

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 CD's 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.

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EXHIBIT E

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.

731.201. General definitions, FL ST § 731.201

(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.

731.201. General definitions, FL ST § 731.201

(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.

731.201. General definitions, FL ST § 731.201

(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

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EXHIBIT 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

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EXHIBIT G

West's Florida Statutes Annotated
Title XLII. Estates and Trusts (Chapters 731-740) (Refs & Annos)
Title 42-Appendix I Probate Rules (Refs & Annos)
Part II. Probate

Fla.Prob.R. Rule 5.440

Rule 5.440. Proceedings for Removal of Personal Representative

Currentness

(a) Commencement of Proceeding. The court on its own motion may remove, or any interested person by petition may commence a proceeding to remove, a personal representative. A petition for removal shall state the facts constituting the grounds upon which removal is sought, and shall be filed in the court having jurisdiction over the administration of the estate.

(b) Accounting. A removed personal representative shall file an accounting within 30 days after removal.

(c) Delivery of Records and Property. A removed personal representative shall, immediately after removal or within such time prescribed by court order, deliver to the remaining personal representative or to the successor fiduciary all of the records of the estate and all of the property of the estate.

(d) Failure to File Accounting or Deliver Records and Property. If a removed personal representative fails to file an accounting or fails to deliver all property of the estate and all estate records under the control of the removed personal representative to the remaining personal representative or to the successor fiduciary within the time prescribed by this rule or by court order, the removed personal representative shall be subject to contempt proceedings.

Credits

Amended Sept. 4, 1980, effective Jan. 1, 1981 (387 So.2d 949); Sept. 13, 1984, effective Jan. 1, 1985 (458 So.2d 1079); Sept. 29, 1988, effective Jan. 1, 1989 (537 So.2d 500); Sept. 24, 1992, effective Jan. 1, 1993 (607 So.2d 1306); May 2, 2002 (824 So.2d 849); July 12, 2007 (964 So.2d 140); Dec. 9, 2010 (51 So.3d 1146).

Editors' Notes

COMMITTEE NOTES

The revision of subdivision (a) of this rule by the addition of its final phrase represents a rule implementation of the procedure found in section 733.505, Florida Statutes. It is not intended to change the effect of the statute from which it was derived but has been reformatted to conform with the structure of these rules. It is not intended to create a new procedure or modify an existing procedure.

Rule History

1980 Revision: Subdivision (a) amended to require formal notice to interested persons and to delete requirement that court give directions as to mode of notice. Surety authorized to petition for removal.

Rule 5.440. Proceedings for Removal of Personal..., FL ST PROB Rule 5.440

1984 Revision: Editorial changes. Provisions in prior rule for contempt have been deleted since the court has the inherent power to punish for contempt. Committee notes revised.

1988 Revision: Last phrase of (a) added to implement the procedure found in section 733.505, Florida Statutes. Subdivision (b) amended to parallel interim accounting rules. Deletes ability to extend time to file and adds reference to court power to punish for contempt. Committee notes expanded. Editorial changes. Citation form changes in committee notes.

1992 Revision: Editorial changes. Committee notes revised. Citation form changes in committee notes.

2002 Revision: Entire rule amended. Contents of accountings by removed fiduciaries are now governed by rule 5.346. Editorial changes in (a), (c), and (d). Committee notes revised.

2003 Revision: Committee notes revised.

2007 Revision: Committee notes revised.

2010 Revision: Editorial change in title to clarify scope of rule.

2012 Revision: Committee notes revised.

Statutory References

§ 731.201(23), Fla. Stat. General definitions.

§ 733.504, Fla. Stat. Removal of personal representative; causes of removal.

§ 733.505, Fla. Stat. Jurisdiction in removal proceedings.

§ 733.506, Fla. Stat. Proceedings for removal.

§ 733.5061, Fla. Stat. Appointment of successor upon removal.

§ 733.508, Fla. Stat. Accounting and discharge of removed personal representatives upon removal.

§ 733.509, Fla. Stat. Surrender of assets upon removal.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.

Fla. Prob. R. 5.025 Adversary proceedings.

Fla. Prob. R. 5.040 Notice.

Fla. Prob. R. 5.041 Service of pleadings and documents.

Fla. Prob. R. 5.042 Time.

Fla. Prob. R. 5.150 Order requiring accounting.

Fla. Prob. R. 5.310 Disqualification of personal representative; notification.

Fla. Prob. R. 5.345 Accountings other than personal representatives' final accountings.

Fla. Prob. R. 5.346 Fiduciary accounting.

Fla. R. Jud. Admin. 2.516 Service of pleadings and documents.

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. Title 42, App. 1, Prob. Rule **5.440**, FL ST PROB Rule **5.440**

Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 06/01/16. All other State Court Rules are current with amendments received through 06/01/16.

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IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY

TED BERNSTEIN, as Trustee
of the Shirley Bernstein Trust Agreement
dated May 20, 2008, as amended,
Plaintiff,

PROBATE DIVISION
CASE NO.: 502014CP003698XXXXNB
DIVISION: IH

v.

ALEXANDRA BERNSTEIN; ERIC
BERNSTEIN; MICHAEL BERNSTEIN;
MOLLY BERNSTEIN; PAMELA B. SIMON,
individually and as Trustee f/b/o Molly Simon
under the Simon L. Bernstein Trust Dtd 9/13/12;
ELIOT BERNSTEIN, individually, as Trustee
f/b/o D.B., Ja.B. and Jo. B. under the
Simon L. Bernstein Trust dtd 9/13/12,
and on behalf of his minor children D.B.,
Ja. B. and Jo. B.; JILL IANTONI, individually,
as Trustee f/b/o J.I. under the Simon L. Bernstein
Trust Dtd 9/13/12, and on behalf of her minor
child, J.I.; MAX FRIEDSTEIN; LISA FRIEDSTEIN,
individually, as Trustee f/b/o Max Friedstein and C.F.,
under the Simon L. Bernstein Trust Dtd 9/13/12, and
on behalf of her minor child, C.F.,
Defendants.

**MOTION FOR PROTECTIVE ORDER AS TO DEPOSITION OF
WILLIAM STANSBURY AND APPEARANCE AT EVIDENTIARY HEARING/TRIAL**

COMES NOW William Stansbury, by and through his undersigned counsel, and moves this Court for the entry of a Protective Order with regard to two subpoenas served upon him on March 10, 2016 demanding him to appear for the taking of his deposition and to appear at a hearing scheduled for April 8, 2016, and states as follows:

1. On March 10, 2016, non-party William Stansbury was served (through counsel) with two subpoenas:

- a. Subpoena Duces Tecum to William Stansbury for appearance at deposition (a copy of which is attached hereto as **Exhibit "A"**); and
- b. Subpoena Duces Tecum to appear at evidentiary hearing/trial (a copy of which is attached hereto as **Exhibit "B"**).

--- **Statement of the Case** ---

2. This is an action brought by TED BERNSTEIN as Successor Trustee of the Shirley Bernstein Trust against all of the beneficiaries of the Shirley Bernstein Trust, plus Eliot Bernstein.

3. This action is a two-count complaint. (A copy of the Complaint is attached hereto as **Exhibit "C."**) The Motion filed by the Trustee on January 28, 2016, which is now set to be heard before the Court on April 8, 2016 at 9:45 a.m., involves the sale of the former homestead of Shirley and Simon Bernstein (Lion's Head property) and requests relief as to Eliot Bernstein concerning holding the proceeds of the sale of the homestead and further injunctive relief against Eliot Bernstein. A copy of the Motion is attached hereto as **Exhibit "D."**

4. William Stansbury is not a party to this action. The trial of this action as to Count II took place on December 15, 2015, and Stansbury was not involved other than as an observer. Stansbury has had no involvement in the administration of the Shirley Bernstein Trust. The Shirley Bernstein Trust is not a defendant in the case pending by William Stansbury against the Simon Bernstein Estate.

--- **Retaliatory Subpoenas** ---

5. This matter has devolved into retaliatory litigation tactics by Ted Bernstein as he seeks to involve William Stansbury in this action solely in an effort to cause William Stansbury

to incur fees and otherwise become involved in this case because William Stansbury has taken action in collateral matters adverse to that of Ted Bernstein.

6. Ted Bernstein is retaliating against William Stansbury as a result of Mr. Stansbury's issues which are adverse to Ted Bernstein on the following matters:

- a. Ted Bernstein is an individual Plaintiff in an action pending in the United States District Court for the Northern District of Illinois (the "Chicago litigation") in which he is claiming that he and the other adult children of Simon Bernstein are beneficiaries of a life insurance policy on the life of Simon Bernstein in the approximate amount of \$1,700,000.00. Mr. Stansbury believes that these insurance proceeds actually belong to the Estate of Simon Bernstein against which is pending his approximate \$2.5 million dollar claim for unpaid compensation. He therefore attempted to intervene in that action, which was vigorously opposed by Ted Bernstein. The Court denied the intervention but thereafter, after the original Personal Representatives of the Estate of Simon Bernstein (Tescher and Spallina) resigned as Personal Representatives, the Curator, Ben Brown, Esq. and subsequently the Successor Personal Representative, Brian O'Connell, Esq. became convinced that the Estate did have a valid interest in and to the insurance proceeds at issue in the Chicago litigation, and the Estate has now intervened in that case. Mr. Stansbury is funding the fees incurred by the Estate in that action. The intervention of the Estate now threatens Ted Bernstein because the life insurance proceeds of approximately \$1.7 million could, now that the Estate has intervened, not go to Ted Bernstein and the adult children, but rather to

the Simon Bernstein Trust, which is the sole monetary beneficiary of the Simon Bernstein Estate. The Estate's attorneys in Chicago feel so strongly about the merits of the Estate's position that they are willing to take this case on a contingency fee basis.

- b. Because the Simon Bernstein Trust could be the recipient of the life insurance proceeds coming from Illinois, it clearly puts Ted Bernstein in a conflict of interest position as, on the one hand, he is the Plaintiff in the Chicago litigation where he is trying to keep the funds away from the Simon Bernstein Trust while, on the other hand, he is holding the position of Successor Trustee of the Simon Bernstein Trust, which is the sole beneficiary of the Simon Bernstein Estate where the life insurance proceeds would be paid should he not prevail as Plaintiff. Therefore, he has a clear and direct conflict of interest. Mr. Stansbury filed a Petition to Remove Ted Bernstein as the Successor Trustee of the Simon Bernstein Trust based upon this conflict, as well as the fact that Ted Bernstein is facially not qualified to hold the position of Successor Trustee according to the plain language of the Trust. Simon Bernstein specifically disinherited Ted Bernstein in his Trust, writing that, for all purposes of the Trust, Ted Bernstein was considered to have pre-deceased him.
- c. Ted Bernstein has additional reasons to want to harass William Stansbury. Mr. Stansbury has also filed his Amended Petition to account for missing property (furniture and fixtures) from the oceanfront condominium owned by the Shirley Bernstein Trust, but which personal property inside was the property

of the Simon Bernstein Estate, and also to account for missing jewelry of the Simon Bernstein Estate. By Mr. Stansbury's Petition, Ted Bernstein is placed squarely in a position to account for the missing property. This also would give Ted Bernstein incentive to harass Mr. Stansbury.

- d. Ted Bernstein's attorney admitted to this Court at the status conference held on March 7, 2016 that the furniture and fixtures contained within the oceanfront condominium in Boca Raton belonged to the Simon Bernstein Estate but was sold along with the condo. He admitted that the Shirley Bernstein Trust, over which Ted Bernstein is the Successor Trustee, needed to reimburse the Estate of Simon Bernstein for the value of that furniture which he had no authority to sell. The sale of that oceanfront condominium took place two years ago and yet no reimbursement has been forthcoming. Mr. Stansbury, among others, brought this to the attention of the Court, further buttressing his position that the Subpoenas issues in this matter are only for harassment purposes.
- e. The proceeds of the sale of the oceanfront condominium, which took place two years ago, based on information and belief, were distributed to 7 of the 10 grandchildren of Simon and Shirley Bernstein. However, by the terms of the Shirley Bernstein Trust, Ted Bernstein's children were excluded as beneficiaries but received a share of the proceeds nonetheless. Mr. Stansbury has made the interested parties to this litigation aware of that as well.

--- Stansbury's Conduct is Not Relevant to the Issues Before the Court to be Heard on
April 8, 2016 ---

7. Ted Bernstein has seized on one e-mail written by Kevin Hall that mentioned the name of William Stansbury to justify the issuance of the Subpoenas. Mr. Stansbury is clearly not involved as a witness in the matters before the Court on April 8, 2016. He is not a party and there is no justifiable reason to involve Mr. Stansbury other than the desire of Ted Bernstein to harass Mr. Stansbury.

8. The only connection Mr. Stansbury has to this litigation is as set forth in the e-mail from Kevin Hall to Alan Rose, wherein Mr. Stansbury's name is mentioned. A copy of the e-mail is attached hereto as **Exhibit "E."** There is no evidence that Mr. Stansbury has been or is involved in any way with the sale of the Lion's Head property which is the subject of the Motion for which he was subpoenaed, or any involvement after the sale concerning the Lion's Head property.

9. Further, the deposition date of March 29, 2016 was not cleared with counsel for Mr. Stansbury. Counsel for Mr. Stansbury is not available on that day. Finally, the location of the deposition is set for the office of counsel for Ted Bernstein in West Palm Beach. Mr. Stansbury resides in Boynton Beach and his deposition could easily be accomplished at the office of his attorney also located in Boynton Beach.

WHEREFORE, for all the foregoing reasons, William Stansbury requests this Honorable Court to enter a Protective Order protecting him from attending the deposition on March 29, 2016, and quashing the Subpoena on him for the hearing set for April 8, 2016, which does not involve him in any way.



Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served in the Florida Courts E-Filing Portal to all parties on the service list below on this 15th day of March, 2016:

Eliot Bernstein, individually and Eliot and Candice Bernstein, as Parents and Natural Guardians of D.B., Ja.B. and Jo.B., Minors
2753 Northwest 34th Street
Boca Raton, Florida 33434
Email: iviewit@iviewit.tv

Alan Rose, Esquire
Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A.
505 South Flagler Drive, Suite 600
West Palm Beach, Florida 33401
Email: arose@mrachek-law.com

John P. Morrissey, Esq.
330 Clematis Street, Suite 213
West Palm Beach, Florida 33401
Email: john@jmorrisseylaw.com
Counsel for Molly Simon, Alexandra Bernstein, Eric Bernstein, Michael Bernstein


Pamela Beth Simon
303 East Wacker Drive, Suite 2725
Chicago, Illinois 60601
Email: psimon@stpcorp.com

Lisa Friedstein, individually and as trustee for her children, and as natural guardian for M.F. and C.F., Minors; and Max Friedstein
Email: lisa.friedstein@gmail.com

Brian M. O'Connell, Esquire
Joielle A. Foglietta, Esq.
Ciklin, Lubitz, Martens & O'Connell
515 North Flagler Drive, 20th Floor
West Palm Beach, Florida 33401
Email: boconnell@ciklinlubitz.com
jfoglietta@ciklinlubitz.com
service@ciklinlubitz.com
slobdell@ciklinlubitz.com

Jill Iantoni, individually and as trustee for her children, and as natural guardian for J.I. a minor
Email: jilliantoni@gmail.com

PETER M. FEAMAN, P.A.
3695 West Boynton Beach Blvd., #9
Boynton Beach, FL 33436
Telephone: (561) 734-5552
Facsimile: (561) 734-5554
Service: service@feamanlaw.com
mkoskey@feamanlaw.com

By: 
Peter M. Feaman
Florida Bar No. 0260347

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

TED BERNSTEIN, as Trustee of the Shirley
Bernstein Trust Agreement dated May 20, 2008,
as amended,

Probate Division
Case No.: 502014CP003698XXXXNBIJ

Plaintiff,

v.

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN;
MICHAEL BERNSTEIN; MOLLY SIMON; PAMELA
B. SIMON, Individually and as Trustee f/b/o Molly
Simon under the Simon L. Bernstein Trust Dtd 9/13/12;
ELIOT BERNSTEIN, individually, as Trustee f/b/o D.B.,
Ja. B. and Jo. B. under the Simon L. Bernstein Trust Dtd
9/13/12, and on behalf of his minor children D.B., Ja. B.
and Jo. B.; JILL IANTONI, Individually, as Trustee f/b/o
J.I. under the Simon L. Bernstein Trust Dtd 9/13/12, and
on behalf of her Minor child J.I.; MAX FRIEDSTEIN;
LISA FRIEDSTEIN, Individually, as Trustee f/b/o Max
Friedstein and C.F., under the Simon L. Bernstein Trust
Dtd 9/13/12, and on behalf of her minor child, C.F.,

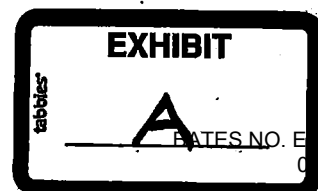
Defendants.

**SUBPOENA DUCES TECUM TO WILLIAM STANSBURY FOR
APPEARANCE AT DEPOSITION**

THE STATE OF FLORIDA

TO: William Stansbury
C/O Peter Feaman, Esq.
PETER M. FEAMAN, P.A.
3695 West Boynton Beach Boulevard, Suite 9
Boynton Beach, FL 33436

YOU ARE COMMANDED to appear before a person authorized by law to take depositions
at the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A., 505 S. Flagler



Drive, Suite 600, West Palm Beach, FL 33401 (Telephone: (561) 655-2250) on March 29, 2016 at 10:00 a.m. for the taking of your deposition in this action, and to have with you at that time and place the documents identified on the attached Exhibit "A."

If you fail to appear, you may be in contempt of court.

You are subpoenaed to appear by the following attorneys, and unless excused from this subpoena by these attorneys or the Court, you shall respond to this subpoena as directed.

Dated on March 9, 2016.



ALAN B. ROSE, ESQ.
For the Court

MRACHEK, FITZGERALD, ROSE,
KONOPKA, THOMAS & WEISS, P.A.
505 S. Flagler Drive, Suite 600
West Palm Beach, FL 33401
Phone: 561-655-2250
Fax: 561-655-5537
Attorneys for Plaintiff, Ted Bernstein
Alan B. Rose
Florida Bar Number: 961825

EXHIBIT A

YOU ARE REQUESTED to bring the following documents:

Definitions

"Documents" shall mean and include all writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, specifically including all letters, emails, text messages, phone messages, notes, deed, title reports, or written communication of any kind—stored in any medium whether in paper or electronic format.

"Property" shall mean 7020 Lions Head Lane, Boca Raton, Florida 33496.

"Eliot" shall mean Eliot Ivan Bernstein, including any agents, employees or others acting on his behalf.

"Stansbury" shall mean William Elwood "Bill" Stansbury, together with his wife Eileen B. Stansbury and any and all agents, employees or others acting on his behalf, including his attorney, Peter M. Feaman, Esquire, or anyone employed by or affiliated with the Law Offices of Peter M. Feaman. (This request does not seek any documents sent solely between William Stansbury and his counsel, and includes only documents which were sent to or received from a third-party outside of the attorney-client relationship.)

"Hall" shall mean Kevin R. Hall.

"Cox" shall mean Crystal Cox.

Documents Requested

1. All documents sent by Stansbury to Eliot concerning the Property.
2. All documents sent by Eliot to Stansbury concerning the Property.
3. All documents sent by Stansbury to Hall concerning the Property.
4. All documents sent by Hall to Stansbury concerning the Property.
5. All documents sent by Stansbury to Cox concerning the Property.

6. All documents sent by Cox to Stansbury concerning the Property.
7. All documents sent by Stansbury relating to the Property to anyone else other than Eliot, Hall or Cox.
8. All documents sent by Stansbury to Cox, or Cox to Stansbury, on any matter.
9. All documents sent to Cox or Hall by anyone for which copies (bcc: or cc:) were provided to Stansbury.
10. All documents, including checks, canceled checks, credit card receipts or other documents showing any payments made by Stansbury to or on behalf of Eliot or his family, from and after May 6, 2015 to the present.
11. All documents evidencing any oral or written agreements between Stansbury and Eliot concerning (i) the Property; (ii) the Trusts or Estates of Simon Bernstein and/or Shirley Bernstein, (iii) the Illinois litigation; or (iv) any other subject matter.
12. All documents relating to the Property, including any internet research, title reports, deeds, notes, pictures, or otherwise in the possession of Stansbury relating to the Property.
13. All documents concerning Lions Head Land Trust, Lions Head Land Trust, Inc., Mitchell and Deborah Huhem, Leilani Ochoada, Larry Pino, and anyone else involved in any way as an owner, participant, professional, lawyer, title examiner, etc. in the real estate transaction under which title of the Property transferred from the Shirley Bernstein Trust to the Lions Head Land Trust.

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

TED BERNSTEIN, as Trustee of the Shirley
Bernstein Trust Agreement dated May 20, 2008,
as amended,

Probate Division
Case No.: 502014CP003698XXXXNBIJ

Plaintiff,

v.

ALEXANDRA BERNSTEIN; ERIC BERNSTEIN;
MICHAEL BERNSTEIN; MOLLY SIMON; PAMELA
B. SIMON, Individually and as Trustee f/b/o Molly
Simon under the Simon L. Bernstein Trust Dtd 9/13/12;
ELIOT BERNSTEIN, individually, as Trustee f/b/o D.B.,
Ja. B. and Jo. B. under the Simon L. Bernstein Trust Dtd
9/13/12, and on behalf of his minor children D.B., Ja. B.
and Jo. B.; JILL IANTONI, Individually, as Trustee f/b/o
J.I. under the Simon L. Bernstein Trust Dtd 9/13/12, and
on behalf of her Minor child J.I.; MAX FRIEDSTEIN;
LISA FRIEDSTEIN, Individually, as Trustee f/b/o Max
Friedstein and C.F., under the Simon L. Bernstein Trust
Dtd 9/13/12, and on behalf of her minor child, C.F.,

Defendants.

**SUBPOENA DUCES TECUM TO WILLIAM STANSBURY FOR
APPEARANCE AT EVIDENTIARY HEARING/TRIAL**

THE STATE OF FLORIDA

TO: William Stansbury
C/O Peter Feaman, Esq.
PETER M. FEAMAN, P.A.
3695 West Boynton Beach Boulevard, Suite 9
Boynton Beach, FL 33436

YOU ARE COMMANDED to appear before the Honorable John L. Phillips, Judge of the
Circuit Court, at the North Branch of the Palm Beach County Courthouse, 3188 PGA Boulevard,

