



# Superior Court of California County of San Benito

## Tentative Decisions for August 28, 2024

**Courtroom #1: Judge Thomas Breen**

**CU-24-00167**

**Lucille Del Carlo v. Frank Del Carlo, et al.**

**8-28-24**

On Calendar for Plaintiff's Motion for preliminary injunctive relief for exclusive passion and control of the businesses and to restrict Defendant Frank Del Carlo from the premises.

Plaintiff: Stephan Allan Barber

Defendant: Frank Del Carlo (Pro Per)

Defendant: Al Fresco Landscape Management, Inc.

Defendant: Al Fresco Landscaping, Inc.

The underlying complaint seeks 1) Involuntary Dissolution of Al Fresco Landscape Management, Inc. and Al Fresco Landscaping, Inc; 2) Partition of Real Properties; 3) Breach of Fiduciary Duty; 4) Injunctive Relief; 5) Restitution; and Damages.

The Complaint avers that Plaintiff as an individual holds 50% of the outstanding shares of Al Fresco Landscaping, Inc, and 80% of the outstanding shares of Al Fresco Landscape Management, Inc. Defendant Frank DelCarlo holds 50% of the outstanding shares of Al Fresco Landscaping, Inc. and 20% of the outstanding shares of Al Fresco Landscape Management, Inc. The real property in question is at 1761 Shelton Drive, Hollister, and is a commercial property. Lucille Del Carlo and Frank Del Carlo each own a 50% undivided interest in the commercial property. Both of the named businesses are operated from the commercial property, and work in close connection as a landscape construction business and landscape maintenance business, respectively, and each would lose value without the other. The Del Carlos are in the middle of a marital dissolution proceeding ( FL-23-00086), and there are related Domestic Violence cases, DV-24-00030 filed by Lucille against Frank, in which a temporary order granting Lucille exclusive use and operation of both business interests and expressly forbidding Frank from interfering with the operation of either business, inappropriate communication to employees,

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and generally erratic behaviors at the business. The Del Carlos no longer have a productive or functioning business relationship and cannot co-manage the businesses. There are also allegations regarding Frank's conduct that have harmed or potentially harmed the companies as alleged therein in greater detail.

7-26-24 Lucille has filed an ex parte application for a temporary restraining order and for a preliminary injunction to have exclusive possession and control of the business and keep Frank off the premises. The ex parte application was granted, and the matter set for further hearing 8-28-24.

The temporary order restrained Defendant Frank Del Carlo from interfering with or participating in the management of Al Fresco Landscaping, Inc. and Al Fresco Landscape Management, Inc. He has been restrained from terminating, instructing, entreating, or otherwise contacting employees or clients of the businesses. He is further restrained from withdrawing and depositing money into the accounts for either business, and from making any changes to the lines of credit for either business.

Argument Plaintiff states the current DVRO order has proved ineffective as Frank has manipulated the loopholes in it to continue to drain the corporate fisc, and he has a pattern exhibited of acting deliberately to damage the business, its relationships with its customers, and frightening and upsetting the employees

Opposition: Frank argues that in mediation they agreed he would run the businesses, but this was never reduced to writing. He also argues that this is redundant to the orders in the DV and FL cases. Noting the status of those orders, he proposes that this case is redundant, and all of these matters are better addressed in the context of the Family Law and Domestic Violence matters.

Legal Authority Injunctive relief pursuant to CCP§526 sub parts (a)(2)-(6) is sought. The court may issue a temporary restraining order when it appears from the facts shown by affidavit or verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice. (CCP §527 sub (c)(1).) The court must evaluate two interconnected factors, one is the likelihood that the plaintiff will prevail on the merits at trial, the second is the interim harm that the plaintiff will likely sustain if the restraining order is denied as opposed to the harm the defendant will likely suffer if it is granted. The court in making this determination weighs these factors, guided by the potential merit and interim harm, the greater the showing of one, the less must be shown of the other, and these are necessarily limited by the likelihood of prevailing on the merits. (*Church of Christ in Hollywood v. Sup. Ct.* (2002) 99 Cal. App. 4<sup>th</sup> 1244 1251-52.) A preliminary injunction is proper in the circumstances listed in CCP §526(a), including where it appears a party is entitled to the relief demanded ( CCP§526 sub (a)(1)), where the conduct would produce waste or great or irreparable injury ( CCP§526(a)(2).), where conduct would render judgment ineffectual, or compensation would not afford adequate relief, or would be difficult to calculate. (CCP§526(a)(3)-(6), inclusive.) AS with the grant of a

temporary order, a preliminary injunction is subject to the weighing of the same interrelated factors as discussed herein. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4<sup>th</sup> 1443, 1449.)

In ruling on a motion for a preliminary injunction, the court must exercise its discretion “in favor of the party most likely to be injured... If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction.” (*Robbins v. Sup. Ct. (County of Sacramento)* (2985) 38 Cal. 3<sup>rd</sup> 199,205.)

Analysis:

Ruling on Request of Judicial Notice: Plaintiff requests judicial notice of the declarations of John Slavich and Olivia Farias in support of her opposition to Frank Del Carlo’s ex parte application in cases DV-24-00030 and DV-24-00026. The court grants the request for judicial notice.

In ruling on the request of a preliminary injunction, the court notes the legal standards as discussed above. Here, the declarations filed by the Plaintiff in relationship to this case, and the history of this matter indicate strongly that great and irreparable harm will result to the Plaintiff if this preliminary injunction is not granted, and any harm inuring to the Defendant Frank Del Carlo appears to be minimal. The concern herein is that the behaviors described indicate that the businesses cannot function and the risk to all is their collapse and financial ruin if the order is not granted. Moreover, the other element of the analysis, whether the Plaintiff is likely to succeed in her underlying complaint is met. California Corporations Code §1800 sub (b) provides that the grounds for involuntary dissolution include “internal dissention”, where, as here, factions of shareholders in the corporation are so deadlocked that the business can no longer be conducted with advantage to all of the shareholders. The declarations filed herewith, if even a portion of the matters attested to are factually accurate show the absolute disfunction impeding the ability to conduct business with advantage to all shareholders, indeed, even risking the survival of the business prior to the conclusion of this case. The court notes the current DVRO order in DV-24-00030 vests control of the business with Lucille Del Carlo, and the proposed orders made herein would align closely with those orders as well.

Proposed Ruling: The motion is granted as prayed.

**CU-23-00049**

**DeCarlo v. EnviroServices, et al.**

**7-31-24**

Matter is on for: Joint and Several Defendant’s Demurrer to Second Amended Complaint.

OSC re Contempt

Plaintiffs: John Crowley

Defendants: Adron Beene (EnviroServices, LLC, Kelli Crestani, Jim Friebe, Jim Friebe Trucking)

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Defendant: Frank Perretta (Agromin Corp.)

Defendant: Keith Merrell, in pro per.

5-11-23 First amended Cross Complaint (Crestani, EnviroServices, LLC v. DeCarlo, et al.): 1) Penal Code §496; 2) Conspiracy to Confer and Embezzle; 3) Breach of Fiduciary Duty and Duty of Loyalty; 4) Fraud; 5) Slander Per Se (Civ. Code §46); 6) Interference with Prospective Economic Advantage; 7) Promissory Note; 8) Implied Contract.

5-29-24 Plaintiff's SAC: 1) Fraud; 2) Conversion; 3) Unjust Enrichment; 4) Accounting; 5) Breach of Fiduciary Duties; 6) Involuntary Dissolution of LLC; 7) Appointment of Receiver; 8) Rescission of Operating Agreement; 9) Extortion; 10) Negligent Misrepresentation; 11) Negligence; 12) Nuisance; 13) Negligence (Friebel); 14) Defamation; 15) Wrongful Termination (DeCarlo); 16) Retaliation (DeCarlo); 17) Failure to Reimburse Business Expenses (DeCarlo); 18) Wrongful Termination (Brum); 19) Retaliation (Brum); 20) Intentional Interference with Prospective Economic Advantage (Agromin).

This case arises from Plaintiff's claim that the Defendants improperly ousted them from the operation and control of their business: an agricultural and construction waste recycling business.

5-9-23: The court denied the ex parte application for a temporary restraining order pending hearing. The court ordered Defendant's reply briefing by May 17, 2023; and the Plaintiff's Reply briefing by 5-23-23. 5-31-23 The court denied Plaintiff's application for temporary injunction. 7-12-23 Defendant's motion for Right to Attach and Issuance of Writ of Attachment vs. Cross Defendants (Plaintiff Tim DeCarlo) is granted. 9-13-23 The court continued the Defendant's 7-623 Motion for Summary Judgment or, alternatively, Summary Adjudication, and Plaintiff's 7-28-23 Motion for leave to File First Amended Complaint are continued to 10-4-23, the court also continues the CMC to 10-4-23.

7-3-24: Hearing on, Contempt OSC and setting Motions to Compel, Claim of Exemption: OSC re Contempt is set for Contested Hearing 8-9-24 at 1:30 p.m. with a 2-hour time estimate. The Motions to Compel further responses to Special Interrogatories, Form Interrogatories, and Requests for Production, Set One, against both Defendant Jim Friebel and Jim Friebel Trucking are Denied without prejudice. With regard to the claim of exemption, the court denies the claim of exemption sought by Plaintiff De Carlo as untimely. Further CMC is also set for 8-9-24 at 1:30 p.m.

7-31-24 After hearing argument regarding the Demurrer and amends its tentative ruling as to the 12<sup>th</sup> Cause of action, sustaining the demurrer with leave to amend. Plaintiffs have 20 days to file a third amended complaint.

8-13-24 The matter was calendared for an ex parte application for a continuance. The motion to continue was granted and order was signed. The OSC hearing and CMC are continued to 8-28-24 at 3:30 p.m. in dept 1.

Argument:

7-12-24 Joint and Several Defendant's Demurrer to the SAC (EnviroServices, LLC, Crestani, Merrell, Friebe, Mitchell, Jim Friebe Trucking, referred to as "Defendants" collectively for the purpose of this memorandum.) Defendants demurred to the 1<sup>st</sup> through the 8<sup>th</sup> causes of action, and the 10<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> causes of action. They note that the prior demurrer to the FAC that the demurrer to the 9<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> causes of action was overruled. Procedurally, during meet and confer the Plaintiffs and Defendants agreed that: 1) Crestani and Merrell would be dismissed from the 6<sup>th</sup> and 8<sup>th</sup> causes of action; 2) that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> causes of action are not proper causes of action but are remedies to the 6<sup>th</sup> cause of action. The 2<sup>nd</sup> through the 5<sup>th</sup> causes of action and the 7<sup>th</sup> cause of action will be dismissed but remain as remedies to the 6<sup>th</sup> cause of action; 3) Defendants Demurrer will be to the 1<sup>st</sup>, 10<sup>th</sup>, and 12<sup>th</sup> (previously the 13<sup>th</sup>) causes of action for failure to state a cause of action. Defendants argue that the 1<sup>st</sup> cause of action for fraud is insufficiently pled, even after the Plaintiffs were given leave to amend the demurrer sustained 5-10-24. Fraud allegations must be pled with specificity, overriding the general notice-pleading requirements and conclusory allegations as made herein are insufficient. Similarly, the 10<sup>th</sup> cause of action for negligent misrepresentation is insufficiently pled given the timing and framing of the operating agreement entered and which is the subject of this allegation. The 12<sup>th</sup> cause of action for Nuisance is a statutory complaint and must be pled with particularity. (*Lopez v. So. Cal. Rapid Transit Dist.* (1985) 40 Cal. 3<sup>rd</sup> 780, 795.) As to the nature of the nuisance and why it is particularly injurious to the Plaintiffs. This they have failed to do, and despite having the opportunity to amend the pleading to state how they have been injured in a manner different from the general public, and it is unlikely they will be able to do so even if given further opportunity. The demurrers should thus be sustained without leave to amend.

8-14-24: Plaintiffs aver that the current demurrer rehashes the prior arguments that they have failed to state a claim but have done so without addressing their claim of fraudulent inducement and the "nefarious tool" used by Defendants to defraud DeCarlo out of his interest in the LLC. The fraudulent conduct was in the associated putative promissory note and how it was used as a tool, as the promissory note was forged and is properly pled in the SAC to show the deceit needed to state a claim. They have stated the conduct that Defendants engaged in that constitute violations of Plaintiff's Cal Recycle Permit as well as Health and Safety Code violations which expose Plaintiff to liability as stated, causing De Carlo emotional distress which is his unique injury. Defendants pick and choose the allegations that they deem to be subject to demurrer, but these by themselves buttress their causes of action and reveal the scheme of fraud, forgery and amply provide necessary facts. Their allegations must be accepted as true when challenged by Demurrer, and the court cannot look outside of the complaint as the demurrer challenges only the legal sufficiency of the complaint. The allegations must be liberally construed in favor of the pleader when read as a whole and in context.

Legal Authority:

Demurrer: A demurrer generally serves to test the legal sufficiency of the complaint's factual allegations. (*Genis v. Schainbaum* (2021) 66 Cal. App. 5<sup>th</sup> 1007, 1014.) It does not test the factual accuracy or truth of the facts alleged. The court must assume the truth of all properly pled allegations. The process of a demurrer does not serve to test the merits of the Plaintiff's case. (*Tenet Health System Desert Inc. v. Blue Cross of CA.* (2016) 245 Cal App 4<sup>th</sup> 821, 834.) Because a demurrer only challenges the defects on the face of the complaint, it can only refer to matters outside the pleadings which are subject to judicial notice. (*Tenet, supra*, at 831.)" When any ground for objection to a complaint...appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (CCP§430.30 sub (a); *Levy v. Nielson* (2000) 83 Cal. App. 4<sup>th</sup> 1061, 1063.) For the purpose of demurrer, a judge must treat the demurrer as an admission of all material facts properly pled in the challenged pleading or that reasonably rise by implication, however improbable they are. (*Collins v. Thurmond* (2019) 41 Cal. App 5<sup>th</sup> 879, 894.) For the purpose of testing the sufficiency of a cause of action, contentions, deductions, or conclusions of law are not admitted as true, and must be ignored. (*Aubry v. Tri-City Hosp Dist.* (1992) 2 Cal. 4<sup>th</sup> 962, 966-67.) Additionally, a party may not allege facts inconsistent with the exhibits to the complaint. (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal. App. 5<sup>th</sup> 1131, 1145-6.)

The other proper use of demurrer is to challenge standing. Standing is the threshold element required to state a cause of action, and thus lack of standing is grounds for demurrer. (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal. App. 4<sup>th</sup> 1024, 1031.)

Before a demurrer is filed, the demurring party must meet and confer with the other party in person or by telephone to determine if agreement can be reached to resolve the objections raised in the demurrer. (CCP §430.41 (a).) The meet and confer must occur at least five days before the responsive is due and a declaration stating the means of the meet and confer is required. (CCP§43.41 (a) (3).) Pursuant to the notice of motion and the declarations filed in support of the motion, this element has been satisfied.

#### Argument and Analysis:

- 1) Joint and Several Defendants' Demurrer:
- 2) First Cause of Action: Fraud: The court notes that the plaintiffs were granted leave to amend after the demurrer was sustained on May 10, 2024. The elements of a claim for fraud are 1) misrepresentation (false representation, concealment, or non-disclosure); 2) knowledge of falsity; 3) intent to defraud (i.e. to induce reliance); 4) justifiable reliance; and 5) resultant damage. (*Lazar v Sup. Ct.* (1996) 12 Cal. 4<sup>th</sup> 631, 638.) Fraud, unlike other causes of action must be pled with specificity. The ordinary rules of liberal construction of the pleadings are thus not the standard by which the court determines whether the Plaintiff has stated a claim. It is thus required that the Plaintiff must plead with sufficient specificity as to how, when, where, and to whom and by what means the representation was made. (*Stansfield v. Starkey* (1990) 220 Cal. App. 3<sup>rd</sup> 59, 73.) The

Defendants argue that the Plaintiffs' allegations are vague and thus unable to sustain the complaint. The court notes more that an allegation of fraud cannot be sustained with inconsistencies of the type noted in the complaint. Defendants notes that the operating agreement was signed on September 9, 2020. (SAC ¶15, Ex. A.) The Plaintiffs allege that the signature on this agreement was induced by fraudulent misrepresentation by the Defendants and point to a statement made some time after November 6, 2020, by Crestani and Merrill about how they were instrumental to restarting DMG's operations after the fire. (SAC ¶17.) This statement is cited as the misrepresentation inducing reliance resulting in the signing of the operating agreement. However, this statement, by the Plaintiff's admission in the SAC was made *after* the operating agreement was signed, thus logically, it cannot be the statement that induced an event occurring before it was ever made. Moreover, DeCarlo, Jr. never spoke to the Defendants in 2020; and DeCarlo Sr. did not sign the operating agreement. So, if DeCarlo Jr. never spoke with the Defendants in 2020, he would be unable to attest to when, where, and to whom and by what means a representation inducing reliance resulting in the signing of the operating agreement was made. General allegations, conclusions, and opinions alleged herein at paragraph 65 of the SAC cannot support a claim for fraud. (*Nibbi Bros. Inc. v. Home Fed Sav. & Ln.* (1988) 205 Cal. App. 3<sup>rd</sup> 1415, 1523.) The Defendants argue and the court concurs that DeCarlo Sr cannot plead reliance as he did not sign the LLC agreement, nor can he claim DeCarlo Jr.'s interest as his own as this is contradicted by the terms of the operating agreement itself (Ex A. paragraphs 8.01 and 8.02 of the operating agreement.) De Carlo Sr. cannot rewrite the document in retrospect to create a right to transfer an interest to him that did not exist within the agreement. Based on the foregoing, the deficiencies in the complaint regarding the fraud claim cannot be pled around and thus the claim is subject to demurrer without leave to amend.

- 3) 10<sup>th</sup> Cause of Action for Negligent Misrepresentation: The plaintiff to recover must prove 1) misrepresentation of a past or existing material fact without reasonable ground for believing it to be true and 2) with the intent to induce another's reliance on the fact misrepresented; 3) Ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and 4) resultant damage (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal. App. 4<sup>th</sup> 967, 983; see also *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rodlapp Ins. Assoc., Inc.* (2004) 115 Cal. App. 4<sup>th</sup> 1145, 1154.) Negligent misrepresentation is narrower than fraud. While a person can be held liable for fraud for "the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact (Civ. Code §11710), negligent misrepresentation requires a false statement of a past or existing material fact. Defendants note that the alleged misrepresentation in paragraph 128 of the SAC are not of past or existing material facts. There is thus no reliance as plaintiffs claim that a partnership was formed, then later EnviroServices was formed. (SAC ¶ 128.) Any alleged partnership terminated at the formation of EnviroServices (Ex A, Operating agreement at §10.13.) This is why the partnership claims were dismissed in the prior demurrer. De Carlo is not a member of

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EnviroServices and thus there is no reliance. Sub section 10.13 of the Operating Agreement, attached as Ex A to the SAC states that all promises and agreements are solely as stated in the operating agreement. IT further states that the members do not have a duty to provide any further capital contributions. (Ex A to SAC, Operating agreement at §6.02.) The operating agreement makes none of the promises alleged. The parties put into the operating agreement the terms that they agreed to so as to avoid any confusion regarding their obligations. The Plaintiffs at this juncture cannot alter this written contract after it was entered in order to suit their preferences. (Civ. Code §1625; CCP§1856.) The terms that are set forth in a writing intended by the parties to be the final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement (CCP§1856, sub (a).) The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument (Civ Code § Nor can the Plaintiffs' premise a claim on future events or alter the agreement raising allegations that are barred by both the parole evidence rule and the Operating agreement itself. In short, they are unable to cite to a misrepresentation made that is not past or existing material facts. There is no reliance that the Plaintiffs refer to at the time that these events transpired. It appears that despite having had the opportunity to amend the complaint to properly state a claim, the Plaintiffs are unable to do so.

- 4) The 12<sup>th</sup> Cause of Action for Nuisance, based on Civil Code §3479 addresses public nuisance, and what must be pled by a private person seeking to abate it. The statute provides the definition that a nuisance is “[a]nything which is injurious to health, including but not limited to, the illegal sale of controlled substances, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property...” Civil Code section 3480 clarifies that a public nuisance” is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. “(See *Birke v. Oakwood Worldwide* (2009) 169 Cal. App. 4<sup>th</sup> 1540, 1547-48.) Civil Code section 3493 limits who can file a public nuisance claim, limiting standing to private persons who can make a claim of public nuisance only “if it is especially injurious to himself, but not otherwise. “This element is not pled. Nor, as defendants note, are all the necessary elements pled. As a statutory claim arising out of Civil Code §3480, and related statutes, the general rule is that a statutory cause of action “must be pleaded with particularity.” (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal. 3<sup>rd</sup> 780, 795.) That dictate is applicable here, and as noted the SAC is wanting in this regard. Plaintiffs have not pled as required that they have suffered harm that is different from that suffered by the public generally, as is needed to put forward a prima facie case. (*Cal. Dept. of Fish and Game v. Sup. Ct.* (2011) 197 Cal. App. 4<sup>th</sup> 1323, 1352, citing to CACI 2021.) The court sustains the demurrer with leave to amend, as it is unclear whether the Plaintiffs will be unable to sufficiently amend the complaint to properly state a cause of action.

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Proposed Rulings.

1. Defendants' demurrer to the 1<sup>st</sup>, 10<sup>th</sup> causes of action are sustained without leave to amend. The Demurrer to the 12<sup>th</sup> Cause of Action is sustained with leave to amend.

**PR-13-00042 Limited Conservatorship of Mary Meza 8-28-24**

On calendar for Transfer to Kern County

Petitioner: Maria Irma Gonzalez

Conservatee: Mary Alyssa Gonzalez

This matter last came on calendar 5-22-24 for the annual review hearing. At that hearing the court read and considered the investigative report and held discussion with the Conservator as to the Conservatee's residence, which is presently in Kern County. The court adopted the recommendations of the investigation as the Court's order and extended the Conservatorship for one year. The court further continued the matter for review of the proposed transfer to Kern County.

There is no petition calendared requesting transfer of venue in this case. Nor is there any briefing or documentation in file that shows that the Conservator has complied with the statutory requirements of Probate Code sections 2011-2215. Pursuant to the Probate Code, a petition to transfer venue has not been filed with the court, pursuant to section 2213, nor has notice been provided as mandated by statute.

Proposed ruling: There is no Petition for the court to actually rule upon. The processes necessary to properly put the Petitioner's request to transfer venue of this case to Kern County, where both the Conservator and Conservatee presently live, are absent. These proceedings are thus premature, as the Petitioner must comply with the requirements of the Probate Code to put his matter properly before the court, put forward the necessary elements of the request to transfer venue, and to provide proper notice as the Probate Code requires. The Petitioner is thus referred to the Self-Help Center for assistance in the drafting and filing of the necessary petition and notices pursuant to Probate Code §§2011, et seq.

**PR-22-00072 Estate of Audrey Marie Dietz 8-28-24**

On calendar for Petition by San Benito County's Public Administration to re open probate administration to resolve a subsequently filed Creditor's Claim by the Department of Health Care Services.

Petitioner: Ben Ramsey (Melinda Casillas)

Creditors: Department of Health Care Services Estate Recovery Branch, Joe Ramirez

Procedurally, in April 2022, MediCal eligibility contacted San Benito County APS Confirming Ms. Dietz's death prior to the termination of her benefits. No notification was given at that time regarding an estate claim, nor did it appear that the county was given notice at that time. The Petition for Probate was filed 5-22-22; the Inventory and Appraisal on 1-13-23; and the Petition for Final Distribution and other relief on 6-26-23. This last was granted 6-28-23. The remaining funds were distributed to the beneficiary on 7-18-23, and an ex parte petition for Final Discharge was submitted and issued by the court on 8-4-23.

Petitioner's Counsel reports that the claimant, the Department of Health Care Services served a creditor's claim by mail on July 13, 2023, mailed from Sacramento, in the amount of \$73,736.57 and filed by the court on 7-17-23 along with a special request for notice. Petitioner requests that pursuant to Probate Code section 12252 that the court therefore reopen Probate in order to resolve this creditor's claim.

Pursuant to Probate Code section 12252 if subsequent administration of an estate is necessary after the personal representative has been discharged because other property has been discovered or it otherwise becomes necessary and proper for any other cause, the following requirements apply:

- 1) The court shall appoint as the personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as the personal representative at the time of the order of discharge has priority; and
- 2) That notice of the hearing of the appointment shall be given as provided in section 1220 to the person who served as personal representative at the time of the order of discharge and to other interested persons. If the property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and notice of hearing shall be given as provided in section 1220 to the Controller.

(Probate Code §12252 sub. (a), (b).)

Section 1220 mandates that notice must be provided at least 15 days before the time set for hearing and shall be delivered pursuant to section 1215 to the personal representative and to all persons who have requested special notice in the estate proceeding pursuant to section 1250. (Prob. Code §1220(a)(1), (a)(2)(A), (B).)

A review of the case file indicates that the notices given herein was both timely and proper, as to the recipients of that notice. The proposed order to re-open probate for the estate likewise appears to comport with statute. What is not addressed is who shall be appointed as the personal representative. However, noting that this matter was previously handled through the San Benito County Public Administrator, and ostensibly by the previously appointed Personal Representative, that her re-appointment would be proper.

Proposed Ruling: Grant the Petition to re-open probate, and request that Attorney for the Public Administrator prepare any necessary documents for the re-appointment of the prior Personal Representative for the estate.

**PR-24-00049 Conservatorship of Maria Jesus Flores** **8-28-24**

Matter on calendar for the appointment of limited conservator.

Petitioner: Jose Flores, Angela Garcia

Proposed Conservatee: Harry J. Damkar ( Maria Jesus Flores)

At the last hearing on 7-10-24, the investigative report had not yet been filed. The court granted a continuance for the completion of the report. The report has since been filed.

The request for conservatorship involves a developmentally disabled adult who is unable to manage the administration of her medication or to manage her illnesses, is unable to read or write, attend to her personal needs without assistance, or to manage her finances. She has been cared for by her family, particularly the proposed conservators who are her father and sister. The report in file confirms that there is clear and convincing evidence that proposed conservatee needs and would benefit from the protections and safeguards that a limited conservatorship would afford her; moreover, that no less restrictive alternatives to a conservatorship are available or can be explored with the proposed conservatee given her global impairments to functioning and understanding.

The report does propose that the conservators be granted limited powers pursuant to Probate Code section 2351.5, and that the request for medical authority pursuant to 2355 be withdrawn in favor of the former provisions. This will prevent duplication and would provide the appropriate scope of powers and limitations as noted.

Proposed Ruling: Based on the report provided, which aligns with the information provided in the underlying petition and noting that there is no objection to the proposed orders within the report, it appears that the proposed order in the investigative report provide for the least restrictive means to protect the conservatee and are necessary and proper to assure her ongoing well-being and welfare.

**END OF TENTATIVE RULINGS**