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

CASE NO. 4D16-3314

ELIOT IVAN BERNSTEIN

L.T. CASE NO. 2014CP003698 XXXX NB

Appellant,

v.

TED S. BERNSTEIN, AS TRUSTEE, et al.

Appellee.
_____/

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

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

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III. PREFACE

Parties

The Shirley Bernstein Trust Agreement dated May 20, 2008 is the "Trust."

Appellee, Ted S. Bernstein, as successor Trustee is the "Trustee."

The Estate of Simon L. Bernstein shall be referred to as the "Estate."

Brian O'Connell, Personal Representative of the Estate, shall be referred to as the "P.R."

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

R**ecord**:

References to the record will be shown as:

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

Hearing transcript: (T. page)[1]

Quoted Materials:

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

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[1] The Hearing Transcript is included in Appellant's Supplemental Appendix filed May 5, 2017, at Exhibit 4, pp. 334-348.

IV. STATEMENT OF THE CASE AND FACTS

This appeal concerns an agreement between the P.R. of Simon Bernstein's Estate and the Trustee of his wife's Trust, for the sale of furniture for $12,394.

In its simplest form, the issue is whether the trial court abused its discretion by approving the P.R.'s business decision to sell some of the Estate's personal property for 100% of its appraised value. No one objected at the approval hearing and, in any event, the transaction is fair, reasonable and in the best interests of the Estate.

A. A Few Words about Eliot Bernstein

This is but another chapter in the never-ending legal saga that is Eliot Bernstein. But this should be a very short chapter. This issues in this appeal are small and insignificant; this Court already has decided the only important issue – Eliot is not a beneficiary of either trust. *See* PCA issued in Case No. 4D16-222.[2] Moreover, the probate court determined Eliot's actions were "adverse and destructive" to his childrens' interests, which compelled the probate court to appoint a guardian ad litem. Eliot's appeals of those orders were dismissed by this Court. *See* Case Nos. 4D16-1449; 4D16-1476; and 4D16-1479.

The PCA confirmed Eliot's disinheritance from the two trusts containing most of his parents' wealth, over his strong and continuing objections. Now, Eliot's only

[2] This Court denied rehearing and rehearing *en banc* on June 5, 2017.

remaining battlegrounds are these ancillary issues; his only consequence more legal fees.

At most, Eliot is a specific devisee of 1/5th of Simon's tangible personal property. If there are sufficient assets to pay all costs of administration and all creditors, which is by no means a certainty and becomes more doubtful with each dollar of legal fees wasted on Eliot's frivolous appeals, Eliot's maximum devise is substantially less than $20,000. Yet he causes the Estate to spend hundreds of thousands defending itself against him. This appeal[3] is just another drain on the inheritance of ten grandchildren trusts, including three for Eliot's kids.

B. <u>Relevant Factual Background</u>

The long and detailed version of the facts are set forth in the Answer Brief in Case 4D16-222. They will not be repeated in this Brief.

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[3] Eliot is not really appealing the even-up order; he is using this as a vehicle to reargue and relitigate all other issues in the case, including those affirmed by this Court. His vision of a wide-ranging conspiracy is severely detached from reality. All of the underlying issues in this case have been resolved by a bench trial, with full evidence, appealed and affirmed by this Court by a PCA.

Eliot is an impossible, vexatious pro se litigant, who has been given more far more process than he is due. The Trustee requests this Court consider some form of non-monetary sanction to limiting or prohibiting this disgruntled *pro se* litigant from further appellate filings which are not reviewed and signed by a Florida lawyer.

The relevant facts are set forth in the *Motion to Approve Agreement Between Ted S. Bernstein, Trustee and Brian O'Connell, as P.R. of The Estate of Simon Bernstein, Regarding the Estate's Personal Property Sold with Trust's Real Estate*. (DE 224; R. 2475-2478)

At the time of Simon Bernstein's death, he had two residences, a condominium and a house. Both residences were owned by the Trust, but Simon owned all of the furniture and some personal items. (*Id*., ¶1) Everything in both residences was appraised. When the Trust sold the condominium, the Estate's then-serving personal representatives directed Shirley's Trustee to include the furniture in the sale, with the understanding that this could be evened-up at a later date. (*Id*., ¶2) Some of Simon's smaller, personal items were moved to the house. (*Id*., ¶3)

When the house was sold, the P.R. hired a different appraisal company to reappraise all of the remaining personal property. (*Id*. at 4) The second appraisal showed the value of the items moved from the condominium to the house, a total of $2,408, leading to the logical conclusion that approximately $12,457 of Simon's furniture had been included in the condominium sale. (*Id*., ¶5)

To accomplish an "even-up" for the furniture sold with the condominium, the Trust agreed to pay the Estate $12,457. (*Id*., ¶6) Both the Trustee and the P.R. moved for probate court approval (DE 224; R. 2475-2478) and noticed a joint hearing for

September 1, 2016. (DE 225, R 2479-2482) Eliot was included in both certificates of service. (R. 2481) No one objected at the hearing, the court approved the agreement. (DE 230, R. 2483-85)

The only person (other than the Trustee's counsel) to speak at the hearing was counsel for a potential claimant against the Estate. The claimant's lawyer raised an irrelevant objection, and was gently rebuffed by the probate judge:

> THE COURT: What does that have to do with the even-up order that I'm being asked to do today which deals with whatever there was in the estate when the property was sold and the distribution to even things up was made? What does that have to do with this?
>
> MR. FEAMAN: Yeah, that's why we're gratified that this money is coming. At least this part is coming into the estate. . . .
>
> THE COURT: So you're okay with me signing this?
>
> MR. FEAMAN: Yes, sir.
>
> THE COURT: Okay. So we're good.
>
> * * * *
>
> THE COURT: Here's what it [the Order] says: The motion is granted. The Shirley Trust will pay the personal representative of Simon's estate $12,457 for the sold personal property. And there will be no further or outstanding obligations between these parties . . . .
>
> MR. FEAMAN: Yes, Sir.

> THE COURT: So that leaves open the issues that you're concerned about.
>
> MR. FEAMAN: Okay. Very good. Thank you.
>
> THE COURT: Okay. Great. Good luck, everybody.

(T. 5-6; Supplemental Appendix filed May 5, 2017, at Exhibit 4, pp. 3-6)

Despite not attending the hearing and not contesting any of the facts asserted in the Motion, Eliot filed yet another a Notice of Appeal. (DE 228; R. 2488-2500)

V. SUMMARY OF ARGUMENT

This appeal lacks merit for a number of reasons. First, Eliot lacks standing in this case – the Shirley Bernstein Trust case.

Second, despite service of the motion and the notice of hearing on Eliot in both cases – including in the Estate matter where Eliot has some limited, marginal standing – Eliot did not attend the hearing; did not request an evidentiary hearing; and did not object to Order under review. Thus, there is no error preserved for appellate review.

Finally, this is a rather simple appeal concerning $12,457. The agreement between the Trust and the Estate makes logical, practical and, most importantly, business sense. The agreement is in the best interests of the Estate. There is no reason to disturb the business judgment of the court-appointed Personal Representative.

The Order under review should be summarily affirmed.

VI. ARGUMENT

A. ELIOT LACKS STANDING IN THE SHIRLEY TRUST CASE

There are two separate legal entities involved in this transaction. With respect to the Shirley Bernstein Trust, Case No. 502014CP003698XXXXNB, Eliot is not a beneficiary. The beneficiaries of the trusts are 10 grandchildren trusts. That is the result of the Final Judgment entered after trial in the probate court and affirmed by this court in Case 4D16-222. The probate court entered a separate order on February 3, 2016, January finding Eliot has no standing. (R. 2153-2158)

With respect to the propriety of the Shirley Bernstein Trustee agreeing to pay 100% of the appraised value, rather than a lesser value for this furniture, Eliot Bernstein had no right to speak or otherwise participate in that case. The order in the Shirley Trust matter is the only order Eliot appealed.[4] Thus, this appeal should be dismissed or affirmed based upon Eliot's lack of standing.

B. NO ERROR WAS PRESERVED

There is no error preserved below, because Eliot presented no objection. He did not request an evidentiary hearing. He did not present contrary evidence of value.

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[4] In the Simon Bernstein Estate, Case No. 202012CP004391, the Order approving the even-up arrangement is Docket Entry 480. There was a motion for rehearing filed by the claimant [DE 492], which was denied [DE 493], but no notice of appeal appears in the docket of the Simon Bernstein Estate.

Florida Statutes section 733.708 governs proposal to compromise or settle claims by the estate:

> . . . . the court may enter an order authorizing the compromise if satisfied that the compromise will be for the best interest of the interested persons. The order shall relieve the personal representative of liability or responsibility for the compromise . . . .

§ 733.708, Fla. Stat. (2016).

Eliot argues for the first time on appeal the compromise approved by the probate court was invalid because no evidentiary hearing was held. Although properly noticed, Eliot did not appear at the hearing or request an evidentiary hearing. Any complaint about the lack of an evidentiary has been waived:

> As a general rule, reviewing courts will not consider claims of error which are raised for the first time on appeal because it is the function of the appellate court to review errors allegedly committed by the trial court, not to entertain for the first time on appeal issues which the complaining party could have and should have, but did not, present to the trial court.

Herskovitz v. Hershkovich, 910 So. 2d 366, 367 (Fla. 5th DCA 2005); see also *Marsh v. Sarasota County*, 97 So. 2d 312, 313 (Fla. 2d DCA 1957)("a party who fails to make timely objection to what he considers procedural irregularities at the time of trial will be deemed to have waived the same by acquiescence.").

> A litigant may not sit on his hands, fail to voice his objections, and then claim prejudice when a final judgment is entered which may adversely affect him. Furthermore, he may not raise his objections for the first time on appeal. Procedural irregularities to which no objection is made are waived.

Allstate Ins. Co., v. Gillespie, 455 So. 2d 617, 620 (Fla. 2d DCA 1984).

Even if the issue were not waived, no evidentiary hearing was required in this case. The plain language of the statute provides that the court "may enter an order authorizing the compromise if satisfied that the compromise will be for the best interest of the interested persons." Fla. Stat. § 733.708. The words "evidentiary hearing" do not appear anywhere in the statute, and such a requirement should not be read into the statute by this Court.

> When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. Instead, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.

State v. Burris, 875 So. 2d 408, 410 (Fla. 2004)(internal citation omitted).

Because the plain language of the statute is clear, and no evidentiary hearing was required, the lower court's approval of the settlement should be affirmed.

C. THE AGREEMENT IS FAIR, REASONABLE AND IN THE BEST INTEREST OF THE ESTATE

The P.R. relied upon valuations made by two reputable appraisal companies, which reached similar conclusions as to value. The P.R., exercising his business judgment, accepted the appraised values and reached a fair compromise. The order under review should be affirmed because it falls within the business judgment of the P.R. and is in the best interests of the Estate. The issues here are very simple and narrow – this is not a vehicle for Eliot to revisit every issue he already has lost or reargue the merits of these matters.

Certainly, the personal representative of an estate must have a certain amount of discretion and latitude to carry out the ordinary and orderly administration of an estate, including the sale of its assets. In this case, a *de minimus* amount of furniture that was sold as part of the condominium sale, rather than being removed and stored. As a practical matter, removal and storage of a condominium full of furniture from 2013 until this estate is closed, which at the current pace may never happen, would result in no money coming into the estate on a net basis.

Under Florida law, "a personal representative, acting reasonably for the benefit of the interested persons, may properly . . . 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." § 733.612(5), Fla. Stat. (2016). Here, the then-serving personal representatives agreed to dispose of the furniture, and the current P.R. accepted a cash payment from the Trust equal to the full appraised value. There could be nothing more normal, reasonable or proper than that, nor any legitimate reason to suggest the P.R. was not "acting reasonably for the benefit of the interested persons." *See, id*.

VII. CONCLUSION

This is the type of transaction that would be handled every day without a court order. However, in this unique circumstances of this case, where every move is scrutinized and challenged so aggressively, both the Trustee and the P.R. sought court approval. After motion and notice, no one objected. No one demanded an evidentiary hearing, or otherwise challenged the appraised values. No one contested the entry of the order or preserved any error for appellate review.

The order under review should be summarily AFFIRMED.

VIII. CERTIFICATE OF SERVICE

WE CERTIFY that a copy of the foregoing Answer Brief and the accompanying Supplemental Appendix has been e-filed and furnished to all counsel and parties on the attached service list by e-mail service this 12th day of June, 2017.

IX. CERTIFICATE OF COMPLIANCE

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

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