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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In the Matter of	CASE NO.: BP152858
THE STERLING FAMILY TRUST	**OPPOSITION TO PETITIONER'S MEMORANDUM REGARDING SCOPE OF EVIDENCE TO DETERMINE WHETHER THE PROCEDURE SPECIFIED IN PARAGRAPHS 7.5.c AND 10.24.(b) OF THE TRUST WAS FOLLOWED**
	Pre-Trail Conference: June 30, 2014
	Trial Date: July 7, 2014
	Time: 1:30 pm
	Dept: 5
	Judge: Michael I. Levanas

DONALD T. STERLING ("Donald") hereby files his Opposition to the Memorandum Regarding Scope of Evidence Related to Paragraphs 7.5.c and 10.24.(b) of the Trust was Followed ("Shelly's Brief") filed by ROCHELLE H. STERLING ("Shelly" or "Petitioner") on June 25, 2014.

1. Introduction

The Sterling Family Trust was established on August 13, 1998, by Donald and Shelly, as Settlors and as Trustees. The Sterling Family Trust was restated in its entirety on December 18, 2013, by Donald and Shelly (collectively the "Sterling Family Trust"). Copies of various relevant provisions of the Sterling Family Trust have been previously filed herein.

On June 9, 2014, Donald gave notice to Shelly that he elected to revoke the Sterling Family Trust effective immediately. The revocation included each and every trust purportedly created pursuant to the Sterling Family Trust.[1]

On or about June 11, 2014, Shelly filed an Ex Parte Petition (1) For Confirmation of Trustee's Acts and Instructing Trustee and (2) For Order Directing Trustee Under Probate Code §1310(b) to Prevent Injury or Loss to Trust (the "Petition" or "Shelly's Petition"). On or about June 13, 2014 Ballmer filed a Joinder to Shelly's Petition ("Joinder"). Without any substantiation, Ballmer avers that he has standing to intervene in this trust proceeding.

On or about June 23, 2014, a Pre-Trial Conference was held wherein Judge Michael I. Levanas requested further briefing of issues by counsel.

On June 25, 2014, briefs of issues were filed by counsel for Donald as Ordered at a Pre-Trail Conference held by Judge Michael I. Levanas on June 23, 2014.

On June 25, 2014, Shelly filed her Brief. The position of Shelly is so fatally flawed that the only authority that Petitioner can cite is not within this jurisdiction nor do they relate to facts or questions of law before this Court.

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[1] The Court may take judicial notice of the revocation of the Sterling Family Trust that is attached as Exhibit 21, page 123, to Shelly's Petition. This Court no longer maintains jurisdiction over the internal affairs of the Sterling Family Trust as a result of this revocation.

2. Donald Should Be Allowed to Present Evidence That Would Show That the Procedures Set Out in the Sterling Family Trust Were Not Followed Thereby Trampling on His Rights as a Co-Trustee of the Sterling Family Trust

Both Shelly and Donald agree that Donald is allowed to present evidence that shows that Shelly did not follow the procedures to remove Donald as a co-trustee of their trust. (Shelly's Brief, 1:23-25.) The evidence will clearly establish that the specific requirements set forth in the Sterling Family Trust were not followed by Shelly, or Drs. Platzer and Spar, and that Shelly has not removed her husband from his co-trusteeship. Shelly states in her brief, "Donald should only be allowed to present evidence that would show that the procedure set out in the Trust was not followed, i.e., that the doctors' certifications were forged, or that the doctors' certifications were obtained through menace, duress, fraud or undue influence." (Shelly's Brief, 1:23-25.) The Court may make such inquiring without making any determination on Donald's capacity. If, however, the Court believes that it can, and should, make a determination of Donald's capacity, Donald is entitled to a full evidentiary hearing.

The requirements to remove a trustee from his or her fiduciary position are controlled by several provisions of the Sterling Family Trust – Paragraphs 7.5.c (the "Removal Provision") and 10.24 (the "Procedure Establishing Incapacity Provision" or "PEI Provision").

Donald was not removed as a co-trustee by Shelly because she failed to comply with the strict terms and conditions of the Removal Provision which relies on the procedural requirements in the PEI Provision.

The Removal Provision states:

> Any individual who is deemed incapacitated, as defined in [the PEI Provision], shall cease to serve as a Trustee of all trusts administered under this document. Each individual who agrees to serve as a Trustee of any trust administered under this document (A) shall ***cooperate*** in any examination ***reasonably appropriate to carry out the provisions of this [Removal Provision]***, (B) waives the doctor-patient and/or psychiatrist-patient privilege with respect to the results of such examination, and (C) shall allow a Co-Trustee or Current Beneficiaries of the trust to review the individual's individually identifiable health information or other medical records, waiving any privacy rights governed by, Health Insurance Portability and Accountability Act of 1996, 42 U.S.C § 1320d (HIPAA), and the regulations thereunder, including the 45 C.F.R. §§ 160-164, to the extent required to implement this [Removal Provision]. . . . (emphasis added.)

Shelly relied on the Removal Provision to effectuate her purported unilateral removal of Donald as co-trustee.

The PEI Provisions states that a co-trustee may be removed, if they lack capacity. Specifically, Paragraph 10.24 provides:

> "Incapacity" and deviations thereof mean incapable of managing an individual's affairs under the criteria set forth in California Probate Code Section §810 et seq. An individual shall be deemed incapacitated if any of the following conditions exist" (a) the individual's regular attending physician (provided such a physician is not related by blood or marriage to any Trustee or beneficiary) examines the individual and certifies in writing that the individual is incapacitated, (b) two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others, and neither of whom is related by blood or marriage to any Trustee or beneficiary, examine the individual and certify in writing that the individual is incapacitated or (c) in order of the court having jurisdiction of the trust as to which the individual is serving as a Trustee or as to which the individual is a beneficiary, as the case may be, finds the individual is incapacitated. . . .

There are three different ways that Shelly could have attempted to remove her husband as co-trustee: (1) obtain a letter from Donald's regular attending physician was certified in writing that Donald lacks capacity under the criteria set forth in *Probate Code* section 810 et seq.; (2) obtain letters from two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others, who examined Donald and certified in writing that Donald lacks capacity under the criteria set forth in *Probate Code* section 810 *et seq.*; or (3) seek an order from this Court that finds Donald to lack capacity.

As the Court is very aware, Shelly chose option number two, stated above. However, by bringing her Petition and seeking the Court's approval of her acts, she has indirectly asked the Court to bless her usurpation of power and removal of Donald as co-trustee – which if granted by this Court would surmount to a judicial finding that Donald is incapacitated.

Shelly did not comply with the PEI Provisions because (1) Donald was not given notice of Shelly's intent to cause mental examinations to be conducted, (2) Shelly fraudulently failed to disclose the purpose of the examinations that she orchestrated, and (3) neither of the letters obtained from the physicians comply with the specific requirements set forth in the Sterling Family Trust. As a result the doctors' letters offered by Shelly are insufficient, on their face, to remove Donald as a co-trustee of the Sterling Family Trust.

The procedures set forth in the PEI Provision are vague as to the terms "reasonable" and "cooperate," in their interpretation, use, or application. Specifically, it was not fully disclosed to Donald by Shelly or by the doctors that he was participating or cooperating in an evaluation to be used for legal purposes. The lack of disclosure and lack of notice violate the terms of the trust. The Removal Provision clearly states that the Shelly and Donald must "cooperate" with one another regarding the determination the mental capacity of either of them. Cooperation (the noun of cooperate) is defined by Black Law Dictionary, 8th Edition, to mean: "an association of individuals who ***join together*** for a common benefit." There is no conceivable way that Shelly cooperated with Donald in obtaining these medical examinations, let alone the doctors' letters. Shelly **never** disclosed her true intention behind having Donald meet with either Dr. Platzer or Dr. Spar. Nor, did she give Donald any notice that she intended to use the evaluations or letters for legal purposes. No trustee has unrestricted authority, nor can they dupe their co-settlor/co-trustee/huband into unauthorized removal. "The requirements of loyalty and fair dealing and good faith are at the core of every trust instrument, whether specifically stated or not." Rest. (Second) of Trust § 164, Comment *h*, at 343-44 (1980). Before the Court can even evaluate the letters obtained by Shelly, and determine whether they comply with the PEI Provision, the Court must determine if they were obtained in violation of Donald's rights under the Sterling Family Trust.

Specifically, the doctors' letters were induced by fraud.[2] Donald was induced to submit to medical examination under false pretenses. Shelly, *his wife*, induced him to meet with doctors she hired based on fraudulent representations.[3] The doctors were paid by third parties. More specifically, Shelly told her husband, to whom she owed fiduciary duties, that the examinations were for other purposes. The doctors also failed to fully disclose the purpose, nature, and consequences of the mental examinations.

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[2] No reference is made in the letter, dated June 10, 2014, of Dr. Stephen Read, since Dr. Read has no percipient knowledge having made no interview or examination of Donald and merely comments on the letters of other doctors.

[3] Shelly has also committed breaches of fiduciary duties owed to Donald under the California *Family Code*. *Cal. Fam. Code* § 721.

On May 19, 2014, Dr. Meril S. Platzer purportedly examined Donald at his Beverly Hills home. Dr. Platzer never inquired if Donald understood the nature of their meeting. She also never inquired if Donald was aware why she was there. But Shelly knew, and she had a duty to disclose this information to her husband and co-trustee. Shelly intentionally failed to disclose the purpose of the examination of Donald to gain a legal advantage over her husband, in violation of her fiduciary duties owed to Donald. At some point, Dr. Plazter joined Donald, Shelly, and at least two other individuals for drinks at the Beverly Hills Hotel (which is located near Donald's residence). It is unclear at what point the purported medical examination ceased and at what point a social interaction began, with the consumption of alcoholic beverages taking place. Dr. Platzer's letter does not specify if she reached any of her purported conclusions based on the exchange at the Beverly Hills Hotel after the consumption of alcoholic beverages.

Like Dr. Platzer, Dr. Spar also failed to inform Donald about the purpose of their meeting. And again, Shelly was present and intentionally failed to inform Donald of her true intentions. In fact, as set forth in Dr. Spar's letter, Donald was called out of a "meeting with several attorneys" and "became impatient with the evaluation and wanted to return to a 'room full of six attorneys'. . . ." (Ex.11 to Shelly's Ptn, p. 80-81.) There is a triable issue as to Donald's mental capacity, and therefore Donald is entitled to offer evidence to establish his capacity, and therefore his ability to act and serve as a co-trustee of the Sterling Family Trust.

Before the Court can even consider whether the doctors' letters were properly obtained (or that they fail to comply with the PEI Provision) the Court must hear evidence about when and how Shelly fraudulently orchestrated the medical examinations.

Even if Shelly had disclosed and given notice to Donald about the evaluations, which she most certainly did not, the doctors' letters fail to comply with the requirements of the PEI Provisions. Shelly makes conclusionary statements about Donald's alleged deficits in mental function throughout her pleadings – none which amount to or show that Donald lacked contractual or testamentary capacity as defined by *Probate Code* sections 810 and 811. In addition, the doctors' letters are not certified as required under the PEI Provision. They also fail

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to make any finding of incapacity. Nor do they make any findings under *Probate Code* sections 810 and 811. The letters are insufficient on their face.

The examinations and letters are defective and are incomplete. For example, Dr. Spar only asked Donald twenty-nine of thirty questions from the Folstein Mini-Mental Examination, neglecting to inquire "Where are we? (Floor)." Moreover, the Folstein Mini-Mental Examination is an inappropriate test to use to determine capacity. Said test is normally used to validate findings for the use of prescription medicine for perceived dementia patients and for other purposes. Lastly, Donald's results are within normal ranges.

When Dr. Platzer conducted the Folstein Mini-Mental Examination she appears to make changes to her opinion and determination of Donald's score by crossing out certain scores and then lowered the scores – resulting in a total score of twenty three points. Of course, she then used this reduced number to justify her conclusion that Donald purported performed poorly on the Folstein Mini-Mental Examination.

Lastly, Shelly has used her Petition as a backdoor to rubberstamp her ouster of Donald as the co-trustee. This is not permissible. Shelly is in effect asking the Court to indirectly confirm Donald's incapacity without a capacity hearing which would violate Donald's right to due process. In the alternative, Shelly is asking the Court to ignore an unsuccessful attempt to remove Donald by her failure to comply with the Sterling Family Trust requirement. The Court cannot make any findings about Donald's capacity without giving him the right to present rebuttal testimony that he was not incapacitated on May 27, 2014, as purported in the conclusions of Dr. Palzter or that he was incapacitated on May 29, 2014, as purported in the conclusions of Dr. Spar. Donald has the right to present the testimony of others, including, Jeffery Cummings, M.D., Michael Lebow, Andy Roesner, Douglas Walton, Stephen W. Mayber, Ph.D. and other experts of his choosing including, but not limited to neurological radiologists from the Cleveland Clinic Lou Ruvo Center for Brain Health.

The cases cited by Shelly are distinguishable, not based on California law, are secondary sources, and do not need to be relied upon by this Court. Shelly is only able to cites cases from Alaska, New York and Illinois in a feeble attempt to locate authority for her position. Ultimately,

these cases do not support her position that the Court may only hear extrinsic evidence relating to her compliance with the Removal Provision and PEI Provision is admissible.

Shelly's reliance on *First Nat'l Bank v. Office of Pub. Advocacy*, 902 P.2d 330 (Alaska 1995) is wholly misplaced. The Alaska Supreme Court held that the guardian of the person and estate of F.H. "was authorized to exercise [its power of removal of the fiduciary bank] **subject to court approval**." (emphasis added). *Id.* More pressing, the Alaska Supreme Court held that former trustee "First National was afforded both notice and an opportunity to be heard." *Id.* As guardian "OPA points out, First National was served with a copy of OPA's motion to remove" and "had an opportunity to request oral argument." *Id.* at 335. "However, First National took no action within the required time frame, and the court entered the order as unopposed. . . ." *Id.* While in passing the Alaska Supreme Court references the Restatement (Second) of Trust § 107 that "a person authorized to remove a trustee under the terms of the trust may do so without application of the court," those facts were not present in *First Nat'l Bank* and such dicta offers no guidance to this Court.

Matter of Stuart, 107 A.D. 3d 811 (N.Y. App. Div. 2013) offer no more support to Shelly than did *First Nat'l Bank.* In *Matter of Stuart,* a husband and wife established their trust. After the death of the husband, the wife, as the surviving settlor attempted to amend the provisions of the trust in two ways. First, she attempted to modify the distribution provisions upon her death to change the percentage that each of her three children would take upon her death. *Id.* at 813. The appellate court found that the wife lacked the ability to change the dispositive provisions of the trust and could only do so through the exercise of a power of appointment in her duly probated will. *Id.* The trust amendment did not comply with this requirement and therefore "the mother's 2006 amendment of the original beneficiary allocation was ineffective as she did not comply with the terms set forth in the subject trust for changing the beneficiary allocation." *Id.*

Second, the appellate court found in *Matter of Stuart* that the surviving settlor had the ability and discretion to amend her trust to change the named successor trustee of her trust. *Id.* The circumstances in *Matter of Stuart* are so far removed from the matters pending before this Court.

Here, the issue is not whether a settlor has the discretion to amend his or her trust to modify a dispositive provision or name a successor trustee after his or her demise/resignation, it is solely about whether Shelly can grab control over the Sterling Family Trust by improperly removing her co-trustee/husband. Again, this case does not support Shelly's position and is not relevant.

Lastly, Shelly's reliance on *Mucci v. Stobbs*, 666 N.E.2d 50 (Ill. App. Ct. 5th Dist. 1996) is unwarranted. Unlike the matter at hand, *Mucci* addresses the removal of a trustee *without cause* and where there is *proper notice*. *Id.* at 56. In *Mucci*, the trust was clear on its face that the income beneficiary could given written notice to the trustee, without cause, for his removal. *Id.* The court made it clear that nothing more was required. *Id.* Written notice from the beneficiary to the trustee was sufficient in that matter.

Here, the Removal Provision and PEI Provision set forth the detailed requirements to removal a trustee *due to incapacity*. And, as discussed in detail above, Shelly did not disclose or give Donald notice of her intention to remove him.

The Court must also consider that Shelly also intentionally ignores the scrivener's error in the restatement which mistakenly omits the provision present in the prior trust agreement that allows a settlor to reinstate him- or herself as co-trustee of the Sterling Family Trust. Now, Petitioner disingenuously claims that Donald and Petitioner sought an expeditious method for determining whether a Co-Trustee was incapacitated and that the incapacitated co-trustee would cease to serve as a co-trustee of the Trust without Court intervention.

Lastly, Shelly's Petition is improperly brought because the issue of whether Donald lacks capacity is not "ripe" since the doctor's letters do not comply with the requirements of the Trust Instrument. To be justiciable, an action must be "ripe." *Pac. Legal Found. v. Cal. Coastal Com*, 33 Cal. 3d 158, 171 (1982). The California Supreme Court informs that "[s]tanding, ripeness, and the related doctrine of mootness all enforce the principle that courts will intervene in disputes . . . 'at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action.'" *New York Times Co. v. Super. Ct.*, 51 Cal. 3d 453, 466 (1990) (*citing Poe v. Ullman*, 367 U.S. 497, 504 (1961)). As such, a "controversy is 'ripe' when it has reached,

but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." *Cal. Water & Tel. Co. v. County of L.A.*, 253 Cal. App. 2d 16, 22 (2d Dist. 1967).

3. Conclusion

Shelly and Donald finally agree on one thing – Donald is entitled to offer evidence to show that the procedures to remove him from his position as a co-trustee were not followed by Shelly. The doctors' letters presented by Shelly in her Petition do not meet the requirements set forth in the PEI Provision: they are not certified, they make no finding of incapacity and they are not written under the criteria set forth in *Probate Code* sections 810 and 811. The issue presented in Shelly's Petition is either not ripe because the trust is self-executing and there is no question regarding whether the duly qualified and acting trustee(s) has certain powers authorizing the sale of real and personal property. Or her Petition is rendered moot as a result of Donald's revocation of the Sterling Family Trust resulting in the duly qualified and acting trustee(s) no longer have any continuing authority to sell or continue with a sale. Lastly, if this Court allows Shelly's Petition to proceed, then Donald has the right to offer evidence relating to (1) the procedures taken by Shelly to purportedly remove Donald as co-trustee, (2) whether the doctors' letters comply with the requirements set forth in the Removal Provision and PEI Provision, and (3) that Donald maintains the requisite capacity to continue acting as a co-trustee of the Sterling Family Trust (if it was not already revoked).

Respectfully submitted,

DATED: June 27, 2014

GINZBURG & BRONSHTEYN, LLP

By: _____
YASHA BRONSHTEYN, ESQ.

DATED: June 27, 2014

BLOOM & RUTTENBERG

By: _____
STEFANIE S. CULTER, ESQ.

Proof of Service

I, the undersigned, declare and say as follows:

I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein states occurred, and not a party to the within actions.

On June 27, 2014, I caused to be served the documents(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelope for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical referenced to their capacity), there being U.S. Mail deliver service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X" by –.

[**X**] **placing each envelope for collection and processing for mailing** following my firms ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

[ ] **depositing** each envelope into the U.S. Mail with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, **including bankruptcy**, among others].

[ ] **faxing** each page of each document and this proof of service to the parties served at their last known fax numbers as listed below from a fax machine located at my business address which reported no errors and which produced a transmission confirmation report, a true copy [**X**] **email** each page of each document and this proof of service to the parties served at their last known email address and which produced a transmission confirmation report, a true copy.

[ ] **depositing** each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery [ ] **by Federal Express** on the morning of the next business day or [ ] **by courier** on the same day, (use only if overnight or courier services authorized or as a supplement.).

[ ] **personal delivery** by [ ] traveling to the address shown on the envelope and delivering it there during normal business hours or [ ] handing the document(s) to the person served.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on June 27, 2014, at my business address, 11111 Santa Monica Blvd., Suite 1840, Los Angeles, California 90025-3352, in the County of Los Angeles.

BRENDA PAREDES

Document Served

OPPOSITION TO PETITIONER'S MEMORANDUM REGARDING SCOPE OF EVIDENCE TO DETERMINE WHETHER THE PROCEDURE SPECIFIED IN PARAGRAPHS 7.5.c AND 10.24.(b) OF THE TRUST WAS FOLLOWED

Person(s) Served

SEE ATTACHED LIST

SERVICE LIST
STERLING TRUST
LASC CASE NO. BP 152858

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