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February 23, 2017

VIA HAND DELIVERY

The Honorable Rosemarie Scher
NORTH COUNTY COURTHOUSE
3188 PGA Blvd., Room 2728
Palm Beach Gardens, FL 33410

Re: Estate of Simon Bernstein;
Palm Beach County Probate Court Case No. 502012CP004391XXXXSB (IH)

Dear Judge Scher:

In accordance with Your Honor's Order on Case Management Conference and Order Specially Setting Hearings of December 13, 2016, and Your Honor's instructions at the conclusion of the hearing held on February 16, 2017, the following is submitted in connection with the hearing to be held on **March 2, 2017 at 1:30 p.m.**:

1. Trustee's Motion to Approve Retention of Counsel and to Appoint Ted Bernstein as Administrator *Ad Litem* to Defend Claim against Estate by William Stansbury;

    A. Ted Bernstein's [Prior] Motion for Appointment of Curator or Administrator *Ad Litem*, dated February 7, 2014;
    B. Order **Denying** Ted Bernstein's [Prior] Motion for Appointment of Curator or Administrator *Ad Litem*, dated February 19, 2014;
    C. Objection to Trustee's Motion to Appoint Ted S. Bernstein as Administrator *Ad Litem* to Defend Claim against Estate by William Stansbury, dated August 22, 2016.

2. Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Funds, dated May 4, 2016;

3. Case Law Authority; and,

4. Proposed Orders in Word format with jump drive and envelopes.

Thank you for your consideration in this regard.

Respectfully submitted,

PETER M. FEAMAN, P.A.

By: _____
Peter M. Feaman

PMF/tr
Enclosures
cc: Alan Rose, Esq. (via email w/enclosures)
Brian O'Connell, Esq. (via email w/enclosures)
Gary R. Shendell, Esq. (via email w/enclosures)
Diana Lewis, Esq. (via email w/enclosures)
Eliot Bernstein (via email w/enclosures)
Jeffrey Friedstein and Lisa Friedstein (via email w/enclosures)
Pamela Beth Simon (via email w/enclosures)

Filing # 44877594 E-Filed 08/05/2016 11:59:56 AM

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

CASE NO. 502012CP004391XXXXNB-IH
Probate – Judge John L. Phillips

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

_____/

TRUSTEE'S MOTION TO APPROVE RETENTION OF COUNSEL AND, TO APPOINT TED S. BERNSTEIN AS ADMINISTRATOR *AD LITEM* TO DEFEND CLAIM AGAINST ESTATE BY WILLIAM STANSBURY

Ted S. Bernstein, Successor Trustee of the Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012 ("Simon's Trustee"), moves the Court to approve the retention of the law firm Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. ("Mrachek-Law") as counsel to defend the Estate in an independent action brought by William Stansbury, and to appoint Ted Bernstein as Administrator Ad Litem to defend the claim against the estate by William Stansbury and states:

1. Claimant, William Stansbury, has sued the Estate of Simon Bernstein for more than $2.5 million, a claim which vastly exceeds the value of all of the current assets and potential recoveries by the Estate in third party litigation. The Estate attempted to resolve Stansbury's claim in good faith at mediation, but was unable to reach agreement with Stansbury during the mediation and does not believe it is likely that the claim can be settled. In light of that, the Estate must vigorously defend the claim.

2. Stansbury's claim relates to his business relationship with the decedent, Simon Bernstein, through an entity known as Life Insurance Concepts, Inc. ("LIC"). That entity was a closely-held corporation owned primarily by Simon Bernstein and Ted Bernstein, with Stansbury

at one time owning 10% of non-voting stock. LIC was operated and managed by Simon Bernstein and Ted Bernstein, who had sole voting rights, and served on the Board of Directors.

3. Stansbury's claim arises from his employment by and ownership interest in LIC. Before Simon died, Stansbury sued Simon Bernstein, Ted Bernstein, LIC, and various subsidiaries of LIC, asserting a variety of claims. The Complaint was filed on July 30, 2012. Simon Bernstein died 45 days after the Complaint was filed, before any responsive pleading or motion to dismiss was filed. A suggestion of death was filed.

4. LIC actively defended and litigated against Stansbury's claim, and pursued a counterclaim against Stansbury, under the direction of Ted Bernstein. During this litigation, Ted Bernstein was the primary client contact for the defense of the claim for approximately two years before Stansbury settled his differences with LIC. Along the way, Stansbury also asserted a claim against The Shirley Bernstein Trust, which Ted Bernstein as Trustee defended.

5. LIC and the other defendants initially hired Greenberg Traurig. In April, 2013, LIC and Ted Bernstein retained Mrachek-Law, which formally appeared on April 12, 2013. Shortly thereafter, Stansbury served summonses on the co-PRs of Simon's Estate, and the Estate retained Mark Manceri as its counsel.

6. Alan Rose of Mrachek-Law served as lead counsel for LIC, Ted Bernstein, and The Shirley Bernstein Trust, and coordinated the defense work with the co-PRs and Mr. Manceri, taking the lead role in the discovery, depositions, and court hearings. Specifically, for more than a year until the claims against LIC, Ted Bernstein, and Shirley Bernstein Trust were settled, Mrachek-Law handled the production of substantial business records; interviewed witnesses; coordinated the defense strategy with Ted Bernstein and counsel for the Estate; and worked with LIC's accountants

and professionals in preparing the defense of the claims. As a result of that work, Mrachek-Law is familiar with the facts, circumstances, and events, and is prepared to represent this Estate if hired.

7. As a result of his involvement as a founder and a shareholder of LIC, and his participation in this litigation for approximately two years, Ted Bernstein is fully familiar with the issues in the case, the nature of the claims, the relevant documents, and has firsthand knowledge of certain of the facts. As Successor Trustee of the Simon Bernstein Trust, Ted Bernstein has a substantial and direct interest in seeing that the claim of Stansbury is properly defended and ultimately defeated. He has conferred with the beneficiaries of The Simon Bernstein Trust, including the Guardian *Ad Litem*, and all are in favor of Ted Bernstein directing the defense of the claim through the Mrachek-Law firm.

8. In contrast, and through no fault of his own, Brian O'Connell, successor PR of the estate has more limited knowledge of the factual and legal underpinnings of Stansbury's claim and LIC. Neither Mr. O'Connell nor his law firm has ever done work for Simon Bernstein (while alive) or LIC; they never worked for, at or with LIC; they never met Simon Bernstein; and they have no firsthand personal knowledge of any facts relevant to the case.

9. Accordingly, and having conferred with the Trustee and the beneficiaries of the Trust, Mr. O'Connell has agreed to have Mrachek-Law retained to represent the Estate in the Stansbury litigation so long as the Court appoints Ted Bernstein as Administrator *Ad Litem* to stand as the Estate's representative in defending and protecting the estate's interests in the Stansbury litigation. Although the estate will be responsible for the reasonable costs and attorneys' fees incurred by Mrachek-Law in defending the claim (as it would regardless of which law firm was retained), Ted Bernstein has agreed to serve as Administrator *Ad Litem* for no additional fee. In other words, there

will be no fee for the time Ted Bernstein expends working on the defense of the independent action by Stansbury against the estate, whereas there might be some additional expense incurred were Brian O'Connell forced to assume that role. The reasonable fees and costs relating to the defense of Simon's claim, and the eventual pursuit of attorneys' fees awards against Stansbury, will be paid by the Estate.

10. Thus, this plan will result is some significant savings to the Estate due to (a) Mrachek-Law's prior knowledge and involvement; and (b) Ted Bernstein's prior knowledge and involvement, and his willingness to serve for no additional fee.

11. For the foregoing reasons, Ted Bernstein believes it is in the best interests of the estate to retain the Mrachek-Law firm, rather than some other law firm which has no prior knowledge or involvement in this matter. The Trustee believes the granting of this motion will result in an overall reduced cost to defend the claim; will employ attorneys skilled in commercial litigation who happen to be very familiar already with the facts, circumstances, events, and documents relating to Stansbury's claim. As indicated above, the Trustee has conferred with not only Mr. O'Connell, but each of the beneficiaries of the Trust, which is the sole beneficiary of the estate, and all are in agreement.

WHEREFORE, Ted S. Bernstein respectfully requests that this Court enter an order approving the retention of Mrachek-Law to defend the Stansbury independent action and appointing Ted S. Bernstein as Adminitration *Ad Litem* to oversee the estate's defense.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by: ☐ Facsimile **and** U.S. Mail; ☐ U.S. Mail; ■ E-mail Electronic Transmission; ☐ FedEx; ☐ Hand Delivery this 5th day of August, 2016.

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By: /s/ Alan B. Rose
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SERVICE LIST - CASE NO. 502012CP004391XXXXNBIJH

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1.A.

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

CASE NO. 502012CP004391XXXXSB
CP - Probate

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

_____/

MOTION FOR APPOINTMENT OF CURATOR OR ADMINISTRATOR AD LITEM

COMES NOW Ted S. Bernstein, pursuant to Fla. Prob. R. 5.120, 5.122 and Fla. Stat. §733.501 by and through counsel, and moves this Court to appoint a curator or an administrator ad litem and states that at all times relevant:

1. This motion is for the appointment of an estate fiduciary for the limited purposes of administering the estate until this Court appoints a successor personal representative since the Co-Personal Representatives have resigned. It seeks to have the moving party appointed as such.

2. There is pending litigation which the estate is involved in as well as assets to marshal.

3. It is necessary that the estate be represented.

4.The Decedent, Simon Bernstein, formerly resided at 7020 Lion's Head Lane, Boca Raton, Palm Beach County, Florida, 33496, died on or about September 13, 2012, in Palm Beach County, Florida where venue is proper. His last will was admitted on or about October 2, 2012.

5. Decedent left surviving the following persons as next of kin:

Name	Address	Relationship to Decedent	Age of Minor

Ted S. Bernstein	880 Berkeley Street Boca Raton, FL 33487	Son	
Pamela Beth Simon	950 N. Michigan Avenue Apartment 2603 Chicago, IL 60611	Daughter	
Eliot Bernstein	2753 NW 34th Street Boca Raton, FL 33434	Son	
Jill Iantoni	2101 Magnolia Lane Highland Park, IL 60035	Daughter	
Lisa Friedstein	2142 Churchill Lane Highland Park, IL 60035	Daughter	

6. Co-Personal Representatives Robert L. Spallina and Donald R. Tescher, were entitled to and granted Letters of Administration on or about October 2, 2012, and have petitioned to resign from that role on or about January 16, 2014, without completing the administration of the estate.

7. The nature and approximate value of the assets of the estate is believed to be a promissory note and investments in excess of $ 100,000.

8. The moving party is the most qualified to act and has personal knowledge of the Decedent's assets and the litigation which the estate is involved in. He is also the trustee of the Decedent's revocable trust, which is now irrevocable.

WHEREFORE, the moving party prays that he be appointed curator or administrator ad litem, that he be granted letters or authority, and that this Court provide such further relief as may be just and proper.

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief.

February _____, 2014

TED BERNSTEIN

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed on attached Service List by: □ Facsimile **and** U.S. Mail; X **U.S. Mail**; □ E-mail Electronic Transmission; □ FedEx; □ Hand Delivery this 7th day of February, 2014.

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By: _____
Alan B. Rose
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– and –

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1.B.

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

IN RE:

Case No.: 50 2012 CP 004391 SB
JUDGE MARTIN COLIN

ESTATE OF SIMON
BERNSTEIN,
Deceased. Division: IY
_____/

ORDER ON MOTION FOR APPOINTMENT
OF CURATOR OR ADMINISTRATOR AD LITEM

THIS MATTER came before this Court on Tuesday, February 18, 2014, upon the Motion for Appointment of Curator or Administrator Ad Litem, filed by Ted S. Bernstein, and the Court, having heard argument of counsel, and considered the evidence, it is

ORDERED AND ADJUDGED that:

DENIED, for the reasons stated on the record.

DONE and ORDERED in Delray Beach, Palm Beach County, Florida, this 19 day of February, 2014.

CIRCUIT COURT JUDGE

Copies to:

Alan Rose, Esq., PAGE, MRACHEK 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401;
John J. Pankauski, Esq., PANKAUSKI LAW FIRM, 120 South Olive Avenue, Suite 701, West Palm Beach, FL 33401;
Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 Boynton Beach Blvd., Boynton Beach, Florida 33436.

1.C.

Filing # 45525929 E-Filed 08/22/2016 04:15:49 PM

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

IN RE: Case No. 50 2012 CP 004391 NB

ESTATE OF SIMON
BERNSTEIN,
Deceased.
_____/

OBJECTION TO TRUSTEE'S MOTION TO APPOINT TED S. BERNSTEIN AS ADMINISTRATOR *AD LITEM* TO DEFEND CLAIM AGAINST ESTATE BY WILLIAM STANSBURY

COMES NOW Interested Person, William Stansbury, by and through his undersigned counsel and objects to Trustee's Motion to Appoint Ted S. Bernstein as Administrator *Ad Litem* to Defend His Claim Against Estate of Simon L. Bernstein, and as grounds therefor would show unto the Court as follows:

I. Stansbury has standing to assert this Objection.

Florida law provides that an administrator ad litem is akin to a personal representative, with the same duties of neutrality and fidelity as a personal representative. *See Funchess v. Gulf Stream Apartments of Broward County, Inc.*, 611 So.2d 43 (Fla. 4th DCA 1993). When removal of a Personal Representative is at issue, Fla. Prob. R. 5.440 specifically provides that, " ... **any interested person, by petition,** may commence a proceeding to remove a personal representative. ..." (emphasis added.) By logical extension an "interested person" would also have standing to object to the appointment of a particular individual as an administrator ad litem.

The provisions of §731.201(23), Fla. Stat. (2013) define an "interested person" as:

> (23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved..."

Stansbury has filed a claim against the Estate of Simon Bernstein (the "Estate") and has sued the Estate in a separate lawsuit styled *William E. Stansbury v. Ted Bernstein, et al,* Case. No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida. Stansbury, as a claimant of the Estate, has an interest in ensuring that the individual appointed by the court to serve as administrator ad litem, if any is appointed at all, will be free of conflicts of interest and will act without bias and in the best interests of the claimants, creditors and devisees of the Estate.

The Fourth District Court of Appeal has recognized that a claimant to an estate is an "interested person" and has standing in a proceeding to approve the personal representative's final accounting and petition for discharge. *See, Arzuman v. Estate of Prince Bander BIN Saud Bin, etc.*, 879 So.2d 675 (Fla. 4th DCA 2004). *See also, Montgomery v. Cribb*, 484 So.2d 73 (Fla. 2d DCA 1986) (Wrongful death claimant was entitled to notice of hearing as an "interested person" under the probate code even though case was dismissed by trial court and disputed settlement was on appeal.) Stansbury is therefore an "interested person" as to the outcome of this proceeding which will determine whether Ted Bernstein should be appointed administrator ad litem.

II. Ted Bernstein has Conflicts of Interest with the Estate which should preclude him from serving as Administrator Ad Litem. Ted Bernstein is a Plaintiff in a pending action where the Simon Bernstein Estate is a Defendant.

At the time of Simon Bernstein's ("Simon") death, it was determined that there was a life insurance policy issued by Heritage Mutual Insurance Company ("Heritage") insuring his life. Simon was listed on the company records as the owner of the policy. Heritage represented that the death benefit was approximately $1.7 million. Heritage records also indicated that on November 27, 1995 there was a beneficiary change for the policy to read: LaSalle National Trust N.A., primary beneficiary and Simon Bernstein Ins. Trust dated 6/21/1995, contingent beneficiary. It was determined by Heritage that the primary beneficiary (LaSalle) no longer had

an interest in the death benefit and the contingent beneficiary would be paid the proceeds. At the time of Simon Bernstein's death the trust document establishing this alleged trust was not and, to date, has not been found.

Supposedly the beneficiaries of the Insurance Trust were Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the "Bernstein Children"). Whether or not they were, in fact, beneficiaries was just an "educated guess" by attorney Robert Spallina, who was counsel to the Bernstein Children. *See* e-mail correspondence from Spallina to the Bernstein Children dated October 23, 2012, attached as **Exhibit "1."** If the Insurance Trust is no longer in existence, is lost, or if the insurance proceeds are not properly payable to this alleged trust, the proceeds would be payable to the Simon Bernstein Estate under Florida law.

Because no trust document could be found, Heritage refused to pay the claim for the life insurance proceeds to anyone without a court order. The Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois (the case was removed to Federal Court), styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95 v. Heritage Union Life Insurance Company,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation"). A copy of the Amended Complaint (the "Complaint") is attached as **Exhibit "2."** In paragraph 2 of the Complaint, the Plaintiff, the Insurance Trust, although apparently still lost, and requiring an "educated guess" to ascertain its beneficiaries, nonetheless also alleges that Ted Bernstein is the "trustee" of the Insurance Trust. No trust document exists establishing the continued existence of the Insurance Trust, let alone that Ted is the Trustee. As a result, the representation in the Complaint that he is the trustee of the missing trust appears false.

More importantly, Ted Bernstein, as the putative "trustee" of the purported insurance trust and Plaintiff in the Illinois Action, is actively pursuing litigation that is contrary to the best interests of the Estate which he now seeks to represent as Administrator Ad Litem. The Estate intervened in the Insurance Litigation to assert that it, not the Bernstein Children, is the proper beneficiary of the life insurance proceeds. (Interestingly, Ted Bernstein opposed the intervention of the Estate.) As such, the Estate is an adverse party to the Insurance Trust for which Ted Bernstein is identified as trustee. The Estate is now a Defendant where Ted Bernstein is a Plaintiff. Thus, Ted Bernstein is actively and directly litigating against the very Estate for which he now seeks to serve as a fiduciary. His Motion to be appointed Administrator Ad Litem should be denied on this basis alone.

It is also important for the Court to note that Ted Bernstein is the Successor Trustee of the Simon Bernstein Amended and Restated Trust Agreement Dated 7/25/2012 (the "Residuary Trust"). The Residuary Trust is the residuary legatee of the Estate, and its beneficiaries are the grandchildren of Simon Bernstein. As a result of Ted Bernstein's prosecution of the Insurance Litigation, Ted is, on the one hand, seeking to deprive the Estate of $1.7 million in life insurance proceeds, while at the same time he serves as Successor Trustee of the Residuary Trust which will be deprived of the life insurance proceeds if he, Ted, succeeds in the Insurance Litigation. The conflict of interest is obvious and should disqualify Ted Bernstein from serving in any fiduciary capacity in the Estate.

Section 733.602(1), Fla. Stat. (2013), expressly provides that ". . . A personal representative (which in this case would mean an administrator ad litem) shall use the authority conferred by this code, the authority in the will, if any, and the authority of any order of the court, **for the best interests of interested persons, including creditors."** (emphasis added.) While the ultimate outcome of the adjudication of the issues surrounding the Heritage life

insurance proceeds is as yet unknown, what is clear is that Ted Bernstein has advocated, and continues to advocate a position that is contrary to the best interests of the Estate and its beneficiaries. These two conflicting and contrary positions between the interests of Ted Bernstein as a Plaintiff in the Insurance Litigation versus his duty as an Administrator Ad Litem to act in the best interests of the Estate, including the claimants, creditors and beneficiaries, renders Ted Bernstein unfit to serve as fiduciary. *See Estate of Bell v. Johnson*, 573 So.2d 57 (Fla. 1st DCA, 1990) (conflict between personal representative, in that capacity, and as power of attorney, necessitated removal as personal representative).

Finally, Ted Bernstein seeks to serve as Administrator Ad Litem to oversee the litigation between Stansbury and the Estate arising out of Stansbury's employment relationship with companies of which Ted Bernstein and Simon Bernstein were principle owners. Ted Bernstein is a key witness, if not the most important witness in the case, other than perhaps Stansbury. Ted Bernstein is conflicted in that, on the one hand, he seeks to serve as a fiduciary with respect to the management of the Stansbury litigation, but, on the other hand, as a key witness in the case, his testimony could contribute to an adverse result against the Estate, depending upon how the testimony is received by the trier of fact. This inherent conflict of interest should also serve to disqualify Ted Bernstein.

III. It was Simon Bernstein's intent, both expressed and implied, that Ted Bernstein not serve in a fiduciary capacity in his Estate.

The appointment of Ted Bernstein as Administrator Ad Litem for the Estate of Simon Bernstein conflicts with both the expressed intent and implied intent of the deceased, Simon Bernstein.

--- The 2008 Testamentary Documents ---

In 2008, Simon Bernstein prepared and executed his Last Will and Testament and his Revocable Trust. The designated Personal Representative under his 2008 Last Will and Testament was his wife, Shirley Bernstein and William Stansbury as Co-Personal Representatives, or either of them alone if the other was unable to serve. In his 2008 Trust, he designated himself as Trustee, and in the event a successor trustee was necessary, Shirley Bernstein and William Stansbury were appointed as Successor Co-Trustees, or either of them if the other was unable to serve. In the 2008 trust document, he specifically excluded Ted Bernstein by indicating that he was to be considered as having pre-deceased him:

> Notwithstanding the foregoing [the definitions of "Children" and "Lineal Descendants"], as I have adequately provided for them during my lifetime, for purposes of the dispositions made under this Trust, my children TED S. BERNSTEIN ("***TED***") and PAMELA B. SIMON ("***PAM***") and their respective lineal descendants shall be deemed to have predeceased the survivor of my spouse and me, ...
>
> *See,* Simon L. Bernstein Trust Agreement dated May 20, 2008, Article III, Section E(1), page 7.

--- The 2012 Last Will and Testament ---

In 2012, Simon Bernstein revised and re-executed his Last Will and Testament (the "2012 Will") and amended his 2008 Trust (the "2012 Trust").

Even though Simon Bernstein could have appointed Ted Bernstein as his Personal Representative or as his Alternate Personal Representative under the 2012 Will, again he specifically chose not to. Rather, Simon Bernstein appointed Donald Tescher and Robert Spallina as Co-Personal Representatives of his Estate. When they were forced to resign, this Court appointed a Curator, Benjamin Brown, Esq. Even though Ted Bernstein filed a Motion to have himself appointed Curator or Administrator Ad Litem, the Court, through Judge Colin, denied his motion. *See* Order of Judge Colin dated February 19, 2014, **Exhibit "3"** attached.

Thereafter, when Curator Benjamin Brown passed away and a Successor Personal Representative was appointed, the Court again chose not to appoint Ted Bernstein, but instead appointed Brian O'Connell, Esq. who presently serves as Personal Representative. It is interesting that in this motion presently before the Court, the Movant is not the Personal Representative, Brian O'Connell, but rather Ted Bernstein, the Successor Trustee to the Trust.

--- The 2012 Trust ---

In 2012, Simon Bernstein also amended his Revocable Trust. Simon again specifically excluded Ted Bernstein, and he stated in even stronger language that Ted Bernstein should be considered as having predeceased him for all purposes of the Trust:

> Notwithstanding the foregoing [the definitions of "Children" and "Lineal Descendants"], for all purposes of this Trust and dispositions made hereunder, my children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA FRIEDSTEIN, shall be deemed to have predeceased me as I have adequately provided for them during my lifetime.
>
> Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012, Article III, Section E(1), page 6. (emphasis added)

A copy of the Trust is attached hereto as **Exhibit "4."** Obviously, Simon Bernstein did not want Ted Bernstein to ever serve in a fiduciary capacity in connection with his Estate and Trust matters.

IV. Ted Bernstein has failed to provide a Trust accounting to the trust beneficiaries as required by statute.

On or about January 14, 2014 Ted S. Bernstein became Successor Trustee of the Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012. He was appointed by the previously disgraced Trustees, Donald Tescher and Robert Spallina. Despite having been the Successor Trustee since January of 2014, Ted S. Bernstein has never prepared and submitted and accounting to the beneficiaries. This violates his general duty to inform and account to the

beneficiaries as required by Section 736.0183, Fla. Stat., and specifically his duty to provide at least an annual accounting as mandated by Section 736.0183(1)(d), Fla. Stat.

WHEREFORE, for all of the foregoing reasons, to wit:

1. Ted Bernstein has a conflict of interest with the Estate;

2. Simon Bernstein's expressed intent;

3. Ted Bernstein's failure to account as a Successor Trustee;

Interested Person to the Estate of Simon Bernstein, William Stansbury, requests this Honorable Court to deny the Motion of Ted Bernstein to be appointed Administrator Ad Litem.

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to: Alan Rose, Esq., MRACHEK, FITZGERALD ROSE, 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401, arose@pm-law.com and mchandler@pm-law.com; Diana Lewis, Esq., ADA & Mediations Services, LLC, 2765 Tecumseh Dr., West Palm Beach, FL 33409, dzlewis@aol.com; Eliot Bernstein, 2753 NW 34th Street, Boca Raton, FL 33434, iviewit@iviewit.tv; Gary R. Shendell, Esq., Shendell & Pollock, P.L., 2700 N. Military Trail, suite 150, Boca Raton, FL 33431, gary@shendellpollock.com; Brian O'Connell, Esq., Ciklin Lubitz Martens & O'Connell, 515 North Flagler Drive, 20th Floor, West Palm Beach, FL 33401, boconnell@ciklinlubitz.com; John P. Morrissey, Esq., 330 Clematis Street, Suite 213, West Palm Beach, FL 33401, john@jmorrisseylaw.com; Lisa Friedstein, 2142 Churchill Lane, Highland Park, IL 60035,

Lisa@friedsteins.com; Jill Iantoni, 2101 Magnolia Lane, Highland Park, IL 60035, jilliantoni@gmail.com, on this 22nd day of August, 2016.

PETER M. FEAMAN, P.A.
3695 W. Boynton Beach Blvd., Suite 9
Boynton Beach, FL 33436
Tel: 561-734-5552
Fax: 561-734-5554
Service: service@feamanlaw.com
mkoskey@feamanlaw.com

By: _____
Peter M. Feaman
Florida Bar No. 0260347

Eliot Bernstein

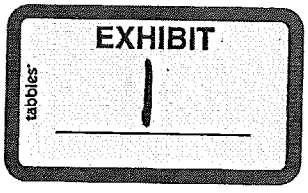
Subject: FW: Call with Robert Spallina tomorrow/Wednesday at 2pm EST

From: Robert Spallina [mailto:rspallina@tescherspallina.com]
Sent: Tuesday, October 23, 2012 2:34 PM
To: Jill Iantoni; Eliot Bernstein; Ted Bernstein; Ted Bernstein; Pamela Simon; Lisa Friedstein
Subject: RE: Call with Robert Spallina tomorrow/Wednesday at 2pm EST

As discussed, I need the EIN application and will process the claim. Your father was the owner of the policy and we will need to prepare releases given the fact that we do not have the trust instrument and are making an educated guess that the beneficiaries are the five of you as a result of your mother predeceasing Si. Luckily we have a friendly carrier and they are willing to process the claim without a copy of the trust instrument. A call regarding this is not necessary. We have things under control and will get the claim processed expeditiously after we receive the form.

Thank you for your help.

Robert L. Spallina, Esq.
TESCHER & SPALLINA, P.A.
4855 Technology Way, Suite 720
Boca Raton, Florida 33431
Telephone: 561-997-7008
Facsimile: 561-997-7308
E-mail: rspallina@tescherspallina.com



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

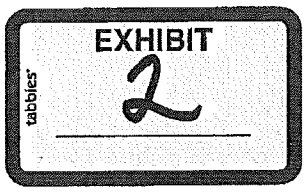
SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland



Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

BACKGROUND

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.

2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").

3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.

4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.

5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

COUNT I

BREACH OF CONTRACT

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE's refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds $1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of $1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

COUNT II

DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;

ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,

iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and

iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;

b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;

c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;

e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;

f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;

g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and

h) for such other relief as this court may deem just and proper.

COUNT III

RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and

b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein

c) and for such other relief as this court may deem just and proper.

By: s/*Adam M. Simon*
Adam M. Simon (#6205304)
303 E. Wacker Drive, Suite 210
Chicago, IL 60601
Phone: 313-819-0730
Fax: 312-819-0773
E-Mail: asimon@chicagolaw.com
Attorneys for Plaintiffs and Third-Party Defendants
Simon L. Bernstein Irrevocable Insurance Trust Dtd 6/21/95; Ted Bernstein as Trustee, and individually, Pamela Simon, Lisa Friedstein and Jill Iantoni

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

IN RE:

Case No.: 50 2012 CP 004391 SB
JUDGE MARTIN COLIN

ESTATE OF SIMON
BERNSTEIN,
Deceased. Division: IY
_____/

ORDER ON MOTION FOR APPOINTMENT OF CURATOR OR ADMINISTRATOR AD LITEM

THIS MATTER came before this Court on Tuesday, February 18, 2014, upon the Motion for Appointment of Curator or Administrator Ad Litem, filed by Ted S. Bernstein, and the Court, having heard argument of counsel, and considered the evidence, it is

ORDERED AND ADJUDGED that:

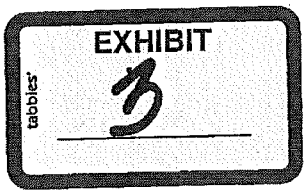
DENIED, for the reasons stated on the record.

DONE and ORDERED in Delray Beach, Palm Beach County, Florida, this 19 day of February, 2014.

CIRCUIT COURT JUDGE

Copies to:

Alan Rose, Esq., PAGE, MRACHEK 505 So. Flagler Drive, Suite 600, West Palm Beach, FL 33401;
John J. Pankauski, Esq., PANKAUSKI LAW FIRM, 120 South Olive Avenue, Suite 701, West Palm Beach, FL 33401;
Peter M. Feaman, Esq., PETER M. FEAMAN, P.A., 3615 Boynton Beach Blvd., Boynton Beach, Florida 33436.



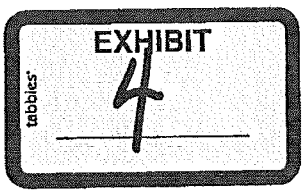
7/25/2012

SIMON L. BERNSTEIN

AMENDED AND RESTATED TRUST AGREEMENT

Prepared by:

Tescher & Spallina, P.A.
4855 Technology Way, Suite 720, Boca Raton, Florida 33431
(561) 997-7008
www.tescherspallina.com



SIMON L. BERNSTEIN

AMENDED AND RESTATED TRUST AGREEMENT

This Amended and Restated Trust Agreement is dated this 25 day of July, 2012, and is between SIMON L. BERNSTEIN, of Palm Beach County, Florida referred to in the first person, as settlor, and SIMON L. BERNSTEIN, of Palm Beach County, Florida and SIMON L. BERNSTEIN's successors, as trustee (referred to as the "***Trustee***," which term more particularly refers to all individuals and entities serving as trustee of a trust created hereunder during the time of such service, whether alone or as co-trustees, and whether originally serving or as a successor trustee).

WHEREAS, on May 20, 2008, I created and funded the SIMON L. BERNSTEIN TRUST AGREEMENT (the "***Trust Agreement,***" which reference includes any subsequent amendments of said trust agreement);

WHEREAS, Paragraph A. of Article I. of said Trust Agreement provides, inter alia, that during my lifetime I shall have the right at any time and from time to time by an instrument, in writing, delivered to the Trustee to amend or revoke said Trust Agreement, in whole or in part.

NOW, THEREFORE, I hereby amend and restate the Trust Agreement in its entirety and the Trustee accepts and agrees to perform its duties and obligations in accordance with the following amended provisions. Notwithstanding any deficiencies in execution or other issues in regard to whether any prior version of this Trust Agreement was a valid and binding agreement or otherwise created an effective trust, this amended and restated agreement shall constitute a valid, binding and effective trust agreement and shall amend and succeed all prior versions described above or otherwise predating this amended and restated Trust Agreement.

ARTICLE I. DURING MY LIFE AND UPON MY DEATH

A. **Rights Reserved**. I reserve the right (a) to add property to this trust during my life or on my death, by my Will or otherwise; (b) to withdraw property held hereunder; and (c) by separate written instrument delivered to the Trustee, to revoke this Agreement in whole or in part and otherwise modify or amend this Agreement.

B. **Payments During My Life**. If income producing property is held in the trust during my life, the Trustee shall pay the net income of the trust to me or as I may direct. However, during any periods while I am Disabled, the Trustee shall pay to me or on my behalf such amounts of the net income and principal of the trust as is proper for my Welfare. Any income not so paid shall be added to principal.

C. **Upon My Death**. Upon my death the Trustee shall collect and add to the trust all amounts due to the trust under any insurance policy on my life or under any death benefit plan and all property added to the trust by my Will or otherwise. After paying or providing for the payment from the augmented trust of all current charges and any amounts payable under the later paragraph captioned "Death Costs," the Trustee shall hold the trust according to the following provisions.

ARTICLE II. AFTER MY DEATH

A. **Disposition of Tangible Personal Property**. If any non-business tangible personal property other than cash (including, but not limited to, my personal effects, jewelry, collections, household furnishings, and equipment, and automobiles) is held in the trust at the time of my death, such items shall be promptly distributed by the Trustee of the trust to such person or persons, including my estate, as to the item or items or proportion specified, as I may appoint, and to the extent that any such items are not disposed of by such appointment, such items shall be disposed of by the Trustee of the trust in exactly the same manner as such items would have been disposed of under the terms and provisions of my Will (including any Codicil thereto, or what the Trustee in good faith believes to be such Will and Codicil) had such items been included in my probate estate. Any such items which are not effectively disposed of pursuant to the preceding sentence shall pass with the other trust assets.

B. **Disposition of Trust Upon My Death**. Upon my death, the remaining assets in this trust shall be divided among and held in separate Trusts for my then living grandchildren. Each of my grandchildren for whom a separate trust is held hereunder shall hereinafter be referred to as a "***beneficiary***" with the separate Trusts to be administered as provided in Subparagraph II.C.

C. **Trusts for Beneficiaries**. The Trustee shall pay to the beneficiary and the beneficiary's children, such amounts of the net income and principal of such beneficiary's trust as is proper for the Welfare of such individuals. Any income not so paid shall be added to principal each year. After a beneficiary has reached any one or more of the following birthdays, the beneficiary may withdraw the principal of his or her separate trust at any time or times, not to exceed in the aggregate 1/3 in value after the beneficiary's 25th birthday, 1/2 in value (after deducting any amount previously subject to withdrawal but not actually withdrawn) after the beneficiary's 30th birthday, and the balance after the beneficiary's 35th birthday, provided that the withdrawal powers described in this sentence shall not apply to any grandchild of mine as beneficiary of a separate trust. The value of each trust shall be its value as of the first exercise of each withdrawal right, plus the value of any subsequent addition as of the date of addition. The right of withdrawal shall be a privilege which may be exercised only voluntarily and shall not include an involuntary exercise. If a beneficiary dies with assets remaining in his or her separate trust, upon the beneficiary's death the beneficiary may appoint his or her trust to or for the benefit of one or more of any of my lineal descendants (excluding from said class, however, such beneficiary and such beneficiary's creditors, estate, and creditors of such beneficiary's estate). Any part of his or her trust such beneficiary does not effectively appoint shall upon his or her death be divided among and held in separate Trusts for the following persons:

1. for his or her lineal descendants then living, *per stirpes*; or

2. if he or she leaves no lineal descendant then living, *per stirpes* for the lineal descendants then living of his or her nearest ancestor (among me and my lineal descendants) with a lineal descendant then living.

A trust for a lineal descendant of mine shall be held under this paragraph, or if a trust is then so held, shall be added to such trust.

D. **Termination of Small Trust**. If at any time after my death in the opinion of the Trustee a separate trust holds assets of a value of less than $50,000.00 and is too small to justify the expense of its retention, and termination of such trust is in the best interests of its current income beneficiary, the Trustee in its discretion may terminate such trust and pay it to said beneficiary.

E. **Contingent Gift**. If at any time property of these Trusts is not disposed of under the other provisions of this Agreement, it shall be paid, as a gift made hereunder, to such persons and in such shares as such property would be distributed if I had then owned such property and had then died solvent, unmarried and intestate domiciled in the State of Florida, according to the laws of inheritance of the State of Florida then in effect.

F. **Protective Provision**. No beneficiary of any trust herein created shall have any right or power to anticipate, transfer, pledge, sell, alienate, assign or encumber in any way his or her interest in the income or principal of such trust. Furthermore, no creditor shall have the right to attach, lien, seize or levy upon the interest of a beneficiary in this trust (other than myself) and such interest shall not be liable for or subject to the debts, liabilities or obligations of any such beneficiary or any claims against such beneficiary (whether voluntarily or involuntarily created), and the Trustee shall pay directly to or for the use or benefit of such beneficiary all income and principal to which such beneficiary is entitled, notwithstanding that such beneficiary has executed a pledge, assignment, encumbrance or in any other manner alienated or transferred his or her beneficial interest in the trust to another. This paragraph shall not preclude the effective exercise of any power of appointment granted herein or the exercise of any disclaimer.

G. **Maximum Duration**. Regardless of anything in this Agreement to the contrary, no trust interest herein created shall continue beyond three hundred sixty (360) years after the date of creation of this Agreement, nor shall any power of appointment be exercised in such manner so as to delay vesting of any trust beyond such period. Immediately prior to the expiration of such period, all such trusts then in existence shall terminate, and the assets thereof shall be distributed outright and in fee to then beneficiaries of the current income and in the proportions in which such persons are the beneficiaries, and if such proportions cannot be ascertained, then equally among such beneficiaries.

ARTICLE III. GENERAL

A. **Disability**. Subject to the following Subparagraph captioned "Subchapter S Stock," while any beneficiary is Disabled, the Trustee shall pay to him or her only such portion of the income to which he or she is otherwise entitled as is proper for his or her Welfare, and any income not so paid shall be added to the principal from which derived. While any beneficiary is Disabled, income or principal payable to him or her may, in the discretion of the Trustee, be paid directly to him or her, without the intervention of a guardian, directly to his or her creditors or others for his or her sole benefit or to an adult person or an eligible institution (including the Trustee) selected by the Trustee as custodian for a minor beneficiary under the Uniform Transfers to Minors Act or similar law. The receipt of such payee is a complete release to the Trustee.

B. **Timing of Income Distributions**. The Trustee shall make required payments of income at least quarterly.

C. **Substance Abuse**.

1. In General. If the Trustee reasonably believes that a beneficiary (other than myself)of any trust:

a. routinely or frequently uses or consumes any illegal substance so as to be physically or psychologically dependent upon that substance, or

b. is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist in a current program of treatment supervised by such doctor or psychiatrist,

and if the Trustee reasonably believes that as a result the beneficiary is unable to care for himself or herself, or is unable to manage his or her financial affairs, all mandatory distributions (including distributions upon termination of the trust) to the beneficiary, all of the beneficiary's withdrawal rights, and all of the beneficiary's rights to participate in decisions concerning the removal and appointment of Trustees will be suspended. In that event, the following provisions of this Subparagraph III.C will apply.

2. Testing. The Trustee may request the beneficiary to submit to one or more examinations (including laboratory tests of bodily fluids) determined to be appropriate by a board certified medical doctor and to consent to full disclosure to the Trustee of the results of all such examinations. The Trustee shall maintain strict confidentiality of those results and shall not disclose those results to any person other than the beneficiary without the prior written permission of the beneficiary. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the Trustee.

3. Treatment. If, in the opinion of the examining doctor, the examination indicates current or recent use of a drug or substance as described above, the examining doctor will determine an appropriate method of treatment for the beneficiary (for example, counseling or treatment on an

in-patient basis in a rehabilitation facility) that is acceptable to the Trustee. If the beneficiary consents to the treatment, the Trustee shall pay the costs of treatment directly to the provider of those services from the distributions suspended under this Subparagraph III.C.

4. Resumption of Distributions. The Trustee may resume other distributions to the beneficiary (and the beneficiary's other suspended rights will be restored) when, in the case of use or consumption of an illegal substance, examinations indicate no such use for 12 months and, in all cases, when the Trustee in its discretion determines that the beneficiary is able to care for himself or herself and is able to manage his or her financial affairs.

5. Disposition of Suspended Amounts. When other distributions to the beneficiary are resumed, the remaining balance, if any, of distributions that were suspended may be distributed to the beneficiary at that time. If the beneficiary dies before distribution of those suspended amounts, the Trustee shall distribute the balance of the suspended amounts to the persons who would be the alternate takers of that beneficiary's share (or takers through the exercise of a power of appointment) as otherwise provided in this Trust Agreement.

6. Exoneration. No Trustee (or any doctor retained by the Trustee) will be responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to inquire whether a beneficiary uses drugs or other substances as described in this Subparagraph III.C. The Trustee (and any doctor retained by the Trustee) is to be indemnified from the trust estate and held harmless from any liability of any nature in exercising its judgment and authority under this Subparagraph III.C, including any failure to request a beneficiary to submit to medical examination, and including a decision to distribute suspended amounts to a beneficiary.

7. Tax Savings Provision. Despite the provisions of this Subparagraph III.C, the Trustee cannot suspend any mandatory distributions or withdrawal rights that are required for that trust to become or remain a Qualified Subchapter S Trust (unless the Trustee elects for the trust to be an Electing Small Business Trust), or to qualify for any federal transfer tax exemption, deduction, or exclusion allowable with respect to that trust.

D. **Income on Death of Beneficiary**. Subject to the later paragraph captioned "Subchapter S Stock," and except as otherwise explicitly provided herein, upon the death of any beneficiary, all accrued or undistributed income of such deceased beneficiary's trust shall pass with the principal of his or her trust but shall remain income for trust accounting purposes.

E. **Definitions**. In this Agreement,

1. Children, Lineal Descendants. The terms "***child,***" "***children,***" "***grandchild,***" "***grandchildren***" and "***lineal descendant***" mean only persons whose relationship to the ancestor designated is created entirely by or through (a) legitimate births occurring during the marriage of the joint biological parents to each other, (b) children born of female lineal descendants, and (c) children and their lineal descendants arising from surrogate births and/or third party donors when (i) the child is

raised from or near the time of birth by a married couple (other than a same sex married couple) through the pendency of such marriage, (ii) one of such couple is the designated ancestor, and (iii) to the best knowledge of the Trustee both members of such couple participated in the decision to have such child. No such child or lineal descendant loses his or her status as such through adoption by another person. Notwithstanding the foregoing, for all purposes of this Trust and the dispositions made hereunder, my children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, shall be deemed to have predeceased me as I have adequately provided for them during my lifetime.

2. Code. "***Code***" means the Internal Revenue Code of 1986, as amended, and in referring to any particular provision of the Code, includes a reference to any equivalent or successor provision of a successor federal tax law.

3. Disabled. "***Disabled***" or being under "***Disability***" means, as to any applicable individual: (1) being under the age of 21 years, (2) having been adjudicated by a court of competent jurisdiction as mentally or physically incompetent or unable to manage his or her own property or personal affairs (or a substantially similar finding under applicable state or national law), or (3) being unable to properly manage his or her personal or financial affairs, or a trust estate hereunder as to a Trustee hereunder, because of a mental or physical impairment (whether temporary or permanent in nature). A written certificate executed by an individual's attending physician or attending psychiatrist confirming that person's impairment will be sufficient evidence of Disability under item (3) above, and all persons may rely conclusively on such a certificate.

4. Education. The term "***education***" herein means vocational, primary, secondary, preparatory, theological, college and professional education, including post-graduate courses of study, at educational institutions or elsewhere, and expenses relating directly thereto, including tuition, books and supplies, room and board, and travel from and to home during school vacations. It is intended that the Trustee liberally construe and interpret references to "education," so that the beneficiaries entitled to distributions hereunder for education obtain the best possible education commensurate with their abilities and desires.

5. Needs and Welfare Distributions. Payments to be made for a person's ***"Needs"*** means payments necessary for such person's health (including lifetime residential or nursing home care), education, maintenance and support. Payments to be made for a person's ***"Welfare"*** means discretionary payments by the Trustee, from time to time, for such person's Needs and also for such person's advancement in life (including assistance in the purchase of a home or establishment or development of any business or professional enterprise which the Trustee believes to be reasonably sound), happiness and general well-being. However, the Trustee, based upon information reasonably available to it, shall make such payments for a person's Needs or Welfare only to the extent such person's income, and funds available from others obligated to supply funds for such purposes (including, without limitation, pursuant to child support orders and agreements), are insufficient in its opinion for such purposes, and shall take into account such person's accustomed manner of living, age, health, marital status and any other factor it considers important. Income or principal to be paid for a person's Needs or Welfare may be paid to

such individual or applied by the Trustee directly for the benefit of such person. The Trustee may make a distribution or application authorized for a person's Needs or Welfare even if such distribution or application substantially depletes or exhausts such person's trust, without any duty upon the Trustee to retain it for future use or for other persons who might otherwise benefit from such trust.

6. Per Stirpes. In a division "***per stirpes***" each generation shall be represented and counted whether or not it has a living member.

7. Related or Subordinate Party. A "***Related or Subordinate Party***" to a trust describes a beneficiary of the subject trust or a related or subordinate party to a beneficiary of the trust as the terms "related or subordinate party" are defined under Code Section 672(c).

8. Spouse. A person's "***spouse***" includes only a spouse then married to and living as husband and wife with him or her, or a spouse who was married to and living as husband and wife with him or her at his or her death. The following rules apply to each person who is a beneficiary or a permissible appointee under this Trust Agreement and who is married to a descendant of mine. Such a person will cease to be a beneficiary and will be excluded from the class of permissible appointees upon:

a. the legal termination of the marriage to my descendant (whether before or after my death), or

b. the death of my descendant if a dissolution of marriage proceeding was pending when he or she died.

The trust will be administered as if that person had died upon the happening of the terminating event described above.

9. Gender, Number. Where appropriate, words of any gender include all genders and the singular and plural are interchangeable.

F. **Powers of Appointment**. Property subject to a power of appointment shall be paid to, or retained by the Trustee or paid to any trustee under any will or trust agreement for the benefit of, such one or more permissible appointees, in such amounts and proportions, granting such interests, powers and powers of appointment, and upon such conditions including spendthrift provisions as the holder of such power (i) in the case of a power exercisable upon the death of such holder, appoints in his or her will or in a trust agreement revocable by him or her until his or her death, or (ii) in the case of a power exercisable during the life of such holder, appoints in a written instrument signed by such holder, two witnesses and a notary public, but in either case only if such will, trust agreement, or instrument specifically refers to such power.

G. **Limitations on Powers of Trustee**. Regardless of anything herein to the contrary, no Trustee shall make or participate in making any distribution of income or principal of a trust to or for the benefit of a beneficiary which would directly or indirectly discharge any legal obligation of such

Trustee or a donor of such trust (as an individual, and other than myself as donor) to support such beneficiary; and no Trustee (other than myself) shall make or participate in making any discretionary distribution of income or principal to or for the benefit of himself or herself other than for his or her Needs, including by reason of a determination to terminate a trust described herein. For example, if a Trustee (other than myself) has the power to distribute income or principal to himself or herself for his or her own Welfare, such Trustee (the "restricted Trustee") shall only have the power to make or participate in making a distribution of income or principal to the restricted Trustee for the restricted Trustee's Needs, although any co-Trustee who is not also a restricted Trustee may make or participate in making a distribution of income or principal to the restricted Trustee for such restricted Trustee's Welfare without the participation or consent of said restricted Trustee.

H. **Presumption of Survivorship**. If any person shall be required to survive another person in order to take any interest under this Agreement, the former person shall be deemed to have predeceased the latter person, if such persons die under circumstances which make it difficult or impracticable to determine which one died first.

I. **Governing Law**. This Agreement is governed by the law of the State of Florida.

J. **Other Beneficiary Designations**. Except as otherwise explicitly and with particularity provided herein, (a) no provision of this trust shall revoke or modify any beneficiary designation of mine made by me and not revoked by me prior to my death under any individual retirement account, other retirement plan or account, or annuity or insurance contract, (b) I hereby reaffirm any such beneficiary designation such that any assets held in such account, plan, or contract shall pass in accordance with such designation, and (c) regardless of anything herein to the contrary, any of such assets which would otherwise pass pursuant to this trust due to the beneficiary designation not having met the requirements for a valid testamentary disposition under applicable law or otherwise shall be paid as a gift made hereunder to the persons and in the manner provided in such designation which is incorporated herein by this reference.

K. **Release of Medical Information.**

1. Disability of Beneficiary. Upon the written request of a Trustee (with or without the concurrence of co-Trustees) issued to any current income or principal beneficiary (including discretionary beneficiaries and myself if a beneficiary) for whom a determination of Disability is relevant to the administration of a trust hereunder and for whom a Trustee (with or without the concurrence of co-Trustees) desires to make such a determination, such beneficiary shall issue to all Trustees (who shall be identified thereon both by name to the extent known and by class description) a valid authorization under the Health Insurance Portability and Accountability Act of 1996 and any other applicable or successor law authorizing all health care providers and all medical sources of such requested beneficiary to release protected health information of the requested beneficiary to all Trustees that is relevant to the determination of the Disability of the requested beneficiary as Disability is defined hereunder. The period of each such valid authorization shall be for six months (or the earlier death of the requested

beneficiary). If such beneficiary (or his or her legal representative if such beneficiary is a minor or legally disabled) refuses within thirty days of receipt of the request to provide a valid authorization, or at any time revokes an authorization within its term, the Trustee shall treat such beneficiary as Disabled hereunder until such valid authorization is delivered.

2. Disability of Trustee. Upon the request to a Trustee that is an individual by (a) a co-Trustee, or if none, (b) the person or entity next designated to serve as a successor Trustee not under legal incapacity, or if none, (c) any adult current income or principal beneficiary not under legal incapacity, or in any event and at any time (d) a court of competent jurisdiction, such Trustee shall issue to such person and all persons, courts of competent jurisdiction, and entities (who shall be identified thereon both by name to the extent known and by class description), with authority hereunder to determine such requested Trustee's Disability, a valid authorization under the Health Insurance Portability and Accountability Act of 1996 and any other applicable or successor law authorizing all health care providers and all medical sources of such requested Trustee to release protected health information of the requested Trustee to such persons, courts and entities, that is relevant to the determination of the Disability of the requested Trustee as Disability is defined hereunder. The period of each such valid authorization shall be for six months (or the earlier death or resignation of the requested Trustee). If such requested Trustee refuses within thirty days of receipt of the request to deliver a valid authorization, or at any time revokes an authorization within its term, such requested Trustee shall thereupon be treated as having resigned as Trustee hereunder.

3. Ability to Amend or Revoke. The foregoing provisions of this paragraph shall not constitute a restriction on myself to amend or revoke the terms of this trust instrument under paragraph I.A hereof, provided I otherwise have legal capacity to do so.

4. Authorization to Issue Certificate. All required authorizations under this paragraph shall include the power of a physician or psychiatrist to issue a written certificate to the appropriate persons or entities as provided in Subparagraph III.E.3 hereof.

ARTICLE IV. FIDUCIARIES

A. Powers of the Trustee. During my life except while I am Disabled, the Trustee shall exercise all powers provided by law and the following powers, other than the power to retain assets, only with my written approval. While I am Disabled and after my death, the Trustee shall exercise said powers without approval, provided that the Trustee shall exercise all powers in a fiduciary capacity.

1. Investments. To sell or exchange at public or private sale and on credit or otherwise, with or without security, and to lease for any term or perpetually, any property, real and personal, at any time forming a part of the trust estate (the "*estate*"); to grant and exercise options to buy or sell; to invest or reinvest in real or personal property of every kind, description and location; and to receive and retain any such property whether originally a part of any trust herein created or subsequently acquired, even if the Trustee is personally interested in such property, and without liability for any

decline in the value thereof; all without limitation by any statutes or judicial decisions whenever enacted or announced, regulating investments or requiring diversification of investments, it being my intention to give the broadest investment powers and discretion to the Trustee. Any bank, trust company, or other corporate trustee serving hereunder as Trustee is authorized to invest in its own common trust funds.

2. Special Investments. The Trustee is expressly authorized (but not directed) to retain, make, hold, and dispose of investments not regarded as traditional for trusts, including interests or investments in privately held business and investment entities and enterprises, including without limitation stock in closely held corporations, limited partnership interests, joint venture interests, mutual funds, business trust interests, and limited liability company membership interests, notwithstanding (a) any applicable prudent investor rule or variation thereof, (b) common law or statutory diversification requirements (it being my intent that no such duty to diversify shall exist) (c) a lack of current cash flow therefrom, (d) the presence of any risk or speculative elements as compared to other available investments (it being my intent that the Trustee have sole and absolute discretion in determining what constitutes acceptable risk and what constitutes proper investment strategy), (e) lack of a reasonable rate of return, (f) risks to the preservation of principal, (g) violation of a Trustee's duty of impartiality as to different beneficiaries (it being my intent that no such duty exists for this purpose), and (h) similar limitations on investment under this Agreement or under law pertaining to investments that may or should be made by a Trustee (including without limitation the provisions of Fla.Stats. §518.11 and successor provisions thereto that would characterize such investmentsas forbidden, imprudent, improper or unlawful). The Trustee shall not be responsible to any trust created hereunder or the beneficiaries thereof for any loss resulting from any such authorized investment, including without limitation loss engendered by the higher risk element of that particular entity, investment, or enterprise, the failure to invest in more conservative investments, the failure to diversify trust assets, the prudent investor rule or variant thereof. Notwithstanding any provisions for distributions to beneficiaries hereunder, if the Trustee determines that the future potential investment return from any illiquid or closely held investment asset warrants the retention of that investment asset or that sufficient value could not be obtained from the sale or other disposition of an illiquid or closely held investment asset, the Trustee is authorized to retain that asset and if necessary reduce the distributions to beneficiaries due to lack of sufficient liquid or marketable assets. However, the preceding provisions of this Subparagraph shall not be exercised in a manner as to jeopardize the availability of the estate tax marital deduction for assets passing to or held in the a trust for my surviving spouse or that would otherwise qualify for the estate tax marital deduction but for such provisions, shall not override any express powers hereunder of my surviving spouse to demand conversion of unproductive property to productive property, or reduce any income distributions otherwise required hereunder for a trust held for the benefit of my surviving spouse or a "qualified subchapter S trust" as that term is defined in Code Section 1361(d)(3).

3. Distributions. To make any division or distribution pro rata or non-pro rata, in cash or in kind, and to allocate undivided interests in property and dissimilar property (without regard to its tax basis) to different shares.

4. Management. To manage, develop, improve, partition or change the character of an asset or interest in property at any time; and to make ordinary and extraordinary repairs, replacements, alterations and improvements, structural or otherwise.

5. Borrowing. To borrow money from anyone on commercially reasonable terms, including entities owned in whole or in part by the trust, a Trustee, beneficiaries and other persons who may have a direct or indirect interest in a Trust; and to mortgage, margin, encumber and pledge real and personal property of a trust as security for the payment thereof, without incurring any personal liability thereon and to do so for a term within or extending beyond the terms of the trust and to renew, modify or extend existing borrowing on similar or different terms and with the same or different security without incurring any personal liability; and such borrowing from a Trustee may be with or without interest, and may be secured with a lien on trust assets.

6. Lending. To extend, modify or waive the terms of any obligation, bond or mortgage at any time forming a part of a trust and to foreclose any such mortgage; accept a conveyance of encumbered property, and take title to the property securing it by deed in lieu of foreclosure or otherwise and to satisfy or not satisfy the indebtedness securing said property; to protect or redeem any such property from forfeiture for nonpayment of taxes or other lien; generally, to exercise as to such bond, obligation or mortgage all powers that an absolute owner might exercise; and to loan funds to beneficiaries at commercially reasonable rates, terms and conditions.

7. Abandonment of Property. To abandon any property or asset when it is valueless or so encumbered or in such condition that it is of no benefit to a trust. To abstain from the payment of taxes, liens, rents, assessments, or repairs on such property and/or permit such property to be lost by tax sale, foreclosure or other proceeding or by conveyance for nominal or no consideration to anyone including a charity or by escheat to a state; all without personal liability incurred therefor.

8. Real Property Matters. To subdivide, develop or partition real estate; to purchase or sell real property and to enter into contracts to do the same; to dedicate the same to public use; to make or obtain the location of any plats; to adjust boundaries; to adjust differences in valuations on exchange or partition by giving or receiving consideration; and, to grant easements with or without consideration as the fiduciaries may determine; and to demolish any building, structures, walls and improvements, or to erect new buildings, structures, walls and improvements and to insure against fire and other risks; and to protect and conserve, or to lease, or to encumber, or otherwise to manage and dispose of real property to the extent such power is not otherwise granted herein or otherwise restricted herein.

9. Claims. To enforce, compromise, adjust, arbitrate, release or otherwise settle or pay any claims or demands by or against a trust.

10. Business Entities. To deal with any business entity or enterprise even if a Trustee is or may be a fiduciary of or own interests in said business entity or enterprise, whether operated in the form of a corporation, partnership, business trust, limited liability company, joint venture, sole

proprietorship, or other form (all of which business entities and enterprises are referred to herein as "***Business Entities***"). I vest the Trustee with the following powers and authority in regard to Business Entities:

a. To retain and continue to operate a Business Entity for such period as the Trustee deems advisable;

b. To control, direct and manage the Business Entities. In this connection, the Trustee, in its sole discretion, shall determine the manner and extent of its active participation in the operation and may delegate all or any part of its power to supervise and operate to such person or persons as the Trustee may select, including any associate, partner, officer or employee of the Business Entity;

c. To hire and discharge officers and employees, fix their compensation and define their duties; and similarly to employ, compensate and discharge agents, attorneys, consultants, accountants, and such other representatives as the Trustee may deem appropriate; including the right to employ any beneficiary or fiduciary in any of the foregoing capacities;

d. To invest funds in the Business Entities, to pledge other assets of a trust as security for loans made to the Business Entities, and to lend funds from a trust to the Business Entities;

e. To organize one or more Business Entities under the laws of this or any other state or country and to transfer thereto all or any part of the Business Entities or other property of a trust, and to receive in exchange such stocks, bonds, partnership and member interests, and such other securities or interests as the Trustee may deem advisable;

f. To treat Business Entities as separate from a trust. In a Trustee's accounting to any beneficiary, the Trustee shall only be required to report the earnings and condition of the Business Entities in accordance with standard business accounting practice;

g. To retain in Business Entities such net earnings for working capital and other purposes of the Business Entities as the Trustee may deem advisable in conformity with sound business practice;

h. To sell or liquidate all or any part of the Business Entities at such time and price and upon such terms and conditions (including credit) as the Trustee may determine. My Trustee is specifically authorised and empowered to make such sale to any person, including any partner, officer, or employee of the Business Entities, a fiduciary, or to any beneficiary; and

i. To guaranty the obligations of the Business Entities, or pledge assets of a trust to secure such a guaranty.

11. Principal and Income. To allocate items of income or expense between income and principal as permitted or provided by the laws of the State of Florida but without limiting the availability of the estate tax marital deduction, provided, unless otherwise provided in this instrument, the Trustee shall establish out of income and credit to principal reasonable reserves for depreciation, obsolescence and depletion, determined to be equitable and fair in accordance with some recognized reasonable and preferably uncomplicated trust accounting principle and; provided, further that the Trustee shall not be required to provide a rate of return on unproductive property unless otherwise provided in this instrument.

12. Life Insurance. With respect to any life insurance policies constituting an asset of a trust, to pay premiums; to apply dividends in reduction of such premiums; to borrow against the cash values thereof; to convert such policies into other forms of insurance, including paid-up insurance; to exercise any settlement options provided in any such policies; to receive the proceeds of any policy upon its maturity and to administer such proceeds as a part of the principal of the Trust; and in general, to exercise all other options, benefits, rights and privileges under such policies.

13. Continuing Power. To continue to have or exercise, after the termination of a trust, in whole or in part, and until final distribution thereof, all title, power, discretions, rights and duties conferred or imposed upon the Trustee by law or by this Agreement or during the existence of the trust.

14. Exoneration. To provide for the exoneration of the Trustee from any personal liability on account of any arrangement or contract entered into in a fiduciary capacity.

15. Agreements. To comply with, amend, modify or rescind any agreement made during my lifetime, including those regarding the disposition, management or continuation of any closely held unincorporated business, corporation, partnership or joint venture, and including the power to complete contracts to purchase and sell real estate.

16. Voting. To vote and give proxies, with power of substitution to vote, stocks, bonds and other securities, or not to vote a security.

17. Combination of Shares. To hold the several shares of a trust or several Trusts as a common fund, dividing the income proportionately among them, to assign undivided interests to the several shares or Trusts, and to make joint investments of the funds belonging to them. For such purposes and insofar as may be practicable, the Trustee, to the extent that division of the trust estate is directed hereby, may administer the trust estate physically undivided until actual division thereof becomes necessary to make distributions. The Trustee may hold, manage, invest and account for whole or fractional trust shares as a single estate, making the division thereof by appropriate entries in the books of account only, and may allocate to each whole or fractional trust share its proportionate part of all receipts and expenses; provided, however, this carrying of several Trusts as a single estate shall not defer the vesting in possession of any whole or fractional share of a trust for the beneficiaries thereof at the times specified herein.

18. Reimbursement. To reimburse itself from a trust for reasonable expenses incurred in the administration thereof.

19. Reliance Upon Communication. To rely, in acting under a trust, upon any letter, notice, certificate, report, statement, document or other paper, or upon any telephone, telegraph, cable, wireless or radio message, if believed by the Trustee to be genuine, and to be signed, sealed, acknowledged, presented, sent, delivered or given by or on behalf of the proper person, firm or corporation, without incurring liability for any action or inaction based thereon.

20. Assumptions. To assume, in the absence of written notice to the contrary from the person or persons concerned, that a fact or an event, by reason of which an interest or estate under a trust shall commence or terminate, does not exist or has not occurred, without incurring liability for any action or inaction based upon such assumption.

21. Service as Custodian. To serve as successor custodian for any beneficiary of any gifts that I may have made under any Transfer to Minors Act, if at the time of my death no custodian is named in the instrument creating the gift.

22. Removal of Assets. The Trustee may remove from the domiciliary state during the entire duration of a trust or for such lesser period as it may deem advisable, any cash, securities or other property at any time in its hands whether principal or not, and to take and keep the same outside the domiciliary state and at such place or places within or outside the borders of the United States as it may determine, without in any event being chargeable for any loss or depreciation to the trust which may result therefrom.

23. Change of Situs. The situs and/or applicable law of any trust created hereunder may be transferred to such other place as the Trustee may deem to be for the best interests of the trust estate. In so doing, the Trustee may resign and appoint a successor Trustee, but may remove such successor Trustee so appointed and appoint others. Each successor Trustee may delegate any and all fiduciary powers, discretionary and ministerial, to the appointing Trustee as its agent.

24. Fiduciary Outside Domiciliary State. In the event the Trustee shall not be able and willing to act as Trustee with respect to any property located outside the domiciliary state, the Trustee, without order of court, may appoint another individual or corporation (including any employee or agent of any appointing Trustee) to act as Trustee with respect to such property. Such appointed Trustee shall have all of the powers and discretions with respect to such property as are herein given to the appointing Trustee with respect to the remaining trust assets. The appointing Trustee may remove such appointed Trustee and appoint another upon ten (10) days notice in writing. All income from such property, and if such property is sold, exchanged or otherwise disposed of, the proceeds thereof, shall be remitted to the appointing Trustee, to be held and administered by it as Trustee hereunder. Such appointed Trustee may employ the appointing Trustee as agent in the administration of such property. No surety shall be required on the bond of the Trustee or agent acting under the provisions of this

paragraph. No periodic court accounting shall be required of such appointed Trustee, it being my intention to excuse any statutory accounting which may ordinarily be required.

25. Additions. To receive and accept additions to the Trusts in cash or in kind from donors, executors, administrators, Trustee or attorneys in fact, including additions of my property by the Trustee or others as my attorneys in fact.

26. Title and Possession. To have title to and possession of all real or personal property held in the Trusts, and to register or hold title to such property in its own name or in the name of its nominee, without disclosing its fiduciary capacity, or in bearer form.

27. Dealing with Estates. To use principal of the Trusts to make loans to my estate, with or without interest, and to make purchases from my estate.

28. Agents. To employ persons, including attorneys, auditors, investment advisers, and agents, even if they are the Trustee or associated with the Trustee, to advise or assist the Trustee in the performance of its administrative duties and to pay compensation and costs incurred in connection with such employment from the assets of the Trust; to act without independent investigation upon their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

29. Tax Elections. To file tax returns, and to exercise all tax-related elections and options at its discretion, without compensating adjustments or reimbursements between any of the Trusts or any of the trust accounts or any beneficiaries.

B. **Resignation.** A Trustee may resign with or without cause, by giving no less than 30 days advance written notice, specifying the effective date of such resignation, to its successor Trustee and to the persons required and in the manner provided under Fla.Stats. §§736.0705(1)(a) and 736.0109. As to any required recipient, deficiencies in fulfilling the foregoing resignation requirements may be waived in a writing signed by such recipient. Upon the resignation of a Trustee, such Trustee shall be entitled to reimbursement from the trust for all reasonable expenses incurred in the settlement of accounts and in the transfer of assets to his or her successor.

C. **Appointment of Successor Trustee.**

1. Appointment. Upon a Trustee's resignation, or if a Trustee becomes Disabled or for any reason ceases to serve as Trustee, I may appoint any person or persons as successor Trustee, and in default of such appointment by me, ROBERT L. SPALLINA and DONALD R. TESCHER shall serve together as successor co-Trustees, or either of them alone as Trustee if either of them is unable to serve. Notwithstanding the foregoing, if a named Trustee is not a U.S. citizen or resident at the time of commencement of his term as Trustee, such Trustee should give due consideration to declining to serve to avoid potential adverse U.S. income tax consequences by reason of the characterization of a trust

hereunder as a foreign trust under the Code, but shall not be construed to have any duty to so decline if such Trustee desires to serve.

2. Specific Trusts. Notwithstanding the preceding provisions of this Subparagraph IV.C, subsequent to my death I specifically appoint the following person or persons as Trustee of the following Trusts under the following described circumstances provided that the foregoing appointments shall apply when and to the extent that no effective appointment is made below:

a. Trustee of Separate Trusts for My Grandchildren. Each grandchild of mine shall serve as co-Trustee with the immediate parent of such grandchild which parent is also a child of mine as to all separate trusts under which such grandchild is the sole current mandatory or discretionary income beneficiary upon attaining the age of twenty-five (25) years, and shall serve as sole Trustee of such trusts upon attaining the age of thirty-five (35) years. While serving alone as Trustee, a grandchild of mine may designate a co-Trustee that is not a Related or Subordinate Party to serve with such grandchild and such grandchild may remove and/or replace such co-Trustee with another that is not a Related or Subordinate Party from time to time.

b. Trustee of Separate Trusts for My Lineal Descendants Other Than My Grandchildren. In regard to a separate trust held for a lineal descendant of mine other than a grandchild of mine which lineal descendant is the sole current mandatory or discretionary income beneficiary, each such lineal descendant shall serve as co-Trustee, or sole Trustee if the preceding described Trustees cease or are unable to serve or to continue to serve, of his or her separate trust upon attaining age twenty-five (25) years. While serving alone as Trustee, a lineal descendant of mine other than a grandchild of mine may designate a co-Trustee to serve with such lineal descendant and such lineal descendant may remove and/or replace such co-Trustee with another from time to time.

3. Successor Trustees Not Provided For. Whenever a successor Trustee or co-Trustee is required and no successor or other functioning mechanism for succession is provided for under the terms of this Trust Agreement , the last serving Trustee or the last person or entity designated to serve as Trustee of the applicable trust may appoint his or her successor, and if none is so appointed, the following persons shall appoint a successor Trustee (who may be one of the persons making the appointment):

a. The remaining Trustees, if any; otherwise,

b. A majority of the permissible current mandatory or discretionary income beneficiaries, including the natural or legal guardians of any beneficiaries who are Disabled.

A successor Trustee appointed under this subparagraph shall not be a Related or Subordinate Party of the trust. The appointment will be by a written document executed by such person in the presence of two witnesses and acknowledged before a notary public delivered to the appointed Trustee and to me if I am living and not Disabled or in a valid last Will. Notwithstanding the foregoing, a designation under this Subparagraph of a successor trustee to a corporate or entity trustee shall be limited to a corporate or

entity trustee authorized to serve as such under Florida law with assets under trust management of no less than one billion dollars.

4. Power to Remove Trustee. Subsequent to my death, the age 35 or older permissible current mandatory or discretionary income beneficiaries from time to time of any trust established hereunder shall have the power to unanimously remove a Trustee of such trust at any time with or without cause, other than a named Trustee or successor Trustee designated hereunder, or a Trustee appointed by me during my lifetime or under my Will or otherwise at the time of my death, with the successor Trustee to be determined in accordance with the foregoing provisions.

D. **Method of Appointment of Trustee**. Any such appointment of a successor Trustee by a person shall be made in a written instrument executed by such person in the presence of two witnesses and acknowledged before a notary public which is delivered to such appointed Trustee during the lifetime of the person making such appointment, or any such appointment of a successor Trustee by a person may be made under the last Will of such person.

E. **Limitations on Removal and Replacement Power**. Any power to remove and/or replace a trustee hereunder that is granted to an individual (including such power when reserved to me) is personal to that individual and may not be exercised by a guardian, power of attorney holder, or other legal representative or agent.

F. **Successor Fiduciaries**. No Trustee is responsible for, nor has any duty to inquire into, the administration, acts or omissions of any executor, administrator, Personal Representative, or trustee or attorney-in-fact adding property to these Trusts, or of any predecessor Trustee. Each successor Trustee has all the powers, privileges, immunities, rights and title (without the execution of any instrument of transfer or any other act by any retiring Trustee) and all the duties of all predecessors.

G. **Liability and Indemnification of Trustee**.

1. Liability in General. No individual Trustee (that is, a Trustee that is not a corporation or other entity) shall be liable for any of his or her actions or failures to act as Trustee, even if the individual Trustee is found by a court to have been negligent or in breach of fiduciary duty, except for liability caused by his or her actions or failures to act done in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Each Trustee that is a corporation or other entity will be liable for its actions or failures to act that are negligent or that breach its fiduciary duty, without contribution by any individual Trustee.

2. Indemnification of Trustee. Except in regard to liabilities imposed on a Trustee under Subparagraph IV.G.1, each Trustee shall be held harmless and indemnified from the assets of the trust for any liability, damages, attorney's fees, expenses, and costs incurred as a result of its service as Trustee. A Trustee who ceases to serve for any reason will be entitled to receive reasonable security from the assets of the trust to protect it from liability, and may enforce these provisions for indemnification against the current Trustee or against any assets held in the trust, or if the former Trustee is an individual

and not a corporation or other entity, against any beneficiary to the extent of distributions received by that beneficiary. This indemnification right extends to the estate, personal representatives, legal successors and assigns of a Trustee.

3. Indemnification of Trustee - Additional Provisions. I recognize that if a beneficiary accuses a Trustee of wrongdoing or breach of fiduciary duty, the Trustee may have a conflict of interest that ordinarily would prevent it from paying legal fees and costs from the trust estate to defend itself. I do not want to put a financial burden on any individual named to serve as a Trustee. Just as important, I do not want an individual who has been selected to serve as a Trustee to be reluctant to accept the position, or while serving to be intimidated in the performance of the Trustee's duties because of the threats of lawsuits that might force the Trustee to pay fees and costs from the Trustee's personal resources. For this reason, I deliberately and intentionally waive any such conflict of interest with respect to any individual serving as Trustee so that he or she can hire counsel to defend himself or herself against allegations of wrongdoing or if sued for any reason (whether by a beneficiary or by someone else) and pay all fees and costs for his or her defense from the trust estate until the dispute is resolved. I understand and agree that a court may award, disallow or allocate fees and costs in whole or in part after the dispute is resolved, as provided by law. The Trustee will account for all such fees and costs paid by it as provided by law. This provision shall not apply to any Trustee that is a corporation or other entity.

H. Compensation, Bond. Each Trustee is entitled to be paid reasonable compensation for services rendered in the administration of the trust. Reasonable compensation for a non-individual Trustee will be its published fee schedule in effect when its services are rendered unless otherwise agreed in writing, and except as follows. Any fees paid to a non-individual Trustee for making principal distributions, for termination of the trust, and upon termination of its services must be based solely on the value of its services rendered, not on the value of the trust principal. During my lifetime the Trustee's fees are to be charged wholly against income (to the extent sufficient), unless directed otherwise by me in writing. Each Trustee shall serve without bond.

I. Maintenance of Records. The Trustee shall maintain accurate accounts and records. It shall render annual statements of the receipts and disbursements of income and principal of a trust upon the written request of any adult vested beneficiary of such trust or the guardian of the person of any vested beneficiary and the approval of such beneficiary shall be binding upon all persons then or thereafter interested in such trust as to the matters and transactions shown on such statement. The Trustee may at any time apply for a judicial settlement of any account. No Trustee shall be required to file any statutory or other periodic accountings of the administration of a trust.

J. Interested Trustee. The Trustee may act under this Agreement even if interested in these Trusts in an individual capacity, as a fiduciary of another trust or estate (including my estate) or in any other capacity. The Trustee may in good faith enter into a sale, encumbrance, or other transaction involving the investment or management of trust property for the Trustee's own personal account or which is otherwise affected by a conflict between the Trustee's fiduciary and personal interests, without liability and without being voidable by a beneficiary. The Trustee is specifically authorized to make loans to, to receive loans from, or to sell, purchase or exchange assets in a transaction with (i) the

Trustee's spouse, (ii) the Trustee's children or grandchildren, siblings, parents, or spouses of such persons, (iii) an officer, director, employee, agent, or attorney of the Trustee, or (iv) a corporation, partnership, limited liability company, or other business entity in which the Trustee has a financial interest, provided that in any transaction the trusts hereunder receive fair and adequate consideration in money or money's worth. The Trustee may renounce any interest or expectancy of a trust in, or an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the Trustee. Such renunciation shall not prohibit the Trustee from participating in the Trustee's individual capacity in such opportunity or expectancy.

K. **Third Parties**. No one dealing with the Trustee need inquire into its authority or its application of property.

L. **Merger of Trusts**. If the Trustee is also trustee of a trust established by myself or another person by will or trust agreement, the beneficiaries to whom income and principal may then be paid and then operative terms of which are substantially the same as those of a trust held under this Agreement, the Trustee in its discretion may merge either such trust into the other trust. The Trustee, in exercising its discretion, shall consider economy of administration, convenience to the beneficiaries, tax consequences and any other factor it considers important. If it is later necessary to reestablish the merged trust as separate trusts, it shall be divided proportionately to the value of each trust at the time of merger.

M. **Multiple Trustees**. If two Trustees are serving at any time, any power or discretion of the Trustees may be exercised only by their joint agreement. Either Trustee may delegate to the other Trustee the authority to act on behalf of both Trustees and to exercise any power held by the Trustees. If more than two Trustees are serving at any time, and unless unanimous agreement is specifically required by the terms of this Trust Agreement, any power or discretion of the Trustees may be exercised only by a majority. The Trustees may delegate to any one or more of themselves the authority to act on behalf of all the Trustees and to exercise any power held by the Trustees. Trustees who consent to the delegation of authority to other Trustees will be liable for the consequences of the actions of those other Trustees as if the consenting Trustees had joined the other Trustees in performing those actions. A dissenting Trustee who did not consent to the delegation of authority to another Trustee and who has not joined in the exercise of a power or discretion cannot be held liable for the consequences of the exercise. A dissenting Trustee who joins only at the direction of the majority will not be liable for the consequences of the exercise if the dissent is expressed in writing delivered to any of the other Trustees before the exercise of that power or discretion.

ARTICLE V. ADDITIONAL TAX AND RELATED MATTERS

A. **GST Trusts**. I direct (a) that the Trustee shall divide any trust to which there is allocated any GST exemption into two separate Trusts (each subject to the provisions hereof) so that the generation-skipping tax inclusion ratio of one such trust is zero, (b) any property exempt from generation-skipping taxation shall be divided as otherwise provided herein and held for the same persons

designated in Trusts separate from any property then also so divided which is not exempt from generation-skipping taxation, and (c) if upon the death of a beneficiary a taxable termination would otherwise occur with respect to any property held in trust for him or her with an inclusion ratio greater than zero, such beneficiary shall have with respect only to such property a power to appoint such fractional share thereof which if included in such beneficiary's gross estate for federal estate tax purposes (without allowing any deduction with respect to such share) would not be taxed at the highest federal estate tax rate and such fractional share of such property shall be distributed to such persons including only such beneficiary's estate, spouse, and issue, as such beneficiary may appoint, and any part of a trust such beneficiary does not effectively appoint shall be treated as otherwise provided for disposition upon his or her death, provided, if upon his or her death two or more Trusts for his or her benefit are directed to be divided among and held or distributed for the same persons and the generation-skipping tax inclusion ratio of any such trust is zero, the amount of any other such Trust to which there is allocated any of such beneficiary's GST exemption shall be added to the Trusts with generation-skipping tax inclusion ratios of zero in equal shares. For purposes of funding any pecuniary payment to which there is allocated any GST exemption, such payment shall be satisfied with cash or property which fairly represents appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which such distribution could be made, and any pecuniary payment made before a residual transfer of property to which any GST exemption is allocated shall be satisfied with cash or property which fairly represents appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which such pecuniary payment could be satisfied and shall be allocated a pro rata share of income earned by all such assets between the valuation date and the date of payment. Except as otherwise expressly provided herein, the valuation date with respect to any property shall be the date as of which its value is determined for federal estate tax purposes with respect to the transferor thereof, and subject to the foregoing, property distributed in kind in satisfaction of any pecuniary payment shall be selected on the basis of the value of such property on the valuation date. All terms used in this paragraph which are defined or explained in Chapter 13 of the Code or the regulations thereunder shall have the same meaning when used herein. I request (but do not require) that if two or more Trusts are held hereunder for any person, no principal be paid to such person from the Trusts with the lower inclusion ratios for generation-skipping tax purposes unless the trust with the highest inclusion ratio has been exhausted by use, consumption, distribution or otherwise or is not reasonably available. The Trustee is authorized and directed to comply with the provisions of the Treasury Regulations interpreting the generation skipping tax provisions of the Code in severing or combining any trust, creating or combining separate trust shares, allocating GST exemption, or otherwise, as necessary to best accomplish the foregoing allocations, inclusion ratios, combinations, and divisions, including, without limitation, the payment of "appropriate interest" as determined by the Trustee as that term is applied and used in said Regulations.

B. **Individual Retirement Accounts**. In the event that this trust or any trust created under this Agreement is the beneficiary of an Individual retirement account established and maintained under Code Section 408 or a qualified pension, profit sharing or stock bonus plan established and maintained under Code Section 401 (referred to in this paragraph as "IRA"), the following provisions shall apply to such trust:

1. I intend that the beneficiaries of such trust shall be beneficiaries within the meaning of Code Section 401(a)(9) and the Treasury Regulations thereunder. All provisions of such trust shall be construed consistent with such intent. Accordingly, the following provisions shall apply to such trust:

a. No benefits from any IRA may be used or applied for the payment of any debts, taxes or other claims against my estate as set forth in the later paragraph captioned "Taxes", unless other assets of this trust are not available for such payment.

b. In the event that a beneficiary of any trust created under this Agreement has a testamentary general power of appointment or a limited power of appointment over all or any portion of any trust established under this Agreement, and if such trust is the beneficiary of any benefits from any IRA, the beneficiary shall not appoint any part of such trust to a charitable organization or to a lineal descendant of mine (or a spouse of a lineal descendant of mine) who is older than the beneficiary whose life expectancy is being used to calculate distributions from such IRA.

2. The Trustee shall deliver a copy of this Agreement to the custodian of any IRA of which this trust or any trust created under this Agreement is the named beneficiary within the time period prescribed Code Section 401(a)(9) and the Treasury Regulations thereunder, along with such additional items required thereunder. If the custodian of the IRA changes after a copy of this Agreement has been provided pursuant to the preceding sentence, the Trustee shall immediately provide a copy of this Agreement to the new custodian. The Trustee shall request each custodian to complete a receipt of the Agreement and shall attach such receipt to this Agreement. The Trustee shall provide a copy of each amendment of this Agreement to the custodian and shall obtain a receipt of such amendment.

C. **Gift Transfers Made From Trust During My Lifetime**. I direct that all gift transfers made from the trust during my lifetime be treated for all purposes as if the gift property had been first withdrawn by (or distributed to) me and then transferred by me to the donees involved. Thus, in each instance, even where title to the gift property is transferred directly from the name of the trust (or its nominee) into the name of the donee, such transfer shall be treated for all purposes as first a withdrawal by (or distribution of the property to) me followed by a gift transfer of the property to the donee by me as donor, the Trustee making the actual transfer in my behalf acting as my attorney in fact, this paragraph being, to that extent, a power of attorney from me to the Trustee to make such transfer, which power of attorney shall not be affected by my Disability, incompetence, or incapacity.

D. **Gifts**. If I am Disabled, I authorize the Trustee to make gifts from trust property during my lifetime for estate planning purposes, or to distribute amounts to my legally appointed guardian or to my attorney-in-fact for those purposes, subject to the following limitations:

1. Recipients. The gifts may be made only to my lineal descendants or to trusts primarily for their benefit, and in aggregate annual amounts to any one such recipient that do not exceed the exclusion amount provided for under Code Section 2503(b).

2. Trustee Limited. When a person eligible to receive gifts is serving as Trustee, the aggregate of all gifts to that person during the calendar year allowable under the preceding subparagraph 1. shall thereafter not exceed the greater of Five Thousand Dollars ($5,000), or five percent (5%) of the aggregate value of the trust estate. However, gifts completed prior to a recipient's commencing to serve as Trustee shall not be affected by this limitation.

3. Charitable Pledges. The Trustee may pay any charitable pledges I made while I was not Disabled (even if not yet due).

E. Death Costs. If upon my death the Trustee hold any United States bonds which may be redeemed at par in payment of federal estate tax, the Trustee shall pay the federal estate tax due because of my death up to the amount of the par value of such bonds and interest accrued thereon at the time of payment. The Trustee shall also pay from the trust all of my following death costs, but if there is an acting executor, administrator or Personal Representative of my estate my Trustee shall pay only such amounts of such costs as such executor, administrator or Personal Representative directs:

1. my debts which are allowed as claims against my estate,

2. my funeral expenses without regard to legal limitations,

3. the expenses of administering my estate,

4. the balance of the estate, inheritance and other death taxes (excluding generation-skipping transfer taxes unless arising from direct skips), and interest and penalties thereon, due because of my death with respect to all property whether or not passing under my Will or this Agreement (other than property over which I have a power of appointment granted to me by another person, and qualified terminable interest property which is not held in a trust that was subject to an election under Code Section 2652(a)(3) at or about the time of its funding) and life insurance proceeds on policies insuring my life which proceeds are not held under this trust or my probate estate at or by reason of my death), and

5. any gifts made in my Will or any Codicil thereto.

The Trustee may make any such payment either to my executor, administrator or Personal Representative or directly to the proper party. The Trustee shall not be reimbursed for any such payment, and is not responsible for the correctness or application of the amounts so paid at the direction of my executor, administrator, or Personal Representative. The Trustee shall not pay any of such death costs with any asset which would not otherwise be included in my gross estate for federal or state estate or inheritance tax purposes, or with any asset which otherwise cannot be so used, such as property received under a limited power of appointment which prohibits such use. Further, no payment of any such death costs shall be charged against or paid from the tangible personal property disposed of pursuant to the prior paragraph captioned "Disposition of Tangible Personal Property."

F. **Subchapter S Stock.** Regardless of anything herein to the contrary, in the event that after my death the principal of a trust includes stock in a corporation for which there is a valid election to be treated under the provisions of Subchapter S of the Code, the income beneficiary of such a trust is a U.S. citizen or U.S. resident for federal income tax purposes, and such trust is not an "electing small business trust" under Code Section 1361(e)(1) in regard to that corporation, the Trustee shall (a) hold such stock as a substantially separate and independent share of such trust within the meaning of Code Section 663(c), which share shall otherwise be subject to all of the terms of this Agreement, (b) distribute all of the income of such share to the one income beneficiary thereof in annual or more frequent installments, (c) upon such beneficiary's death, pay all accrued or undistributed income of such share to the beneficiary's estate, (d) distribute principal from such share during the lifetime of the income beneficiary only to such beneficiary, notwithstanding any powers of appointment granted to any person including the income beneficiary, and (e) otherwise administer such share in a manner that qualifies it as a "qualified Subchapter S trust" as that term is defined in Code Section 1361(d)(3), and shall otherwise manage and administer such share as provided under this Agreement to the extent not inconsistent with the foregoing provisions of this paragraph.

G. **Residence as Homestead.** I reserve the right to reside upon any real property placed in this trust as my permanent residence during my life, it being the intent of this provision to retain for myself the requisite beneficial interest and possessory right in and to such real property to comply with Section 196.041 of the Florida Statutes such that said beneficial interest and possessory right constitute in all respects "equitable title to real estate" as that term is used in Section 6, Article VII of the Constitution of the State of Florida. Notwithstanding anything contained in this trust to the contrary, for purposes of the homestead exemption under the laws of the State of Florida, my interest in any real property in which I reside pursuant to the provisions of this trust shall be deemed to be an interest in real property and not personalty and shall be deemed my homestead.

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, the parties hereto have executed this Amended and Restated Trust Agreement on the date first above written.

SETTLOR and TRUSTEE:

SIMON L. BERNSTEIN

This instrument was signed by SIMON L. BERNSTEIN in our presence, and at the request of and in the presence of SIMON L. BERNSTEIN and each other, we subscribe our names as witnesses on this 21 day of July, 2012:

Print Name: Robert L. Spallina
Address: 7387 Wisteria Avenue
Parkland, FL 33076

Print Name: Kimberly Moran
Address: Kimberly Moran
6362 Las Flores Drive
Boca Raton, FL 33433

STATE OF FLORIDA

SS.

COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me this 25 day of July, 2012, by SIMON L. BERNSTEIN.

Signature - Notary Public-State of Florida

Lindsay Baxley
Print, type or stamp name of Notary Public

[Seal with Commission Expiration Date]

NOTARY PUBLIC-STATE OF FLORIDA
Lindsay Baxley
Commission # EE092282
Expires: MAY 10, 2015
BONDED THRU ATLANTIC BONDING CO., INC.

Personally Known _____ or Produced Identification _____
Type of Identification Produced _____

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

IN RE:

Case No.: 502012CP004391XXXXNB (IH)
JUDGE JOHN L. PHILLIPS

ESTATE OF SIMON
BERNSTEIN,
Deceased.
_____/

MOTION OF CREDITOR, WILLIAM E. STANSBURY, FOR DISCHARGE FROM FURTHER RESPONSIBILITY FOR THE FUNDING OF THE ESTATE'S PARTICIPATION IN THE CHICAGO LIFE INSURANCE LITIGATION AND FOR ASSUMPTION OF RESPONSIBILITY BY THE ESTATE AND FOR REIMBURSEMENT OF ADVANCED FUNDS

COMES NOW, William E. Stansbury ("Stansbury"), Creditor of the Estate of Simon Bernstein (the "Estate"), by and through his undersigned counsel, and moves this Court for an Order discharging Stansbury from further responsibility for the funding of the Estate's participation in the "Chicago life insurance litigation", and for the Estate to assume responsibility for funding the Chicago life insurance litigation, and states:

1. At the time of Simon Bernstein's death it was determined that there existed a life insurance policy on the life of Simon Bernstein issued by Heritage Union Insurance Company ("Heritage"). The policy proceeds are approximately $1.75 million, which, if included in the Estate, would more than double its assets. The policy was allegedly payable to a Simon Bernstein Irrevocable Insurance Trust as its beneficiary (the "Insurance Trust").

2. The alleged Insurance Trust submitted a death claim to Heritage and demanded that Heritage pay the policy proceeds to the so-called "trustee" of the Insurance Trust the former Co-Personal Representative of the Estate. If paid to the Insurance Trust, the death benefit would

not be included as an asset of the Estate. However, neither the original nor a copy of the "Insurance Trust" exists.

3. Heritage refused to pay the death benefit of $1.7 million to anyone without a court order. The alleged Insurance Trust then sued Heritage in the Circuit Court of Cook County, Illinois. The case was subsequently removed to the U.S. District Court for the Northern District of Illinois. (The "Life Insurance Litigation") *See* Simon Bernstein Irrevocable Trust DTD 6/21/95 v. Heritage Union Life Insurance Company, Case No. 13 cv 3643 (N.D. Ill., E. Div.) A copy of the Amended Complaint filed in U.S. District Court is attached as **Exhibit "1."** Heritage ultimately deposited the entire $1.75 million death benefit of the policy into the registry of the court in Chicago.

4. The Estate of Simon Bernstein was not made a party to the Life Insurance Litigation, even though the Estate will clearly be affected by the outcome of the case. The original co-personal representatives of the Estate, Donald Tescher and Robert Spallina, either failed or refused to intervene on behalf of the Estate. In fact, they actively participated in trying to prevent the death benefit from being paid to the Estate at a time when they were Co-Personal Representatives of the Estate!

5. In December of 2013, Stansbury filed a Motion to Intervene in the Life Insurance Litigation as an Interested Party. The Court denied the Motion and thus Stansbury was unable to Intervene in his own right.

6. Thereafter, Stansbury brought the Life Insurance Litigation to the attention of Benjamin Brown ("Brown"), who had been appointed Curator of the Estate following the resignation of Tescher & Spallina as co-personal representatives. By Order dated May 23, 2014, pursuant to a Petition filed by Stansbury, this Court appointed Brown as Administrator Ad Litem

to pursue intervention in the Life Insurance Litigation in order to protect the interests of the Estate.

7. More importantly, as a creditor of the Estate, Stansbury volunteered to initially fund the Life Insurance Litigation despite being under no legal obligation to do so. While Stansbury does stand to benefit from a successful outcome in the Life Insurance Litigation, his funding of the case on behalf of the Estate will clearly benefit the Estate and the Simon Bernstein Trust, who is the residuary legatee of the Estate. As a consequence of Stansbury's offer of initial funding, this Court accordingly ordered that all fees and costs incurred in the Life Insurance Litigation, "including for the Curator in connection with this work as Administrator Ad Litem and any counsel retained by Administrator Ad Litem, will initially be borne by William Stansbury." A copy of the May 23, 2014 Order is attached as **Exhibit "2."**

8. On June 5, 2014, the Estate, by and through counsel in Chicago, James J. Stamos, Esq., filed a Motion to Intervene on behalf of the Estate.

9. On July 28, 2014, the United States District Court for the Northern District of Illinois **granted** the Estate's Motion to Intervene. In granting the Motion, the court stated at page 3 of the Order:

> It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the policy proceeds must be paid to the Estate as a matter of law. (*citing* Harris v. Byard, 501 So.2d 730, 734 (Fla. App. 1st DCA, 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than the decedent's estate for administration and distribution.")

The Court concluded that the Estate demonstrated a sufficient interest justifying intervention. A copy of the Order of the District Court Order is attached as **Exhibit "3."**

10. Thereafter, James J. Stamos ("Stamos"), the attorney in Chicago hired by the Estate to represent it in the Life Insurance Litigation, opines that the Estate has a meritorious case, and has a reasonable likelihood of success on the merits. Stamos believes in the merits of the Estate's position so strongly that his firm has offered to continue representing the Estate on a contingency fee basis. In that event, there will be no further out of pocket expenses to the Estate for legal fees unless and until there is a recovery, either through settlement or judgment. To date the Estate has not yet brought the contingency fee offer by Stamos before the Court for approval.

11. As a result of the foregoing, Stansbury respectfully submits that due to his actions on behalf of the Estate, he has enabled the Estate to intervene and advance a meritorious position in the pending Life Insurance Litigation. There is now created a realistic expectation that the assets in the Estate could be more than doubled should the Estate's position prevail.

12. As such, Stansbury, who volunteered to initially fund the Life Insurance Litigation, despite being under no legal obligation to do so, should be discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation. The Estate, through a contingent fee arrangement, can now proceed without paying legal fees out of pocket. Any fees would only be paid if there is a recovery.

WHEREFORE, Petitioner, William E. Stansbury, requests that this Court issue an Order stating that: a) Stansbury is hereby discharged from further responsibility to pay attorney fees and costs in connection with the Estate's participation in the Life Insurance Litigation; b) the responsibility to pay future attorney fees and costs in the case are hereby to be assumed by the Estate and the Estate is hereby authorized to proceed; and c) that the Court order that the Estate reimburse Stansbury for fees advanced in the amount to be determined at a subsequent hearing, together with any other relief this court deems just and proper.

Respectfully submitted,

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 4th day of May, 2016.

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By: _____
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95, by Ted S. Bernstein, its Trustee, Ted Bernstein, an individual, Pamela B. Simon, an individual, Jill Iantoni, an individual and Lisa S. Friedstein, an individual.

Plaintiff,

v.

HERITAGE UNION LIFE INSURANCE COMPANY,

Defendant,

HERITAGE UNION LIFE INSURANCE COMPANY

Counter-Plaintiff

v.

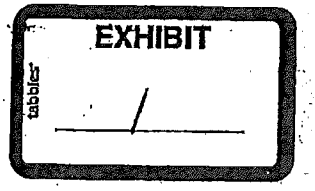
SIMON BERNSTEIN IRREVOCABLE TRUST DTD 6/21/95

Counter-Defendant

and,

FIRST ARLINGTON NATIONAL BANK as Trustee of S.B. Lexington, Inc. Employee Death Benefit Trust, UNITED BANK OF ILLINOIS, BANK OF AMERICA, Successor in interest to LaSalle National Trust, N.A., SIMON BERNSTEIN TRUST, N.A., TED BERNSTEIN, individually and as purported Trustee of the Simon Bernstein

Case No. 13 cv 3643
Honorable Amy J. St. Eve
Magistrate Mary M. Rowland



Irrevocable Insurance Trust Dtd 6/21/95, and ELIOT BERNSTEIN

Third-Party Defendants.

ELIOT IVAN BERNSTEIN,

Cross-Plaintiff

v.

TED BERNSTEIN, individually and as alleged Trustee of the Simon Bernstein Irrevocable Insurance Trust Dtd, 6/21/95

Cross-Defendant

and,

PAMELA B. SIMON, DAVID B.SIMON, both Professionally and Personally ADAM SIMON, both Professionally and Personally, THE SIMON LAW FIRM, TESCHER & SPALLINA, P.A., DONALD TESCHER, both Professionally and Personally, ROBERT SPALLINA, both Professionally and Personally, LISA FRIEDSTEIN, JILL IANTONI S.B. LEXINGTON, INC. EMPLOYEE DEATH BENEFIT TRUST, S.T.P. ENTERPRISES, INC. S.B. LEXINGTON, INC., NATIONAL SERVICE ASSOCIATION (OF FLORIDA), NATIONAL SERVICE ASSOCIATION (OF ILLINOIS) AND JOHN AND JANE DOES

Third-Party Defendants.

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COMES Plaintiffs, SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST dtd 6/21/95, and TED BERNSTEIN, as Trustee, (collectively referred to as "BERNSTEIN TRUST"), TED BERNSTEIN, individually, PAMELA B. SIMON, individually, JILL IANTONI, individually, and LISA FRIEDSTEIN, individually, by their attorney, Adam M. Simon, and complaining of Defendant, HERITAGE UNION LIFE INSURANCE COMPANY, ("HERITAGE") states as follows:

BACKGROUND

1. At all relevant times, the BERNSTEIN TRUST was a common law irrevocable life insurance trust established in Chicago, Illinois, by the settlor, Simon L. Bernstein, ("Simon Bernstein" or "insured") and was formed pursuant to the laws of the state of Illinois.

2. At all relevant times, the BERNSTEIN TRUST was a beneficiary of a life insurance policy insuring the life of Simon Bernstein, and issued by Capitol Bankers Life Insurance Company as policy number 1009208 (the "Policy").

3. Simon Bernstein's spouse, Shirley Bernstein, was named as the initial Trustee of the BERNSTEIN TRUST. Shirley Bernstein passed away on December 8, 2010, predeceasing Simon Bernstein.

4. The successor trustee, as set forth in the BERNSTEIN TRUST agreement is Ted Bernstein.

5. The beneficiaries of the BERNSTEIN TRUST as named in the BERNSTEIN TRUST Agreement are the children of Simon Bernstein.

6. Simon Bernstein passed away on September 13, 2012, and is survived by five adult children whose names are Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. By this amendment, Ted Bernstein, Pamela Simon, Jill Iantoni and Lisa Friedstein are being added as co-Plaintiffs in their individual capacities.

7. Four out five of the adult children of Simon Bernstein, whom hold eighty percent of the beneficial interest of the BERNSTEIN TRUST have consented to having Ted Bernstein, as Trustee of the BERNSTEIN TRUST, prosecute the claims of the BERNSTEIN TRUST as to the Policy proceeds at issue.

8. Eliot Bernstein, the sole non-consenting adult child of Simon Bernstein, holds the remaining twenty percent of the beneficial interest in the BERNSTEIN TRUST, and is representing his own interests and has chosen to pursue his own purported claims, pro se, in this matter.

9. The Policy was originally purchased by the S.B. Lexington, Inc. 501(c)(9) VEBA Trust (the "VEBA") from Capitol Bankers Life Insurance Company ("CBLIC") and was delivered to the original owner in Chicago, Illinois on or about December 27, 1982.

10. At the time of the purchase of the Policy, S.B. Lexington, Inc., was an Illinois corporation owned, in whole or part, and controlled by Simon Bernstein.

11. At the time of purchase of the Policy, S.B. Lexington, Inc. was an insurance brokerage licensed in the state of Illinois, and Simon Bernstein was both a principal and an employee of S.B. Lexington, Inc.

12. At the time of issuance and delivery of the Policy, CBLIC was an insurance company licensed and doing business in the State of Illinois.

13. HERITAGE subsequently assumed the Policy from CBLIC and thus became the successor to CBLIC as "Insurer" under the Policy and remained the insurer including at the time of Simon Bernstein's death.

14. In 1995, the VEBA, by and through LaSalle National Trust, N.A., as Trustee of the VEBA, executed a beneficiary change form naming LaSalle National Trust, N.A., as Trustee, as primary beneficiary of the Policy, and the BERNSTEIN TRUST as the contingent beneficiary.

15. On or about August 26, 1995, Simon Bernstein, in his capacity as member or auxiliary member of the VEBA, signed a VEBA Plan and Trust Beneficiary Designation form designating the BERNSTEIN TRUST as the "person(s) to receive at my death the Death Benefit stipulated in the S.B. Lexington, Inc. Employee Death Benefit and Trust and the Adoption Form adopted by the Employer".

16. The August 26, 1995 VEBA Plan and Trust Beneficiary Designation form signed by Simon Bernstein evidenced Simon Bernstein's intent that the beneficiary of the Policy proceeds was to be the BERNSTEIN TRUST.

17. S.B. Lexington, Inc. and the VEBA were voluntarily dissolved on or about April 3, 1998.

18. On or about the time of the dissolution of the VEBA in 1998, the Policy ownership was assigned and transferred from the VEBA to Simon Bernstein, individually.

19. From the time of Simon Bernstein's designation of the BERNSTEIN TRUST as the intended beneficiary of the Policy proceeds on August 26, 1995, no document was submitted by Simon Bernstein (or any other Policy owner) to the Insurer which evidenced any change in his intent that the BERNSTEIN TRUST was to receive the Policy proceeds upon his death.

20. At the time of his death, Simon Bernstein was the owner of the Policy, and the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

21. The insured under the Policy, Simon Bernstein, passed away on September 13, 2012, and on that date the Policy remained in force.

22. Following Simon Bernstein's death, the BERNSTEIN TRUST, by and through its counsel in Palm Beach County, FL, submitted a death claim to HERITAGE under the Policy including the insured's death certificate and other documentation.

COUNT I

BREACH OF CONTRACT

23. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶22 as if fully set forth as ¶23 of Count I.

24. The Policy, by its terms, obligates HERITAGE to pay the death benefits to the beneficiary of the Policy upon HERITAGE'S receipt of due proof of the insured's death.

25. HERITAGE breached its obligations under the Policy by refusing and failing to pay the Policy proceeds to the BERNSTEIN TRUST as beneficiary of the Policy despite HERITAGE'S receipt of due proof of the insured's death.

26. Despite the BERNSTEIN TRUST'S repeated demands and its initiation of a breach of contract claim, HERITAGE did not pay out the death benefits on the Policy to the BERNSTEIN TRUST instead it filed an action in interpleader and deposited the Policy proceeds with the Registry of the Court.

27. As a direct result of HERITAGE's refusal and failure to pay the Policy proceeds to the BERNSTEIN TRUST pursuant to the Policy, Plaintiff has been damaged in an amount equal to the death benefits of the Policy plus interest, an amount which exceeds $1,000,000.00.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for a judgment to be entered in its favor and against Defendant, HERITAGE, for the amount of the Policy proceeds on deposit with the Registry of the Court (an amount in excess of $1,000,000.00) plus costs and reasonable attorneys' fees together with such further relief as this court may deem just and proper.

COUNT II

DECLARATORY JUDGMENT

28. Plaintiff, the BERNSTEIN TRUST, restates and realleges the allegations contained in ¶1-¶27 above as ¶28 of Count II and pleads in the alternative for a Declaratory Judgment.

29. On or about June 21, 1995, David Simon, an attorney and Simon Bernstein's son-in-law, met with Simon Bernstein before Simon Bernstein went to the law offices of Hopkins and Sutter in Chicago, Illinois to finalize and execute the BERNSTEIN TRUST Agreement.

30. After the meeting at Hopkins and Sutter, David B. Simon reviewed the final version of the BERNSTEIN TRUST Agreement and personally saw the final version of the BERNSTEIN TRUST Agreement containing Simon Bernstein's signature.

31. The final version of the BERNSTEIN TRUST Agreement named the children of Simon Bernstein as beneficiaries of the BERNSTEIN TRUST, and unsigned drafts of the BERNSTEIN TRUST Agreement confirm the same.

32. The final version of the BERNSTEIN TRUST Agreement named Shirley Bernstein, as Trustee, and named Ted Bernstein as, successor Trustee.

33. As set forth above, at the time of death of Simon Bernstein, the BERNSTEIN TRUST was the sole surviving beneficiary of the Policy.

34. Following the death of Simon Bernstein, neither an executed original of the BERNSTEIN TRUST Agreement nor an executed copy could be located by Simon Bernstein's family members.

35. Neither an executed original nor an executed copy of the BERNSTEIN TRUST Agreement has been located after diligent searches conducted as follows:

i) Ted Bernstein and other Bernstein family members of Simon Bernstein's home and business office;

ii) the law offices of Tescher and Spallina, Simon Bernstein's counsel in Palm Beach County, Florida,

iii) the offices of Foley and Lardner (successor to Hopkins and Sutter) in Chicago, IL; and

iv) the offices of The Simon Law Firm.

36. As set forth above, Plaintiffs have provided HERITAGE with due proof of the death of Simon Bernstein which occurred on September 13, 2012.

WHEREFORE, PLAINTIFF, the BERNSTEIN TRUST prays for an Order entering a declaratory judgment as follows:

a) declaring that the original BERNSTEIN TRUST was lost and after a diligent search cannot be located;

b) declaring that the BERNSTEIN TRUST Agreement was executed and established by Simon Bernstein on or about June 21, 1995;

c) declaring that the beneficiaries of the BERNSTEIN TRUST are the five children of Simon Bernstein;

d) declaring that Ted Bernstein, is authorized to act as Trustee of the BERNSTEIN TRUST because the initial trustee, Shirley Bernstein, predeceased Simon Bernstein;

e) declaring that the BERNSTEIN TRUST is the sole surviving beneficiary of the Policy;

f) declaring that the BERNSTEIN TRUST is entitled to the proceeds placed on deposit by HERITAGE with the Registry of the Court;

g) ordering the Registry of the Court to release all of the proceeds on deposit to the BERNSTEIN TRUST; and

h) for such other relief as this court may deem just and proper.

COUNT III

RESULTING TRUST

37. Plaintiffs restate and reallege the allegations contained in ¶1-¶36 of Count II as ¶37 of Count III and plead, in the alternative, for imposition of a Resulting Trust.

38. Pleading in the alternative, the executed original of the BERNSTEIN TRUST Agreement has been lost and after a diligent search as detailed above by the executors, trustee and attorneys of Simon Bernstein's estate and by Ted Bernstein, and others, its whereabouts remain unknown.

39. Plaintiffs have presented HERITAGE with due proof of Simon Bernstein's death, and Plaintiff has provided unexecuted drafts of the BERNSTEIN TRUST Agreement to HERITAGE.

40. Plaintiffs have also provided HERITAGE with other evidence of the BERNSTEIN TRUST'S existence including a document signed by Simon Bernstein that designated the BERNSTEIN TRUST as the ultimate beneficiary of the Policy proceeds upon his death.

41. At all relevant times and beginning on or about June 21, 1995, Simon Bernstein expressed his intent that (i) the BERNSTEIN TRUST was to be the ultimate beneficiary of the life insurance proceeds; and (ii) the beneficiaries of the BERNSTEIN TRUST were to be the children of Simon Bernstein.

42. Upon the death of Simon Bernstein, the right to the Policy proceeds immediately vested in the beneficiary of the Policy.

43. At the time of Simon Bernstein's death, the beneficiary of the Policy was the BERNSTEIN TRUST.

44. If an express trust cannot be established, then this court must enforce Simon Bernstein's intent that the BERNSTEIN TRUST be the beneficiary of the Policy; and therefore upon the death of Simon Bernstein the rights to the Policy proceeds immediately vested in a resulting trust in favor of the five children of Simon Bernstein.

45. Upon information and belief, Bank of America, N.A., as successor Trustee of the VEBA to LaSalle National Trust, N.A., has disclaimed any interest in the Policy.

46. In any case, the VEBA terminated in 1998 simultaneously with the dissolution of S.B. Lexington, Inc.

47. The primary beneficiary of the Policy named at the time of Simon Bernstein's death was LaSalle National Trust, N.A. as "Trustee" of the VEBA.

48. LaSalle National Trust, N.A., was the last acting Trustee of the VEBA and was named beneficiary of the Policy in its capacity as Trustee of the VEBA.

49. As set forth above, the VEBA no longer exists, and the ex-Trustee of the dissolved trust, and upon information and belief, Bank Of America, N.A., as successor to LaSalle National Trust, N.A. has disclaimed any interest in the Policy.

50. As set forth herein, Plaintiff has established that it is immediately entitled to the life insurance proceeds HERITAGE deposited with the Registry of the Court.

51. Alternatively, by virtue of the facts alleged herein, HERITAGE held the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein and since HERITAGE deposited the Policy proceeds the Registry, the Registry now holds the Policy proceeds in a resulting trust for the benefit of the children of Simon Bernstein.

WHEREFORE, PLAINTIFFS pray for an Order as follows:

a) finding that the Registry of the Court holds the Policy Proceeds in a Resulting Trust for the benefit of the five children of Simon Bernstein, Ted Bernstein, Pamela Simon, Eliot Ivan Bernstein, Jill Iantoni and Lisa Friedstein; and

b) ordering the Registry of the Court to release all the proceeds on deposit to the Bernstein Trust or alternatively as follows: 1) twenty percent to Ted Bernstein; 2) twenty percent to Pam Simon; 3) twenty percent to Eliot Ivan Bernstein; 4) twenty percent to Jill Iantoni; 5) twenty percent to Lisa Friedstein

c) and for such other relief as this court may deem just and proper.

By: *s/Adam M. Simon*
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Attorneys for Plaintiffs and Third-Party Defendants
Simon L. Bernstein Irrevocable Insurance Trust Dtd 6/21/95; Ted Bernstein as Trustee, and individually, Pamela Simon, Lisa Friedstein and Jill Iantoni

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

IN RE:

ESTATE OF SIMON L. BERNSTEIN,
Deceased.

CASE NO.: 50 2012 CP 004391 XXXX SB
PROBATE DIV.

/

ORDER APPOINTING ADMINISTRATOR AD LITEM TO ACT ON BEHALF OF THE ESTATE OF SIMON L. BERNSTEIN TO ASSERT THE INTERESTS OF THE ESTATE IN THE ILLINOIS LITIGATION (CASE NO. 13CV3643, N.D. ILL. E. DIV.) INVOLVING LIFE INSURANCE PROCEEDS ON THE DECEDENT'S LIFE

THIS CAUSE came before this Honorable Court on May 23, 2014 upon the Curator's Amended Motion for Instructions/Determination regarding Estate Entitlement to Life Insurance Proceeds and upon the Petition for Appointment of Administrator Ad Litem filed by William Stansbury, in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, currently pending in the United States District Court for the Northern District Court of Illinois, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED and ADJUDGED that

1. The Court appoints Benjamin P. Brown, Esq., who is currently serving as Curator, as the Administrator Ad Litem on behalf of the Estate of Simon L. Bernstein to assert the interests of the Estate in the Illinois Litigation involving life insurance proceeds on the Decedent's life in the U.S. District Court case styled *Simon Bernstein Irrevocable Insurance Trust DTD 6/21/95 v. Heritage Union Life Insurance*, Case No. 13-cv-03643, pending in the United States District Court for the Northern District Court of Illinois.

EXHIBIT
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2. For the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the Curator in connection with his work as Administrator Ad Litem and any counsel retained by the Administrator Ad Litem, will initially be borne by William Stansbury.

3. The Court will consider any subsequent Petition for Fees and Costs by William Stansbury as appropriate under Florida law.

DONE AND ORDERED in Palm Beach County, Florida this 23 day of May, 2014.

MARTIN COLIN
Circuit Court Judge

Copies to:
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Benjamin P. Brown, Esq., Matwiczyk & Brown, LLP, 625 No. Flagler Drive, Suite 401, West Palm Beach, FL 33401, bbrown@matbrolaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SIMON BERNSTEIN IRREVOCABLE INSURANCE TRUST DTD 6/21/95,	)	
Plaintiff,	)	
v.	)	Case No. 13 C 3643
	)	Judge Amy St. Eve
HERITAGE UNION LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

The Court grants Benjamin P. Brown's motion to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2) [110].

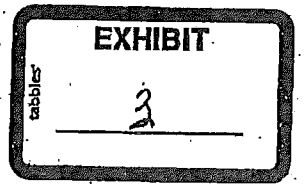
STATEMENT

On May 20, 2013, Defendant Jackson National Life Insurance Company ("Defendant" or "Jackson"), as successor in interest to Heritage Union Life Insurance Company ("Heritage"), filed an amended notice of removal pursuant to 28 U.S.C. § 1441 removing the present lawsuit from the Circuit Court of Cook County, Illinois, based on the Court's diversity jurisdiction. *See* 28 U.S.C. § 1332(a). In the Complaint filed on April 5, 2013, Plaintiff Simon Bernstein Irrevocable Insurance Trust ("Bernstein Trust") alleged a breach of contract claim against Heritage based on Heritage's failure to pay Plaintiff proceeds from the life insurance policy of decedent Simon Bernstein. On June 26, 2013, Defendant filed a Third-Party Complaint and Counter-Claim for Interpleader pursuant to 28 U.S.C. § 1335(a) and Federal Rule of Civil Procedure 14 seeking a declaration of rights under the life insurance policy for which it is responsible to administer. Plaintiffs filed a First Amended Complaint on January 13, 2014.

Before the Court is Benjamin P. Brown's ("Brown") motion to intervene both as of right and permissibly under Federal Rule of Civil Procedure 24(a)(2) and Rule 24(b)(1)(B). Brown is the Administrator Ad Litem of the Estate of Simon Bernstein. For the following reasons, the Court grants Brown's motion brought pursuant to Rule 24(a)(2).

BACKGROUND

In their First Amended Complaint, Plaintiffs, who are the Bernstein Trust and four of the five adult children of decedent Simon Bernstein, allege that at all times relevant to this lawsuit,



the Bernstein Trust was a common law trust established in Chicago, Illinois by Simon Bernstein. (R. 73, Am. Compl. ¶¶ 1, 7.) Plaintiffs assert that Ted Bernstein is the trustee of the Bernstein Trust and that the Bernstein Trust was a beneficiary of Simon Bernstein's life insurance policy. (*Id.* ¶¶ 2, 4.) In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. (*Id.* ¶ 5.) According to Plaintiffs, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy. (*Id.* ¶ 20.) Following Simon Bernstein's death on September 13, 2012, the Bernstein Trust, by and through its counsel in Palm Beach County, Florida, submitted a death claim to Heritage under the life insurance policy at issue. (*Id.* ¶ 22.)

In its Counter-Claim and Third-Party Complaint for Interpleader, Jackson alleges that it did not originate or administer the life insurance policy at issue, but inherited the policy from its predecessors. (R. 17, Counter ¶ 2.) Jackson further alleges that on December 27, 1982, Capitol Bankers Life Insurance Company issued the policy to Simon Bernstein and that over the years, the owners, beneficiaries, contingent beneficiaries, and issuers of the policy have changed. (*Id.* ¶¶ 15, 16.) At the time of the insured's death, the policy's death benefits were $1,689,070.00. (*Id.* ¶ 17.) It is undisputed that no one has located an executed copy of the Bernstein Trust. (*Id.* ¶ 19.)

In the present motion to intervene, Brown maintains that after Simon Bernstein, a resident of Florida, died in September 2012, his estate was admitted to probate in Palm Beach County, Florida on October 2, 2012. Brown further alleges that on May 23, 2014, a judge in the Probate Court of Palm Beach County appointed him as Administrator Ad Litem of the Estate of Simon Bernstein ("Estate"). According to Brown, the probate judge directed him to "assert the interests of the Estate in the Illinois Litigation involving the life insurance proceeds on the Decedent's life." Brown contends that because no one can locate an executed copy of the Bernstein Trust, and, in absence of a valid trust and designated beneficiary, the insurance policy proceeds at issue in the present lawsuit are payable to the Estate, and not Plaintiffs.

LEGAL STANDARD

"Rule 24 provides two avenues for intervention, either of which must be pursued by a timely motion." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013). Intervention as of right under Rule 24(a)(2) states that "the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed.R.Civ.P. 24(a)(2); *see also Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009) (citation omitted). "Intervention as of right requires a 'direct, significant[,] and legally protectable' interest in the question at issue in the lawsuit." *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (citation omitted). "That interest must be unique to the proposed intervenor." *Id.*

ANALYSIS

At issue in this lawsuit is who are the beneficiaries of Simon Bernstein's life insurance policy. In their First Amended Complaint, Plaintiffs allege that there is a common law trust, namely, the Bernstein Trust, and that the Bernstein Trust is the beneficiary of Simon Bernstein's life insurance policy. In addition, Plaintiffs allege that the beneficiaries to the Bernstein Trust are Simon Bernstein's five children. In short, according to Plaintiffs' First Amended Complaint, at the time of his death, Simon Bernstein was the owner of the life insurance policy and the Bernstein Trust was the sole surviving beneficiary under the policy.

It is undisputed, however, that no one can locate the Bernstein Trust. Accordingly, Brown, the Administrator Ad Litem of the Estate, moves to intervene arguing that in the absence of a valid trust and designated beneficiary, the insurance policy proceeds must be paid to the Estate as a matter of law. *See, e.g., New York Life Ins. Co. v. Rak* 24 Ill.2d 128, 134, 180 N.E.2d 470 (Ill. 1962); *see Harris v. Byard,* 501 So.2d 730, 734 (Fla. Ct. App. 1987) ("Since the policy had no named beneficiary, there is no basis in law for directing payment of the policy proceeds to anyone other than decedent's estate for administration and distribution.").

In response to the present motion to intervene, Plaintiffs maintain that there is a designated beneficiary of the insurance proceeds. In support of their argument, Plaintiffs set forth an affidavit averring that "on the date of death of Simon Bernstein, the Owner of the Policy was Simon Bernstein, the primary beneficiary was designated as LaSalle National Trust, N.A. as Successor Trustee, and the Contingent Beneficiary was designated as the Simon Bernstein Irrevocable Insurance Trust dated June 21,1995. (R. 116-2, Sanders Aff. ¶ 62.) By submitting Sanders' affidavit, Plaintiffs have contradicted their own allegations in their First Amended Complaint by contending that the primary beneficiary of the insurance policy is LaSalle National Trust, N.A., and not the Bernstein Trust. Nevertheless, the Court cannot view this averment in a vacuum without more information about the insurance policy's provisions and any additional extrinsic evidence. To clarify, under Illinois law, "[t]he designation of a beneficiary is solely a decision of the insured and when a controversy arises as to the identity of a beneficiary the intention of the insured is the controlling element. If such intention is dependent on extrinsic facts which are disputed the question, of course, must be resolved as one of fact." *Reich v. W. F. Hall Printing Co.,* 46 Ill.App.3d 837, 844, 361 N.E.2d 296, 5 Ill.Dec. 157 (2d Dist. 1977); *see also Estate of Wilkening,* 109 Ill.App.3d 934, 941, 441 N.E.2d 158, 163, 65 Ill.Dec. 366, 371 (1st Dist. 1982) ("Evidence to establish a trust must be unequivocal both as to its existence and to its terms and conditions.") Moreover, Plaintiffs' contradiction illustrates why Brown has a competing interest in the insurance proceeds justifying intervention.

Further, Plaintiffs take issue with the fact that William E. Stansbury, who brought an unsuccessful motion to intervene in January 2014, filed a petition in the Florida probate court for an administrator ad litem and is paying costs and legal fees for the present motion to intervene. Based on Stansbury's conduct, Plaintiffs argue that the law of the case doctrine and collateral estoppel apply. In denying Stansbury's motion, the Court concluded that his interest as an

unsecured creditor of the Estate was too remote for purposes of Rule 24(a)(2). *See Flying J, Inc.*, 578 F.3d at 571 ("the fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit — maybe you're a creditor of one of them — does not entitle you to intervene in their suit.").

Plaintiffs' law of the case doctrine argument fails because "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Here, Brown, as the Administrator Ad Litem, is protecting the Estate's interest in the insurance proceeds, which is different from Stansbury's remote interest as an unsecured creditor of the Estate. *See Walker*, 705 F.3d at 658; *see also Tallahassee Mem. Reg'l Med. Ctr., Inc. v. Petersen*, 920 So.2d 75, 78 (Fla. Ct. App. 2006) ("Florida Probate Rule 5.120(a) provides for discretionary appointment of a guardian ad litem in estate and trust proceedings where ... the personal representative or guardian may have adverse interests.").

Furthermore, the doctrines of collateral estoppel or issue preclusion do not apply under the facts of this case because there was no separate, earlier judgment addressing the issues presented here. *See Adams v. City of Indianapolis*, 742 F.3d 720, 736 (7th Cir. 2014) ("'collateral estoppel' or 'issue preclusion'—applies to prevent relitigation of issues resolved in an earlier suit."). Therefore, this argument is unavailing.

Dated: July 28, 2014

Amy J. St. Eve

AMY J. ST. EVE
United States District Court Judge

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

PROBATE DIV.
CASE NO. 50 2012 CP 004391 XXXX NB

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

CASE LAW AUTHORITY

COMES NOW, Creditor and Interested Person, William E. Stansbury ("Stansbury"), by and through his undersigned counsel and hereby submits the following case law authority in connection with the matters to be heard on March 2, 2017 at 1:30 p.m.:

ISSUES:

I. WHETHER TED BERNSTEIN SHOULD BE APPOINTED AS ADMINISTRATOR *AD LITEM*

A. *Woolf v. Reed,* 389 So.2d 1029 (Fla. 3rd DCA, 1980)
B. *Arzuman v. Estate of Prince Bander BIN Saud Bin, etc.*, 879 So.2d 675 (Fla. 4th DCA 2004)
C. *Estate of Bell v. Johnson*, 573 So.2d 57 (Fla. 1st DCA, 1990)
D. §731.201(23), Fla. Stat.
E. §733.504, Fla. Stat.
F. §733.602(1), Fla. Stat.
G. §736.0813, Fla. Stat.

II. WHETHER WILLIAM STANSBURY SHOULD BE DISCHARGED FROM FURTHER RESPONSIBILITY FOR FUNDING THE ESTATE'S PARTICIPATION IN THE CHICAGO LIFE INSURANCE LITIGATION; ASSUMPTION OF RESPONSIBILITY BY THE ESTATE AND REIMBURSEMENT TO WILLIAM STANSBURY

H. *In re Estate of Wejanowski,* 920 So. 2d 190 (Fla. 2d DCA 2006)
I. *Bookman v. Davidson*, 136 So. 3d 1276 (Fla. 1st DCA 2014)
J. *In re Paine's Estate,* 174 So. 430 (Fla. 1937)
K. § 733.612(20), Fla. Stat.

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 23rd day of February, 2017.

PETER M. FEAMAN, P.A.
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3.A.

KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Estate of Bierman, Fla.App. 4 Dist., October 9, 1991

389 So.2d 1026
District Court of Appeal of Florida, Third District.

Shirley WOOLF, Appellant,
v.
David REED et al., Appellees.

Nos. 79-479, 79-480 and 79-505.
|
Sept. 9, 1980.
|
Rehearing Denied Nov. 25, 1980.

Appeal was taken from an order of the Circuit Court, Dade County, Francis J. Christie, J., which appointed an administrator ad litem in the probate of decedent's estate. The District Court of Appeal held that: (1) trial court's appointment of an administrator ad litem with authority to determine any liability of attorney, who had acted as legal counsel for executrix of her father's estate until executrix' death, to estate of executrix arising out of administration of executrix' father's estate was supported in the record; and (2) insofar as court sought to delegate its judicial authority to appointed administrator ad litem, court's act was void ab initio.

Affirmed in part; reversed in part and remanded.

West Headnotes (6)

[1] **Executors and Administrators**
Proceedings for Appointment

Trial court's appointment of administrator ad litem with authority to determine any liability of attorney, who had acted as legal counsel for executrix of her father's estate until executrix' death, to estate of executrix arising out of administration of executrix' father's estate was supported by record. Rules of Probate and Guardianship Procedure, Rule 5.120(a).

Cases that cite this headnote

[2] **Executors and Administrators**
Grounds for Appointment

Administrator ad litem is court-appointed advocate for interests of estate, where whose interests are jeopardized, and where acting representative, if any, will not or cannot defend them. Rules of Probate and Guardianship Procedure, Rule 5.120(a).

1 Cases that cite this headnote

[3] **Executors and Administrators**
Temporary or Special Appointment

Administrator ad litem is officer of the court, insofar as is every attorney certified to practice therein; however, his primary and overriding duty is to the estate, rather than to the bench.

Cases that cite this headnote

[4] **Executors and Administrators**
Temporary or Special Appointment

Court may not mandate specific acts through appointment of administrator ad litem, such as holding of hearings, but, rather, imposes upon administrator fiduciary duty to the estate and so empowers him to minister to specific estate interests, not as judicial officer making findings of fact and conclusions of law, but as fiduciary who owes highest duty to the estate to safeguard those specific interests which he has been commissioned to protect.

2 Cases that cite this headnote

[5] **Executors and Administrators**

⚷Temporary or Special Appointment

Appointed administrator ad litem becomes solely responsible to the estate for administration of that portion of its affairs entrusted to him by court, and thus supplants in that regard authority of personal representative, who continues to be responsible for administration of all other aspects of estate's business.

4 Cases that cite this headnote

[6] **Constitutional Law**
⚷Delegation of Powers by Judiciary

Insofar as court sought to delegate its judicial authority to appointed administrator ad litem, court's act was void ab initio.

2 Cases that cite this headnote

Attorneys and Law Firms

***1027** Sibley, Giblin, Levenson & Glaser, Thomas E. Lee, Jr., Miami, for appellant.

Robert A. Ginsburg, County Atty. and Murray A. Greenberg and Roy Wood, Asst. County Attys., Rafael K. Yunes, Miami Beach, Mershon, Sawyer, Johnston, Dunwody & Cole and Mark V. Silverio and Roland C. Goss, Miami, Smith, Mandler, Smith, Werner, Jacobowitz & Fried, Miami Beach, for appellees.

Steel, Hector & Davis, Miami, for Dade County Bar Assn., as amicus curiae.

Before HENDRY, BASKIN and DANIEL S. PEARSON, JJ.

Opinion

PER CURIAM.

We review the appointment by the circuit court of an administrator ad litem in the probate of Pat B. Elbert's estate.

A short review of the facts is in order.

Pat Elbert, until her death in 1974, acted as the executrix of her father's estate; appellant was her legal counsel in that undertaking. Upon the death of Pat Elbert, Sun Bank was appointed administrator of the father's estate, and appellant's connection with the father's estate ended.

Appellant was a nominated trustee under the will of Pat Elbert; moreover, she served as attorney for the personal representative of the Pat Elbert estate.

Records of administration kept for the father's estate disclosed an apparent indebtedness to that estate from the Pat Elbert estate. The personal representative of Pat's estate, Patricia Byrne, negotiated a compromise and settlement between the two estates which she submitted to the court, in the form of a settlement stipulation, for approval. Thereafter, Ms. Byrne informed the court of her discovery that appellant had obtained from the father's estate a release from liability to that estate, negotiated at some cost to appellant.

Appellee Reed was the nominated co-trustee, with appellant, of a trust established in the Pat Elbert will, to be funded from her estate. He has resigned that position. It is he who first requested the appointment of an administrator ad litem-a request subsequently joined in by the University of Miami, which holds certain remainder interests in the trust, and by the Dade County Bar Association, as amicus curiae. Appellees contend that the Pat Elbert estate may have a claim against appellant for all or part of the funds in question, and that appointment of an administrator ad litem is necessary to properly protect the estate's interests.

Appellee's request culminated in the appointment of an administrator ad litem with the authority to ". . . determine the nature and extent, if any, of the liability of SHIRLEY WOOLF, to the (Pat Elbert) ***1028** Estate and/or its beneficiaries, arising out of the administration of the ROBERT G. ELBERT (the father's) ESTATE."

[1] Appellant contends that the appointment of an administrator ad litem is improper without a prior finding that an acting administrator has engaged in misconduct, or is incapable of protecting the estate's interests in the matter for which the appointment is made. Moreover, appellant urges that the authority with which the administrator ad litem was clothed by the court was excessive.

We dispose of appellant's first contention by reference to the language of Fla.R.P. & G.P. 5.120(a):

> When it is necessary that the estate of a decedent . . . be represented in any probate . . . proceeding and . . . the personal representative . . . is or may be interested adversely to the estate . . ., or the necessity arises otherwise, the court may appoint an administrator ad litem . . ., without bond or notice for that particular proceeding.

In our review of the record, and in light of the relationship between appellant and Ms. Byrne, as personal representative for the estate of Pat Elbert, we find adequate support for the trial court's appointment of an administrator ad litem.

[2] Appellant's second claim, however, is well-founded. The special administrator was seemingly appointed as an adjunct of the court, in the nature of a special master. But an administrator ad litem is a court-appointed advocate for the interests of an estate, where those interests are jeopardized, and where the acting representative, if any, will not or cannot defend them. See In re Estate of Herlan, 209 So.2d 225 (Fla.1968); Shambow v. Shambow, 5 So.2d 454, 149 Fla. 278 (1942), reviewed on other grounds, 15 So.2d 837, 153 Fla. 762 (1943); Fasel v. Cox, 128 So. 33, 99 Fla. 968 (1930); Edmonson v. Frank J. Rooney, Inc., 171 So.2d 566 (Fla. 3d DCA 1965).

[3] [4] [5] An administrator ad litem is an officer of the court, insofar as is every attorney certified to practice therein. However, his primary and overriding duty is to the estate, rather than to the bench; the court may not mandate specific acts through his appointment, such as the holding of hearings, but rather imposes upon the administrator a fiduciary duty to the estate, and so empowers him to minister to specific estate interests, not as a judicial officer making findings of fact and conclusions of law, but as a fiduciary, who owes the highest duty to the estate to safeguard those specific interests he has been commissioned to protect. The appointee becomes solely responsible to the estate for the administration of that portion of its affairs entrusted to him by the court, and thus supplants in that regard the authority of the personal representative, who continues to be responsible for the administration of all other aspects of the estate's business.

[6] Insofar as the court below sought to create such a limited role, it may properly do so. Insofar as it sought to delegate its judicial authority to its appointee, its act was void ab initio.

Affirmed as to the appointment, reversed as to the powers conferred; and remanded for action by the trial court not inconsistent with this opinion.

All Citations

389 So.2d 1026

End of Document

3.B.

879 So.2d 675
District Court of Appeal of Florida,
Fourth District.

Mark P. ARZUMAN, a/k/a Mark P. Arzoumanian, Appellant,
v.
The ESTATE OF Prince Bander BIN Saud Bin, etc., Appellee.

No. 4D03-2406.
|
Aug. 11, 2004.

Synopsis

Background: Personal representative of estate filed petition for discharge and approval of final accounting. The Fifteenth Judicial Circuit Court, Palm Beach County, Gary L. Vonhof, J., issued final order granting petition. Claimant against estate appealed.

[Holding:] The District Court of Appeal, Klein, J., held that appeal was not timely.

Affirmed.

West Headnotes (2)

[1] Executors and Administrators
⇐ Persons Entitled to Object

Claimant against estate was an "interested person" in proceedings to approve final accounting and discharge personal representative. West's F.S.A. § 731.201(21).

1 Cases that cite this headnote

[2] Executors and Administrators
⇐ Perfection of Appeal and Effect Thereof

Time for claimant against estate to appeal order approving settlement of separate wrongful death action against estate began to run when trial court approved settlement, rather than when trial court granted personal representative's motion to disburse funds, approve final accounting, and discharge personal representative; order approving settlement finally determined right of claimant in that it resulted in estate having no assets with which to pay his claim. West's F.S.A. R.App.P.Rule 9.110(a)(2).

1 Cases that cite this headnote

Attorneys and Law Firms

*675 Mark P. Arzuman, a/k/a Mark P. Arzoumanian, Boca Raton, pro se.

Lawrence Bunin of Lawrence Bunin, P.A., Plantation, for appellee.

Opinion

KLEIN, J.

Appellant, a claimant against the appellee estate, appeals a final order granting the personal representative's motion to disburse funds, approve final accounting, and discharge personal representative. He argues that the trial court erred in approving the settlement of a wrongful death claim in which the estate was a plaintiff, but we conclude that this appeal is not timely as to the order approving the settlement, which was a final order.

*676 The decedent died in an airplane accident, and the estate filed a negligence suit which was settled for a total of $750,000. The settlement, which apportioned $700,000 to decedent's mother and $50,000 to the estate, was approved by the court. The low amount to the estate resulted from the fact that the decedent reported no income. The aviation lawyer who obtained the recovery testified that the estate had no recoverable damages. Claimant, who had a pending lawsuit against the estate, filed an appeal from the March 2002 order approving the settlement, but subsequently dismissed it.

In April 2003, the personal representative filed a petition for discharge and approval of final accounting, noting that claimant's lawsuit was still pending, but asserting that the estate would have no assets to pay any judgment claimant might obtain in the future. Following a hearing

the court granted the petition, finding that if claimant obtained a judgment, it would be a class 8 claim under section 733.707, Florida Statutes, and that, after paying expenses having a higher priority, the estate would have no funds remaining. It is this order, which was entered in May 2003, which claimant has appealed, but his primary argument is that the court erred in approving the wrongful death settlement a year earlier.

[1] The estate argues that claimant is not an "interested person" under section 731.201(21), Florida Statutes (2002), which defines interested person as:

> any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.... The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

The closest case is *Montgomery v. Cribb,* 484 So.2d 73 (Fla. 2d DCA 1986), in which a claimant's claim against an estate had been stricken, and the order striking the claim was on appeal. The second district held that the claimant was an interested party. We agree with that decision and conclude that claimant was an interested person.

[2] The estate next argues that claimant was required to appeal the order approving the settlement when it was entered. Final orders in probate proceedings are defined under rule 9.110(a)(2), as orders which "finally determine a right or obligation of an interested person as defined in the Florida Probate Code."

We conclude that the order approving the settlement of the tort claim did "finally determine a right" of this claimant. Section 733.708, Florida Statutes (2002), which addresses the compromise of lawsuits filed by estates, provides that the probate court may authorize the settlement "if satisfied that the compromise will be for the best interest of the interested persons," and that an order authorizing settlement "shall relieve the personal representative of liability or responsibility for the compromise."

In this case once the order approving the settlement became final, the personal representative was, by statute, absolved of further responsibility. The order approving the settlement accordingly did finally determine a right of the claimant in that it resulted in the estate having no assets with which to pay his claim.

We are of course aware that, when we decide that an appellant should have appealed an earlier order, it can result in *677 grave consequences.[1] In probate cases, however, where the order of final discharge may not be entered for years after the opening of an estate, interim appeals of orders which finally determine rights or obligations are necessary for the orderly administration of the estate. If we were to review the order approving settlement at this late date, it is doubtful that any remedy would be available which would benefit claimant.

We have considered the issues which appellant has raised regarding the final order of discharge and find them to be without merit. Affirmed.

SHAHOOD, J., and EMAS, KEVIN M., Associate Judge, concur.

All Citations

879 So.2d 675, 29 Fla. L. Weekly D1844

Footnotes

1 Even if we had reviewed the order approving the settlement, we would have affirmed, because as we noted earlier, the estate had no damage recoverable in the wrongful death claim.

End of Document

3.C.

573 So.2d 57
District Court of Appeal of Florida,
First District.

In re the ESTATE OF Katherine V. BELL,
also known as Virginia Bell, Deceased.
William HUNTER, Daniel Hunter and
Marywil Hunter Croson, Appellants,
v.
Oleta JOHNSON, Personal Representative
of the Estate of Katherine V. Bell,
also known as Virginia Bell, Appellee.

No. 90-1318.
|
Dec. 26, 1990.

Will beneficiaries moved to compel production of estate assets or to remove another beneficiary as personal representative. The Circuit Court, Hamilton County, David E. Bembry, J., denied motion, and beneficiaries appealed. The District Court of Appeal, Nimmons, J., held that certificates of deposit were estate assets, even though beneficiary who was also personal representative was listed as trust beneficiary on one and co-owner of other, absent language in the power of attorney expressly authorizing gift of testatrix' assets to beneficiary.

Reversed in part; affirmed in part; and remanded.

West Headnotes (3)

[1] **Executors and Administrators**
⇦ Trust Estates and Other Equitable Estates and Interests

Executors and Administrators
⇦ Ownership of Property at Time of Death

Principal and Agent
⇦ Purpose and Terms of and Consideration for Sale or Conveyance

Certificates of deposit purchased under power of attorney by beneficiary with testatrix' funds were assets of testatrix' estate, even though beneficiary was listed as trust beneficiary on one certificate and co-owner of other, where power of attorney did not expressly authorize gift of testatrix' assets to beneficiary, and where testatrix did not document wish to make gift although she had ample opportunity to do so.

3 Cases that cite this headnote

[2] **Witnesses**
⇦ Agency

Dead man's statute barred testimony of will beneficiary as to statements evidencing testatrix' intent to authorize gift to beneficiary under power of attorney. West's F.S.A. § 90.602.

4 Cases that cite this headnote

[3] **Executors and Administrators**
⇦ Hostility or Adverse Interest

Personal representative who held conflicting and adverse interests against estate was required to be removed, where personal representative had purchased certificates of deposit under power of attorney for her own benefit with testatrix' funds, and where court found certificates were estate assets.

2 Cases that cite this headnote

Attorneys and Law Firms

*57 Thomas W. Brown and Donna Houghton Thames of Brannon, Brown, Haley, Robinson & Cole, P.A., Lake City, for appellants.

*58 David D. Eastman of Parker, Skelding, Labasky & Corry, Tallahassee, for appellee.

Opinion

NIMMONS, Judge.

Appellants, beneficiaries of decedent Katherine V. Bell's will, appeal a final order denying their motion to compel production of estate assets or remove the personal representative, and finding two certificates of deposit are not estate assets. We reverse in part and affirm in part.

On January 7, 1985, Katherine V. Bell, also known as Virginia Bell, executed her last will and testament. In the will she bequeathed all funds remaining in her estate, after debts had been paid, to Oleta Johnson (a first cousin), Marywil Hunter Croson (a niece), William Miles Hunter, Jr. (a nephew), and Daniel Thomas Hunter (a nephew), to be divided equally among them. Bell also bequeathed her home, the land upon which it was situated, and all household furniture and fixtures to Oleta Johnson, and named Johnson personal representative. At the same time the will was drawn, Bell executed a power of attorney naming Oleta Johnson as attorney-in-fact. Both of these documents were executed approximately three weeks after Bell entered a nursing home where she remained until her death on February 21, 1989. There was no dispute that Ms. Bell was alert and mentally competent until a few weeks before she passed away.

On April 12, 1985, Johnson, using the power of attorney, purchased with $37,000 of Bell's funds a certificate of deposit in that sum at the First Federal Savings and Loan Association of Live Oak. That CD was set up with Bell's name as "trustee" and Oleta Johnson as "beneficiary." On July 12, 1985, in a similar fashion, Johnson purchased with $40,000 of Bell's funds another Certificate of Deposit at the Hamilton County Bank, n/k/a Barnett Bank. That CD was set up in the names of "Katherine V. Bell or Oleta Johnson."

Following Bell's death, Johnson filed a petition for administration and was appointed as personal representative. In an inventory filed by Johnson, the two CD's were referred to with the statement that, notwithstanding the names of the owners of the CDs as reflected on the certificates themselves, Johnson intended "that all of the principal and accrued interest of [the certificates] shall be a part of the estate assets."

The appellants objected to the appellee's accounting of funds and monies received or disbursed from the estate, so the trial court required a full and complete accounting of all the estate funds from the time Johnson became cosigner on any of the decedent's accounts or from January 1, 1985, whichever was first.

A special report prepared by a certified public accountant was submitted, but the appellants remained unsatisfied and filed another motion to compel the personal representative to make a full and complete accounting of the decedent's funds, including receipts from interest on the certificates of deposit, income tax refunds, and rental income. At the hearing on the motion, Johnson testified that she and Bell, her cousin, enjoyed a close relationship for over twenty years and when Bell was ill, Johnson willingly took care of her and visited her in the nursing home at least three times a week. Johnson testified Bell gave her the interest checks on the certificates of deposit after reviewing them and Johnson, with her power of attorney, would sign Bell's name to them. Johnson also testified the tenants renting Bell's home simply made the rental checks out to Johnson per Bell's wishes. Johnson indicated none of the other beneficiaries were close to Bell and had visited only a few times in the previous forty years.

The trial judge denied the appellants' motion to compel and the appellants filed another motion to compel production of the assets or, in the alternative, to remove the personal representative. Johnson filed a motion to withdraw the certificates of deposit from the estate's assets. In the trial court's order, the appellants' motion was denied and the certificates of deposit, the decedent's house, and all rental income associated with it were found to be the personal property of Johnson.

***59** The appellants raise three issues on appeal: (1) whether the trial court erred in finding the two certificates of deposit were not estate assets; (2) whether the trial court erred in denying the appellants' motion to compel a full and complete accounting; and (3) whether the trial court erred in not removing the personal representative based on a conflict of interest.

According to *Johnson v. Fraccacreta,* 348 So.2d 570 (Fla. 4th DCA 1977), a general power of attorney does not give the agent authority to make a gift of the principal's property. A conveyance that exceeds the scope of the power of attorney is void. In *Fraccacreta,* the decedent owned real property and, several months before her death, executed a power of attorney appointing her daughter as attorney-in-fact. The daughter used her power of attorney to execute a warranty deed conveying the decedent's property to the decedent and her husband as tenants by the entireties. The administrator ad litem brought the action contending the power of attorney did not authorize the attorney-in-fact/agent to make a gift. The court agreed and held that in construing an instrument creating a power of attorney, the court must look to the language of the

instrument and that an agent has no power to make a gift of the principal's property unless that power is expressly conferred by the instrument or unless such power arises as a necessary implication from the powers which are expressly conferred.

[1] [2] The power of attorney executed by Ms. Bell in the case at bar is devoid of any language purporting to authorize Johnson to use Ms. Bell's funds to purchase certificates of deposit in such a way as to create an individual pecuniary interest in Johnson. Furthermore, there were no witnesses to any oral agreement that may have existed between Bell and Johnson. Johnson is precluded, pursuant to the Dead Man's Statute, [1] from testifying as to any statements Bell may have made evidencing her intent to authorize Johnson to appropriate Bell's property for Johnson's own use and benefit.

Under *Hodges v. Surratt,* 366 So.2d 768 (Fla. 2d DCA 1978), the court held the attorney-in-fact for the decedent violated her fiduciary duty by transferring the principal's property to her husband and appropriating funds in the checking account for her own use absent clear language in the power of attorney authorizing such actions.

Hodges was cited with approval in *Krevatas v. Wright,* 518 So.2d 435 (Fla. 1st DCA 1988). Krevatas was a close friend and neighbor of Mrs. Fambrough, a childless widow with no local relatives. Mrs. Fambrough executed a power of attorney designating Krevatas attorney-in-fact and delivered it to him three years later. Approximately three weeks before she died, Fambrough changed her checking account, the balance of which never exceeded $6,000, to a survivorship account, adding Krevatas' name. She also, via her will, left $20,000 and her car to Krevatas, and during her last few weeks, signed documents making gifts to Krevatas and others. Krevatas used the power of attorney to transfer $100,000 into the survivorship account from her other accounts and altered existing CD's totalling $25,000 so that he and one of Mrs. Fambrough's nieces would have survivorship rights.

The court noted an absence of evidence indicating Mrs. Fambrough participated in the transfer of money into her checking account or the creation of survivorship interests in her certificates of deposit. Additionally, the court found Mrs. Fambrough did not intend to give Krevatas more money than was in the checking account at the time she changed it to a survivorship account. This apparent lack of intent was based on the fact that Mrs. Fambrough documented a gift to Krevatas in the last few weeks of her life while she was still alert when she easily could have documented her desire for him to have the money. The court found that neither the power of attorney itself nor the circumstances surrounding the execution of the document demonstrated an express or implied authority for Krevatas to use the power for his personal benefit.

***60** In the case at bar, the facts indicate that the will and the power of attorney were executed approximately three weeks after Ms. Bell entered a nursing home where she remained alert for several years prior to her death in 1989. She had ample opportunity to document in writing her wishes regarding the disposition of her estate assets. However, the language of the power of attorney does not expressly authorize Johnson to make a gift of Bell's assets for her own personal benefit, nor does the will evidence Bell's intent for Johnson to have the funds. Further, there is no evidence of implied authorization from the circumstances surrounding the execution of the documents. Therefore, we reverse the trial court's finding that the two certificates of deposit were not estate assets. [2]

[3] In reversing the first issue, we must also reverse the third issue. According to Section 733.504(9), Florida Statutes, a personal representative may be removed for holding or acquiring conflicting or adverse interests against the estate which will adversely interfere with the administration of the estate as a whole. In holding that the certificates of deposit are to be considered estate assets, a conflict between the personal representative and the estate is created, requiring Johnson's removal as personal representative.

We affirm as to the second issue, since the trial court did not err in failing to compel a full and complete accounting. It is obvious from the record that the appellee testified as to the whereabouts of the funds the appellants claim are unaccounted for. The trial court did not err in refusing to order another accounting.

Accordingly, we reverse in part and affirm in part and remand for further proceedings consistent with this opinion.

SMITH and ZEHMER, JJ., concur.

All Citations

573 So.2d 57, 16 Fla. L. Weekly 37

Footnotes

1 Section 90.602, Florida Statutes.

2 The trial court's order relied in part upon Section 658.56, Florida Statutes. However, that section has no application to the case at bar because Bell had nothing to do with the purchase of the two CD's.

End of Document

3.D.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 731. Probate Code: General Provisions (Refs & Annos)
Part II. Definitions

West's F.S.A. § **731.201**

731.201. General definitions

Effective: October 1, 2013
Currentness

Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

(1) "Authenticated," when referring to copies of documents or judicial proceedings required to be filed with the court under this code, means a certified copy or a copy authenticated according to the Federal Rules of Civil Procedure.

(2) "Beneficiary" means heir at law in an intestate estate and devisee in a testate estate. The term "beneficiary" does not apply to an heir at law or a devisee after that person's interest in the estate has been satisfied. In the case of a devise to an existing trust or trustee, or to a trust or trustee described by will, the trustee is a beneficiary of the estate. Except as otherwise provided in this subsection, the beneficiary of the trust is not a beneficiary of the estate of which that trust or the trustee of that trust is a beneficiary. However, if each trustee is also a personal representative of the estate, each qualified beneficiary of the trust as defined in s. 736.0103 shall be regarded as a beneficiary of the estate.

(3) "Child" includes a person entitled to take as a child under this code by intestate succession from the parent whose relationship is involved, and excludes any person who is only a stepchild, a foster child, a grandchild, or a more remote descendant.

(4) "Claim" means a liability of the decedent, whether arising in contract, tort, or otherwise, and funeral expense. The term does not include an expense of administration or estate, inheritance, succession, or other death taxes.

(5) "Clerk" means the clerk or deputy clerk of the court.

(6) "Collateral heir" means an heir who is related to the decedent through a common ancestor but who is not an ancestor or descendant of the decedent.

(7) "Court" means the circuit court.

(8) "Curator" means a person appointed by the court to take charge of the estate of a decedent until letters are issued.

(9) "Descendant" means a person in any generational level down the applicable individual's descending line and includes children, grandchildren, and more remote descendants. The term "descendant" is synonymous with the terms "lineal descendant" and "issue" but excludes collateral heirs.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. The term includes "gift," "give," "bequeath," "bequest," and "legacy." A devise is subject to charges for debts, expenses, and taxes as provided in this code, the will, or the trust.

(11) "Devisee" means a person designated in a will or trust to receive a devise. Except as otherwise provided in this subsection, in the case of a devise to an existing trust or trustee, or to a trust or trustee of a trust described by will, the trust or trustee, rather than the beneficiaries of the trust, is the devisee. However, if each trustee is also a personal representative of the estate, each qualified beneficiary of the trust as defined in s. 736.0103 shall be regarded as a devisee.

(12) "Distributee" means a person who has received estate property from a personal representative or other fiduciary other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increments to them remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(13) "Domicile" means a person's usual place of dwelling and shall be synonymous with residence.

(14) "Estate" means the property of a decedent that is the subject of administration.

(15) "Exempt property" means the property of a decedent's estate which is described in s. 732.402.

(16) "File" means to file with the court or clerk.

(17) "Foreign personal representative" means a personal representative of another state or a foreign country.

(18) "Formal notice" means a form of notice that is described in and served by a method of service provided under rule 5.040(a) of the Florida Probate Rules.

(19) "Grantor" means one who creates or adds to a trust and includes "settlor" or "trustor" and a testator who creates or adds to a trust.

(20) "Heirs" or "heirs at law" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(21) "Incapacitated" means a judicial determination that a person lacks the capacity to manage at least some of the person's property or to meet at least some of the person's essential health and safety requirements. A minor shall be treated as being incapacitated.

(22) "Informal notice" or "notice" means a method of service for pleadings or papers as provided under rule 5.040(b) of the Florida Probate Rules.

(23) "Interested person" means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent's estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings.

(24) "Letters" means authority granted by the court to the personal representative to act on behalf of the estate of the decedent and refers to what has been known as letters testamentary and letters of administration. All letters shall be designated "letters of administration."

(25) "Minor" means a person under 18 years of age whose disabilities have not been removed by marriage or otherwise.

(26) "Other state" means any state of the United States other than Florida and includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(27) "Parent" excludes any person who is only a stepparent, foster parent, or grandparent.

(28) "Personal representative" means the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor.

(29) "Petition" means a written request to the court for an order.

(30) "Power of appointment" means an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.

(31) "Probate of will" means all steps necessary to establish the validity of a will and to admit a will to probate.

(32) "Property" means both real and personal property or any interest in it and anything that may be the subject of ownership.

(33) "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead.

(34) "Residence" means a person's place of dwelling.

(35) "Residuary devise" means a devise of the assets of the estate which remain after the provision for any devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount. If the will contains no devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount, "residuary devise" or "residue" means a devise of all assets remaining after satisfying the obligations of the estate.

(36) "Security" means a security as defined in s. 517.021.

(37) "Security interest" means a security interest as defined in s. 671.201.

(38) "Trust" means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; [1] business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.071, except to the extent provided in s. 689.071(7); trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is nominee or escrowee for another.

(39) "Trustee" includes an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.

(40) "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 4; Laws 1977, c. 77-174, § 1; Laws 1985, c. 85-79, § 2; Laws 1987, c. 87-226, § 66; Laws 1988, c. 88-340, § 1; Laws 1993, c. 93-257, § 7. Amended by Laws 1995, c. 95-401, § 6, eff. July 1, 1995; Laws 1997, c. 97-102, § 949, eff. July 1, 1997; Laws 1998, c. 98-421, § 52, eff. July 1, 1998; Laws 2001, c. 2001-226, § 11, eff. Jan. 1, 2002; Laws 2002, c. 2002-1, § 106, eff. May 21, 2002; Laws 2003, c. 2003-154, § 2, eff. June 12, 2003; Laws 2005, c. 2005-108, § 2, eff. July 1, 2005; Laws 2006, c. 2006-217, § 29, eff. July 1, 2007; Laws 2007, c. 2007-74, § 3, eff. July 1, 2007; Laws 2007, c. 2007-153, § 8, eff. July 1, 2007; Laws 2009, c. 2009-115, § 1, eff. July 1, 2009; Laws 2010, c. 2010-132, § 4, eff. Oct. 1, 2010; Laws 2012, c. 2012-109, § 1, eff. July 1, 2012; Laws 2013, c. 2013-172, § 16, eff. Oct. 1, 2013.

Editors' Notes

APPLICABILITY

<The introductory language to § 1 of Laws 2012, c. 2012-109, provides:>

<"Effective July 1, 2012, and applicable to proceedings pending before or commenced on or after July 1, 2012, subsection (33) of section **731.201**, Florida Statutes, is amended to read:">

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Footnotes
1 See § 710.101 et seq.

West's F. S. A. § **731.201**, FL ST § **731.201**
Current through the 2016 Second Regular Session of the Twenty-Fourth Legislature.

End of Document

3.E.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 733. Probate Code: Administration of Estates (Refs & Annos)
Part V. Curators; Resignation and Removal of Personal Representatives
West's F.S.A. § 733.504

733.504. Removal of personal representative; causes for removal

Effective: July 1, 2015

Currentness

A personal representative shall be removed and the letters revoked if he or she was not qualified to act at the time of appointment. A personal representative may be removed and the letters revoked for any of the following causes:

(1) Adjudication that the personal representative is incapacitated.

(2) Physical or mental incapacity rendering the personal representative incapable of the discharge of his or her duties.

(3) Failure to comply with any order of the court, unless the order has been superseded on appeal.

(4) Failure to account for the sale of property or to produce and exhibit the assets of the estate when so required.

(5) Wasting or maladministration of the estate.

(6) Failure to give bond or security for any purpose.

(7) Conviction of a felony.

(8) Insolvency of, or the appointment of a receiver or liquidator for, any corporate personal representative.

(9) Holding or acquiring conflicting or adverse interests against the estate that will or may interfere with the administration of the estate as a whole. This cause of removal shall not apply to the surviving spouse because of the exercise of the right to the elective share, family allowance, or exemptions, as provided elsewhere in this code.

(10) Revocation of the probate of the decedent's will that authorized or designated the appointment of the personal representative.

(11) Removal of domicile from Florida, if domicile was a requirement of initial appointment.

(12) The personal representative was qualified to act at the time of appointment but is not now entitled to appointment.

Removal under this section is in addition to any penalties prescribed by law.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 69; Laws 1977, c. 77-174, § 1. Amended by Laws 1997, c. 97-102, § 998, eff. July 1, 1997; Laws 2001, c. 2001-226, § 117, eff. Jan. 1, 2002; Laws 2009, c. 2009-115, § 10, eff. July 1, 2009; Laws 2015, c. 2015-27, § 5, eff. July 1, 2015.

Editors' Notes

APPLICABILITY

<Laws 2015, c. 2015-27, § 9, provides:>

<"The amendments made by this act to ss. 733.212, 733.2123, 733.3101, and **733.504**, Florida Statutes, apply to proceedings commenced on or after July 1, 2015. The law in effect before July 1, 2015, applies to proceedings commenced before that date.">

RESEARCH REFERENCES

Forms

Florida Pleading and Practice Forms § 53:64, Petition--To Remove Personal Representative [§§ **733.504** to 733.506, Fla. Stat.; Fla. Prob. R. 5.440].
Florida Pleading and Practice Forms § 53:66, Petition--By Interested Party--Maladministration [§ **733.504**(5), Fla. Stat.; Fla. Prob. R. 5.440].

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West's F. S. A. § **733.504**, FL ST § **733.504**

Current through the 2016 Second Regular Session of the Twenty-Fourth Legislature.

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3.F.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 733. Probate Code: Administration of Estates (Refs & Annos)
Part VI. Duties and Powers of Personal Representative

West's F.S.A. § **733.602**

733.602. General duties

Effective: July 1, 2009
Currentness

(1) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred by this code, the authority in the will, if any, and the authority of any order of the court, for the best interests of interested persons, including creditors.

(2) A personal representative shall not be liable for any act of administration or distribution if the act was authorized at the time. Subject to other obligations of administration, a probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a proceeding challenging intestacy or a proceeding questioning the appointment or fitness to continue. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of interested persons.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 74; Laws 1977, c. 77-87, § 27; Laws 1977, c. 77-174, § 1; Laws 1979, c. 79-400, § 270; Laws 1989, c. 89-340, § 3. Amended by Laws 1997, c. 97-102, § 1001, eff. July 1, 1997; Laws 2001, c. 2001-226, § 125, eff. Jan. 1, 2002; Laws 2006, c. 2006-217, § 37, eff. July 1, 2007; Laws 2009, c. 2009-115, § 11, eff. July 1, 2009.

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West's F. S. A. § **733.602**, FL ST § **733.602**
Current through the 2016 Second Regular Session of the Twenty-Fourth Legislature.

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3.G.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 736. Florida Trust Code (Refs & Annos)
Part VIII. Duties and Powers of Trustee (Refs & Annos)

West's F.S.A. § **736.0813**

736.0813. Duty to inform and account

Effective: October 1, 2013
Currentness

The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee's duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust, the full name and address of the trustee, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings under this section, and that the fiduciary lawyer-client privilege in s. 90.5021 applies with respect to the trustee and any attorney employed by the trustee.

(c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, from the date of the last accounting or, if none, from the date on which the trustee became accountable, to each qualified beneficiary at least annually and on termination of the trust or on change of the trustee.

(e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

(2) A qualified beneficiary may waive the trustee's duty to account under paragraph (1)(d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior waivers are effective only with respect to accountings for future periods.

(3) The representation provisions of part III apply with respect to all rights of a qualified beneficiary under this section.

(4) As provided in s. 736.0603(1), the trustee's duties under this section extend only to the settlor while a trust is revocable.

(5) This section applies to trust accountings rendered for accounting periods beginning on or after July 1, 2007.

Credits

Added by Laws 2006, c. 2006-217, § 8, eff. July 1, 2007. Amended by Laws 2007, c. 2007-153, § 15, eff. July 1, 2007; Laws 2011, c. 2011-183, § 11, eff. June 21, 2011; Laws 2013, c. 2013-172, § 14, eff. Oct. 1, 2013.

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West's F. S. A. § **736.0813**, FL ST § **736.0813**

Current through the 2016 Second Regular Session of the Twenty-Fourth Legislature.

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3.H.

920 So.2d 190
District Court of Appeal of Florida,
Second District.

In re ESTATE OF Peter WEJANOWSKI.
Richard MacDonald, as Personal Representative of the Estate of Peter Wejanowski, Appellant,
v.
Donna Mauriello, as Personal Representative of the Estate of Karen A. Stacy, Appellee.

No. 2D04-3853. | Feb. 15, 2006.

Synopsis

Background: Executor of estate filed motion seeking authority to expend estate funds to prosecute an appeal in a wrongful death action brought against estate. The Circuit Court, Pinellas County, George W. Greer and Ray E. Ulmer, Jr., JJ., denied motion without prejudice to resubmit it after the appeal upon a showing of a monetary benefit to the estate. Executor appealed.

[Holding:] The District Court of Appeal, Casanueva, J., held that trial court could not require executor to demonstrate a monetary benefit before allowing the expenditure of estate funds.

Reversed.

Villanti, J., filed specially concurring opinion.

West Headnotes (5)

[1] **Executors and Administrators**
Resisting Claims Against Estate

Trial court could not require executor of estate to demonstrate a monetary benefit to estate before allowing the expenditure of estate funds for the prosecution of an appeal in a wrongful death action against estate; benefit to estate was the presentation of a good faith appeal, and executor could be held accountable if appeal were subsequently determined to have been frivolous. West's F.S.A. §§ 733.602(1, 2), 733.609.

Cases that cite this headnote

[2] **Attorney and Client**
Frivolous, Vexatious, or Meritless Claims

An appellate attorney has an ethical duty not to prosecute a baseless or frivolous appeal.

Cases that cite this headnote

[3] **Executors and Administrators**
Counsel Fees and Costs

Payment by an estate of appellate fees and costs incurred in an appeal involving the estate cannot be contingent upon prevailing on appeal because neither party can guarantee the outcome.

Cases that cite this headnote

[4] **Executors and Administrators**
Counsel Fees and Costs

The true benefit to an estate provided by an appellate attorney, for purposes of entitlement to payment of appellate fees and costs out of estate assets, is the presentation of a good-faith appeal and its ultimate resolution.

Cases that cite this headnote

[5] **Constitutional Law**
Courts in General
Constitutional Law
Appeal or Other Proceedings for Review

The judicial system affords litigants the right to

resolve disputes with due process, safeguarded by appellate review of the trial court's decisions. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

*190 Thomas C. Jennings, III of Repka & Jennings, Clearwater, for Appellant.

Alan M. Gross of Powell, Carney, Gross, Maller & Ramsay, P.A., St. Petersburg, for Appellee.

Opinion

CASANUEVA, Judge.

Richard MacDonald, as personal representative of the estate of Peter Wejanowski, appeals an order of the probate court that effectively denies him an opportunity *191 to pursue this or three other appeals stemming from the events surrounding the deaths of Mr. Wejanowski and Karen Stacy. The three other pending appeals, 2D04-1493, 2D04-2113, and 2D04-2374, have been abated to await the outcome of this appeal. We reverse.

Mr. Wejanowski and Ms. Stacy lived together unmarried for almost twenty years before their relationship began to deteriorate several months before their deaths. Mr. Wejanowski's health was rapidly declining because he was suffering from end-stage cancer of the throat, Ms. Stacy was romantically involved with another man while living with Mr. Wejanowski, and acrimony permeated their relationship. On the day of his death, Mr. Wejanowski called his friend Mr. MacDonald and requested that he visit him, which Mr. MacDonald did, accompanied by his girlfriend. After a short visit, Mr. Wejanowski excused himself and retired to another room. The couple then heard a gunshot. Responding to the sound, they discovered Mr. Wejanowski, who had committed suicide, lying next to the body of Ms. Stacy. She had been fatally shot four times and had sustained several superficial stab wounds.

Donna Mauriello, as personal representative of Ms. Stacy's estate, filed a wrongful death suit against Mr. Wejanowski's estate. Mr. MacDonald, as personal representative of the Wejanowski estate, hired one lawyer to handle probate matters and another to handle the civil litigation. Ms. Mauriello ultimately prevailed in the wrongful death suit, and Mr. MacDonald filed the first of his now-abated appeals, challenging that judgment for damages.[1] Ms. Mauriello claimed that the appeal was frivolous and that he was wasting estate assets and reducing the estate's ability to pay her judgment. In response to her claims, Mr. MacDonald filed a motion in the trial court to approve costs and fees associated with appeal. The trial court denied his motion without prejudice to resubmit the request at the conclusion of the appeal upon a showing of monetary benefit to the estate and ordered him not to expend estate funds for prosecution of the appeal, to include attorney's fees and costs. It is this order that we reverse.

[1] [2] [3] [4] [5] Requiring Mr. MacDonald to show a monetary benefit to the estate before he is entitled to reimbursement for appellate expenses narrows the definition of "benefit to the estate" to an unworkable level in this appellate context. An appellate attorney has an ethical duty not to prosecute a baseless or frivolous appeal. Payment of appellate fees and costs cannot be contingent upon prevailing on appeal because neither party can guarantee the outcome. The true benefit to an estate provided by an appellate attorney is the presentation of a good-faith appeal and its ultimate resolution. Our system affords litigants the right to resolve disputes with due process, safeguarded by appellate review of the trial court's decisions. *Cf. Brake v. Murphy*, 693 So.2d 663 (Fla. 3d DCA 1997) (reversing an order that required the personal representative and her husband to post a bond in order to file further pleadings in a surcharge proceeding because the order violated the access to the courts provision and due process clause of the state constitution).

Because section 733.602(2), Florida Statutes (2002), removes liability for any act of administration if the act was authorized at the time, personal representatives often *192 attempt to protect themselves from future liability by obtaining pre-approval, i.e., immunity, from the probate court for actions they undertake which do not need court approval. Section 733.602 provides that the personal representative "shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified by this code or ordered by the court, shall do so without adjudication, order, or direction of the court." Among the transactions authorized for the personal representative are hiring attorneys and others to aid him in his duties and prosecuting or defending claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative. § 733.612(19), (20). As a fiduciary, *see* section 733.602(1), if the personal representative breaches

his fiduciary duty, he may be liable to the interested persons for damage or loss resulting from that breach. *See* § 733.609; *see also Landon v. Isler*, 681 So.2d 755 (Fla. 2d DCA 1996) (holding that a personal representative does not breach his or her fiduciary duty, and thus become personally subject to damages, by opposing a debatable claim that later proves valid). When asked by Mr. MacDonald in this case for pre-approval to expend estate monies to prosecute these appeals, the trial court was understandably cautious given the circumstances surrounding the couple's deaths and Ms. Mauriello's objections. It would have been a better course of action to neither give nor withhold permission to expend estate monies for these appeals, rather than to give it with conditions that unduly hampered the personal representative in the exercise of his authority. If prosecuting these appeals is later determined to have been frivolous, the personal representative, as any other fiduciary, can be held accountable.

We reverse the order of the trial court that precluded Mr. MacDonald from expending estate monies to prosecute the pending appeals. Should the trial court determine, upon proper motion and after full review of the completed appellate proceedings, that the appeals were not taken in good faith or were frivolous, it has other remedies available to it. *See* § 733.609.

Reversed.

SALCINES, J., Concurs.

VILLANTI, J., Concurs specially.

VILLANTI, Judge, Specially concurring.

I fully concur in the majority opinion but take this opportunity to expound on what I perceive to be an overused and overrated probate procedure-requesting and receiving court approval when it is not necessary or legally required. I suspect this superfluous procedure is used because it is viewed as a means of obtaining a harbor safe from criticism or consequence for the future actions so "authorized." As this case demonstrates, this assumption is incorrect.

Pursuant to section 733.612, Florida Statutes (2002), the personal representative "acting reasonably for the benefit of the interested persons" may perform the "transactions authorized" "without court order." If done, then the personal representative is entitled to the protection afforded by section 733.602(2). Obtaining court approval for actions already authorized by statute does not insulate the personal representative from personal liability, nor does it eliminate the requirements of section 733.612 that the personal representative act reasonably and for the benefit of the interested persons. Additionally, the unnecessary solicitation of court approval itself may arguably even be perceived as a dissipation of estate assets.

All Citations

920 So.2d 190, 31 Fla. L. Weekly D473

Footnotes

1 The two other abated appeals challenge an order of disbursement from the estate and an order denying attorney's fees.

End of Document

3.I.

136 So.3d 1276
District Court of Appeal of Florida,
First District.

Alan B. BOOKMAN, as Successor Personal Representative of the Estate of Deborah E. Irby, Deceased, Appellant,
v.
Dale DAVIDSON, Appellee.

No. 1D13–3086.
|
May 5, 2014.

Synopsis
Background: Successor personal representative of estate filed suit against estate's original personal representative for breach of fiduciary duty, defalcation, malfeasance, devastavit, and for disgorgement of fees, and against estate's former attorney for legal malpractice and for disgorgement of legal fees. Original personal representative filed cross-claim against attorney for legal malpractice, breach of fiduciary duty, and contribution. The Circuit Court, Walton County, David W. Green, J., granted summary judgment in favor of attorney on malpractice claim and dismissed claim for disgorgement against attorney. Successor representative appealed.

Holdings: The District Court of Appeal, Swanson, J., held that:

[1] as a matter of first impression, successor representative had standing and duty to pursue legal malpractice claims against attorney retained by original personal representative, and

[2] although trial court acted within its discretion when it dismissed disgorgement claim on ground that claims should be heard in probate proceedings, court had subject matter jurisdiction over claim.

Affirmed in part, reversed in part, and remanded.

West Headnotes (6)

[1] **Executors and Administrators**
⚖Administrators De Bonis Non
Executors and Administrators
⚖Personal or representative capacity

Successor personal representative of estate had standing and duty, pursuant to statute governing power and rights of successor representatives, to bring legal malpractice suit against attorney who had been retained by estate's original personal representative alleging that the original representative, through attorney's guidance, improperly disclaimed or transferred estate's assets; original representative had power to engage attorney and to pay attorney from estate funds and duty to pursue assets of the estate, and successor representative stepped into the shoes of original representative. West's F.S.A. §§ 733.602, 733.603, 733.612(20), 733.614.

Cases that cite this headnote

[2] **Executors and Administrators**
⚖Administrators De Bonis Non

The powers granted to the original personal representative of an estate flow to a successor personal representative. West's F.S.A. §§ 733.602(1), 733.612(19), 733.614.

Cases that cite this headnote

[3] **Executors and Administrators**
⚖Property in possession of or claimed by heirs, distributees, and others

A personal representative of an estate is required by law to pursue assets and claims of the estate, with value, including those assets which are in the hands of a former personal representative or her or his agents. West's F.S.A. §§ 733.602, 733.603, 733.612(20).

1 Cases that cite this headnote

[4] **Executors and Administrators**
Jurisdiction

Although trial court acted within its discretion when it dismissed disgorgement claims, brought by successor representative of estate against estate's former attorney, on the ground that the claims should be heard in pending probate proceedings, the probate statute governing proceedings for review of compensation for persons employed by estate's personal representative did not preclude trial court's subject matter jurisdiction over disgorgement claim, and thus trial court, in its discretion on remand, could exercise subject matter jurisdiction to hear that issue. West's F.S.A. § 733.6175(2).

1 Cases that cite this headnote

[5] **Judges**
Judicial powers and functions in general

Every judge of the circuit court possesses the full jurisdiction of that court in his or her circuit.

Cases that cite this headnote

[6] **Executors and Administrators**
Decisions reviewable

Statute governing proceedings for review of compensation of personal representatives and employees of estates does not preclude circuit court of general jurisdiction from hearing, in a related civil suit, the issue of compensation of a person who was employed by the personal representative of an estate as a part of the estate's administration. West's F.S.A. § 733.6175(2).

1 Cases that cite this headnote

Attorneys and Law Firms

*1277 John H. Adams, P. Michael Patterson, and Cecily M. Welsh of Emmanuel, Sheppard, and Condon, Pensacola, for Appellant.

W. David Jester and Jonathan B. Minchin of Galloway, Johnson, Tompkins, Burr & Smith, Pensacola, for Appellee.

Opinion

*1278 SWANSON, J.

Appellant, Alan B. Bookman, as successor personal representative of the estate of Deborah E. Irby, appeals the trial court's "Summary Final Judgment as to Count II and Order Dismissing Count III." In it, the court found, as a matter of law, that appellant does not have standing to bring a legal malpractice action against appellee, Dale Davidson, the attorney who was hired by the initial personal representative to aid her in the administration of the estate. The court also granted appellee's motion to dismiss appellant's claim for disgorgement of attorney's fees paid by the estate to appellee on the basis they were excessive. It concluded that while appellant had a right to pursue that claim, it would be more appropriately heard in the estate proceedings, which were still pending. We reverse the trial court's summary final judgment based on a plain reading of section 733.614, Florida Statutes. We affirm on principle, however, the trial court's dismissal of the claim for disgorgement, but hold the court may, in its discretion on remand, exercise its subject matter jurisdiction to hear that issue along with the other counts of the civil case.

According to the undisputed facts, on January 4, 2007, Dana Ford, through appellee, filed a petition for the administration of the estate of Deborah Irby in the Walton County circuit court. On January 24, 2007, Ford was appointed personal representative of the estate and Letters of Administration were issued. Ford engaged the legal services of appellee to advise her concerning her administrative duties until shortly before she resigned as personal representative on February 12, 2010. During the course of his representation of Ford, appellee was paid from estate funds the sum of $195,000.

On February 17, 2010, appellant was appointed successor

personal representative of the estate. After his appointment, appellant filed a civil suit against Ford and appellee. In his Second Amended Complaint, appellant alleged that Ford, through appellee's guidance, improperly disclaimed or transferred out of the estate certain assets belonging to the estate that could have been used to pay its creditors. Appellant sought damages based on allegations that appellee had improperly advised Ford in regards to her responsibilities as personal representative, as well as damages from Ford, personally, for breach of fiduciary duty, defalcation, malfeasance, and devastavit, and also sought disgorgement of personal representative fees paid to her. Ford, in turn, filed an answer raising affirmative defenses, including the defense that her actions were done in good faith and in reliance on the advice of legal counsel. She also filed a cross-claim against appellee for legal malpractice, breach of fiduciary duty, and contribution.

Appellee moved for summary judgment against appellant, in part claiming the undisputed facts established a lack of any attorney-client relationship between appellee and appellant such that appellant, as successor personal representative, could not file a suit against him for malpractice. Primarily, appellee argued a successor personal representative is not in privity with the original personal representative's attorney, a necessary prerequisite to maintaining a malpractice claim under Florida law. He also moved to dismiss appellant's count for disgorgement of the portion of attorney's fees paid to him, urging the probate court had exclusive jurisdiction, or, at least, was the proper court, to review the compensation of professionals involved with the administration of the estate.

The trial court granted appellee's motion for summary judgment, finding appellant lacked standing to sue appellee because he ***1279** was not in privity with appellee. It also dismissed the claim for disgorgement, concluding that while appellant might have a right to pursue a claim for disgorgement of excessive attorney's fees, it was more appropriate that such claim be made in the then-pending estate proceedings. Appellant now challenges these findings and conclusions.

[1] This case presents a question of first impression in Florida, that being whether a successor personal representative of an estate may bring a cause of action for legal malpractice against an attorney hired by her or his predecessor to provide services necessary to the administration of the estate. In reaching our decision to reverse the summary final judgment, we conclude we need not address the privity issue. Instead, our decision is informed by the plain meaning of the language of the relevant statutes in the Florida Probate Code, sections 733.601–733.620, Florida Statutes. *See Petty v. Fla. Ins. Guar. Ass'n,* 80 So.3d 313, 316 n. 2 (Fla.2012); *Srygley v. Capital Plaza, Inc.*, 82 So.3d 1211, 1212 (Fla. 1st DCA 2012); *In re A.G.*, 40 So.3d 908 (Fla. 3d DCA 2010) (holding where the statute's language is clear and unambiguous, courts need not employ principles of statutory construction).

[2] Sections 733.601 through 733.620 set forth the powers, duties, and obligations of the personal representative as regards not only the estate, but an assemblage of other individuals related to the estate's administration, including its beneficiaries, creditors, contractors, accountants, and attorneys. Section 733.602(1), Florida Statutes, prescribes the general duties of the personal representative by providing that the personal representative

> is a fiduciary who shall observe the standards of care applicable to trustees ... [and] is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and [the Florida Probate Code] as expeditiously and efficiently as is consistent with the best interests of the estate.

To accommodate the personal representative's exercise of her or his duties, section 733.612, Florida Statutes, governs the transactions authorized by the personal representative, including the employment of an attorney. *See* § 733.612(19), Fla. Stat. Most significantly, section 733.614 addresses the "[p]owers and duties" of a successor personal representative:

> A successor personal representative has *the same power and duty as the original personal representative* to complete the administration and distribution of the estate as expeditiously as possible, but shall not exercise any power made personal to the personal representative named in the will without court approval.

Therefore, the powers granted to the original personal representative flow to the successor personal representative.

[3] Within this context, the Florida Probate Code expressly

granted to Dana Ford, as personal representative of the estate of Deborah E. Irby, the power to engage appellee to represent her and to pay appellee from estate funds. *See* §§ 733.612(19) & 733.6171(1), Florida Statutes. The Code also grants to the personal representative the power to prosecute lawsuits or proceedings for the protection of the estate and the benefit of interested parties. *See* § 733.612(20), Fla. Stat. Furthermore, Ford, as personal representative, had the duty to act within "the best interests of the estate" and in "the best interests of all interested parties, including creditors." §§ 733.602 & 733.603, Fla. Stat. This means the personal representative is ***1280** required by law to pursue assets and claims of the estate, with value, including those assets which are in the hands of a former personal representative or her or his agents. *See Sessions v. Willard,* 172 So. 242, 245–46 (Fla.1937).

Thus, there is no dispute that Ford, as the estate's personal representative, had standing to bring suit against appellee for legal malpractice. Yet, by virtue of the plain language of section 733.614, we hold all of the power and rights Ford possessed, *including the right to bring suit against appellee on behalf of the estate,* likewise transferred to appellant as the successor personal representative. In essence, appellant stepped into the shoes of Dana Ford when he became the successor personal representative. Consequently, the trial court erred when it entered summary judgment in favor of appellee, claiming appellant lacked standing. Appellant, as successor personal representative, has every right and duty under the Florida Probate Code to pursue legal action for malpractice against appellee on behalf of the estate. *Cf. Onofrio v. Johnston & Sasser, P.A.,* 782 So.2d 1019 (Fla. 5th DCA 2001). The cause is therefore remanded for further proceedings.

[4] [5] Appellant's remaining point concerns the trial court's decision to dismiss his count for disgorgement of attorney's fees against appellee. The court ruled: "While [appellant] may have the right to pursue a claim for disgorgement of excessive fees allegedly charged by [appellee], it is more appropriate that such claim be made in the estate proceedings, which currently remain pending." Section 733.6175(2), Florida Statutes, provides that "[c]ourt proceedings to determine the reasonable compensation of the personal representative *or any person employed by the personal representative,* if required, are *a part of the estate administrative proceedings* ...." (Emphasis added.) Accordingly, it has been held that "the Florida probate court has exclusive jurisdiction [over the matter of compensation] and is obligated to review estate fees upon the petition of a proper party." *In re Winston,* 610 So.2d 1323, 1325 (Fla. 4th DCA 1992). The trial court, then, did not abuse its discretion in holding it was "more appropriate" for the disgorgement claim to be heard in the probate proceedings. Nonetheless, the trial court did not lack subject matter jurisdiction to consider the claim for disgorgement. The "court" for purposes of the Florida Probate Code is defined generally as "the circuit court." § 731.201, Fla. Stat. Any circuit court has "exclusive original jurisdiction" over "proceedings relating to the settlement of the estates of decedents and minors, the granting of letters testamentary ..., and other jurisdiction usually pertaining to courts of probate." § 26.012(2)(b), Fla. Stat. In this respect, "every judge of the circuit court possesses the full jurisdiction of that court in his or her circuit and [ ] the various divisions of that court operate in multi-judge circuits for the convenience of the litigants and for the efficiency of the administration of the circuits' judicial business." *Maugeri v. Plourde,* 396 So.2d 1215, 1217 (Fla. 3d DCA 1981) (holding, however, in the case before it, the clear language of section 744.387(3)(a), Florida Statutes (1977), mandated that "the only court having jurisdiction to approve the settlement of a minor's claim in a pending action is the court in which the action is pending"). *See also Fort v. Fort,* 951 So.2d 1020, 1022 (Fla. 1st DCA 2007) (citing *Maugeri,* and also citing *In the Interest of Peterson,* 364 So.2d 98, 99 (Fla. 4th DCA 1978), for the holding: "All circuit court judges have the same jurisdiction within their respective circuits.... The internal operation of the court system and the assignment of judges to various divisions ***1281** does not limit a particular judge's jurisdiction.") (internal quotations omitted). *Accord Weaver v. Hotchkiss,* 972 So.2d 1060, 1062 (Fla. 2d DCA 2008).

[6] Unlike the statutory language addressed in *Maugeri,* we do not read section 733.6175(2) as precluding a circuit court of general jurisdiction from hearing, in a related civil suit, the issue of compensation of a person who was employed by the personal representative of an estate as a part of the estate's administration. On remand, the trial court, in its discretion and for the convenience of the court and the parties, may hold a joint trial of all the claims if it is shown that a joint trial will not prejudice a party or cause inconvenience. *See Yost v. Am. Nat'l Bank,* 570 So.2d 350, 352 (Fla. 1st DCA 1990).

AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

BENTON and OSTERHAUS, JJ., concur.

All Citations

136 So.3d 1276, 39 Fla. L. Weekly D932

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3.J.

128 Fla. 151
Supreme Court of Florida.

In re PAINE'S ESTATE.
WILLIAMS
v.
GARNETT.

May 1, 1937.
|
Rehearing Denied June 2, 1937.

Action by W. J. Garnett, as administrator de bonis non of the estate of Maggie G. Paine, deceased, against C. H. Williams. From an order of the circuit court which affirmed a judgment of the county judge's court for plaintiff, and denied defendant's petition for rehearing, defendant appeals.

Reversed and remanded, with directions.

West Headnotes (10)

[1] **Executors and Administrators**
Forfeiture or Deprivation of Compensation

Only commissions on sale of estate property, not compensation of administrator and other charges, are forfeited by administrator by failure to file annual returns. Comp.Gen.Laws 1927, §§ 5541, 5546.

Cases that cite this headnote

[2] **Executors and Administrators**
Forfeiture or Deprivation of Compensation

Where administrator does not give proper attention to his duties, court has discretion to refuse to allow him compensation for services. Comp.Gen.Laws 1927, §§ 5541, 5546.

Cases that cite this headnote

[3] **Executors and Administrators**
Services

Administrator may employ counsel when necessary or proper to protect estate or to enable administrator properly to manage estate, and where suits are instituted in good faith against administrator in his representative capacity, he must employ counsel to defend such suits.

1 Cases that cite this headnote

[4] **Executors and Administrators**
Counsel Fees and Costs

Attorneys' fees, where determined by court to be reasonable in amount and rendered for services necessary or proper to protection of estate, will be paid out of estate in settlement of administrator's account unless suits in which services were rendered were collusive or not properly defended, even where administrator has mismanaged estate, since mismanagement may be penalized by denying administrator compensation.

1 Cases that cite this headnote

[5] **Executors and Administrators**
Actions Against Foreign Executors or Administrators

Ordinarily, executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction.

2 Cases that cite this headnote

[6] **Executors and Administrators**

Actions Against Foreign Executors or Administrators

Where administrator was appointed in Florida for woman who died in Florida, but administrator moved to Kentucky and took estate property with him, including property in which deceased had only life estate, remaindermen held entitled to sue administrator in Kentucky courts for return of specific property to which remaindermen had title and proceeds of sale thereof, since property was subject of jurisdiction of Kentucky courts, and hence administrator was entitled to credit for money paid in satisfaction of consent judgment entered in such action.

Cases that cite this headnote

[7] **Executors and Administrators**
Actions Against Foreign Executors or Administrators

In action brought in Kentucky against administrator appointed in Florida, to recover specific property and proceeds of sale thereof, Kentucky law governed as to whether suit might be maintained, but Florida law governed as to liability of administrator.

Cases that cite this headnote

[8] **Executors and Administrators**
Accounting and Settlement

Administrator appointed in Florida held not entitled to credit on final accounting for money paid on consent judgment entered in Kentucky action against him for waste committed by decedent as life tenant of realty, since such action was a "local action" for damages by general creditor of estate, and maintainable in Kentucky only if ancillary administration had been taken out.

1 Cases that cite this headnote

[9] **Life Estates**
Timber

Tenant for life without impeachment for waste may cut wood to same extent as owner of fee, provided tenant does not cut trees planted for ornament or shelter, or commit equitable waste, or cut willfully or maliciously.

1 Cases that cite this headnote

[10] **Executors and Administrators**
Compromises by Creditors

Administrator may compromise claim or suit brought against estate if compromise is fair, beneficial to estate and free from fraud, negligence, or misconduct, but not suit brought in court of state which had no jurisdiction thereof.

Cases that cite this headnote

***152** ****431** Appeal from Circuit Court, Pinellas County; John I. Viney, judge.

Attorneys and Law Firms

***153** McKay, Macfarlane, Jackson & Ramsey and Chester H. Ferguson, all of Tampa, for appellant.

Baskin, Jordan & Richard, of Clearwater, for appellee.

Opinion

PER CURIAM.

This is an appeal from an order of the circuit court affirming certain orders of the county judge's court, and denying a petition for rehearing. The orders of the county judge's court appealed to the circuit court were those

orders sustaining certain objections made to the report of C. H. Williams, as administrator of the estate of Maggie G. Paine, deceased, denying a rehearing and entering judgment in favor of the estate against C. H. Williams former administrator, in the sum of $4,269.17.

It appears that the First National Bank of St. Petersburg, Fla., was, on May 26, 1930, appointed administrator of the estate of Maggie G. Paine, deceased. Thereafter the First National Bank of St. Petersburg became insolvent, and Gertie M. Dickinson, Carrie M. Barker, George A. McElwain, Elizabeth T. Graves, Mamie T. Bassett, Lulu L. Goff, Nell O. Garnett, and Jimmie Graves Thompson, nieces and nephews and next of kin of the deceased, petitioned the county judge to remove the First National Bank of St. Petersburg as administrator of the estate and to appoint C. H. Williams of Hopkinsville, Ky., as administrator. Whereupon the county judge, on September 10, 1930, entered an order appointing C. H. Williams administrator de bonis non of the estate of Maggie G. Paine, deceased, and letters of administration were issued to him. Edgar H. Dunn of St. Petersburg was designated as the resident agent for the administrator. Upon his appointment, C. H. Williams returned to his domicile in Kentucky, and carried with him or had forwarded to him the entire estate, consisting of cash, notes, bonds, and jewelry, and ***154** there proceeded to administer it without taking out ancillary proceedings.

On May 17, 1934, Lulu L. Goff, Florence De Bar, Elizabeth T. Graves, Jimmie G. Thompson, Nell Garnett, Mamie T. Bassett, George F. Thompson, James G. Thompson, Rebecca T. Crockett, Ruth T. Wilson, and Rachel T. Griffin, heirs at law of Maggie G. Paine, deceased, filed their petition praying that the court remove C. H. Williams as administrator of the estate and appoint W. J. Garnett of Pembroke, Ky., administrator de bonis non of the estate; that C. H. Williams be required to give an accounting; that he be required to pay the legal rate of interest on the money retained in his hands for an unreasonable period of time; that he be denied compensation as administrator of the estate because of his failure to properly administer it and file the proper reports.

The petition alleged that C. H. Williams, as administrator, has in his hands, after payment of all debts and costs of the estate, a substantial sum of money and certain articles of personal property, consisting of shares of stock, jewelry, notes, and other articles; that petitioners and other interested parties have repeatedly requested him to convert said assets into money so that it might be distributed, or that distribution be made in kind, but he has refused and still refuses to do either; that part of said property consists of stock in the Planter's Bank & Trust Company of Hopkinsville, Ky., which petitioners and others frequently requested him to sell while market conditions were favorable, but he refused and still refuses to sell said stock, with the result that it is worth only about half of what it was worth when he was first requested to sell it; that said administrator has failed to take steps to collect certain notes and money due the estate, which collection may become ***155** impossible by reason of delay; that although more than three years have elapsed since said administrator was appointed and received his letters of administration, yet he has not filed any report whatever; that his failure to properly administer the estate and file his reports as required by law are without just cause or excuse; that upon his appointment he received approximately $9,000 in cash, which has been in his hands since that time; that upon information and belief petitioners allege that said administrator paid out a substantial part of that money without receiving proper authority from this court or otherwise; that petitioners ****432** believe said administrator has paid out money on certain proper charges against the estate, but have no knowledge of the amount because of his failure to file any reports; that said administrator has had in his hands for more than three years a large sum of money belonging to the estate.

The answer of the administrator set up affirmative matter of defense by averring that although he was appointed administrator in September, 1930, the money did not come into his hands until September, 1931, because of long-drawn-out litigation to establish the fact that the funds of the estate on deposit with the defunct First National Bank of St. Petersburg were trust funds; that he made an effort to sell the stock of the Planter's Bank & Trust Company of Hopkinsville, Ky., but at that time a bitter campaign was going on between that bank and the other bank of Hopkinsville, the financial structure at Nashville, Tenn., broke down, the National Bank of Kentucky at Louisville failed, and all demand for bank stock was cut off. The answer then alleged that Maggie G. Paine had, by a former marriage, been the wife of V. A. Garnett, who died and willed the major portion of his estate, both real and personal, ***156** to his widow, Maggie G. Paine, for life, and also made her executrix of his will; that title could be traced from the intangibles of Garnett's estate to much of the assets that came into the hands of C. H. Williams as administrator of the Paine estate; that said widow afterwards married a Mr. Paine; that on December 23, 1930, a writ of garnishment was served on C. H. Williams as administrator of the estate, and concurrently a suit was filed attacking the validity of the claim of the Paine estate to any of the property, contending that all assets in the hands of C. H. Williams, as administrator of the Paine estate, was in fact property of the remaindermen under the will of V. A. Garnett, and it was found during

the course of the litigation that Maggie G. Paine had not filed with the court a settlement showing what portion of the property came into her hands through the will of V. A. Garnett, which after her death was to go to other persons; that in this case a judgment of $2,500 was rendered in favor of plaintiffs against C. H. Williams as administrator of the Paine estate; that the attorney's fees were not decided upon until the current year, after final disposition of the matter; that plaintiffs contended in that case that the moneys on deposit in the First National Bank of St. Petersburg to the credit of the Paine estate were proceeds from the sale of stock in the bank of Hopkinsville, Ky., which originally belonged to V. A. Garnett, this contention being substantiated by the records of said bank as to fourteen of said shares, but the status of the remaining shares of stock were somewhat indefinite; that the status of fourteen shares of the stock of the Planter's Bank & Trust Company was also doubtful and it is contended that they were bought with money belonging to the Garnett estate. The answer then set up the defense that another suit was filed against C. H. Williams as administrator of the estate of Maggie G. *157 Paine, deceased, alleging that Maggie G. Paine, during her life tenancy of certain lands, cut timber therefrom, which was not for the upkeep of the property, and a judgment for $425 was entered in favor of the remaindermen under the Garnett will. The answer set up the further defense that C. H. Williams made an earnest effort to sell the various properties and collect the debts due the estate, but without avail; that prior to the filing of the petition herein, suit was instituted against Mamie T. Bassett to foreclose a lien on certain property for the amount of $7,500; that the administrator is anxious to close the estate and recently determined to get a court order directing him to sell the stocks belonging to the estate, but ran into difficulties and was blocked from carrying out that plan.

Then followed the administrator's reports, listing the assets of the estate that he received and that have come in since his appointment, and the expenditures and disbursements made from those assets.

The heirs of Maggie G. Paine then filed their exceptions to the report of the administrator, objecting to certain items given in the report. General objections were filed to the report as an entirety because C. H. Williams, as administrator, paid the vouchers without any authority from the county judge of Pinellas county; that he never applied to the court for authority to make any of the disbursements; that he did not file his report within the time allowed by law; that he made each of the payments arbitrarily with a total disregard for the laws of the state of Florida and the authority of the county judge's court of Pinellas county; that from September, 1930, to June, 1934, the estate had a cash balance running as high as $9,000, and at present amounting to $2,388.33, according **433 to the report; that if this money was deposited so as to draw interest, the receipts *158 should show it, and if not so deposited, the administrator is properly chargeable with the amount the estate should have received as interest on said funds.

Trial of the issues was had before the county judge of Pinellas county on September 12, 1934, after which the court entered its order approving the report of the administrator except as to the following items, which were not followed:

"Voucher

No.	To whom Paid	Amount
19	C. H. Williams	$ 350.00
23	James Breathitt, Jr.	250.00
24	James Breathitt, Jr.	250.00
25	John C. Duffy, attorney and Helen	

	Morehead Layne	106.25
26	John C. Duffy and Clarence G.	
	Morehead	212.50
27	John C. Duffy and James W.	
	Morehead	106.25
29	S. Y. Trimble, Trustee	2500.00
30	R. A. Craft, Circuit Clerk	41.17
31	Mrs. Mary W. Keller	3.00
33	James Breathitt, Jr.	200.00
40	White & Clark	250.00

'All other objections are overruled, and the report otherwise approved.'

The administrator filed his petition for rehearing in which he set out in detail what each voucher disallowed by the court was spent for. He requested the order, disallowing these payments, be vacated, because the payments accrued either directly or indirectly by reason of actions instituted in Kentucky, upon which valid judgments were obtained against petitioner-administrator; because ***159** said payments were not made from the assets of the estate of Maggie G. Paine, but from assets in petitioner's hands belonging to certain beneficiaries named in the last will and testament of V. A. Garnett, the husband of Maggie G. Paine, prior to her marriage to Dr. Paine; because said order attempts to require petitioner to pay his successor in trust, funds that do not comprise part of the estate of Maggie G. Paine; and because said order is contrary to law.

The court denied the petition for rehearing and ordered that final judgment for $4,269.17 be entered in favor of the petitioning heirs against C. H. Williams, former administrator; and directing him to pay over to W. J. Garnett, the administrator, the sum of $4,269.17.

C. H. Williams took an appeal to the circuit court, which

court affirmed the orders of the county judge's court appealed from.

Petition for rehearing and reargument of the cause was denied by the circuit court.

From these two orders of the circuit court the former administrator, C. H. Williams, took an appeal to the Supreme Court.

The first question presented is whether an administrator forfeits all of the compensation allowed to him by law because he fails to file his annual returns as required by statute?

The court, in denying C. H. Williams compensation for his services stated that under section 5546, C.G.L., the administrator precluded himself from receiving any compensation for his services and forfeited all commissions by reason of the fact that he did not make annual accountings as required by law.

[1] Section 5546, C.G.L. provides that administrators, unless ***160** otherwise ordered by the court, shall make their annual returns on the first day of June in every year, unless appointed after January first and before June first, then the first annual return may not be filed until the first of June of the second year after the appointment. Then the statute provides:

'If they fail to make such returns before such time, they shall forfeit all commissions on such returns so to be made.'

Section 5541, C.G.L. provides as follows:

'Executors and administrators shall be allowed all reasonable charges on account of disbursement for funeral expenses, and in the administration of the estate of the person deceased, and shall also be allowed a just and fair compensation for their services, and also a compensation not exceeding six per cent. on money arising from the sale of personal property and lands of the deceased.'

In the case of Shepard's Heirs v. Shepard's Administrator, 19 Fla. 300, this statute was construed to give to the administrator four different kinds of allowances or compensation, which are as follows: (1) Reasonable charges on account of funeral expenses; (2) reasonable charges incurred in the administration of the decedent's estate; (3) fair and just compensation for his services; and (4) compensation not exceeding 6 per cent. on money arising from the sale of real and personal property of the decedent.

In the case of Sanderson's Administrators v. Sanderson, 20 Fla. 292, the statute, now section 5546, C.G.L., forfeiting the ****434** commissions of the administrator, upon his failure to file his annual report, was interpreted. The court said at page 319:

'We do not understand the statute to provide for any forfeiture except in the case of the neglect of the administrator 'to render' his annual account to the County Court, and the ***161** forfeiture there does not extend beyond commissions on amounts collected or disbursed and approved and allowed.'

[2] Thus only the fourth class of compensation is forfeited when the administrator fails to file his report pursuant to the provisions of section 5546, C.G.L. The administrator would be entitled to receive compensation or allowances under the first three heads enumerated, even though he failed to file his annual report on time, unless there be other legal reasons why he should not be so entitled. The report of the administrator showed and the testimony likewise revealed that the administrator was entitled to some compensation for his services in procuring by court action the sum of $8,971.37 as a preferred claim from the receiver of the defunct First National Bank of St. Petersburg. There may have been other services such as the sale of Hopkinsville Milling Company stock for $675, the receipt of a cash balance in the Bank of Pembroke, Pembroke, Ky., of $426.03, and the receipt of refund on farm insurance of $3.30, for which the administrator should be compensated. Then there is the consideration to be taken into account by the court, that the administrator did not give proper attention to his duties, so that the value of his services in the first instance would be nullified. In that event, it is in the discretion of the court of refuse to allow him compensation for his services. See Eppinger, Russell & Co. v. Canepa, 20 Fla. 262; Schouler on Wills, Executors & Administrators (6th Ed.) vol. 4, § 3049.

The second question presented is whether the amounts paid by the administrator as fees to attorneys to defend suits brought against him should be allowed as a credit to him.

[3] [4] An administrator may employ counsel, when necessary or proper to protect the estate, or to enable him properly to ***162** manage it, and the reasonable charges for such service will be paid out of the estate, in the settlement of the administrator's account. Brickell v. McCaskill, 90 Fla. 441, 106 So. 470. This allowance should be made when these facts exist, even though the administrator has mismanaged the estate, where the element of mismanagement may be taken care of by the court in determining as above set forth in Eppinger, Russell & Co. v. Canepa, 20 Fla. 262, that the administrator is not entitled to any compensation.

The county judge refused to allow the administrator credit for any sum paid to attorneys who represented him in the handling of the estate's affairs. It seems that where suits are instituted, in good faith, against an administrator in his representative capacity, he has no alternative than to employ counsel to defend those suits. However, if the court finds that the suits were collusive and not properly defended, but were part of a prearranged transaction between both parties and attorneys to have the record show that a judgment was entered against the defendant, then the attorneys would not be entitled to any compensation, and the administrator would not be entitled to allowance for the amounts so paid. The trial court must determine whether, under the circumstances, the employment of counsel was for the purpose of protecting the estate, and, if so, whether the fees paid were reasonable for the services rendered.

The third, fourth, and fifth questions presented are argued together and present the query as to whether judgments rendered against a foreign administrator in the courts of the state of his residence instead of the courts of the state of his appointment, determining the ownership of property within the state of his residence, are entitled to recognition in the state of his appointment, under the full ***163** faith and credit clause of the Constitution of the United States?

Payments by the administrator that were disallowed by the county judge were disallowed under the theory that judgments rendered in Kentucky against an administrator appointed by a Florida court, though a resident of Kentucky, were void, and that there was no duty on the part of the administrator to discharge them by payment, and that such conduct on his part was waste of the assets of the estate.

The record shows that the residuary devisees under the Garnett will brought their bill of complaint in Kentucky against C. H. Williams, as administrator of the estate of Maggie G. Paine, deceased, to recover assets in his possession purporting to belong ****435** to the Paine estate, but which were alleged to belong to the devisees under the Garnett will. Williams was served with process and later filed his answer thereto. Thereafter it was stipulated by the parties that certain assets in the hands of Williams constituted property of the Garnett estate, and a consent judgment for $2,500 was entered in favor of plaintiffs against Williams as administrator of the Paine estate. The court also decreed that James Breathitt, Jr., and the firm of White and Clark be paid $250 each as counsel fees. These amounts were paid by Williams from the assets of the Paine estate. For the alleged waste of timber lands by Maggie G. Paine during her lifetime, when she had only a life interest therein, another consent judgment for $425 was entered in favor of the heirs under the Garnett will against Williams as administrator of the Paine estate, and he also paid this judgment from the assets of the Paine estate.

In each of these cases the petition contained a false statement in alleging that C. H. Williams was appointed ***164** administrator of the Paine estate by the Christian county court in Kentucky, when in fact he was appointed such administrator by the county judge's court of Pinellas county, Fla. This allegation was inserted in the petitions to confer jurisdiction on the Kentucky courts.

In the suit resulting in entry of consent judgment in the amount of $2,500 against the Paine estate, the administrator did not deny the allegation of the petition that he was appointed administrator of the Paine estate in Kentucky. This lax conduct on the part of the administrator has the appearance of an attempt on his part to jeopardize the interests of the Paine estate by permitting the assets of the estate to be bargained away by consent judgments rather than have the issues tried by the court.

[5] The petition in the case resulting in entry of a consent judgment against the Paine estate in the amount of $425 alleged that Mrs. Paine died in Kentucky, whereas she died in Florida, and also alleged that there was no property in the estate subject to execution and that the estate is probably insolvent, all of which allegations were untrue.

'The general rule is that an executor or administrator appointed in one jurisdiction cannot be sued in his representative capacity in any other jurisdiction.' 24 C.J. 1136, § 2720.

Exceptions to the above rule have been made in a number of cases, but the exceptions are not universally recognized.

Practically all of these exceptions to the general rule have been in suits in equity involving peculiar circumstances, Finley v. Keinningham, 79 S.W. 236, 25 Ky.Law Rep. 1955; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Laws Rep. 315; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330; Baker v. Smith, 3 Metc.(Ky.) 264; ***165** Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; Atchison's Heirs v. Lindsey, 6 B.Mon. (Ky.) 86, 43 Am.Dec. 153; Curle v. Moor, 1 Dana(Ky.) 445; Dorsey's Ex'r v. Dorsey's Adm'r, 5 J.J.Marsh.(Ky.) 280, 22 Am.Dec. 33, where the suit was permitted, of necessity, to prevent a failure of

justice. Colbert v. Daniel, 32 Ala. 314; Bergmann v. Lord, 194 N.Y. 70, 86 N.E. 828; Montgomery v. Boyd, 78 App.Div. 64, 79 N.Y.S. 879; McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627.

[6] Such suits have been maintained where a foreign representative came into another jurisdiction and brought with him assets from the jurisdiction of his appointment, McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627; Calhoun v. King, 5 Ala. 523; Julian v. Reynolds, 8 Ala. 680, or where he left the jurisdiction of his appointment and became a resident of another jurisdiction. Courtney v. Pradt (C.C.A.) 160 F. 561; Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330. In such case a bill in equity will lie to compel him to account for such assets to the persons lawfully entitled thereto, where but for the interference of the court of equity there would manifestly be a failure of justice. Colbert v. Daniel, 32 Ala. 314; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Law Rep. 315. To authorize this proceeding, it must appear that the administrator has assets within the jurisdiction of the court, and is accountable to the complaining party under a will or as a trustee ex maleficio. Lewis v. Parrish, 155 F. 285, 53 C.C.A. 77; Marcy v. Marcy, 32 Conn. 308; Campbell v. Tousey, 7 Cow.(N.Y.) 64; Dillard v. Harris, 2 Tenn.Ch. 196. But a creditor is not entitled to sue under such circumstances. ****436** Baker v. Smith, 3 Metc.(Ky.) 264; Hedenberg v. Hedenberg, 46 Conn. 30, 33 Am.Rep. 10.

'The principle that executors and administrators are not ***166** liable to actions as such in States where they have obtained no letters is not permitted to protect them against the consequences of their own wrong or default. Thus where an executor or administrator removes the property of the estate in his charge, without having completed the administration, to another State, and fails to obtain new letters of administration there, a court of equity will grant relief to any person whose interest is thereby jeoparded, on the ground that, where a trust fund is in danger of being wasted or misapplied, the court of chancery, on the application of those interested, will interfere to protect the fund from loss. The exercise of this authority is in no way inconsistent with the general principle announced as governing the powers and liabilities of executors and administrators, who, as such, derive their powers from, and are amenable only to, the forum of the State under whose laws they hold office. They are in such proceeding treated, not in their official capacity, which is coextensive only with the State in which they receive their appointment, but as persons who, by withdrawing themselves from the jurisdiction of the court having power over them, are unlawfully in possession of the property which is to be protected or adjudged to its lawful owner. 'This is not a suit against the administrator for a debt due from the estate, but it is an assertion of title to the property itself, which, being found in this State, will give the court jurisdiction.'' Woerner-The American Law of Administration, vol. 1, § 164, p. 571 (3d Ed.).

An administrator or executor who is appointed or qualified in another state and there receives assets in his hands may be sued in the tribunals of the state of Kentucky by persons entitled to such assets if he shall have removed to and settled in Kentucky. ***167** Manion's Administrators v. Titsworth, 18 B.Mon. 582; Hussey v. Sargent, 116 Ky. 53, 75 S.W. 211, 25 Ky.Law Rep. 315; Kenningham v. Kenningham's Ex'r, 139 Ky. 666, 71 S.W. 497, 24 Ky.Law Rep. 1330. Where suit against a foreign administrator is allowed, his liability will be determined by the laws of the state of his appointment and not of the state in which he was sued. Manion's Adm'rs v. Titsworth, 18 B.Mon.(Ky.) 582; McNamara v. Dwyer, 7 Paige (N.Y.) 239, 32 Am.Dec. 627.

[7] Under the rules as laid down above, it appears that the suit instituted for the purpose of having certain property in the hands of C. H. Williams, as administrator of the Paine estate, declared to be property of the Garnett estate, might properly have been instituted and maintained in the courts of the state of Kentucky, because the property, ownership of which is claimed by the remaindermen under the Garnett will, and the administrator were both physically in the state of Kentucky, and the suit was against the administrator and the bank, whose stock was involved; provided the final decree in that case was for the return of the property in specie or the payment of the amount of money received from the sale of that property, if it had in fact been sold, and the money had been reasonably identified as being the proceeds from the sale. Otherwise the courts of Kentucky would not have jurisdiction of the case. The laws of Kentucky govern as to whether the suit may be brought or maintained; but the laws of Florida govern as to the liability of the administrator. The payment of this judgment by the administrator should have been allowed on the final accounting if these facts were found to exist.

[8] [9] The suit instituted against the administrator to recover damages for the conduct of the life tenant, Mrs. Maggie G. ***168** Paine, cutting timber from certain lands, which timber was not used for the upkeep of the place, the suit terminating in a consent judgment in favor of the heirs under the Garnett will, was not a claim maintainable in the state of Kentucky under any of the foregoing rules. It was not a claim made under any will that was being administered by Williams, was not a claim against Williams as trustee ex maleficio, was not a claim for specific property in the hands of Williams in the state of

Kentucky; but was, on the contrary, a claim for damages for the conduct of the life tenant, Mrs. Maggie G. Paine, which was a claim by a creditor of the Paine estate, and such case, under the Kentucky law, was not, in these circumstances, maintainable in the courts of Kentucky as an exception to the general rule. This was a local action because it was for damages to the freehold and was maintainable, if at all, only by taking out ancillary administration of the Paine estate in Kentucky.

**437 'A tenant for life without impeachment for waste may cut wood though such cutting would otherwise, at the common law, amount to waste. In other words, he may do any act with reference to woodland that the owner of the fee might do, being restrained only from the commission of willful and malicious waste. He may thin out the timber of a wood's pasturage, or cut off all the timber and cultivate it as a field. If the cutting is not wanton or malicious, and does not amount to equitable waste, it cannot be restrained by the owner of the fee, even if he sells the timber. But even a tenant for life without impeachment for waste may not cut down trees left or planted for ornament or shelter, the question whether the particular timber does answer that description being one of fact, and effect being *169 given to the design of the testator as to what is ornamental.' 27 R.C.L. 1030, § 19.

Therefore the entry in this case of the consent judgment against Williams as administrator of the Paine estate was without authority of law of the Kentucky courts, and the county judge of Pinellas county, Fla., correctly refused to allow payment of this judgment as a proper charge against the Paine estate.

Appellant argued the sixth and seventh questions together, which present the question as to whether an administrator may compromise and settle a valid and subsisting indebtedness against the estate, especially when authorized to do so by the beneficiaries of the estate.

This question embodies two separate propositions: First, that the administrator had the power in these circumstances to compromise the two suits instituted against him in his representative capacity and agree to the entry of judgments in conformity with the compromise; and, second, that the heirs of Maggie G. Paine agreed to accept the consent judgments as binding on the estate in both cases.

In support of the proposition that the heirs had agreed to the compromises made, appellant quotes testimony in his brief, which he states is all of the evidence on the subject. This evidence shows that Mr. Breathitt, attorney for appellant in Kentucky, testified that Dr. Bassett, in undertaking to speak for a great number of heirs, agreed to the settlement. Mr. Richeson said, while cross-examining Mr. Breathitt, that he was induced to agree to this because he was informed that C. H. Williams was administering the Paine estate in Kentucky, which information Mr. Breathitt did not recall. Mr. Richeson stated that he and Mrs. Lulu Goff were in the office of Mr. Breathitt in Kentucky in September, 1932, and had a conversation about this suit. *170 There is no showing made by this evidence that all or even a majority of those interested in the matter agreed to the entry of a compromise judgment in either suit that would bind them. The most that is shown is that Mr. Breathitt referring to the $2,500 judgment testified that Dr. Bassett, who was representing a great number of the heirs, agreed to the entry of that judgment.

[10] The power of an administrator or executor to compromise claims is stated in the following language in 11 R.C.L. 202, § 225:

'At common law the executor and administrator, having an absolute power of disposal over the whole of the personal effects of a decedent, had authority to compromise or accept any composition or otherwise settle any debt, claim, or thing whatsoever in regard thereto. And he still has such powers in this connection that his compromise of a claim against the estate will be upheld if it is *fair, beneficial to the estate*, and *free from fraud, negligence* or *misconduct*. The same is true as to claims belonging to the estate.' (Italics supplied.)

Thus it is seen that the administrator had the power to compromise these suits if such compromises were fair, beneficial to the estate, and free from fraud, negligence, or misconduct. Under this rule, the administrator had no authority to compromise the suit in which judgment for $425 was entered against him in his representative capacity, because it would not be beneficial to the estate to have a judgment entered against it, when the courts of the state of Kentucky were without jurisdiction to entertain suit upon which the judgment was entered. In the other suit in which a consent judgment was entered against the administrator in his representative capacity for $2,500, the administrator had authority to compromise that claim *171 if it was fair, beneficial to the estate, and free from fraud, negligence, and misconduct.

The trial court must determine this, after it has determined whether the suit is maintainable against the administrator in Kentucky, in these particular circumstances, **438 under the rules as set forth in another part of this opinion.

The orders of the circuit court appealed from are reversed, and the cause is remanded, with directions that the circuit

court order the county judge's court to entertain such further proceedings as will conform to the views expressed in this opinion.

It is so ordered.

ELLIS, C. J., and WHITFIELD, TERRELL, BROWN, BUFORD, and DAVIS, JJ., concur.

All Citations

128 Fla. 151, 174 So. 430

End of Document

3.K.

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Chapter 733. Probate Code: Administration of Estates (Refs & Annos)
Part VI. Duties and Powers of Personal Representative

West's F.S.A. § 733.612

733.612. Transactions authorized for the personal representative; exceptions

Effective: January 1, 2002

Currentness

Except as otherwise provided by the will or court order, and subject to the priorities stated in s. 733.805, without court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent, pending distribution or liquidation, including those in which the personal representative is personally interested or that are otherwise improper for fiduciary investments.

(2) Perform or compromise, or, when proper, refuse to perform, the decedent's contracts. In performing the decedent's enforceable contracts to convey or lease real property, among other possible courses of action, the personal representative may:

(a) Convey the real property for cash payment of all sums remaining due or for the purchaser's note for the sum remaining due, secured by a mortgage on the property.

(b) Deliver a deed in escrow, with directions that the proceeds, when paid in accordance with the escrow agreement, be paid as provided in the escrow agreement.

(3) Receive assets from fiduciaries or other sources.

(4) Invest funds as provided in ss. 518.10-518.14, considering the amount to be invested, liquidity needs of the estate, and the time until distribution will be made.

(5) Acquire or dispose of an asset, excluding real property in this or another state, for cash or on credit and at public or private sale, and manage, develop, improve, exchange, partition, or change the character of an estate asset.

(6) Make ordinary or extraordinary repairs or alterations in buildings or other structures; demolish improvements; or erect new party walls or buildings.

(7) Enter into a lease, as lessor or lessee, for a term within, or extending beyond, the period of administration, with or without an option to renew.

(8) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

(9) Abandon property when it is valueless or so encumbered, or in a condition, that it is of no benefit to the estate.

(10) Vote, or refrain from voting, stocks or other securities in person or by general or limited proxy.

(11) Pay calls, assessments, and other sums chargeable or accruing against, or on account of, securities, unless barred by the provisions relating to claims.

(12) Hold property in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the property so held.

(13) Insure the assets of the estate against damage or loss and insure against personal and fiduciary liability to third persons.

(14) Borrow money, with or without security, to be repaid from the estate assets or otherwise, other than real property, and advance money for the protection of the estate.

(15) Extend, renew, or in any manner modify any obligation owing to the estate. If the personal representative holds a mortgage, security interest, or other lien upon property of another person, he or she may accept a conveyance or transfer of encumbered assets from the owner in satisfaction of the indebtedness secured by its lien instead of foreclosure.

(16) Pay taxes, assessments, and other expenses incident to the administration of the estate.

(17) Sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) Employ persons, including, but not limited to, attorneys, accountants, auditors, appraisers, investment advisers, and others, even if they are one and the same as the personal representative or are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act upon the recommendations of those employed persons without independent investigation; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary. Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative's compensation.

(20) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative.

(21) Sell, mortgage, or lease any personal property of the estate or any interest in it for cash, credit, or for part cash or part credit, and with or without security for the unpaid balance.

(22) Continue any unincorporated business or venture in which the decedent was engaged at the time of death:

(a) In the same business form for a period of not more than 4 months from the date of appointment, if continuation is a reasonable means of preserving the value of the business, including good will.

(b) In the same business form for any additional period of time that may be approved by court order.

(23) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(24) Satisfy and settle claims and distribute the estate as provided in this code.

(25) Enter into agreements with the proper officer or department head, commissioner, or agent of any department of the government of the United States, waiving the statute of limitations concerning the assessment and collection of any federal tax or any deficiency in a federal tax.

(26) Make partial distribution to the beneficiaries of any part of the estate not necessary to satisfy claims, expenses of

administration, taxes, family allowance, exempt property, and an elective share, in accordance with the decedent's will or as authorized by operation of law.

(27) Execute any instruments necessary in the exercise of the personal representative's powers.

Credits

Laws 1974, c. 74-106, § 1; Laws 1975, c. 75-220, § 78; Laws 1976, c. 76-172, § 3; Laws 1977, c. 77-87, § 31; Laws 1977, c. 77-174, § 1; Laws 1979, c. 79-400, § 271. Amended by Laws 1997, c. 97-102, § 1009, eff. July 1, 1997; Laws 2001, c. 2001-226, § 135, eff. Jan. 1, 2002.

Notes of Decisions (104)

West's F. S. A. § 733.612, FL ST § 733.612
Current with chapters from the 2016 2nd Regular Session of the 24th Legislature in effect through May 10, 2016

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

PROBATE DIV. CASE NO.: 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

ORDER ON TRUSTEE'S MOTION TO APPROVE RETENTION OF COUNSEL AND, TO APPOINT TED S. BERNSTEIN AS ADMINISTRATOR AD LITEM TO DEFEND CLAIM AGAINST ESTATE BY WILLIAM STANSBURY

THIS CAUSE came on to be heard before this Honorable Court on March 2, 2017, upon Trustee's Motion to Approve Retention of Counsel and, to Appoint Ted S. Bernstein as Administrator Ad Litem to Defend Claim against Estate by William Stansbury, and the Court having reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is hereby

ORDERED and ADJUDGED that:

1. Trustee's Motion to Approve Retention of Counsel and, to Appoint Ted S. Bernstein as Administrator Ad Litem to Defend Claim against Estate by William Stansbury is hereby DENIED.

2. _____

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DONE AND ORDERED in Palm Beach Gardens, Palm Beach County, Florida this ___ day of _____, 2017.

_____
ROSEMARIE SCHER, Probate Judge

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***Pamela Beth Simon**, 950 North Michigan Avenue, #2603, Chicago. IL 60611; psimon@stpcorp.com*

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

PROBATE DIV. CASE NO.: 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

ORDER ON MOTION OF CREDITOR, WILLIAM E. STANSBURY, FOR DISCHARGE FROM FURTHER RESPONSIBILITY FOR THE FUNDING OF THE ESTATE'S PARTICIPATION IN THE CHICAGO LIFE INSURANCE LITIGATION AND FOR ASSUMPTION OF RESPONSBILITY BY THE ESTATE AND FOR REIMBURSEMENT OF ADVANCED FEES

THIS CAUSE came on to be heard before this Honorable Court on March 2, 2017, upon Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Fees, and the Court having reviewed the file, heard argument of counsel, and being otherwise duly advised in the premises, it is hereby

ORDERED and ADJUDGED that:

1. Motion of Creditor, William E. Stansbury, for Discharge from Further Responsibility for the Funding of the Estate's Participation in the Chicago Life Insurance Litigation and for Assumption of Responsibility by the Estate and for Reimbursement of Advanced Fees is hereby GRANTED.

2. _____

DONE AND ORDERED in Palm Beach Gardens, Palm Beach County, Florida this ___ day of _____, 2017.

_____
ROSEMARIE SCHER, Probate Judge

Copies to:
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