

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

CASE NO. 4D16-1449

Consolidated with Case Nos. 4D16-1476 and 4D16-1478

ELIOT IVAN BERNSTEIN

Appellant,

L.T. CASE NOS. 2014CP003698 XXXX NB
 2014CP002815 XXXX NB
 2011CP000653 XXXX NB

v.

TED S. BERNSTEIN, AS TRUSTEE, et al.

Appellee.

_____ /

**APPELLEE'S, TED S. BERNSTEIN, AS TRUSTEE, RESPONSE
TO APPELLANT'S UNTIMELY MOTION FOR REHEARING,
CERTIFICATION AND TO VACATE ORDER DISMISSING
APPEAL AND TO ACCEPT LATE-FILED INITIAL BRIEF**

Appellee, Ted S. Bernstein, as successor Trustee of the Shirley Bernstein Trust ("Bernstein Trustee"), responds in opposition to Appellants' untimely *Motion for Re-Hearing, Certification and to Vacate Order Dismissing the Appeal Herein and Accept Late Filing of Initial Brief* ("Motion for Rehearing") filed by Eliot Bernstein ("Eliot") on December 15, 2016.

Appellee joins fully in the Response filed by Appellee, Oppenheimer, and additionally states:

The Motion for Rehearing should be denied. This Court properly dismissed this appeal for lack of prosecution and failure to comply with numerous court orders. The

Motion for Rehearing is untimely; does not demonstrate excusable neglect; and makes no effort to establish a meritorious appellate issue that the appointment of a guardian ad litem at the evidentiary hearing was improper.

The Motion Contains Several Inaccuracies

Before addressing the lack of good cause for Eliot's latest Motion, there are several inaccuracies in Eliot's Motion which should be corrected.

First, the trial court did hold an evidentiary hearing; Eliot cross-examined but did not present his own witnesses or evidence.

Second, it was not a plenary guardianship or incapacity hearing. Instead, Judge Phillips entered an order that Eliot could no longer represent the interests of his children in this probate case due to an obvious and direct conflict,¹ and appointed a Guardian ad Litem ("GAL"). The GAL represents and protects the interests of Eliot's children in the estate and trust proceedings, including settlement.

Third, while one of Eliot's children may now be over 18, technically he is not a direct beneficiary of the Bernstein Trusts. Simon's Trust Agreement created new trusts for each of Eliot's children, and only Eliot is designated to serve as trustee until

¹ Under Florida law, a court should appoint a guardian ad litem when a parent's interests are adverse to the child's interest. *Gilbertson v. Boggs*, 743 So. 2d 123 (Fla. 4th DCA 1999); *Mistretta v. Mistretta*, 566 So. 2d 836, 837-38 (Fla. 1st DCA 1990); §731.303(4), Fla. Stat. (2016). Here, Eliot's interests admittedly are directly adverse to his children's interests, as demonstrated by his appeal in Case No. 4D16-222.

a child reaches 25 years of age. (Upon reaching age 25, Eliot's children may serve as co-trustee of their respective trusts and may withdraw up to 1/3 of the trust principal.). The GAL was necessary in this case due to the undeniable conflict with Eliot's position and Eliot's intransigence in refusing to serve. Ultimately, the trial court will need to appoint a successor trustee for each of Grandchildren Trusts for which Eliot refuses to serve, and upon the appointment of same, the GAL can be discharged. Moreover, to the extent any child is over 18, Eliot no longer would have standing to represent that child's interests in any event.

Fourth, the probate court expressly had subject matter jurisdiction over these matters. Oppenheimer filed its action in accordance with section 736.0201 seeking, among other things: to appoint or remove a trustee (§736.0201(4)(b)); and to review and approve its final accounting (§736.0201(4)(d)). The Bernstein Trustee brought a trust construction action as permitted under section 736.0201(4)(e-g): ascertaining beneficiaries; determining questions arising in the distribution of trust assets, including questions of construction of the trust instruments; and determining who are beneficiaries and in what percentage.

Eliot Has Not Demonstrated Good Cause

Turning to his lack of good cause for the Court to vacate the dismissal, it is important for the Court to consider the messenger – Eliot is a serial litigant who

already has filed his tenth appeal to this Court in these modest estate proceedings, plus two petitions to the Supreme Court,² and Judge Phillips determined he has acted in a manner "adverse" and "destructive" to his children's interests. Eliot has routinely ignored orders of this Court, resulting in show cause orders in a number of his appeals, including one issue today in Case 4D16-4120.

In this specific consolidated appeal, Eliot refused to file a brief, instead filing at least four successive motions for extension of time. Eliot ignored the Court's orders, including one dated November 3, 2016 explaining "[f]ailure to comply with this order WILL result in dismissal of this appeal for lack of prosecution without further notice." Eliot violated that order and again moved for an extension on November 15th, which was denied by order dated November 17th, which provided "this appeal WILL be dismissed" and "no further extensions will be granted."

Eliot failed to file a brief on November 22 when it was due. On November 29, one week after his final deadline – with Eliot still not filing anything – this Court entered a dismissal for lack of prosecution. As a result of Eliot's noncompliance, these consolidated appeals were properly dismissed.

² Case Nos. 4D15-3849; 4D16-64; 4D16-222; 4D16-1449; 4D16-1476; 4D16-1478; 4D16-2249; 4D16-3162; 4D16-3314; 4D16-4120; SC15-1077; SC16-29.

On the 16th day after the dismissal, Eliot belatedly sought rehearing and permission to file an initial brief. Most importantly, in his improper motion for rehearing, Eliot makes no assertion of excusable neglect – Eliot fully knew the Court-ordered deadlines and its prior rulings, but ignored them because he disagreed with the Court. Eliot also does not set forth a meritorious appellate issue, because he does not dispute that his interests are in material and direct conflict with his children's interests.³ Absent such assertions, there could not possibly be good cause to vacate the dismissal order and force the Bernstein Trustee to spend more of the trust's funds, 30% of which are to be distributed into trusts for Eliot's children's, on this appeal.

The Bernstein Trustee requests that this Court enforce its rules and uphold its order dismissing this appeal.

WHEREFORE, the Motion for Rehearing Extension should be denied.

³ Eliot continues to challenge Simon's 2012 testamentary documents, under which his children are indirect beneficiaries of trust interests, and instead seeks to reinstate an earlier set of testamentary documents (the 2008 Will and Trust) under which Eliot was to receive 1/3 of the trust proceeds. *See* Case No. 4D16-222.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been served by e-mail on all parties listed on the attached service list, this 28th day of December, 2016.

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