

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

Department 1, Honorable Daniel Nishigaya, 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 Or Email at
Department1@scscourt.org before 4:00 P.M.**

**PROBATE LAW AND MOTION TENTATIVE RULINGS
DATE: October 23, 2024 TIME: 10:00 A.M.**

*****NOTICE*****

**APPEARANCES IN DEPT. 1 MAY BE IN PERSON OR REMOTE
THROUGH MICROSOFT TEAMS**

PLEASE GO TO:

**https://www.scscourt.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**

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or
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"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.

This is NOT Probate Examiner's note. For that please click here

And look for probate advance case status.

**[https://santaclara.courts.ca.gov/divisions/probate-division/probate-advance-case-
status-reports](https://santaclara.courts.ca.gov/divisions/probate-division/probate-advance-case-status-reports)**

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21PR191331	Cleston and Geraldine Fisher	Click on LINE 1 or scroll down for attached Tentative Ruling.

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 2			Click on LINE 2 or scroll down for attached Tentative Ruling.
LINE 3			Click on LINE 3 or scroll down for attached Tentative Ruling.
LINE 4			
LINE 5			
LINE 6			

Line 1

Case Name: The Cleston and Geraldine Fisher Trust

Case No.: 21PR191331

Hearing date, time, and department: October 23, 2024 at 10:00 a.m. in Department 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. On the death of the first settlor, the trust split into two subtrusts, the survivor’s trust and the residual trust. Geraldine (“Decedent” or “Geraldine”) passed away in 2021.

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” or “Bolivar”) 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 Decedent 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”), Respondent’s wife, 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 (against Bolivar and First Allied), (4) financial elder abuse (against Bolivar, Lena, and First Allied), (5) lack of capacity under Probate Code sections 810 through 812 (against Bolivar), (6) lack of capacity under Probate Code section 6100.5 (against Bolivar and Lena), (7) breach of fiduciary duty as financial advisor (against Bolivar and First Allied), (8) intentional interference with expected inheritance (against Bolivar, Lena, and First Allied), (9) accounting (against Bolivar only), (10) conversion (against Bolivar and First Allied), (11) constructive trust (against Bolivar only), (12) fraud (against Bolivar only), (13) professional negligence (against Bolivar and First Allied), (14) negligence (against Respondent), (15) negligence (against First Allied), (16) negligent supervision or retention of employee (against First Allied), (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 pursuant to the amended trust instrument. In that capacity, he made distributions to himself as a beneficiary. He also made distributions to the other beneficiaries.

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.

Currently before the court are (1) First Allied's motion for summary judgment or summary adjudication and (2) Petitioner's motion for summary adjudication. Petitioner and the Bolivars opposed First Allied's motion and First Allied filed a single reply. The Bolivars and First Allied opposed Petitioner's motion and Petitioner filed two separate replies, one for each opposition.

On September 10, 2024, the motions came on for hearing. The tentative ruling issued by the court was contested and the parties appeared at the hearing for oral argument. The court took the matter under submission. However, thereafter, the parties entered into a stipulation that Petitioner would be allowed to file an amended petition in order to allege certain theories of liability not pled previously. Although the amended petition has not yet been filed, the court finds that the motions for summary judgment and summary adjudication are moot. "[T]he filing of an amended complaint moots a motion directed to a prior complaint. [Citation.] Thus, once an amended complaint is filed, it is error to grant summary adjudication on a cause of action contained in a previous complaint." (State Compensation Ins. Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1131, see also Hartline v. Kaiser Foundation Hospitals (2005) 132 Cal.App.4th 458, 464 [summary judgment and summary adjudication are the similarly procedurally except that summary adjudication is as to a cause of action and summary judgment is as to the entire pleading].)

As explained in Hejmadi v. AMFAC, Inc. (1988) 202 Cal.App.3d 525, 536, "a court granting plaintiff leave to amend a cause of action should not at the same time attempt to summarily adjudicate material issues which underlie that same cause of action. After a cause of action is amended, the court may rule in favor of the defendant if, upon subsequent motion, or perhaps renewal of the earlier motion if

appropriately framed, it is shown (a) that plaintiff simply cannot state a cause of action on the theory relied upon (in effect a judgment on the pleadings without leave to amend, [citation] or (b) there are no triable material issues of fact which would permit recovery on that theory. [Citation.]” Here, although the amended petition will be filed based on the parties’ stipulation rather than a grant of leave to amend, the outcome is the same. The court may not summarily adjudicate any of the causes of action in the current petition as Petitioner has been allowed to file an amended petition.

The motions for summary judgment and summary adjudication are DISMISSED AS MOOT.

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