

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

Department 1, Honorable Julie A. Emede, 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: July 12, 2024 TIME: 10:00 A.M.

*****NOTICE*****

**APPEARANCES IN DEPT. 1 MAY BE IN PERSON OR
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Prevailing party shall prepare the order by e-file, unless stated otherwise below

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TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it, or adjust your internet settings to see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21PR191331	Cleston and Geraldine Fisher Trust u/a/d 6/27/94	Click on LINE 1 or scroll down for attached Tentative Ruling.
LINE 2			
LINE 3			
LINE 4			
LINE 5			
LINE 6			

Line 1

In 1994, settlors Cleston and Geraldine Fisher, husband and wife, executed the Cleston and Geraldine Fisher Trust (“the trust”). Cleston passed away in 2008.¹ On the death of the first settlor, the trust split into two subtrusts, the survivor’s trust and the residual trust.

On October 27, 2021, Petitioner and beneficiary Brenda Gossman (“Petitioner”) filed a Verified Petition (“the petition”) seeking declaratory relief, an accounting, a constructive trust, and damages associated with a trust distribution that she alleges Respondent Rene Bolivar (“Respondent”) procured through a purported second amendment to the survivor’s trust (“the second amendment”). According to the allegations in the petition, after Cleston’s death, Respondent, the settlors’ financial advisor, was involved in preparing the second amendment which provided that he would become the trustee upon the death of the surviving settlor and that he would be a beneficiary of the survivor’s trust. The petition alleges, inter alia, that Geraldine lacked the capacity to draft the second amendment, that Respondent unduly influenced her, and that Respondent converted trust assets.

On July 12, 2023, Petitioner filed a verified amended petition against Respondent and also naming Lena Bolivar (“Lena”) and First Allied Securities, Inc. (“First Allied”), Respondent’s employer, as respondents. Petitioner’s amended petition alleged causes of action for (1) declaratory relief finding residual trust modification void, (2) declaratory relief regarding disposition of survivor’s trust, (3) undue influence, (4) financial elder abuse, (5) lack of capacity under Probate Code sections 810 through 812, (6) lack of capacity under Probate Code section 6100.5, (7) breach of fiduciary duty, (8) intentional interference with expected inheritance, (9) accounting, (10) conversion, (11) constructive trust, (12) fraud, (13) professional negligence, (14) negligence (against Respondent), (15) negligence (against First Allied), (16) negligent supervision or retention of employee, (17) aiding and abetting breach of fiduciary duty (against First Allied), (18) aiding and abetting fraud (against First Allied), (19) aiding and abetting breach of fiduciary duty (against Lena), (20) aiding and abetting fraud (against Lena).

Before her death, from at least 2012 to 2021, Geraldine made periodic payments to Respondent’s wife, Lena Bolivar, which Respondent alleges were paid to assist Lena financially due to Lena’s failing health. Geraldine passed away on May 13, 2021.

After Geraldine’s death, Respondent became the trustee. In that capacity, he made distributions to himself as a beneficiary.² He also made distributions to the other beneficiaries.

He admits that he paid his attorney fees incurred in defending his position as trustee from trust funds.

In a written order dated May 9, 2023 and filed May 11, 2023, the court suspended Respondent as trustee and appointed Russell Marshall to serve as trustee while this litigation is pending or pending further order of the court.

On April 8, 2024, Respondent filed a petition to approve accounting and ratify his prior actions as trustee. On April 16, 2024, he filed an amended petition.

On May 10, 2024, the court ordered that Respondent and Lena to transfer \$5,236,639.69 to the new trustee, Russell Marshall. If they did not return the funds, the court ordered a tracing.

Currently before the court is Petitioner's motion to bifurcate the trial such that the equitable claims are tried by the court before the remaining legal claims are presented to the jury. Respondent and Lena oppose the motion and Petitioner has filed a reply.

DISCUSSION

I. Legal Standard

Code of Civil Procedure³ section 598 provides, "The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case"

Section 1048, subdivision (b) provides, "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States."

II. Merits of the Motion

Petitioner moves to bifurcate the trial such that the equitable causes of action are tried first by the court and the remaining legal causes of action are later tried by the jury. She

identifies the legal causes of action as: (1) Petitioner's claims for declaratory relief, (2) Petitioner's claim for an accounting, (3) Petitioner's claim for a constructive trust, (4) Petitioner's claim for undue influence, (5) Petitioner's claim for lack of testamentary capacity, (6) Petitioner's claim for financial abuse of an elder, (7) Petitioner's claim for a tracing of Rene and Lena Bolivar's assets pursuant to the court's May 10, 2024 order, and (8) Rene Bolivar's claim, raised in his petition filed April 16, 2024, to ratify his acts as trustee. Petitioner contends that bifurcating the trial will promote judicial economy and save resources.

"A jury trial, '[a]s a general proposition, '... is a matter of right in a civil action at law, but not in equity.' [Citations.]' [Citations.] An action at law is one for which a jury trial was permitted at common law as it existed at the time our Constitution was first adopted in 1850. [Citation.] 'In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action.' (People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 299; see also Walton v. Walton (1995) 31 Cal.App.4th 277, 291 [] [' "gist" of the action is ordinarily determined by the mode of relief to be afforded, though the prayer for relief is not conclusive. [Citation.]'].)" (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1237-1238.)

"Where plaintiff's claims consist of a 'mixed bag' of equitable and legal claims, the equitable claims are properly tried first by the court. A principal rationale for this approach has been explained as follows: ' "When an action involves both legal and equitable issues, the equitable issues, ordinarily, are tried first, for this may obviate the necessity for a subsequent trial of the legal issues." [Citation.]' [Citations.]" (Nwosu v. Uba, supra, 122 Cal.App.4th at p. 1238.) "If 'there are equitable and legal remedies sought in the same action, the parties are entitled to have a jury determine the legal issues unless the trial court's initial determination of the equitable issues is also dispositive of the legal issues, leaving nothing to be tried by a jury.' [Citation.]" (DiPirro v. Bondo Corp. (2007) 153 Cal.App.4th 150, 185.)

Respondent and Lena agree to specific equitable claims being tried first, namely, the declaratory relief claims, Petitioner's accounting claim, the tracing of the Bolivar's assets as ordered by the court on May 10, 2024, and Respondent's claim for ratification of his acts as trustee. They assert that, with respect to the undue influence, financial elder abuse, lack of testamentary capacity, and constructive trust causes of action, the legal and equitable issues are intertwined such that they much be tried by the jury. Thus, they object to those specific claims being tried in the first phase court trial.

With respect to the undue influence cause of action, Petitioner asserts that undue influence claims are generally equitable in nature. Petitioner relies on *Strauss v.*

Summerhays (1984) 157 Cal.App.3d 806, 813 (Strauss), in which the Court of Appeal stated that the “right to a jury trial on the issues of incompetency, fraud and undue influence cannot be expanded to an action involving the validity of an inter vivos trust, as this is an equitable action. (Estate of Kreher (1951) 107 Cal.App.2d 83 (issue of undue influence in action to set aside joint tenancy agreements not entitled to jury trial).)” Respondent contends that Strauss is distinguishable

because, in that case, the plaintiff sought declaratory relief determining that the decedent’s residence was an asset of an inter vivos trust and that possession of the residence and validity of the trust were not at issue. Here, the undue influence cause of action is alleged against Respondent and First Allied, asserting that Respondent influenced Geraldine to amend the trust. It alleges that First Allied ratified Respondent’s conduct. Within that cause of action, Petitioner seeks compensatory and exemplary damages against Respondent and First Allied, as well as injunctive relief. The court agrees with Respondent and Lena that the gist of the undue influence cause of action is legal. “Determining whether the gist of a claim is in law or equity depends in large measure upon the mode of relief to be afforded. [Citation.] Generally, an action for damages is legal in nature. [Citation.]” (Brown v. Mortensen (2019) 30 Cal.App.5th 931, 941, internal quotation marks omitted.) Further, the undue influence cause of action raises issues of fact properly tried by a jury. (See Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 623 [unclean hands defense properly tried by jury where the facts relating to the defense were intertwined with the parties’ legal claims].) The motion is denied as to the undue influence cause of action.

Petitioner’s claim for financial elder abuse is alleged against Respondent, Lena, and First Allied. It asserts that Respondent and Lena coerced Geraldine into making over \$1.56 million in donative transfers to them during her lifetime. It again alleges that First Allied ratified Respondent’s conduct. Within that cause of action, Petitioner seeks compensatory, punitive, exemplary, and/or double damages, and attorney fees and costs under Welfare and Institutions Code section 15657.5, subdivision (a). Petitioner contends that the financial elder abuse cause of action is equitable in nature because she can request a writ of attachment as to property allegedly obtained via financial elder abuse pursuant to Welfare and Institutions Code section 15657.01. But, she does not request a writ of attachment in the amended petition and she does not indicate that she has filed a separate application for a writ of attachment. As Respondent and Lena correctly point out, Petitioner primarily seeks damages in connection with her financial elder abuse claim. As mentioned above, an action for damages is generally legal in nature. (Brown v. Mortensen, supra, 30 Cal.App.5th at p. 941, internal quotation marks omitted.) The court finds that Petitioner has not established that the gist of the financial elder abuse claim is equitable in nature. Accordingly, the motion is denied as to the financial elder abuse claim.

Respondent and Lena contend that, because Petitioner's prayer for relief primarily seeks money damages, the lack of capacity causes of action are legal, rather than equitable. They also argue that the legal and equitable issues in this case are intertwined. Petitioner asserts two causes of action for lack of capacity. The first, alleged against Respondent only, contends that Geraldine lacked capacity to execute the first and second trust amendments under Probate Code sections 810 through 812. The second, alleged against both Respondent and Lena, argues that Geraldine lacked capacity to execute the first and second trust amendments under Probate Code section 6100.5. Both causes of action seek to have the court declare that the first and second amendments are void and that the only operative version of the trust is the original. Here, the remedy sought as to the lack of capacity causes of action, namely, a determination of the invalidity of the trust amendments, is purely equitable. Further, as Petitioner points out, it has

been held that issues of incompetency in the context of an inter vivos trust are equitable. (See Strauss, supra, 157 Cal.App.3d at p. 813.) The court finds that the issue of Geraldine's capacity is not so intertwined with legal issues that it must be tried via jury. The motion is granted as to the lack of capacity causes of action.

The constructive trust cause of action, alleged against Respondent only, requests that the court impose a constructive trust over all assets of the survivor's trust in Respondent and Lena's possession. The petition asserts that a constructive trust is warranted due to Respondent's and Lena's wrongdoing. A constructive trust is an equitable remedy. (PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal.App.4th 384, 398.) "The issue of whether to impose a constructive trust is an equitable issue for the court." (American Master Lease LLC v. Idanta Partners, Ltd. (2014) 225 Cal.App.4th 1451, 1485 [holding that it was error to submit the issue of whether to impose a constructive trust to the jury].) However, until the legal issues (including undue influence and financial elder abuse) have been decided, any determination regarding a constructive trust is premature. The motion is denied as to the constructive trust cause of action.

CONCLUSION

The motion to bifurcate is GRANTED in part, as to the declaratory relief claims, Petitioner's accounting claim, the tracing of the Bolivar's assets as ordered by the court on May 10, 2024, the lack of capacity claims, and Respondent's claim for ratification of his acts as trustee. The motion is DENIED as to the undue influence, financial elder abuse, and constructive trust causes of action.

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