

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

CASE NO.: 4D16-2249

L.T. NO. 2014CP002815XXXXNB

ELIOT IVAN BERNSTEIN,

Appellant,

vs.

OPPENHEIMER TRUST CO. OF
DELAWARE, et al.,

Appellees.

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee, Oppenheimer Trust Company of Delaware, et al. ("Oppenheimer"), moves to dismiss this appeal and states as follows:

Background

1. Oppenheimer seeks the dismissal of this appeal on the basis that Appellant does not have standing to bring an appeal of a final judgment in this matter because: a) he is not a real party in interest and has no legally cognizable interest in this proceeding; b) he was removed as guardian of the real parties in interest (his children) and replaced with a court-appointed guardian *ad litem* for the real parties in interest earlier this year; ; and c) his three appeals of the orders appointing a guardian *ad litem* for his children were dismissed by this Court, leaving no possibility of a change with respect to Appellant's role (or lack of same) in this appeal.

2. The sole beneficiaries of the three "Grandchildren Trusts" that were the subject of the below proceedings were Eliot Bernstein's children, Joshua, Jake and Daniel Bernstein

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(the “Beneficiaries”). Eliot Bernstein was named as a defendant in the below proceeding solely in his capacity as a natural guardian of the Beneficiaries. He was not sued and had no standing to participate in the below proceedings in his own right.

3. Due to his pattern of vexatious litigation in the below proceedings and other cases, and his conflicts of interest in representing the Beneficiaries’ interests, Oppenheimer and others moved for the appointment of a guardian *ad litem* for the Beneficiaries.

4. After an evidentiary hearing, the Probate Court found that Eliot Bernstein was acting “adverse” and “destructive” to the interests of the Beneficiaries and, therefore, would no longer be permitted to serve as their guardian in the litigation. The Court ordered that a guardian *ad litem* would be appointed, and, by separate order, appointed former Palm Beach County Circuit Court Judge Diane Lewis to serve as the Beneficiaries’ guardian *ad litem*.

5. The separate orders entered in the two related cases, the Bernstein Trust case and the Oppenheimer case – were the subject of three appeals brought by Appellant. (Case Nos. 4D16-1449, 4D16-1476, and 4D16-1478). This Court consolidated the three appeals for all purposes. (See Order of this Court dated August 25, 2016).

6. After an order to show cause and several extensions without the filing of an initial brief, this Court dismissed the three consolidated guardianship appeals for lack of prosecution. (See this Court’s order of November 29, 2016, attached as Exhibit A.)

7. After the dismissal of the consolidated appeals, the only remaining appeal involving Oppenheimer is this matter, in which Appellant challenges the trial court’s final order discharging Oppenheimer from its role as trustee and approving Oppenheimer’s accountings.

Argument

8. The Rules of Civil Procedure address the present issue directly. Florida Rule of Civil Procedure 1.210(b), “**Minors or Incompetent Persons,**” states:

When a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person.

That rule was adopted verbatim from the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 17(c).¹ Because Fla. R. Civ. P. 1.210(b) was adopted from Fed. R. Civ. P. 17(c), “decisions of the federal courts construing the counterpart rule relating to suits by and against infants are pertinent.” *See Smith v. Lanford*, 255 So. 2d 294, 297 (Fla. 1st DCA 1971).

9. The case law interpreting the procedural rule makes clear that where a guardian *ad litem* is appointed to represent a minor’s interests, the parents have no standing to represent the minor’s interests.

10. In *Garrick v. Weaver*, 888 F. 2d 687 (10th Cir. 1989), the court examined the precise issue raised in the instant case. In that case, after a guardian *ad litem* was appointed to represent Plaintiff’s children, Plaintiff (the children’s mother) sought to make legal arguments on appeal on behalf of the children when the guardian *ad litem* had not chosen to do so. *Id.* at 693. The Court examined the rule and the public policy and held that only the guardian *ad litem*, and not the parent, could act on behalf of the children. *Id.* The Court examined the policy considerations and pointed out that allowing two parties to represent the children “interferes

¹ Although there have been some changes to Fed. R. Civ. P. 17(c) over the last sixty years, it remains essentially – and for the purpose of this case, identically – the same.

with the orderly development of the lawsuit because the minor children could take inconsistent positions through their multiple representatives.” *Id.* In fact, the *Garrick* case illustrated that problem, where the Plaintiff sought to take positions on behalf of the children that the guardian *ad litem* chose not to take. *Id.* The facts in the instant case even more strongly support the lack of any role for Appellant because, here, Appellant was *removed* as representative for specific reasons by the trial court at the time the guardian *ad litem* was appointed, and Appellant has no other interest in the litigation.

11. In *Hull v. United States*, 53 F. 3d 1125 (10th Cir. 1995), the Court that decided *Garrick* faced a situation similar to the instant facts. In that case, when the trial court recognized a potential conflict of interest between the minor and his parents, the Court appointed a guardian *ad litem*. *Id.* at 1126-27. When the parents sought to nevertheless take legal positions on behalf of the minor, the court ruled that the parents may not do so because once a guardian *ad litem* is appointed, only the guardian *ad litem* may represent the minor’s interests. *See also, Ackel v. Ackel*, 318 P. 2d 676, 679 (Ariz. 1957) (where a guardian *ad litem* was appointed and remained in that position, the parent of minor defendants had no standing to represent their interests).

12. The three consolidated appeals dismissed by this Court per Exhibit A to this motion were the only existing appeals of the guardianship orders by which the guardian *ad litem*, Diana Lewis, was appointed to represent the interests of Appellant’s children. Therefore, the guardianship orders remain finally intact, and Appellant does not have the ability to challenge them or to reverse their impact. Based upon the Rules of Civil Procedure and well-settled law, Appellant does not have – and cannot regain –standing to represent the interests of

the Beneficiaries in challenging the final order at issue in this appeal or raising any other issue in the case.

WHEREFORE, based upon the foregoing, this appeal should be dismissed.

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART, P.A.
Counsel for Appellee
4855 Technology Way, Suite 630
Boca Raton, FL 33431
Telephone: (561) 961-8085

By: /s/Steven A. Lessne
Steven A. Lessne, Esq.
Florida Bar No. 107514
slessne@gunster.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-mail to all parties on the attached Service List this 13th day of December, 2016.

/s/ Steven A. Lessne
Steven A. Lessne
Florida Bar No. 107514

SERVICE LIST

Joshua, Jacob (Jake) and Daniel Bernstein
c/o Diana Lewis, their Guardian *Ad Litem*
ADR & Mediation Services, LLC
2765 Tecumseh Drive
West Palm Beach, FL 33409
dzlewis@aol.com

Eliot Bernstein
2753 N.W. 34th Street
Boca Raton, FL 33434
ivewit@ivewit.tv
ivewit@gmail.com

Candice Bernstein
2753 N.W. 34th Street
Boca Raton, FL 33434
tourcandy@gmail.com

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

November 29, 2016

CASE NO.: 4D16-1449, 4D16-1476,
4D16-1478
L.T. No.: 2014CP002815XXXXNB,
2014CP002815XXXXNB,
2014CP003698XXXXNB

ELIOT IVAN BERNSTEIN

v. OPPENHEIMER TRUST CO. OF
DELAWARE, ET AL.

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED sua sponte that the above-styled case is dismissed for lack of prosecution.

Served:

cc: Steven A. Lessne
Brian M. O'Connell
John P. Morrissey
Donald R. Tescher
Eliot Ivan Bernstein
Jill Iantoni
Dennis McNamara
William McCabe
STP Enterprises, Inc.
Joseph M. Leccese
Brian Moynihan
Hunt Worth

Alan Benjamin Rose
Mark R. Manceri
Kenneth S. Pollock
Joielle A. Foglietta
Charles D. Rubin
Theodore Stuart Bernstein
Dennis G. Bedley
Gerald Lewin
Lindsay Baxley
Heritage Union Life Ins. Co
Pamela Beth Simon

Lorin Louis Mrachek
Gary R. Shendell
Peter Marshall Feaman
Hunt Worth
Lisa Friedstein
Theodore Stuart Bernstein
James Dimon
Neil Wolfson
T & S Registered Agents
David Lanciotti
Ralph S. Janvey

ms



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

