

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

IN RE: CASE NO. 502012CP004391XXXXNBIH

ESTATE OF SIMON L. BERNSTEIN,

_____ /

ORDER ON (i) TRUSTEE'S MOTION TO APPROVE COMPROMISE AND SETTLEMENT (ii) APPOINT A TRUSTEE FOR THE TRUSTS CREATED FOR D.B., J.A.B., AND JO.B, AND (iii) DETERMINE COMPENSATION FOR GUARDIAN AD LITEM [D.E. #498]; (iv) MOTION TO DIRECT PAYMENTS FOR BENEFIT OF ELIOT'S CHILDREN TO COURT REGISTRY IN LIEU OF APPOINTING TRUSTEE; AND (v) TO DETERMINE COMPENSATION FOR GUARDIAN AD LITEM AND DISCHARGE GUARDIAN [D.E. 724]

THIS CAUSE came before the Court on Wednesday, November 15, 2017 on Trustee's *Motion to Approve Compromise and Settlement, Appoint a Trustee for the Trusts Created for D.B., J.A.B., and Determine Compensation for Guardian Ad Litem* (D.E. 498) and Trustee's *Motion to Direct Payments for Benefit of Eliot's Children to Court Registry in Lieu of Appointing a Trustee and to Determine Compensation for Guardian Ad Litem and Discharge Guardian* (D.E. 724) (collectively the "Motions"). The Court, having reviewed the Motions and the record, heard argument of counsel and the parties, having received evidence, and being otherwise fully advised in the premises, hereby ORDERS AND ADJUDGES:

1. The Motions are granted in part as set forth in this Order.
2. After mediation, a written Mediation Settlement Agreement ("Settlement") was executed by and between: (i) Ted S. Bernstein, as Trustee of the Simon L. Bernstein Trust (the "Simon Trust"), which is the sole residuary beneficiary of this Estate; and (ii) the trustees or court-appointed representatives of ten trusts created for the benefit of Simon's ten grandchildren

under the terms of Simon's Trust, being all of beneficiaries and potential beneficiaries of the Simon Trust.¹

3. The Settlement is approved and made effective immediately, subject to the terms of the Settlement. The Court will retain jurisdiction to enforce and fully implement the Settlement.

4. One of the issues now before the Court is the selection of a trustee to serve in place of Eliot Bernstein in connection with the three Eliot Children Trusts created under the Simon L. Bernstein Amended and Restated Trust Agreement dated 7-25-12 ("Simon's Trust"), for the ultimate benefit of D.B, Ja. B and Jo. B ("Eliot's Children").

5. The Court heard evidence from the Guardian Ad Litem, Diana Lewis. Lewis is an experienced member of The Florida Bar, who testified to having more than 20 years of experience in private practice plus approximately 12 years experience as a circuit court judge in Palm Beach County, including time serving as a judge in this Court's Probate Division.

6. Lewis testified that she would not agree to serve as trustee for the three Eliot's Children's Trust. Further, based on her experience as a lawyer and a judge and the unique circumstances of this case, Lewis testified she believes no corporate trustee would accept an appointment as trustee for the Eliot Children's Trust. Lewis explained her belief that no corporate trustee would likely take an appointment in this matter due to the small asset size of the trusts, the limited fees to be earned, and the unique nature of the parties to this case. A brief

¹ Trusts created for the benefit of Jo. B., Ja. B. and D.B., (the Eliot Children's Trusts) by Diana Lewis as Guardian ad Litem and pending appointment of a Trustee; Trust created for the benefit of J.I. by Jill Iantoni as Trustee; Trusts created for the benefit of Alexandra Bernstein, Eric Bernstein and Michael Bernstein by Ted Bernstein as Trustee; Trust created for the benefit of Molly Simon by Pam Simon as Trustee; and Trust created for the benefit of Max Friedstein and C.F. by Lisa Friedstein as Trustee.

review of the docket establishes a level of contentiousness and litigiousness that is unprecedented. Lewis testified that the Shirley Bernstein Trustee had communicated with Eliot Ivan Bernstein and with Eliot's Children, and received no suggestions for the new trustee. Lewis is not aware of any attorney or other person willing to serve as trustee.

7. Because this Court already has determined that Eliot Bernstein's actions were adverse and destructive to his children's interest (in connection with appointment the Guardian Ad Litem), and given the difficulty or impossibility of finding a trustee, the Court reluctantly directs all funds for the benefit of Eliot's Children to be deposited into the Registry of the Court, under the terms and conditions set forth in this Order.

8. The Court-awarded fees to the GAL as set forth below, will be paid before the distribution of any funds into the Registry. The Court directs the Trustee to pay such fees directly to the GAL.

9. Any and all funds which would otherwise be paid into the Eliot Children's Trust, as defined in the Settlement Agreement or any other agreement (including any settlement proceeds from the Illinois insurance litigation), will be deposited or paid into the Registry of the Court, separately for the benefit of each of Eliot's Children, and such funds will be released under the following conditions:

a. if the Court at any time appoints a successor trustee for any or all of the Eliot Children's Trust, all funds held in the Registry of the Court will be released to such trustee, to hold in an appropriate trust account solely for the benefit of Eliot's Children, consistent with the terms of Simon's Trust (the relevant parts of which are attached as Exhibit A).

b. if no successor trustee has yet been appointed and any of Eliot's Children requests a distribution consistent with the terms of Simon's Trust, such child could seek such distribution by filing a motion with the Court. Upon the filing of any such motion, this Court will consider such request in light of the terms of Simon's Trust, and will direct the Clerk to release such funds as this Court deems appropriate under the circumstances; and

c. upon each child reaching the age of 35, each such child is entitled to seek the immediate release of all remaining funds held by the Clerk of the Court, upon motion and order.

10. By entry of this order which resolves the need for a new trustee, and upon the entry of orders approving all of the pending settlement agreements involving the GAL, the GAL shall be discharged. The GAL's reasonable compensation shall be split equally between the three Eliot Children's Trust.

11. Notwithstanding the discharge of the GAL, the Court's prior *Order on Successor Trustee's Motion to Appoint a Guardian ad Litem; for a Gag Order to Protect the Guardian and Others; and to Strike Eliot Bernstein's Filings* dated March 1, 2016² (the "Order" [DE 161]) will remain in full force and effect.

² The Order provides at paragraph 10:

To protect the integrity and independence of the guardian, Eliot Bernstein and all persons acting in concert with him: (a) shall not contact, email or otherwise communicate with the Guardian Ad Litem except at the request of the Guardian Ad Litem; (b) shall not in any way threaten or harass the guardian. This Court alone shall supervise the Guardian. Any violation of this order may subject the violator to severe sanctions for contempt of court. The Court will use the full measure of its coercive powers to ensure compliance with this Order.

12. As to the issue of determining the reasonable compensation of the GAL, the Court heard further testimony from the GAL and received into evidence time and expense records of the GAL. The time and expense reports from March 4, 2016 showed a total of 122 hours and 16 minutes as of October 27, 2017, not including time preparing for and attending the November 15th hearing and any further proceedings in this case. The GAL also incurred travel expenses of \$179.16 in mileage costs.

13. In addition to authenticating and verifying the accuracy of her time and expense records, the GAL explained that her standard hourly rate for work as an attorney after leaving the bench was \$350 per hour. The Court finds such rate would be reasonable for a lawyer and former circuit judge with the experience held by the GAL as noted above. Notwithstanding her standard hourly rate, the GAL testified that she had agreed to this appointment at a lower rate to be determined by this Court in the best interests of Eliot's Children. The GAL explained her willingness to take a reduced rate given the time and expense that had predated her involvement, the relatively small amount of assets, and the circumstances of this case. The GAL further explained that she had already reduced some of her time entries as a courtesy by not including every single item of work or the full amount of time when she performed services as GAL on behalf of the best interests of Eliot's Children. This Court took the time to review each entry. The GAL's billing was reasonable. It is clear the GAL was specific to the amount of time spent, a few entries were actually billed for only one minute.

14. In this particular case, it is clear that the Guardian's extensive background and knowledge as a lawyer benefitted the interests of the children. In determining a reasonable rate, the Court weighed this against the Guardian's desire to conserve the assets of the children. The

Court notes a professional guardian on the 15th Judicial “wheel” is charged at \$95 an hour. The professional guardians are not required to be lawyers. Lawyers who serve as Guardians Ad Litem in family cases range from pro bono to \$350.00 an hour.³ Based upon the GAL's background, her time and expense records and her testimony that she had agreed to a discounted rate and wished to conserve the assets for the children, the Courts finds as to the reasonable compensation of the GAL:

a. The reasonable hourly rate for the work performed by the GAL in this matter is:

\$_250.00_;

b. The total number of hours reasonably expended by the GAL is:

\$__122.27_ hours (122 hours and 16 minutes) through October 27, 2017;

c. Therefore, the total reasonable fee for the work performed by the GAL in this matter (rate x number of hours) is:

\$____30,567.50_;

d. The total costs reasonably expended by the GAL are

\$__179.16_____;

e. Therefore, the total for reasonable fees and costs awarded to the GAL is

\$____30,746.66_____;

which shall be paid by the Trustee from the funds available for the distributions to Eliot's Children, split 1/3 each.

³ This range is from lists distributed to family judges on Guardian Ad Litem and their rates.

15. The Court has considered the *ore tenus* request by Eliot Bernstein to appoint Candice Schwager as replacement trustee for the Eliot Children's Trust. The Court reviewed a letter presented by Eliot Bernstein, which was purportedly written by Candice Schwager, and found the letter to contain odd prose and an irregular presentation. Schwager is not an attorney licensed to practice law in the State of Florida. Subject to the provisions of paragraph 9(a), the Court denies the *ore tenus* request to appoint Candice Schwager without prejudice.

DONE AND ORDERED in Chambers, North County Courthouse on 12/6/2017,
2017.



HONORABLE ROSEMARIE SCHER

cc: All parties on the attached service list

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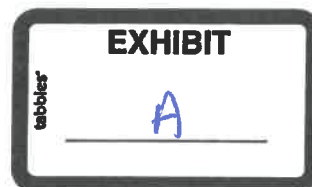
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SIMON L. BERNSTEIN
AMENDED AND RESTATED TRUST AGREEMENT

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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:



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

