

**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: August 30, 2024 TIME: 10:00 A.M.**

**\*\*\*NOTICE\*\*\***

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REMOTE THROUGH MICROSOFT TEAMS**

**PLEASE GO TO:**

**[https://www.sccourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.sccourt.org/general_info/ra_teams/video_hearings_teams.shtml) to find the appropriate link.**

**State and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while on Microsoft Teams.**

**Prevailing party shall prepare the order by e-file, unless stated otherwise below**

**The court does not provide official court reporters for civil/probate law and motion hearings. See court website for policy and forms for court reporters at hearing**

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	18PR182796	Gerald C.Fox Trust	Click on <a href="#">LINE 1</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 2</a>	18PR182796	Gerald C.Fox Trust	Click on <a href="#">LINE 2</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 3</a>			Click on <a href="#">LINE 3</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 4</a>			

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**PROBATE LAW AND MOTION TENTATIVE RULINGS**

<a href="#">LINE 5</a>			
<a href="#">LINE 6</a>			

Line 1

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

Case No.: 18PR182796

Hearing date, time, and department: August 30, 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. According to the petition, Gerald has had limited cognitive capacity since birth.

Respondents Charles Fox (“Charles”) and Allison Greene (“Allison”) are the directors of the Foundation and beneficiaries under the original terms of the trust. The Foundation, Charles, and Allison (collectively, “Respondents”) filed a 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.

After the appeal had concluded, the court placed the demurrer and motion for sanctions back on calendar. The court sustained the demurrer without leave to amend as Petitioner conceded that, in light of the outcome of the appeal in docket A165821, the petition had no merit. The court also indicated that it would grant sanctions pursuant to section 128.7 but reserved ruling on the amount of sanctions,

requesting additional briefing and information regarding the amount of sanctions to be imposed.

On June 28, 2024, Respondents filed their memorandum of points and authorities in support of the amount of sanctions. Petitioner filed an opposition and Respondents filed a reply.

## 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. 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.

On June 12, 2024, the demurrer and motion for sanctions came on for hearing. The court sustained the demurrer and indicated that it intended to award sanctions pursuant to section 128.7 but it reserved ruling on the amount of sanctions.

On June 28, 2024, Respondents filed their memorandum of points and authorities in support of the amount of sanctions. On July 31, 2024, Petitioner filed an opposition and, on August 16, 2024, Respondents filed a reply.

## DISCUSSION

### I. Petitioner's Request for Judicial Notice

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

1. The opinion of the Court of Appeal for the First Appellate District, Division Five in *Gerald C. Fox Foundation, et al. v. Richard B. Fox*, No. A165821, decided March 6, 2023;
2. The first amended petition filed September 12, 2022 in *Richard B. Fox vs. Lakeland Management Services, et al.*, Santa Clara Superior Court, Case No. 20PR187714;
3. The stipulation and order to stay proceedings filed February 10, 2023 in docket 20PR187714;
4. The order re motion to quash service of summons filed on December 8, 2022 in docket 20PR187714;
5. The order re default judgment issued on June 25, 2019 in the instant case;
6. The Request for Relief at September 10, 2018 Hearing filed September 6, 2018 in the instant case;
7. The reporter's transcript of the proceedings on September 10, 2018 in the instant case;
8. The order re motion to quash service and motion to strike petition filed on December 11, 2019 in the instant case;
9. The Petition for Order Approving Sale of Business Interest filed by Bank of the

West on December 2, 2021 in the instant case;

10. The Appellant's Opening Brief filed on February 5, 2024 in Gerald C. Fox Foundation v. Fox, No. H051471.

11. The Appellant's Reply Brief filed on May 28, 2024 in Gerald C. Fox Foundation v. Fox, No. H051471.

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." Respondents do not oppose the request for judicial notice.

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.)

The request for judicial notice is unopposed and the documents are the proper subject of judicial notice pursuant to Evidence Code section 452, subdivision (d). Accordingly, Petitioner's request for judicial notice is GRANTED.

## II. Petitioner's Opposition

At the June 12, 2024 hearing on this matter, the court indicated that sanctions pursuant to section 128.7 were warranted and requested supplemental briefing from the parties regarding the amount of sanctions to be awarded, an issue which had not yet been addressed by Petitioner. In his current opposition, Petitioner argues the propriety of awarding sanctions. Citing authority not previously presented to the court, he contends, with supporting authority, that sanctions pursuant

to section 128.7 are inappropriate because the standards of frivolity and presentation of the petition for an improper purpose have not been met. (See § 128.7, subds.



(b)(1)&(2).) Respondents' replied asserting that the court's order continuing the hearing on the sanctions motion only allowed for briefing regarding the amount of sanctions.

While Respondents are correct that the court did request briefing on the amount of sanctions, the motion has not yet been granted. This is not a decision the court takes lightly. In light of these arguments with supporting authority and the chilling effect sanctions may have on zealous advocacy, (see, e.g., *Pacific Trends Lamp & Lighting Products, Inc. v. J. White, Inc.* (1998) 65 Cal.App.4th 1131, 1136), the court will consider the motion for sanctions anew but only after Respondents have had the chance to respond substantively.

In an effort to consider all the arguments that have been made and provide the parties the opportunity for full briefing on the motion for sanctions, the court hereby requests briefing from Respondents regarding the issues discussed in Petitioner's opposition filed July 31, 2024.

#### CONCLUSION

The court requests a substantive response from Respondents regarding the arguments made by Petitioner in his opposition filed on July 31, 2024. Petitioner may file a response and Respondents may file a reply. Additionally, the court will consider alternative and appropriate means for Respondents' request for attorney fees from Petitioner and/or his counsel outside the context of section 128.7 sanctions or any other relevant arguments the parties wish to make.

The parties are ordered to appear at the hearing on this matter to a briefing schedule and a new hearing date. The parties also ordered to meet and confer to determine if a resolution can be reached.

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