

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable Le Jacqueline Duong, Presiding
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

PROBATE LAW AND MOTION TENTATIVE RULINGS

DATE: June 12, 2024

TIME: 10 A.M.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	18PR182796	Gerald C. Fox Trust	Click on LINE 1 or scroll down for attached Tentative Ruling.
LINE 2	18PR182796	Gerald C. Fox Trust	Click on LINE 1 or scroll down for attached Tentative Ruling.
LINE 3			Click on LINE 3 or scroll down for attached Tentative Ruling.

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Calendar line 1

Case Name: The Gerald C. Fox Trust of August 23, 2011

Case No.: 18PR182796

Hearing date, time, and department: June 12, 2024 at 10:00 a.m. in Department 1

INTRODUCTION

This case has a long and complicated procedural history. However, the petition at issue is Petitioner Richard B. Fox (“Petitioner”)’s verified petition to determine the invalidity of the trust (“the petition”). The petition seeks a court order determining that the Gerald C. Fox Trust of August 23, 2011, as amended, is invalid as a result of fraud, mistake, impossibility, undue influence, and/or lack of capacity. The petition contends that Bill Fox (“Bill”), father of the decedent Gerald Fox (“Gerald”) and Petitioner, and David Fox, Gerald and Petitioner’s brother tricked Gerald into leaving his assets in trust to the Gerald C. Fox Foundation (“the Foundation”), a Minnesota non-profit which Petitioner contends no longer exists. According to the petition, Gerald has had limited cognitive capacity since birth.

Respondents Charles Fox (“Charles”) and Allison Greene (“Allison”) are David’s children and Gerald’s nephew and niece. They are also directors of the Foundation and beneficiaries under the original terms of the trust. The Foundation, Charles, and Allison (collectively, “Respondents”) filed the instant demurrer on two grounds: (1) failure to state a claim and (2) the petition is barred because there is another petition pending on the same cause of action. Alternatively, Respondents had requested that the court stay the proceedings on the new petition until the outcome of the first petition has been determined on appeal. Respondents have also filed a motion for sanctions under Code of Civil Procedure section 128.71 requesting that the court strike the petition and award monetary sanctions.

In 2020, in response to the demurrer, the court stayed the proceedings pending the outcome of the appeal of a statement of decision on Respondents’ February 2018 petition, which was then pending before the First District Court of Appeal, *Gerald C. Fox Foundation, et al. v. Richard v. Fox*, A165821.2 In the same order, the court continued the demurrer and motion for sanctions to a date after the appeal had been decided.

The demurrer and motion for sanctions have now come back on calendar and are currently before the court. Petitioner has also filed his own request for sanctions.

RELEVANT PROCEDURAL HISTORY

On August 23, 2011, Gerald executed the Gerald C. Fox Trust (“the Trust”). On October 4, 2017, Gerald executed the Second Amendment to the Trust. Bill died on March 16, 2017. Gerald died on October 10, 2017.

On February 8, 2018, the Foundation and Jay Johnson, a successor trustee, filed a Petition to Determine Invalidity of Purported Amendment to Trust challenging the Second Amendment to the Trust. On February 28, 2018, Respondents filed an Amended Petition to Determine Invalidity of Purported Amendment to Trust, requesting the Court to: (1) determine the Second Amendment to the Trust was invalid due to capacity and undue influence; (2) enjoin Petitioner from taking any actions as purported trustee of the Trust; (3) order Petitioner to inventory all assets he, his attorneys, or agents obtained from the Trust and to provide an accounting; (4) remove Petitioner as trustee of the Trust and appoint an independent trustee as successor trustee; (5) determine that Petitioner had committed elder financial abuse under Welfare and Institutions Code section 15610.30; and (6) award compensatory and punitive damages and costs of suit, including reasonable attorneys’ fees.

On May 29, 2018, Petitioner filed a Verified Response to Respondents’ Amended Petition in which he argued that the petition did not adequately allege that Gerald lacked capacity to execute the Second Amendment to the Trust or that Petitioner had exerted undue influence over Gerald. He also argued that the Foundation was merely a conduit to transfer wealth from Gerald to David and to the family business. He further argued that if the Second Amendment was invalid due to undue influence, the Trust itself was also; that he (Petitioner) should remain the trustee of the Trust, that the Foundation lacked standing to prosecute the petition because its sole director was Petitioner.

Also on May 29, 2018, Petitioner filed a verified petition (“Petitioner’s initial petition”) in which he alleged that the Trust held funds in a bank account and that Jay Johnson, a successor trustee under the terms of the original trust and an accountant for Bill and Gerald, had written checks to himself from that account without Gerald’s knowledge. Petitioner sought to recover those allegedly misappropriated funds for the Trust. He argued that Johnson converted the funds, that Johnson breached his fiduciary duty to Gerald, that Johnson committed financial abuse of a dependent adult under Welfare and Institutions Code section 15610.30, and that Johnson violated Penal Code section 496 by concealing and withholding property stolen from Gerald. The petition indicated that Petitioner brought it in his capacity as trustee of the Trust.

On June 25, 2019, the Honorable Julie Emede issued an order re: default judgment. The order found Johnson liable for damages in the amount of \$1,196,304 under all of the theories alleged in Petitioner’s initial petition other than under Penal Code

section 496 and concluded that the amount should be doubled to \$2,392,608 under Probate Code section 859. The court held that Johnson was disqualified from serving as trustee and found that the Trust was the prevailing party. The order expressly indicated that it did not resolve the issues of whether the bank account

from which the funds were taken was an account that was part of the Trust or a personal account of Gerald's and whether Petitioner was the trustee. On August 21, 2019, a judgment was issued in favor of the Trust and against Jay Johnson in the amount of \$2,392,608.

On September 10, 2019, Petitioner filed a second verified petition, in which he sought to recover for the Trust or Gerald's estate certain assets that he claimed had been misappropriated by various persons, including Jay Johnson.

On September 30, 2019, Petitioner admitted in a stipulation, entered into before trial, that the Second Amendment to the Trust was invalid. He also resigned as trustee. On October 3, 2019, the court accepted Petitioner's resignation as trustee without prejudice to Petitioners pursuing their claims against him as trustee. By order dated October 7, 2019, the court appointed Bank of the West to be successor trustee of the Trust.

On October 9, 2019, Petitioner filed a motion for judgment on the pleadings.³ In it, he alleged, inter alia, that the Trust was invalid because Gerald lacked capacity to execute it in 2011, that the Trust was invalid due to the nonexistence of the Foundation and impossibility of performance, and that the Foundation no longer existed and could not be a beneficiary of the trust and, therefore, lacked standing in this action.

On February 13, 2020, the Honorable Thomas Kuhnle issued a 45-page judgment and statement of decision addressing Respondents' 2018 amended petition. In it, the court found that (1) Petitioner's contention that Gerald entered into the Trust agreement by reason of fraud or mistake was not supported by admissible evidence; (2) Petitioner is barred from contending the 2011 Trust is invalid under the doctrines of judicial estoppel and contractual estoppel; (3) Gerald had capacity to execute the Trust in 2011; and (4) Petitioner's contention that the Foundation ceased to exist was unsupported.

On March 30, 2020, Petitioner moved for a new trial arguing that Respondents lacked standing in this case because the Foundation no longer existed and that the Trust was invalid due to the undue influence of Bill. On May 12, 2020, the court denied the motion for a new trial.

On May 21, 2020, Petitioner filed the petition that is the subject of the demurrer and motion for sanctions ("the petition"). The petition contends that Bill and David

tricked Gerald into leaving his assets in trust to the Foundation, which he contends no longer exists due to failure to comply with Minnesota law. He argued that the trust was invalid due to fraud, mistake, impossibility, undue influence, or lack of capacity based on Bill and David's alleged fraud and undue influence in convincing Gerald to accept a complicated estate plan that included leaving

assets in trust for the Foundation. Petitioner filed the new petition as an individual and not as trustee of the Trust.

On June 8, 2020, Petitioner filed a notice of appeal challenging the February 13, 2020 judgment and statement of decision. That case was ultimately assigned docket number A165821.

On June 22, 2020, Respondents filed their demurrer and on July 16, 2020, they filed their motion for sanctions. As part of the demurrer, in the alternative, Respondents asked the court to stay the proceedings pending the outcome of the appeal in A165821. Petitioner opposed the demurrer and motion and Respondents filed replies.

Respondents' demurrer and motions for sanctions were initially heard in October 2020. The court, the Honorable Julie Emede presiding, ordered the proceedings stayed, pursuant to Respondents, alternative request for a stay, pending the outcome of the appeal in A165821.

On January 25, 2024, Petitioner moved to dismiss the petition. However, dismissal was not entered by the clerk because the request was not on the proper judicial council form. On February 13, 2024, Respondents filed a response to Petitioner's request to dismiss the petition. On March 18, 2024, Petitioner again attempted to dismiss the petition, this time on the correct form. But, the clerk again rejected the request because Respondents had not signed the form.

On April 22, 2024, Petitioner filed a memorandum of points and authorities and declaration in opposition to Respondents' motion for sanctions and in support of Petitioner's request for sanctions against Respondents. On April 26, 2024, Respondents submitted a memorandum of points and authorities and declaration in support of their motion for sanctions and demurrer and in opposition to Petitioner's request for sanctions. But, these documents were rejected by the Clerk's Office because they did not contain the date of the hearing. Respondents thereafter refiled the documents on June 10, 2024. On May 1, 2024, Petitioner filed a reply.

DISCUSSION

I. The Demurrer and Motion for Sanctions Do Not Ask the Court to Reconsider Judge Emede's Stay Order

One of the arguments Petitioner raises in his April 22, 2024 memorandum is that Respondents are improperly seeking untimely reconsideration of Judge Emede's order staying the proceedings. This is an incorrect characterization. Judge Emede's order stayed the proceedings pending the outcome of the appeal in *Gerald C. Fox Foundation, et al. v. Richard v. Fox*, A165821. That appeal has been completed. Judge Emede's order also stated that the hearing on the demurrer and motion for sanctions would be continued to a date after the stay had been lifted. Thus, Judge Emede's order did not require that Respondents refile their demurrer and motion for sanctions. Respondents' representation that the demurrer and motion for sanctions

were fully briefed in 2020 is correct. Accordingly, Respondents were not required to comply with the requirements of section 1008.

II. Demurrer

A. Respondents' Requests for Judicial Notice

Respondents request that this court take judicial notice of the following items under Evidence Code sections 452, subdivision (d) and 453:

1. Dr. Richard B. Fox's Verified Response filed in this case on May 29, 2018;
2. Dr. Richard B. Fox's Verified Petition filed in this case on May 29, 2018;
3. Order of The Honorable Julie A. Emede filed in this case on June 25, 2019;
4. Judgment filed in this case on August 21, 2019;
5. Dr. Richard B. Fox's Motion for Judgment on the Pleadings filed in this case on September 30, 2019;
6. Statement of Decision and Judgment of the Honorable Thomas E. Kuhnle filed in this case on February 13, 2020;
7. Order Re: Respondent's Motion For New Trial by the Honorable Thomas E. Kuhnle, filed in this case on May 12, 2020;
8. Dr. Richard B. Fox's Notice of Intent to File Motion for New Trial filed in this case on March 13, 2020;
9. Dr. Richard B. Fox's Notice of Appeal of Judgment filed in this case on June 8, 2020;

10. Declaration of Richard B. Fox In Support of Motion for Disqualification filed in this case on August 13, 2019.

Evidence Code section 452, subdivision (d) provides that the court may take judicial notice of “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.” Evidence Code section 453 provides that the court “shall” take judicial notice of the items specified in section 452 when the proponent of judicial notice provides sufficient notice to the opposing party and when the proponent furnishes the court with “sufficient information to enable it to take judicial notice of the matter.”

While the Court is free to take judicial notice of the existence of a document in a court file, the Court may not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) With respect to any and all court records, the law is settled that “the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment. [Citation.]” (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.) “Otherwise judicial notice for the truth of the content of court records is not appropriate either because the truth of the content is reasonably subject to dispute [citation], or because the content is hearsay [citation].” (*Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 473.)

As court records are an appropriate subject of judicial notice and Petitioner does not object to Respondents’ request, judicial notice is GRANTED.

B. Meet and Confer

“Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer.” (Code Civ. Proc., § 430.41, subd. (a).) Respondents’ counsel has provided a meet and confer declaration indicating that the parties’ counsel spoke on the phone regarding the demurrer and that they could not reach an agreement. Accordingly, Respondents’ meet and confer requirements appear to have been met.

C. Timeliness of the Motion

“A person against whom a complaint or cross-complaint has been filed may, within 30 days after service of the complaint or cross-complaint, demur to the complaint or cross-complaint.” (Code Civ. Proc., § 430.40, subd. (a)) Even if the demurrer had been untimely filed, the Court has discretion to hear the demurrer so long as its action “. . . ‘does not affect the substantial rights of the parties.’ [Citations.]” (See

McAllister v. County of Monterey (2007) 147 Cal.App.4th 253, 281-282.) Here, the petition was filed and served on May 21, 2020. The demurrer was filed on June 22, 2020. As June 21, the 30th day, was a Sunday, the demurrer was timely filed on June 22.

D. Legal Background

As relevant to the instant case, “[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . (c) There is another action pending between the same parties on the same cause of action. . . . [or] (e) The pleading does not state facts sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subds. (c) & (e).)

The Court in ruling on a demurrer treats it “as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (Piccinini v. Cal. Emergency Management Agency (2014) 226 Cal.App.4th 685, 688, citing Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (Committee on Children’s Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 213-214.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (Scott v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 743, 751.)

E. Merits of the Motion

Respondents demurred on two grounds: (1) failure to state a claim because the claims were barred by the statute of limitations and principles of judicial and contractual estoppel and (2) the petition is barred because there is another petition pending on the same cause of action.

On February 13, 2020, the Honorable Thomas Kuhnle issued a 45-page judgment and statement of decision addressing Respondents’ 2018 amended petition. In it, the court found that (1) Petitioner’s contention that Gerald entered into the trust agreement by reason of fraud or mistake was not supported by admissible evidence; (2) Petitioner is barred from contending the 2011 trust is invalid under the doctrines of judicial estoppel and contractual estoppel; (3) Gerald had capacity to execute the Trust in 2011; and (4) Petitioner’s contention that the Foundation ceased to exist was unsupported.

Petitioner now concedes that the petition must be dismissed due to the preclusive effect of Judge Kuhnle’s statement of decision and judgment because the judgment

was affirmed on appeal in docket A165821 and Petitioner's petition for review to the California Supreme Court was denied. Accordingly, the court need not address Respondents' arguments on demurrer and the petition must be dismissed.

F. Conclusion

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

III. Motion for Sanctions Under Section 128.7

In their motion for sanctions under section 128.7, Respondents seek (1) an order striking Petitioner's Verified Petition to Determine Invalidity of Trust and (2) "monetary sanctions jointly and severally against Dr. Fox and his counsel of record in the estimated amount of \$15,000 for fees incurred (anticipated) by Respondents in connection with this Motion, as well as monetary sanctions in an amount to be later proven and determined for Petitioners' reasonable attorneys' fees and costs incurred as a direct result of [Petitioner's] Violation of Code of Civil

Procedure [section] 128.7." (Motion for Sanctions Pursuant to Code of Civil Procedure Section 128.7 at p. 1, lines 8-14.)

A. Timeliness

A motion for sanctions under section 128.7 cannot be filed until 21 days after it has been served on the party against whom sanctions are sought. (§ 128.7, subd. (c)(1).) This so-called "safe harbor" waiting period allows the party being served the opportunity to correct the violation. (See *Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 132.) Here, Respondents served Petitioner on June 22, 2020 and they filed their motion on July 16, 2020, more than 21 days later. Accordingly, the motion complies with section 128.7's safe harbor provision.

In his opposition filed on April 22, 2024, Petitioner contends that Respondents failed to provide him with the "safe harbor" time period required by section 128.7, subdivision (c)(1) after the completion of the appeal. But, the time to provide the safe harbor period was at the time of the initial filing of the motion for sanctions. Petitioner cites to no authority indicating that Respondents must provide an additional safe harbor period at this time. Accordingly, the court rejects this argument.

B. Merits of the Motion

Respondents contend that Petitioner had no legal basis for his petition and that he filed it for the purposes of harassing Respondents and to obtain trust assets to which he is not entitled to. They contend that he has violated section 128.7, subdivisions

(b)(1) and (b)(2). They ask that the court strike the petition and that it award them their attorney fees. At the outset, the court notes that the request to strike the petition is moot in light of the court's ruling on the demurrer. The court will go on to address the request for attorney fees.

“By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” (§ 128.7, subds. (b)(1) & (2).)

“A claim is factually frivolous if it is ‘not well grounded in fact’ and is legally frivolous if it is ‘not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.’ [Citation.] In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. [Citation.] A claim is objectively unreasonable if ‘any reasonable attorney would agree that [it] is totally and completely without merit.’ [Citations.]” (Bucur v. Ahmad (2016) 244 Cal.App.4th 175, 189.) “Filing a new complaint based on the same facts to evade a ruling made in a previous litigation constitutes sanctionable conduct under section 128.7. [Citation.]” (Id. at p. 191.)

“When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.” (§ 128.7, subd. (e).)

“Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b).” (§ 128.7, subd. (d)(1).)

Respondents repeat their allegations, raised in connection with the demurrer, that Petitioner's claims are barred by the statute of limitations and the principles of judicial and contractual estoppel.

i. Statute of Limitations

“A statute of limitations defense may be raised by demurrer [citation].” (Doyle v. Fenster (1996) 47 Cal.App.4th 1701, 1707.) The statute of limitations may be asserted on demurrer, when the grounds for the defense are disclosed on the face of the complaint or from matters judicially noticed. (See Vaca v. Wachovia Mortgage

Corp. (2011) 198 Cal.App.4th 737, 746; Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal.App.4th 990, 995.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (Frantz v. Blackwell (1987) 189 Cal.App.3d 91, 94.)

“ ‘A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.’ [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. [Citation.]” (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881.)

“A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear ‘clearly and affirmatively’ from the dates alleged. It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy ‘is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment’ [Citation.]” (Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 324-325.)

The parties agree that Probate Code sections 16061.7 and 16061.8 govern the statute of limitations for the filing of the new petition. Probate Code section 16061.7, subdivision (a) provides that a trustee must serve notice of certain enumerated events to beneficiaries, heirs, and other parties. The enumerated events include when a revocable trust becomes irrevocable due to the death of the settlor (Prob. Code, §16061.7, subd. (a)(1)) and when there is a change in trustee (Prob. Code, §16061.7, subd. (a)(2)). “If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, . . . the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows: [¶] ‘You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on

which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later.’ ” (Prob. Code, § 16061.7, subd. (h).)

Probate Code section 16061.8 provides, in its entirety, “No person upon whom the notification by the trustee is served pursuant to this chapter, whether the notice is served on him or her within or after the time period set forth in subdivision (f) of

Section 16061.7, may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the date on which a copy of the terms of the trust is delivered pursuant to Section 1215 to him or her during that 120-day period, whichever is later.”

Here, the petition does not allege that it is timely filed. But, a filing stamp appears on the face of the petition indicating it was filed on May 21, 2020. Additionally, a Probate Code section 16061.7 notice appears attached to the petition as an exhibit. The attached notice indicates that it was sent on October 30, 2017, shortly after Gerald’s death. Thus, Respondents contend that the new petition was not filed within the 120-day statute of limitations period.

Petitioner admits that he received the October 30, 2017 notice and does not challenge its validity. But, he argues that he received an additional Probate Code section 16061.7 notice, containing the Probate Code section 16061.7, subdivision (h) advisement, after Bank of the West was appointed as trustee. He asserts that the notice was provided at a time when the trust was substantially changed due to his resignation as trustee and due to the invalidation of the Second Amendment. Therefore, he contends that the statute of limitations began anew on December 27, 2019, the date Bank of the West served the notice of change in trustee.

Petitioner cites only *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208 (*Harustak*), wherein, he argues a Probate Code section 16061.7, subdivision (h) advisement was contained in a notification sent on “change in trust status” by death of second settlor where an amendment had changed beneficiary and successor trustee.” In that case, the settlors were husband and wife and the trust instrument provided that the trust would become irrevocable upon the death of either spouse. (*Id.* at p. 211.) After the death of the surviving spouse, the trustee sent out a Probate Code section 16061.7 notice containing the subdivision (h) advisement. (*Ibid.*) There is no evidence that the petitioner in that case had received a valid notice when the first settlor died, rendering the trust irrevocable. In fact, as Respondents’ point out, when the first spouse died, the surviving spouse became the sole trustee and attempted to amend the trust, which may suggest that she did not send out the required notice when the first spouse died and the trust became irrevocable.

Harustak dealt only with the sufficiency of the notice itself. The court held that the notice did not comply with the terms of then section 16061.7, subdivision (g) because the 120 day advisement was not bolded and did not stand out enough from the rest of the text to be the reasonable equivalent. (*Harustak*, supra, 84 Cal. App.4th at pp. 216, 219.) It did not hold that the 120-day statute of limitations will restart upon each time a Probate Code section 16061.7 notice containing a subdivision (h) advisement is se

Petitioner's argument that the 120-day period restarted upon his receipt of the December 27, 2019 notice is without merit. Although the notice sent by Bank of the West contained the Probate Code section 16061.7, subdivision (h) advisement, it also indicates that it was brought under Probate Code section 16061.7, subdivision (a)(2), which is the subdivision requiring notice when there is a change in trustee.

The 120-day deadline to file a trust contest contained in Probate Code section 16061.8 is, by its terms, triggered only by a notice served under subdivision (a)(1) of Probate Code section 16061.7, which provides, "When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust." Thus, a new 120-day timeframe is not triggered by the service of a notice of change in trustee. The mere fact that Bank of the West sent out the notice of change in trustee with the Probate Code section 16061.7, subdivision (h) advisement did not renew that statute of limitations period as Petitioner claims. Accordingly, the court finds that the petition was barred by the statute of limitations at the time it was filed.

ii. Estoppel

While Petitioner initially asserted that principles of judicial estoppel and do not bar his petition, he admits that Judge Kuhnle's decision and judgment have preclusive effect now that the judgment has been affirmed on appeal. Petitioner contends that he was entitled to pursue his petition until the Court of Appeal affirmed Judge Kuhnle's decision on Respondents' petition. However, Petitioner filed his petition that is the subject of the motion for sanctions after Judge Kuhnle issued his statement of decision and Judge Kuhnle concluded that the petition was barred by judicial estoppel at the time. Specifically, Judge Kuhnle determined that Petitioner had taken the position that the trust was valid when he filed his initial petition in 2018 seeking to recover money for the trust. But, he later stipulated that the trust was invalid. All of this occurred prior to the filing of the petition now at issue. Further, as discussed above, the petition was barred by the statute of limitations at the time it was filed. Accordingly, sanctions are warranted.

iii. Respondents' Requested Sanctions

Respondents initially requested \$15,000 in sanctions for their attorney fees incurred in drafting and filing the demurrer and request for sanctions. The motion and its supporting documents did not provide a breakdown of how the fees were incurred, nor did it provide the hourly rates of the attorney(s) involved in drafting and filing those documents. In reply, Respondents requested a total of \$47,218.50 but they did not provide the breakdown of how the fees were incurred until they filed the declaration of their counsel in connection with their reply. Thus, Petitioner did not

have the opportunity to respond to the amount of the attorney fees. Accordingly, the court requests supplemental briefing from Petitioner regarding the amount and

reasonableness of Respondents requested attorney fees. Respondents may respond to this supplemental briefing. The court has indicated that it will award sanctions but it will reserve ruling on the amount of sanctions at this time. The hearing on the motion for sanctions is CONTINUED. The parties must appear at the hearing on this matter, either in person or remotely, to determine the date for the continued hearing and set a briefing schedule.

IV. Petitioner's Request for Sanctions

In his April 22, 2024 filing, Petitioner argues that Respondents themselves should be sanctioned under section 128.5 because they have caused the court to hold an unnecessary hearing on their demurrer and motion for sanctions by preventing Petitioner from dismissing the petition. Petitioner asserts that Respondents should pay his attorney fees of \$5,000 incurred in opposing Respondents' motion for sanctions under section 128.5, subdivision (f)(1)(C), which provides, "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." He also requests that the court order that dismissal be entered pursuant to his request for dismissal filed February 13, 2024.

Petitioner's request for sanctions is procedurally improper. "A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay." (§ 128.5, subd. (f)(1)(A).) Here, the motion for sanctions is not made separately but within the same document as an opposition to Respondents' motion for sanctions.

Further, while the court is cognizant that the demurrer could have been rendered moot if Respondents accepted Petitioner's attempts to dismiss the petition, it does not find that Respondents were required to accept the requested dismissal. Petitioner's request for sanctions is DENIED.

CONCLUSION

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. With respect to Respondents' motion for sanctions, the court requests supplemental briefing from Petitioner regarding the amount and reasonableness of Respondents requested attorney fees. Respondents may respond to this supplemental briefing. The court has indicated that it will award sanctions but it will reserve ruling on the amount of sanctions at this time. The hearing on the motion for sanctions is CONTINUED. The parties must appear at the hearing on this matter, either in person or remotely, to

determine the date for the continued hearing and set a briefing schedule. Petitioner's request for sanctions is DENIED.

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