE

WE CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) because this is a computer-generated brief and is submitted in Times New Roman 14-point font.

**MRACHEK, FITZGERALD, ROSE,**
**KONOPKA, THOMAS & WEISS, P.A.**
505 South Flagler Drive, Suite 600
West Palm Beach, FL 33401
(561) 655-2250 Telephone
(561) 655-5537 Facsimile
**Alan B. Rose**
Florida Bar No. 961825
e-mail: arose@mrachek-law.com
*Appellate Counsel for Appellee*

By: s/ Alan B. Rose
Alan B. Rose

**SERVICE LIST** - CASE NO. 4D16-222

Eliot Bernstein
2753 NW 34th Street
Boca Raton, FL 33434
(561) 245-8588 - Telephone
(561) 886-7628 - Cell
(561) 245-8644 - Facsimile
Email: Eliot I. Bernstein
(iviewit@iviewit.tv)

Peter M. Feaman, Esq.
Peter M. Feaman, P.A.
3695 W. Boynton Beach Blvd., Suite 9
Boynton Beach, FL 33436
(561) 734-5552 - Telephone
(561) 734-5554 - Facsimile
Email: service@feamanlaw.com;
mkoskey@feamanlaw.com
Counsel for William Stansbury

John P. Morrissey, Esq.
330 Clematis Street, Suite 213
West Palm Beach, FL 33401
(561) 833-0766 - Telephone
(561) 833-0867 - Facsimile
Email: John P. Morrissey
(john@jmorrisseylaw.com)
Counsel for Molly Simon, Alexandra Bernstein, Eric Bernstein, Michael Bernstein

Pam Simon
303 E. Wacker Drive, Suite 2725
Chicago, IL 60601
psimon@stpcorp.com

Jill Iantoni
2101 Magnolia Lane
Highland Park, IL 60035
jilliantoni@gmail.com
Individually and as trustee for her children, and as natural guardian for J.I. a minor

Lisa Friedstein
2142 Churchill Lane
Highland Park, IL 60035
lisa@friedsteins.com
Individually and as trustee for her children, and as natural guardian for M.F. and C.F., Minors

Gary R. Shendell, Esq.
Kenneth S. Pollock, Esq.
Matthew A. Tornincasa, Esq.
Shendell & Pollock, P.L.
2700 N. Military Trail, Suite 150
Boca Raton, FL 33431
(561) 241-2323 - Telephone
(561) 241-2330 - Facsimile
Email: gary@shendellpollock.com
ken@shendellpollock.com
matt@shendellpollock.com
estella@shendellpollock.com
britt@shendellpollock.com
grs@shendellpollock.com
robyne@shendellpollock.com

Diana Lewis, Esq.
ADA & Mediations Services, LLC
2765 Tecumseh Drive
West Palm Beach, FL 33409
(561) 758-3017 - Telephone
Email: dzlewis@aol.com
Guardian *Ad Litem* for
Eliot Bernstein's minor children,
Jo.B., Ja.B., and D.B.

Brian M. O'Connell, Esq.
Joielle A. Foglietta, Esq.
Ciklin Lubitz Martens & O'Connell
515 N. Flagler Dr., 20th Floor
West Palm Beach, FL 33401
561-832-5900 - Telephone
561-833-4209 - Facsimile
Email: boconnell@ciklinlubitz.com;
jfoglietta@ciklinlubitz.com;
service@ciklinlubitz.com;
slobdell@ciklinlubitz.com