

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

IN RE: ESTATE OF

Case Number: 502012CP004391XXXXSB

SIMON L. BERNSTEIN

/

**PETITION FOR CONSTRUCTION OF TESTAMENTARY TRUST,
FOR REMOVAL OF TRUSTEE AND FOR TRUST ACCOUNTING**

Petitioner, ELIOT BERNSTEIN, individually and on behalf of his minor children ("Petitioner"), who are all alleged qualified beneficiaries of the testamentary trust ("Settlor's Trust")¹ that is the alleged residuary beneficiary of the Estate of Simon L. Bernstein (the "Estate"), hereby petitions this Court for the construction of Settlor's Trust as permitted by Section 736.0201(5) of the Florida Statutes, for the removal of TED S. BERNSTEIN ("Ted"), as purported trustee of the Trust, and for a trust accounting with respect to Settlor's Trust, and in support thereof, Petitioner alleges as follows:

1. SIMON L. BERNSTEIN ("Settlor") is the decedent of this Estate.

2. The alleged Will of Settlor dated July 25, 2012 ("Settlor's Will")² was admitted to probate in this proceeding³.

3. The alleged 2012 Settlor's Will has been challenged by Petitioner, as well as, the alleged 2012 Amended and Restated Trust of Settlor. Petitioner has challenged these documents.

¹ Settlor's Trust is known as the Simon L. Bernstein Amended and Restated Trust Agreement dated July 25, 2012. A copy of Settlor's Trust is attached hereto as Exhibit "A" and is hereby incorporated by reference herein.

² A copy of Settlor's alleged Will is attached hereto as Exhibit "B" and is hereby incorporated by reference herein.

³ Petitioner in May of 2013 Contested both the 2012 Settlor's Will and a 2012 Amended and Restated Trust of Settlor in Petitions to this Court that remain unheard. Petitioner and other beneficiaries have never been given the 2008 Will of Settlor and the 2008 Trust of Settlor as required by Florida Probate Rules and Statutes by the former Personal Representatives despite repeated demands by Petitioner and Petitioner's former counsel.

along with other documents done in 2012 by Settlor and claims they are part of a Fraud to change beneficiaries of Settlor's Estate and his wife Shirley Bernstein's ("Shirley") Estate from three of five of Settlor's children to Settlor's ten grandchildren. Evidence of Fraud and Forgery have already been discovered in the Estates of Settlor and Shirley.

2.4. That Petitioner will however argue forward in the alternative assuming that the documents are valid, while granting no validity to them until the court can determine the ultimate beneficiaries after forensic document analysis can be completed.

3.5. By Article III of Settlor's Will, upon Settlor's death, Settlor directed that his residuary estate be distributed to the then serving trustee of Settlor's Trust. Thus, Settlor's Trust is a testamentary trust that is the residuary beneficiary of the Estate.

4.6. Upon Settlor's death, Settlor's Florida counsel, DONALD R. TESCHER ("Tescher") and ROBERT L. SPALLINA ("Spallina") of the law firm of Tescher & Spallina, P.A., accepted their roles as the designated successor co-trustees of Settlor's Trust.

7. Tescher and Spallina were also appointed as and served as the initial co-personal representatives of the Estate.

5.8. Tescher & Spallina, P.A. and Spallina also acted as their own counsel as co-personal representatives and co-trustees.

6.9. In the wake of certain unethical, egregious and potentially criminal conduct perpetrated by Tescher and Spallina (some of which conduct is explained more fully below), Tescher and Spallina resigned as co-trustees of Settlor's Trust, and as co-personal representatives of Settlor's estate and as counsel in all capacities.

7.10. Settlor's Trust does not designate a successor trustee in the event that Tescher and Spallina cease to serve, but it does provide under Subparagraph C.3 of Article IV that the last serving trustee may appoint his or her successor.

8.11. Based upon information and belief, upon their resignation, Tescher and/or Spallina purported to appoint Ted as successor trustee of Settlor's Trust. Thus, Petitioner believes that Ted is currently serving as the purported trustee of Settlor's Trust, although no formal notice has been provided to the beneficiaries as proscribed by Probate Rules and Statutes.

9.12. Subparagraph E.1 of Article III of Settlor's Trust provides, in relevant part, as follows:

"Notwithstanding the foregoing, **for all purposes of [Settlor's] Trust** and the dispositions made hereunder, [Settlor's] children, TED S. BERNSTEIN, PAMELA B. SIMON, ELIOT BERNSTEIN, JILL IANTONI and LISA S. FRIEDSTEIN, **shall be deemed to have predeceased** [Settlor] . . ."

10.13. It is a well established rule of will/trust construction that the intent of the testator/settlor must govern and be given full force and effect to the extent possible when it does not violate law or public policy. See, e.g., *First Union National Bank of Florida, N.A., as trustee v. Frumkin, et. al.*, 659 So. 2d 463 (Fla. 3d DCA 1995).

11.14. Settlor's alleged intent in Subparagraph E.1 of Settlor's Trust is clear and unambiguous: Settlor allegedly intended that his children, including Ted, **shall** be treated as if they predeceased Settlor for **all purposes** of Settlor's Trust. As Settlor clearly intended for Ted to be treated as having predeceased him for all purposes of Settlor's Trust, Ted cannot serve as successor trustee of Settlor's Trust. Thus, the purported appointment of Ted as successor trustee is void and Ted must be removed as purported trustee.

12.15. In addition to Ted being prohibited under the trust terms from serving as successor trustee of Settlor's Trust, Ted should be removed as purported trustee of Settlor's Trust for the following reasons:

(a) Ted has failed to keep the qualified beneficiaries of Settlor's Trust reasonably informed of Settlor's Trust and its administration despite reasonable requests for information from Petitioner, in violation of Section 736.0813 of the Florida Statutes.

(b) As explained more fully below, Ted has failed to administer Settlor's Trust in good faith and solely in the interests of the beneficiaries of Settlor's Trust by depriving certain beneficiaries of Settlor's Trust of certain assets to which they are entitled and by allowing such assets to instead be distributed to trusts for Ted's children created under Settlor's Trust, which conduct violates Sections 736.0801 and 736.0802 of the Florida Statutes:

(i) Ted is currently serving as trustee of the testamentary trust of his mother, SHIRLEY BERNSTEIN ("Shirley"). Shirley's testamentary trust is known as the Shirley Bernstein Trust Agreement dated May 20, 2008 ("Shirley's Trust"). A copy of Shirley's Trust is attached hereto as Exhibit "C" and is hereby incorporated by reference herein.

(ii) Two separate trusts were created under Shirley's Trust upon her death: the Family Trust and the Marital Trust. By Subparagraph E.1 of Article II of Shirley's Trust, Settlor was granted a limited testamentary power of appointment over the remaining assets of the Family Trust and Marital Trust at Settlor's death. Said power of appointment was exercisable in favor of Shirley's lineal descendants and their spouses; provided, however, that by Subparagraph E.1 of Article III of Shirley's Trust, Shirley specifically provided that Ted and his lineal descendants and PAMELA B. SIMON ("Pam", who is Shirley's daughter) and her lineal

descendants shall be treated as if they predeceased the survivor of Shirley and Settlor (i.e., Settlor as he survived Shirley).

(iii) Thus, by the express terms of Shirley's Trust, Ted, the lineal descendants of Ted, Pam and the lineal descendants of Pam are considered to have predeceased Settlor. Therefore, no assets of Shirley's Trust are permitted to be distributed to Ted, Pam or their respective lineal descendants.

(iv) On or about November 18, 2008, Shirley executed an alleged First Amendment to Shirley's Trust, by which she deleted a specific gift to MATTHEW LOGAN under Subparagraph B of Article II of Shirley's Trust.

(v) Spallina admits that, after Shirley's death, he allegedly altered the First Amendment to Shirley's Trust dated November 18, 2008 before sending it to Petitioner's prior counsel. Specifically, Spallina admits that he inserted paragraph 2 of the First Amendment such that only Ted and Pam, and not their respective children, would be treated as having predeceased the survivor of Settlor and Shirley. *See* page 5 of that certain Offense Report dated January 23, 2014 by Detective Ryan W. Miller, a copy of which is attached hereto as Exhibit "D" and is hereby incorporated by reference herein ("Spallina's Police Report"). A copy of the purported First Amendment to Shirley's Trust that was provided to Petitioner's prior counsel is attached hereto as Exhibit "E" and is hereby incorporated by reference herein (the "Purported First Amendment to Shirley's Trust").

(vi) By Article II of Settlor's alleged 2012 Will, Settlor exercised the power of appointment granted to him under Shirley's Trust in favor of his grandchildren who survived him. Specifically, Settlor's alleged Will directs all remaining assets of the Marital Trust and the Family Trust created under Shirley's Trust to be divided into equal shares for Settlor's

grandchildren who survived him, and that each grandchild's share be distributed to the separate trust created for him or her under Settlor's Trust.

(vii) Notwithstanding that the true alleged version of Shirley's Trust (i.e., Shirley's Trust as amended by the First Amendment but without the alteration by Spallina) precludes any distributions to Ted's lineal descendants and Pam's lineal descendants, Ted, as trustee of Shirley's Trust, distributed an equal share of the remaining assets of Shirley's Trust to the trusts created under Settlor's Trust for Ted's lineal descendants and Pam's lineal descendants.

(viii) Ted alleges that Spallina instructed him to distribute a portion of the remaining assets of Shirley's Trust to the trusts for Ted's children and Pam's children created under Settlor's Trust. Ted further alleges that Tescher and Spallina advised him on how to set up such trust accounts to receive such assets. *See* pages 2-3 of that certain Offense Report dated January 29, 2014 by Detective Ryan W. Miller, a copy of which is attached hereto as Exhibit "F" and is hereby incorporated by reference herein ("Ted's Police Report").

(ix) Ted further alleges that he "did not read all of Shirley's Trust documents and that Spallina and Tescher had both told him several times how Shirley's Trust was to be distributed." *See* page 2 of Ted's Police Report.

(x) Conversely, Spallina alleges that "[Ted] was told not to make [the] distributions [from Shirley's Trust to the trusts for Settlor's grandchildren created under Settlor's Trust]." *See* page 6 of Spallina's Police Report. Indeed, Spallina admits that "all [Settlor] can do with Shirley's Trust is give it to Lisa, Jill, and [Petitioner's] children." *See* page 3 of Spallina's Police Report.

(xi) Ted colluded with Tescher and Spallina to allow a portion of the assets of Shirley's Trust to be distributed to the trusts created for his children under Settlor's

Trust, in violation of his duty to administer Settlor's Trust in good faith and solely in the interests of the beneficiaries of Settlor's Trust. Said conduct by Ted as purported trustee of Settlor's Trust has deprived Petitioner's children and other beneficiaries of Settlor's Trust of certain assets of Shirley's Trust to which they are entitled.

(c) Tescher and Spallina should be prohibited from appointing the successor trustee of Settlor's Trust in light of their conduct more specifically described above in fabricating the Purported First Amendment to Shirley's Trust, for closing the Estate of Shirley with a deceased Personal Representative (Settlor) and for their part in Fraudulent Notarizations and Forgery of six signatures, including a forged document for Settlor Post Mortem and therefore Ted should be removed as purported trustee since he is believed to have been appointed by Tescher and Spallina. Further, Ted has a strong business and personal relationship with both Tescher and Spallina and was in fact the person who brought them to his father to attempt to have him make changes to the Estates and Trusts of Settlor and Shirley.

(d) Ted's actions more specifically described above demonstrate multiple conflicts of interest that warrant his removal as purported trustee of Settlor's Trust.

(e) Petitioner is prepared to offer additional grounds for the removal of Ted as purported trustee of Settlor's Trust upon the Court's request. However, Petitioner believes that a proper construction of Settlor's Trust and the grounds set forth above are sufficient to warrant Ted's removal.

13.16. Petitioner requests that Tescher and Spallina, as the initial successor trustees of Settlor's Trust, and Ted, as the current purported successor trustee of Settlor's Trust, serve a trust accounting with respect to Settlor's Trust on all alleged qualified beneficiaries of Settlor's Trust that covers the periods of their respective service.

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

- (i) removing Ted as purported trustee of Settlor's Trust based on Settlor's clear intent as expressed in Settlor's Trust and/or based on the serious breaches of trust described above committed by Ted as purported trustee;
- (ii) requiring Tescher, Spallina and Ted to provide a trust accounting to each qualified beneficiary of the Trust that covers their respective periods of service; and
- (iii) granting such other and further relief as the Court deems just and proper.

Signed on _____, 2014.

Respectfully submitted,

By: ELIOT BERNSTEIN, on behalf of his minor children, who are qualified beneficiaries of Settlor's Trust, Petitioner (*pro se*)
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition was served via electronic mail on April _____, 2014 to: (i) Alan Rose, Esq., counsel for Ted S. Bernstein, arose@mrachek-law.com; (ii) Benjamin Brown, Esq., curator of the Estate of Simon L. Bernstein, bbrown@matbrolaw.com; (iii) Peter Feaman, Esq., counsel for William E. Stansbury, as a creditor of the Estate, pfeaman@feamanlaw.com; and (iv) _____, Esq., counsel for _____, beneficiaries of the Estate of Simon Bernstein.

Eliot Bernstein, Pro Se Petitioner

Exhibit "A"

Settlor's Trust

Exhibit "B"

Settlor's Will

Exhibit "C"

Shirley's Trust

Exhibit "D"

Spallina's Police Report

Exhibit "E"

Purported First Amendment to Shirley's Trust

Exhibit "F"

Ted's Police Report