## Department 5 Probate Notes for Friday, August 9, 2024

Probate Notes are not tentative rulings. Parties and counsel are still expected to appear for the hearings unless the Probate Note specifies otherwise. Unless indicated otherwise, all parties and counsel are authorized to appear via Zoom using this link: https://tuolumne-courts-ca-gov.zoomgov.com/j/1615813960?pwd=NTRMT0NwMDg5cnlYdzZ6VnBXWWFsUT09. [Meeting ID: 161 581 3960; Passcode: 123456]. All matters set for hearing in Department 5 are presumptively assigned to that department for all purposes. Parties retain the right under Cal. Const. art VI §21 to decline consent to the Commissioner serving as a Judge Pro Tem by so stating clearly at the outset of the first hearing in the case. By participating in the hearing, or electing not to attend after due notice thereof, parties are deemed to have stipulated to the Commissioner serving as a Judge Pro Tem for the entirety of the case. See CRC 2.816.

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**8:30 a.m.**

1. **In re Nicolo Family Trust (PR12487).** This is a petition to confirm an asset of a trust. Specifically, petitioner seeks an order declaring APN 050-102-008 to be an asset of the 2003 de Nicolo Family Trust. The trust instrument identifies "all property described in Schedule A" as assets of the trust. See Art. II. Schedule A includes "22371 Ridgeroad, Twain Harte," which does appear to this Court to be APN 050-102-008. (That is fortunate for petitioner since the instrument does not expressly authorize trustees to add to the trust corpus – see Art. IX.) Thus, it appears that the subject property was supposed to be in the trust, and according to petitioner it is not. A trial court may make a transfer under §856 of property into a trust if the settlor(s) presently own(s) the subject property, the settlor(s) created a trust with themselves as trustor, and there exists sufficient evidence from which to conclude that the settlor(s) intended said property to be held in that trust. See *Carne v. Worthington* (2016) 246 Cal.App.4th 548, 558-560; *Ukkestad v. RBS Asset Finance, Inc.* (2015) 235 Cal.App.4th 156, 160-161; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1443; *Estate of Heggstad* (1993) 16 Cal.App.4th 943, 950-951. There is little doubtm based upon the evidence submitted, that elements 2 and 3 have bene met. In terms of the first element, there is no evidence showing that one or both parcels are presently held by the settlors in their individual capacity. Although Para 11 so states that the property is presently held by the settlors individually, there are no facts provided from which to find that petitioner has personal knowledge of that fact. See Evid. Code §702; *Forest Lawn Memorial-Park Ass'n v. Superior Court* (2021) 70 Cal.App.5th 1, 8-12. This issue is ordinarily resolved with a litigation guarantee, preliminary title report, tax statements, or reference to some research performed by petitioner.

2. **Conservatorship of Bass (PR10249).** No appearance is necessary. The Court, having received and reviewed the investigative report, intends to find by clear and convincing evidence that a conservatorship of the person and estate remains necessary, that a general conservatorship is the least restrictive option, and that the conservators are serving the conservatee's best interests. Court intends to set annual review date.

3. **Conservatorship of Kolpack (PR10694).** No appearance is necessary. The Court, having received and reviewed the 2022 investigative report, intends to find by clear and convincing evidence that a conservatorship of the person remains necessary, that a general conservatorship is the least restrictive option, and that the conservators are serving the conservatee's best interests. Court intends first to continue the hearing another 60 days to permit the court investigator time to complete the San Bernardino home study, and to thereafter set biennial annual review date.

4. **Estate of Harvey (PR12355).** No appearance is necessary. This was to be the §8800 review hearing, and a final I&A is already on file.

5. **Estate of McGee (PR12228).** This is a petition to close the administration and distribute the estate. The petition fails to clarify what came of the miscellaneous household goods, the 2001 GMC Suburban, the 1998 Bounder RV, or the 1967 Ford Mustang. There is also no explanation in the petition as to the handling of Denise's $40,000. This court assumes that the funds will be used to

satisfy statutory legal fees and costs, with the balance being distributed to the four remaining heirs at law. Assuming that is the case, Para 6 of the distribution agreement is incorrect. More importantly, there is no evidence with the petition showing that Denise has indeed fully assumed or refinanced the existing debt on the property. Finally, this Court is unclear why the estate is seeking permission to liquidate its primary asset for 1/3 of its value.

6. **Estate of Bellinger (PR12414).** This hearing has been continued by request of the parties.

7. **Estate of Morales (PR12288).** No appearance is necessary. This was to be the §8800 review hearing, and a final I&A is already on file.

8. **Estate of Richesin (PR12136).** Pursuant to Probate Code §12200(a), "the personal representative shall either petition for an order for final distribution of the estate or make a report of status of administration within one year after the date of issuance of letters." In this case, Letters were issued on 11/10/22. According to the final I&A, this estate consists of a residence, a vehicle, and some personal items. While this Court has extended every courtesy to counsel/petitioner in this matter, there is still no final petition or updated status report. A petition for final distribution shall be filed within 30 days (§12204). In addition, this Court is reserving the issue of a financial haircut to both counsel and petitioner for these delays (§12205).

9. **Estate of Holland (PR12327).** Counsel to advise whether the pending motion to quash remains ripe since the challenged production was to have taken place at a deposition four weeks ago (on 07/09/24), and whether the tried-and-true meet-and-confer obligation has borne fruit. While the RPDs do not seem terribly overbroad, the court file includes no opposition to the motion.

**10:00 a.m.**

10. **Conservatorship of Jardine (PR11602).** No appearance is necessary. This is a conservatorship estate only. This was to be the hearing on the Third Accounting. However, on 04/10/24, a family member commenced a new petition for conservatorship over the person and estate of the conservatee. See PR12450. There is Notice of Related Case filed in either case, but the relation is evident. The Court has no objection to permitting the Public Guardian to await appointment of what amounts to a successor conservator of the estate, and file a "final" accounting commensurate with the handoff.complete one comprehensive accounting if there is to be a change in the position of conservator. Court intends to reset this hearing for 45 days, give or take. Counsel should, nevertheless, continue working on the accounting.

11. **Conservatorship of Jardine (PR12450).** No appearance is necessary. The Court, having received and reviewed the investigative report, intends to find by clear and convincing evidence that a conservatorship of the person and estate remains necessary, that a general conservatorship is the least restrictive option, and that the conservator will likely serve the conservatee's best interests. By this order, the Public Guardian shall cease to serve as conservator of the estate (PR11602). Court intends to set annual review date.

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**12. Conservatorship of Kohler-Crowe (PR9006).** This Court has not heard from the conservator in quite some time. There is still no 12th accounting, despite the conservator's request to utilize funds to improve the communal residence. There has been no appearance on 4/26/2024, 6/07/2024 and 6/28/2024. This Court does not wish to impose sanctions, or remove the conservator and appoint the Public Guardian, but time is not on the conservator's side here.

**13. Conservatorship of Kleier (PR12410).** No appearance is necessary. Court grants petitioners' request to waive notice to bio dad. The Court, having received and reviewed the investigative report, along with further inquiry, intends to find by clear and convincing evidence that a conservatorship of the person and estate is necessary, that a general conservatorship is the least restrictive option, and that the conservators will likely serve the conservatee's best interests. However, in light of the co-conservator's potential disqualification (§2650(d)), this Court intends to appoint both as conservators of the person, and only Samantha as conservator of the estate. Samantha to secure and post bond in the interim amount of $10,000 (see §2320). Court intends to set annual review date, and to consider accounting waiver under §2628 if warranted.

**14. Conservatorship of Fowles (PR12409).** No appearance is necessary. The Court, having received and reviewed the investigative report, along with further inquiry, intends to find by clear and convincing evidence that a conservatorship of the person and estate is necessary, that a general conservatorship is the least restrictive option, and that the conservators will likely serve the conservatee's best interests. However, in light of the co-conservator's potential disqualification (§2650(d)), this Court intends to appoint both as conservators of the person, and only Samantha as conservator of the estate. Although no Attachment 1C was included, this Court grants the request to waive a bond (see §2321(a)). Court intends to set annual review date, and to consider accounting waiver under §2628 if warranted.

**15. Conservatorship of Johnson (PR11789).** This is a general conservatorship which has reportedly terminated by operation of law (§1860(a)). However, there has not been any filing confirming the conservatee's passing. Once that is resolved, since this is a conservatorship of the person only, the matter can be concluded.

**16. Conservatorship of Tolhurst (PR11138).** This is a general conservatorship, awaiting the filing of a 5th Accounting. At a recent hearing, counsel for the conservator indicated that the conservatee may have passed away. The fact that the conservator does not know is cause for serious concern.

**17. Conservatorship of Smith (PR10905).** This is a general conservatorship, awaiting the filing of a 6th Accounting. Although an OSC re sanctions has already been issued, this court would prefer to simply have the accounting resolved.

**18. Claim of ASH (PR12216).** On 05/24/23, this Court entered an order approving compromise of a disputed claim involving the identified minor. As part of that order, both the Clifford and Hillberg law offices were entitled to fees and costs. On 01/23/24, a request was made by the minor's father to withdraw funds from what remained in the blocked account to pay six different entities/creditors.

The order granting that request specified that "paid invoices" were to be filed within 30 days. That was six months ago, and to date no paid invoices have been provided. Court intends to set an OSC re sanctions, and to order counsel to return those funds back to the blocked account forthwith.

19. **Guardianship of Pritchard (PR10912).** No appearance is necessary. The court, having received and reviewed the GC-251 with attachments, intends to find by a preponderance of the evidence that the guardianship remains necessary or convenient, and that the guardian is serving the ward's best interests. Court intends to set annual review date.

20. **Guardianship of Douglass (PR11336).** No appearance is necessary. The court, having received and reviewed the GC-251 with attachments, intends to find by a preponderance of the evidence that the guardianship remains necessary or convenient, and that the guardians are serving the ward's best interests. Court intends to set annual review date.

**1:30 p.m.**

21. **Marriage of Bacon (FL14012).** Requiring proof of service per CCP §1279.5(c).

22. **In re Clark and Hambelton (FL14868).** In-chambers conference via Zoom to determine 6 vs 9 month interstate exchange.

23. **Marriage of Fairfield (FL7115).** See TR below.

24. **In re Marriage of Rutikanga (FL18433).** Reserved date for continuance of trial.

**FL7115 (as related to CV65501).**

On 02/09/07, Petitioner Dave Fairfield (hereinafter "Petitioner") filed a petition to dissolve his 11-yr marriage to Respondent Allison Fairfield (hereinafter "Respondent"). See FL7115.

In May of 2018, Petitioner and Respondent reportedly entered into an oral agreement whereby Petitioner agreed to lend Respondent $125,000, interest free, so that she could purchase a new residence. That same month, she closed escrow on 19326 Rockridge Way, Sonora, for $325,000. In exchange for the alleged loan, Respondent agreed to "repay" the loan in the form of a testamentary gift to Petitioner's daughter (Kristen).

On 07/23/08, Petitioner and Respondent entered into a Marital Settlement Agreement containing the following salient terms and conditions:

- Petitioner would provide dental insurance benefits for Respondent "up to a maximum of $100.00 per month."
- Petitioner would pay Respondent a compromised amount to equalize the CP distribution as follows:
  - $150,000 (via cash-out refinance of Petitioner's existing residence) toward Respondent's acquisition of her own residence (the MSA does ***not*** describe this as a loan);
  - $200,000 as a promissory note, secured by a deed of trust to Petitioner's residence (Petitioner states that this was eventually paid off).
- Full integration clause: "this contract supersedes any previous oral and written agreements."
- Prevailing party to recover reasonable attorney fees and costs.

On 11/17/08, the MSA was entered in FL7115 as a Judgment.

On 12/14/16, Respondent sold 19326 Rockridge Way, Sonora, for $260,000.

In or about December of 2019, Petitioner reached out to Delta Dental through his benefits coordinator and requested to add his new registered domestic partner, Marsha, to his dental plan. According to Petitioner's employer, this was the first notice they received that Petitioner and Respondent were no longer married. Following a review of the file, the benefits manager cancelled Respondent's coverage (as a non-spouse) and added Marsha.

In or about July of 2022, Respondent reportedly learned for the first time that she was no longer on Petitioner's Delta Dental policy. According to Respondent, Petitioner removed her from the plan in order to make room on his policy for his new partner, Marsha. At the time, Respondent was living off of a teachers pension, and presumably did not have access to covered dental care. She needed a root canal. Meet and confer efforts bore no fruit.

On 09/12/22, Respondent filed an RFO seeking to enforce the dental benefits provision in the MSA (as well as legal fees associated with having to seek judicial intervention). Petitioner responded that he

received "bad legal advice" when the MSA was drafted, and mistakenly understood that he could elect to *either* have Respondent on his existing dental plan *or* he could pay Respondent $100/month toward her own individual dental plan. Petitioner further averred that he wanted his own legal fees for this dispute because "Respondent owed me $130,000 plus interest" – a reference to the loan for 19326 Rockridge Way, Sonora.

On 11/23/22, the parties reached an agreement whereby Petitioner would pay Respondent $100/month to assist with her premium costs for her own dental plan, and reimburse Respondent's counsel $3,500 for fees reasonably incurred as a result of Petitioner's alleged breach.

On 08/14/23, Petitioner filed a civil action against Respondent, alleging what amounts to anticipatory breach of the oral agreement to make a will favoring his daughter as repayment of the $125,000 loan. See CV65501. The operative pleading went through a few iterations, thanks in part to Respondent's two demurrers. The issue, however, remained the same: *was the $125,000 a loan, and if so did selling Rockridge in 2016 trigger Respondent's obligation to repay the loan prior to a testamentary bequest?* (As noted, a promise to repay a loan via testamentary bequest – if valid under Probate Code §21700 – can only be breached after the promisor loses capacity to make a testamentary gift. See CCP §366.3 and *Sefton v. Sefton* (2012) 206 Cal.App.4th 875, 894.)

On 06/07/24 – with a motion to consolidate FL7115 and CV65501 pending – Petitioner voluntarily dismissed the civil action (CV65501).

Before the Court this day is Respondent's motion – filed 07/09/24 – for pendente lite equitable (aka "need based") fees pursuant to Family Code §2030 and CRC 5.427(b)(2). Respondent made plain at an earlier hearing that she was *not* seeking statutory (Family Code §217) or contractual (Civil Code §1717) fees as a prevailing party.

An award of fees pursuant to Family Code §2030 is intended to level the field and cure any disparity of access to symbolic weapons or competent legal assistance as the parties march out onto the dissolution battlefield. Although the party requesting an equitable allocation of fees has the initial burden of proof, the trial court is expected to employ its own equitable judgment, with guidance from the §4320 spousal support factors, to assess whether the parties had an equal opportunity to present an effective case and if either party scorched the earth (ie, fomented unnecessary litigation in the action). See, *e.g, Marriage of Knox* (2022) 83 Cal.App.5th 15, 39-40; *Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 111-112; *Marriage of Schleich* (2017) 8 Cal.App.5th 267, 294; *Marriage of M.A.* (2015) 234 Cal.App.4th 894, 902-903; *Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 356-357.

Here, Respondent is seeking fees based ostensibly on her time and effort fending off Petitioner's civil action – which she contends should have been pursued as part of the pending dissolution action. Had that occurred, she would likely have utilized the services of her current family lawyer (Attorney Salkeld) rather than going out and separately employing a civil litigator (Attorney Christopherson). Since one can only assume that Attorney Salkeld would have handled the MSA dispute had it been raised in FL7115, the question presented here is whether the fees spent on Attorney Christopherson in CV65501 have put

Respondent into an unfair position trying to continue the fight in FL7115. Although these actions are unmistakenly related (see CRC 3.300(a)), formal relation (let alone consolidation) is not necessary since §2030 fees can be awarded "in any proceeding" subsequent to entry of a family court judgment which is inexorably intertwined with the issues contained in the dissolution action itself. *See v. Superior Court* (1961) 55 Cal.2d 279, 281; *N.S. v. D.M.* (2018) 21 Cal.App.5th 1040, 1055-1056; *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 394-395; *Neal v. Superior Court* (2001) 90 Cal.App.4th 22, 26; *Askew v. Askew* (1994) 22 Cal.App.4th 942, 964; *Marriage of Green* (1992) 6 Cal.App.4th 584, 591. There is no question that Petitioner's civil action for breach of the Marital Settlement Agreement – based upon an oral understanding the parties made during the dissolution action but before the MSA was entered as a Judgment – is inexorably intertwined with the issues contained in the dissolution action itself, and can support an award of §2030 fees.

The problem this Court is having is that §2030 is intended to provide prospective balance on the battlefield, not posthumous spoils after the war is over. See Family Code §§ 2030(a) and 2031(a). For posthumous spoils, parties typically look to Family Code §271 or Civil Code §1717 – which Respondent here has declined to do. What remains of the battle? Parties to discuss.