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

ELIOT BERNSTEIN, individually;
ELIOT BERNSTEIN as a beneficiary of the 2008 SIMON L. BERNSTEIN TRUST AGREEMENT, as amended and restated in the SIMON L. BERNSTEIN AMENDED AND RESTATED TRUST AGREEMENT dated July 25, 2012 and as Legal Guardian of JOSHUA BERNSTEIN, JACOB BERNSTEIN, and DANIEL BERNSTEIN,

Case No.: 502014CA014637XXXXSBAD

Plaintiffs,

v.

THEODORE STUART BERNSTEIN, individually;
THEODORE STUART BERNSTEIN, as Successor Trustee of the 2008 SIMON L. BERNSTEIN TRUST AGREEMENT, as amended and restated in the SIMON L. BERNSTEIN AMENDED AND RESTATED TRUST AGREEMENT dated July 25, 2012;
ALEXANDRA BERNSTEIN;
ERIC BERNSTEIN;
MICHAEL BERNSTEIN;
MOLLY SIMON;
JULIA IANTONI;
MAX FRIEDSTEIN;
CARLY FRIEDSTEIN;
JOHN AND JANE DOE 1-5000,

Defendants.
_____/

SUCCESSOR TRUSTEE'S MOTION TO DISMISS COMPLAINT TO REMOVE THEODORE STUART BERNSTEIN AS SUCCESSOR TRUSTEE, OR ALTERNATIVE MOTION TO STRIKE AND MOTION TO STAY

Defendant, Ted S. Bernstein, as Successor Trustee of the 2008 Simon L. Bernstein Trust Agreement (the "Trustee"), moves to dismiss the Complaint to Remove Theodore Stuart Bernstein

as Successor Trustee (the "Complaint") filed by Eliot Bernstein in numerous capacities ("Eliot"), and states:

1. First, the Complaint contains a misjoinder of causes of action, because Eliot has filed suit in numerous independent capacities. Under Rule 1.110(g), Fla. R. Civ.P., "[a] pleader may set up in the same action as many claims or causes of action or defenses ***in the same right as the pleader has,*** and claims for relief may be stated in the alternative if separate items make up the cause of action, or if 2 or more causes of action are joined." A complaint shall state all causes of action held by the plaintiff in one capacity, but in this case, Eliot improperly has included separate claims held by Eliot Bernstein in many different capacities, including individually and in a representative capacity. See Fla. R. Civ. P. 1.110(g); *General Dynamics Corp. v. Hewitt*, 225 So. 2d 561, 563 (Fla. 3d DCA 1969); *County of Sarasota v. Wall*, 403 So. 2d 500 (Fla. 2d DCA 1981) (must file a separate suit as to an action brought in a representative capacity); 1 Am.Jur.2d Actions § 94 (1994) ("One cannot in the same action sue in more than one distinct right or capacity." This is not merely a semantic difference in this case, because there are clear and distinct issues and conflicts between the claims attempted to be raised by Eliot individually as opposed to by his children.

2. Secondly, Eliot is not a beneficiary of the Trust – "for purposes of this Trust and the dispositions made hereunder . . . Eliot Bernstein . . . shall be deemed to have predeceased me." Eliot also is neither a beneficiary of Simon's Estate (everything is given to Simon's Trust); Shirley's Estate (everything given to Shirley's Trust); nor Shirley's Trust (Simon exercised his Power of Appointment to distribute equal shares to his grandchildren). Thus, for all intents and purposes, Eliot was disinherited entirely and also was not named in any fiduciary role in either estate or trust. Simply, he lacks individual standing. Pursuant to statute, only a "settlor, a cotrustee, or a beneficiary may

request the court to remove a trustee." Fla. Stat. § 736.0706(1). Eliot is neither of these, which ends the analysis.

3. Third, Eliot is not qualified to act for his children because he admits there is a conflict between his position and theirs, as he may challenge the 2012 Will and Trust of Simon under which monies are left for grandchildren, and try to uphold (1) an earlier revoked will and (2) an earlier form of trust that has been fully amended and restated. Eliot is not a suitable representative for his children's interests based upon his stated conflict, as more fully explained in Oppenheimer's Motion to Appoint Guardian Ad Litem dated September 19, 2014 in Case No. 502014CP002815XXXXSB (IY)(incorporated herein by reference), which case is separate and unrelated to these estate and trust matters, but involves some of the same players. Oppenheimer stated:

> • Courts are inclined to appoint a parent as a child's litigation representative ***unless "it appears that the minor's general representative has interests which may conflict with those of the person he is supposed to represent."*** *1 Leg. Rts. Child. (Legal Rights of Children) Rev. 2d § 12:3 (2d ed. 2013), citing Mistretta v. Mistretta, 566 So. 2d 836, 837 (Fla. 5th DCA 1990)(other internal citations omitted)*. In this case, Eliot Bernstein has confirmed, by the allegations of his Counter-Complaint that he has interests which conflict (or certainly which may conflict) with those of the Minors. For instance, in the Counter-Complaint:
>
> • Mr. Bernstein alleges that ***beneficiary designations were changed from him to his children based upon fraudulent documents and frauds on this Court***. See Counter-Complaint, ¶ 253.
>
> • Mr. Bernstein alleges that "approximately 1/3 of all assets [are] ***either going to Eliot or his children or a combination of both depending on how this Court rules regarding the validity of the Wills and Trusts that have been challenged*** and already found fraught with fraud, fraudulent notarizations, improper notarizations, forgeries and more." See Counter-Complaint, ¶ 186.

- Even though the Minors are clearly listed as the sole beneficiaries of the Grandchildren Trusts, Eliot Bernstein alleges that he himself is a beneficiary. Specifically, he alleges that "Simon and Shirley [Bernstein] set up [the Grandchildren Trusts and Bernstein Family Realty, LLC] while living, in order to fund all of their living expenses due to the fact that Eliot has had a bomb put in his car, death threats and is in the middle of a very intense RICO and ANTITRUST lawsuit where he and his family have been in grave danger for many years fighting corruption inside the very framework of the legal system." ***He alleges that the Grandchildren Trusts were "set up by Simon and Shirley [Bernstein] for the benefit of Eliot, Candice and their children."*** *See Counter-Complaint, ¶¶ 109-110*

4. Fourth, Eliot has not established a sufficient basis in law or fact to remove the Trustee as Successor Trustee of the Simon Trust. Such removal is governed by section 736.0706 Removal of trustee, which provides (the irrelevant/non-applicable parts are lined through):

> 736.0706 Removal of Trustee
>
> (1) ~~The settlor, a cotrustee, or~~ a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on the court's own initiative.
>
> (2) The court may remove a trustee if:
>
> (a) The trustee has committed a serious breach of trust;
>
> (b) ~~The lack of cooperation among cotrustees substantially impairs the administration of the trust~~;
>
> (c) Due to the unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (d) There has been a substantial change of circumstances ~~or removal is requested by all of the qualified beneficiaries~~, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Removal of a trustee must be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust, not a personality issue by a beneficiary nor any potential mismanagement of the trust. *Parr v. Cushing,* 507 So. 2d 1227, 1228 (Fla. 5th DCA 1987)(reversing removal due to abuse of discretion); *In Re Estate of Murphy*, 336 So. 2d 697 (Fla. 4th DCA 1976)(minimal mismanagement by fiduciary insufficient to warrant removal).

Hostility and/or tension between a trustee and potential beneficiaries of the trust does not by itself constitute a ground for such removal. *Parr,* 507 So. 2d at 1228. In *Parr*, the court held:.

> Here, there was no showing that appellants had not administered the trust in anything but an efficient manner. To warrant their removal, a showing of *actual* not *potential* mismanagement must be made. A proper balance is thereby achieved between a settlor's right to appoint the person(s) of his choice as trustee(s), with the court's interest of ensuring its proper and efficient administration. Conditioning appellants' continuation as trustees upon the approval of contingent beneficiaries demonstrates that the *only* basis for removal was friction among the contingent beneficiaries. Removal for this reason was an abuse of discretion. Accordingly, the final declaratory judgment is REVERSED.

Id.

The Fourth DCA in *In Re Estate of Murphy*, 336 So. 2d 697 (Fla. 4th DCA 1976), addressed similar issues of a beneficiary being unhappy with the fiduciary. The court rejected this, stating:

> With regard to appellant's disenchantment with Mr. Pace as a co-executor, at first blush it might seem that if the sole beneficiary wants a change in personal representatives, no one may complain. But that conclusion does not necessarily follow. It must be remembered we are dealing here with an executor appointed by the decedent in his will, not an administrator appointed by the court. As the court pointed out in *In re Estate of Beichner,* 432 Pa. 150, 247 A.2d 779, 781 (1968):
>
> > "'A testator has, as a property right, the privilege and power to place the management of his estate in a selected person as a condition of his bounty.'"

> ***The removal of a personal representative chosen by the deceased is a drastic action*** and should ***only be resorted to when the administration of the estate is endangered*** . . . . The mere fact that a certain hostility has arisen between a beneficiary and the executor absent some showing of wrongdoing on the part of the executor or other factors which will prejudice the administration does not warrant such drastic action as removal. . . . . Our close examination of the testimony in this case leads us to the conclusion that the trial court could well find that there was no showing that the administration would be prejudiced or endangered by Mr. Pace's continuing to act pursuant to his nomination by the decedent as a coexecutor. We must also keep in mind that the administration of this estate remains under the continuing jurisdiction of the court, and should reason arise for removal in the future the court may entertain another petition for removal.

Id. at 698-99.

"Potential conflict in and of itself is not necessarily improper. A trustee has wide discretion in the exercise of his power and a court will not interfere unless he abuses his discretion." *State of Del. Ex rel. Gebelein v. Belin,* 456 So. 2d 1237, 1241 (Fla. 1st DCA 1984).

Here, the major complaint against Ted S. Bernstein, as Successor PR of Shirley's Estate, and as Successor Trustee of the Shirley Trust and the Simon Trust, is that lawyers from the decedent's law firm engaged in misconduct and were forced to withdraw. These were the lawyers chosen by Simon to administer his Estate and his Trust; the misconduct occurred before Ted S. Bernstein was appointed by this Court to a role as Successor PR of Shirley's Estate; before Ted S. Bernstein was appointed as Successor Trustee of Simon's Trust; and to the extent Ted S. Bernstein was serving as Trustee of Shirley's Trust, he was unaware of and did not participate in such conduct, and has taken immediate steps to remedy the problem upon learning of it.

There are not sufficient facts alleged in this Complaint to warrant the removal of the Trustee; therefore, the Complaint should be dismissed.

5. Fifth, Eliot improperly names the two minors, J.I. and C.F., in both the case style and body of the Complaint, rather than name and serve the parents and natural guardians of the minor. As a result, Eliot has failed to join indispensable parties.

6. Sixth, Eliot names Ted S. Bernstein both "individually" and as Successor Trustee in the case style. Although no relief apparently is sought against Ted "individually," it is improper to name him in his individual capacity. Such a filing is a nullity as it violates the Court's order on joining additional parties, and service has never been made on Ted S. Bernstein individually. As such, to the extent it seeks to state a claim against Ted S. Bernstein, the Complaint should be dismissed.

7. Finally, the Trustee joins in and adopts any and all other grounds for dismissal raised by Molly Simon, Alexandra Bernstein, Eric Bernstein and Michael Bernstein in their Motion to Dismiss filed on December 29, 2014.

MOTION TO STRIKE

8. The Trustee moves to strike paragraph 89 on the grounds that it is irrelevant and impertinent material. The Court did not reject Ted Bernstein from any position in this case; the Court merely chose to appoint a neutral Personal Representative to serve under the terms of the Will of Simon Bernstein. The Court has never made any finding rejecting Ted or determining that he is not capable of serving in his fiduciary capacity. Therefore, paragraph 89 should be stricken.

9. The Trustee also moves to strike all references in the Complaint to alleged wrongdoing or misconduct by Robert Spallina, Esq., or any other lawyers prior to the time of the Trustee's appointment. These paragraphs are irrelevant and should be stricken.

10. Paragraphs 28 through 31 address an alleged "failure to account in the Shirley Estate and Shirley Trust." These allegations are irrelevant with respect to whether this Trustee should be removed as Trustee of Simon's Trust. Eliot also lacks standings to asserts such issues or demand accountings in the Shirley Estate and Trust matters. Thus, these paragraphs should be stricken.

11. The reference to John and Jane Doe 1 – 5000 in the case style and paragraph 12 should be stricken.

WHEREFORE, for the foregoing reasons, the Trustee respectfully requests this Court dismiss the Complaint; or alternatively, strike certain allegations; award Trustee its costs and attorneys' fees, and further order that such be paid by or from any eventual distribution to any of Plaintiffs; and grant such other relief as is just.

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; ■ Email Electronic Transmission; ☐ FedEx; ☐ Hand Delivery this 29th day of December, 2014.

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