

The undersigned, PATRICIA POLLAK WEISS ("WEISS"), appearing in proper person, pursuant to the Florida Rules of Appellate Procedure including **Rule 9.100**, and otherwise, hereby timely serves and files this petition for (1) a writ of prohibition that prohibits The Honorable Arthur Rothenberg and Clerk Harvey Ruvin from dismissing this probate adversary proceeding (commenced by WEISS against Mr. and Mrs. BERKETT) and from closing the case for a judicially assumed failure to prosecute or otherwise as stated in Judge Rothenberg's November 16, 2006 order entitled "*SUA SPONTE* COMBINING NOTICE OF INTENTION TO DISMISS AND ORDER OF DISMISSAL" [Appendix page 1] to the extent that the order, and/or any part thereof, is not in compliance with the amended Fla. R. Civ. P. 1.420(e) which became effective January 1, 2006, and (2) a writ of mandamus directing the Clerk of the Court to reinstate the probate adversary case if it so dismissed during the during the pendency of this appellate proceeding, and WEISS shows the Court as follows:

TABLE OF CONTENTS

I. The Basis of Jurisdiction is Fla. R. App. P. 9.100	2
A. The November 16, 2006 "<i>Sua Sponte</i> Combining Notice of Intention To Dismiss And Order of Dismissal" is a Departure from the Essential Requirements of Law That Will Cause Material Injury For Which There Is No Adequate Remedy By Appeal	2
B. The Standard of Review is <i>De Novo</i>	4
II. The Facts Upon Which Petitioner Relies	5

III. The Nature of The Relief Sought	8
A. Writ of Prohibition	8
B. Writ of Mandamus	9
IV. Argument in Support Of Petition With Legal Authorities ..	9
APPENDIX	separately bound

I. The Basis of Jurisdiction is Fla. R. App. P. 9.110

A. The November 16, 2006 “*Sua Sponte* Combining Notice of Intention To Dismiss And Order of Dismissal” is a Departure from the Essential Requirements of Law That Will Cause Material Injury For Which There Is No Adequate Remedy By Appeal

This Court has jurisdiction to issue a writ of prohibition under Article V section 4(b)(3) of the Florida Constitution, and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Prohibition is the proper remedy to prevent a lower tribunal from improper use of a judicial power and to prevent the Clerk of the Courts from closing a case without Due Process.

As explained in Padovano, Florida Appellate Practice, 2007 ed. at “§28.3 Prohibition”, pages 679-680 “A party may file a petition for a writ of prohibition in an appellate court to prevent a lower tribunal from the improper use of a judicial power. Prohibition has been defined as the process by which a superior court restrains the unauthorized use of judicial power by an inferior tribunal.”

The gist of the order is that unless a further order is signed and entered within 45 days of November 16, 2006, then "this cause is hereby dismissed *sua sponte* without further notice or order of this Court." Petitioner WEISS seeks to prevent that anticipated harm of an anticipated dismissal of this probate adversary proceeding for the lower court's perceived failure to prosecute because the procedure being used by the lower court does not comport with the current Rule as set forth in Fla.R.Civ.P. 1.420(e). Rule 1.420(e) is applicable to the underlying probate adversary proceeding because of Fla. Probate Rule 5.025(d)(2) which states, *inter alia*,: "(2) After service of formal notice, the proceeding, as nearly as practicable, shall be conducted similar to suits of a civil nature and the Florida Rules of Civil Procedure shall govern, including entry of defaults."

This Court has jurisdiction to issue a writ of mandamus under Article V section 3(b)(8) of the Florida Constitution and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Mandamus is the proper remedy since the duty to allow a probate adversary suit to continue absent a court order that complies with the current version of Fla. R. Civ. P. 1.420(e). Furthermore, the order itself is confusing - the order could be construed to be retroactively "final" if the court issues no further order within 45 days. That ambiguity poses all sorts of problems for the Clerk of the Courts, who is the person charged with accepting documents

for filing in court cases, transmitting records for appeals, etc. Clerk of the Courts Harvey Ruvin has a ministerial duty to allow court cases to remain pending until they are properly dismissed through the correct procedure involving judicial action, and any closing of cases through judicial inaction would essentially violate the Equal Protection and Due Process Clauses of the state and federal constitutions and the Privileges and Immunities Clause.

B. The Standard of Review is De Novo

"Appellate courts are not required to defer to trial judges on issues of law. The standard of review of legal issues involves more than a determination whether the issue was correctly decided in the lower tribunal. ... [T]he appellate court is free to decide the legal issue differently without paying deference to the trial judge's view of the law." Philip J. Padovano, Florida Appellate Practice, 2007 ed. at § 9.4.

Appellate court review is *de novo* on the merits where a trial judge dismisses a complaint for failure to state a cause of action. "Any other dismissal order that determines the legal right to proceed with the action or the legal right to proceed against a particular defendant would be reviewable by the *de novo* standard." *Id.*

A dismissal based upon record inactivity is a question of law, which takes into consideration undisputed facts. Because the

amended Rule 1.420(e) reflects a new procedure, it is likely that this case is one of "first impression" for this panel and analogy to previous decisions concerning writs of prohibition may be helpful in determining the standard of review.

When writing for the panel on December 6, 2000, in Sume and Boyer v. State of Florida, 773 So. 2d 600, (Fla. 1st DCA 2000), Judge Padovano opined that the standard of review must be *de novo*:

"Although the matter has apparently not be addressed in the Florida case law, we conclude that an order denying a motion for disqualification is reviewable by the *de novo* standard of review. Rule 2.160(c) states that the trial judge shall "determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged." Whether the motion is "legally sufficient" is a pure question of law. See MacKenzie v. Super Kids Bargain Store, 565 So. 2d 1332 (Fla. 1990). It follows that the proper standard of review is the *de novo* standard. See Armstrong v. Harris, 25 Fla. L. Weekly S656 (Fla. Sept. 7, 2000); Rittman v. Allstate Ins. Co., 727 So. 2d 391 Fla. 1st DCA 1999).

II. The Facts Upon Which Petitioner Relies

Petitioner is the Plaintiff in a case pending in the Probate Division of the lower court. The complaint was filed on October 6, 2005 and it was comprised of 34 pages and 10 exhibits. Copies of the first two pages of the complaint appear in the Appendix at pages 2-3. One of the two civil action summonses issued by a court clerk and a proof of service appear in the Appendix at pages 4-7. The affidavit of service demonstrates that copies of the complaint, summons and the declaration that proceeding is adversary were all served. Both defendants were served with identical sets of papers.

Joel Hirschhorn, Esq. appeared for both Mr. and Mrs. BERKETT and served a motion to dismiss. This is shown on the "on-line" docket record, a copy of which is part of the Appendix at page 8.

Mr. Hirschhorn did not give notice of any specially set hearing for his clients' motion, and the lower court did not set any hearing.

On October 16, 2006, Judge Rothenberg held a hearing in a related case in which both WEISS and Mrs. BERKETT are parties. Judge Rothenberg inquired as to whether the parties had "been to mediation," and (after learning that former Judge "Robert Newman was our mediator"), Judge Rothenberg stated "We'd like a comprehensive resolution of everything" and WEISS stated that she agreed with that goal. Judge Rothenberg said that His Honor would "get back to you all" and make a "suggestion" as to a mediator, after Judge Rothenberg agreed with WEISS "that mediation can't be forced unless all sides agree." Copies of the relevant pages of the October 16, 2006 transcript are part of the Appendix at pages 9-13. (The pages show that the name of Former Judge Wetherington was suggested by Judge Rothenberg but that WEISS responded by saying that she had inquired and that his hourly rates were too expensive. In fact, Former Judge Wetherington's mediation rates were higher than those of former Judge Robert H. Newman the last

time WEISS checked into it.)¹

Following that October 16, 2006 hearing, BERKETT's counsel Hirchhorn & Bieber, P.A. moved their offices and on or about October 30, 2006, the firm sent WEISS a formal notice of change of address to their new Biltmore Way location.

Judge Rothenberg signed the November 16, 2006 order entitled "SUA SPONTE COMBINING NOTICE OF INTENTION TO DISMISS AND ORDER OF DISMISSAL" [Appendix page 1]. According to the on-line docket [Appendix at 8], the order was entered on November 20, 2006 and also on November 22, 2006.

According to the order, it appears that in order to keep the case "active", WEISS must convince Defendants' counsel to sign a joint motion requesting that the trial court extend the time to close the case and then Judge Rothenberg must agree to enter such an order and also sign and enter that order within 45 days of November 16, 2006. WEISS lacks any ability to timely cause the signatures of opposing counsel and the judge by the dates set.

¹The pages also show the tail end of a discussion about the Third District Court's decision in a prior lawsuit which sought, *inter alia*, a fiduciary accounting from BERKETT, which lawsuit Judge Rothenberg had dismissed. That dismissal was reversed. See *Weiss v. Berkett*, 883 So.2d 299 (3d DCA 2004) #3D03-3171. [Appendix at 14] After the Third District Court of Appeal later awarded attorneys fees on appeal in favor of WEISS in #3D03-3171, WEISS timely filed a motion for the determination of the amount of attorneys fees in the lower tribunal within 30 days and she requested an evidentiary hearing on that motion. On October 16, 2006, Judge Rothenberg requested some additional supporting material from WEISS in connection therewith, and WEISS has since timely complied with that request.

III. The Nature of The Relief Sought

A. Writ of Prohibition

_____Petitioner seeks a writ of prohibition that prohibits The Honorable Arthur Rothenberg and Clerk Harvey Ruvin from dismissing this probate adversary proceeding (commenced by WEISS against Mr. and Mrs. BERKETT) and from closing the case for a judicially assumed failure to prosecute or otherwise as stated in Judge Rothenberg's November 16, 2006 order entitled "*SUA SPONTE* COMBINING NOTICE OF INTENTION TO DISMISS AND ORDER OF DISMISSAL" [Appendix page 1] to the extent that the order, and/or any part thereof, is not in compliance with the amended Fla. R. Civ. P. 1.420(e) which became effective January 1, 2006.

Fla.R.Civ.P. 1.420(e) was amended in 2005 and that amendment became effective on January 1, 2006. Petitioner WEISS is entitled to a full "60-day" period after notice by the lower court within which to re-commence prosecution of the action and avoid dismissal for failure to prosecute it.

Moreover, random reassignment is appropriate. Judge Rothenberg failed to follow the law concerning procedures for *sua sponte* dismissal under Rule 1.420(e). When a lower tribunal judge fails to follow the established procedures, an appellate court may, and indeed should, rely upon its inherent jurisdiction to remand the case with directions that the case be randomly reassigned to a different judge. See McLee v. Chrysler, 38 F. 2d 67 (2nd Cir. 1994)

(case remanded with directions for reassignment where district judge acknowledged -- but failed to exercise -- its decision-making authority on motion for summary judgment as required). Judge Rothenberg has demonstrated a pattern, without legal justification, of dismissing cases in which WEISS seeks an accounting from her trustee Mrs. BERKETT. See footnote 1, *supra*.

B. Writ of Mandamus

Petitioner WEISS also seeks a writ of mandamus directing the Clerk of the Court to reinstate the probate adversary case if it so dismissed during the pendency of this appellate proceeding.

IV. Argument in Support Of Petition With Legal Authorities

Fla. R. Civ. P. 1.420(e) (2006) [Appendix at 30-31] is attached and it is that Rule upon which Petitioner WEISS relies to support her petition.

Bruce J. Berman, Florida Civil Procedure, 2007 ed. vol. 4 at ¶ 420.5, discusses the amendment to Rule 1.420(e) and pages 576-584 are included in the Appendix for the convenient reference of the Court. The author explains the 2005 amendment's new procedure which appertains to the facts of this case, beginning at page 564:

¶420.5 Involuntary Dismissal for Failure to Prosecute; Subdivision (e).

" ... Rule 1.540(e) has generated extensive case law because of the malpractice exposure to lawyers where non-prejudicial dismissals nevertheless preclude re-filing after expiration of the statute of limitations. As a result, the Civil Procedure Rules Committee submitted to the Supreme Court a proposed amendment that would significantly alter subdivision (e) to increase the likelihood that cases would be resolved on the merits rather than based on a procedural misstep. The Supreme Court subsequently adopted that proposed amendment, effective January 1, 2006. [fn 55 See In re Amendments to The Florida Rules of Civil Procedure (Two Year Cycle), 917 So.2d 176, 177 (Fla. 2005)] That amendment replaced the 1-year period of inactivity on the face of the record with a 10-month period and further provided that, following service on all parties of a notice that there has been no record activity for 10 months, the plaintiff shall have 60 days within which to take action of record, and thereby avoid dismissal for failure to prosecute. [fn 56. "See In re Amendments to The Florida Rules of Civil Procedure (Two Year Cycle), 917 So.2d 176,181-182 (Fla. 2005) (and Committee Note to 2005 Amendment, at 182)."

The Berman text further explains at page 565:

" [3] *The "10 Months" is that Which Precedes the Notice.* As a result of the 2005 amendment, if it "appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and that no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred." The plaintiff then has 60 days from the date of service of the notice within which to re-commence prosecution of the action and avoid dismissal for failure to prosecute. If no record activity occurs within this 60-day period (and "no stay was issued or approved prior to the expiration of such 60-day period"), "the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending."

The Berman text also specifically discusses the earlier version of Rule 1.420(e) at page 565, referring to the Third District Court of Appeal's opinion, and noting that:

"...One appellate court has noted that the practice of some courts to use a form of conditional order of dismissal similar in content to Form 1.989(b) "can cause confusion and uncertainty over issues of finality" because the order is subject to conditions subsequent (i.e., failure to make a showing of good cause) before becoming effective"), [citing in footnote 59 to] "59. Lynbrook Court Condo. Ass'n v. Arana, 711 So.2d 249, 250 n. 2 (Fla. 3d DCA 1998) citing to Ponton v. Gross, 576 So.2d 910, 911 (Fla.1st 1991) and Dept. of Transp. v. Post, Buckley, Schuh & Jernigan, 557 So.2d 145, 146 (Fla.1stDCA 1990)."

Judge Rothenberg's order is just such a confusing order. It conjoins two mandatory steps into one order, which surely cannot be done nowadays. It also makes it difficult, or perhaps impossible, for Clerk Harvey Ruvin to properly fulfill his duties.

The October 16, 2006 transcript demonstrates that Judge Rothenberg was aware of pending cases involving the same parties and trust accounting issues.

Even if Judge Rothenberg eschewed this Third District's prior holding in Insua v. Chantres, 665 So. 2d 288, 289 (Fla. 3d DCA 1995) ("It is well settled that the pendency of another related action provides justification for apparent non-activity, precluding dismissal for failure to prosecute..." (citations omitted))" as quoted in Bruce J. Berman, Florida Civil Procedure, 2007 ed. vol. 4 at ¶ 420.5, fn 101 page 573 at Appendix page 26), and even if

Judge Rothenberg believed that His Honor could ignore his statements to WEISS a month earlier that he was going to "suggest" a mediator other than Former Judge Wetherington to attempt to reach a global resolution of various pending cases, WEISS is nevertheless entitled to a full "60-day" period without being subjected to a dismissal of this case, or a retroactive dismissal of this case, even if Judge Rothenberg fails to sign any more orders in this case.

WEISS alone cannot cause the timely filing of what Judge Rothenberg's order required in order to keep the case "alive".

A writ of prohibition is the proper form of relief here. See Padovano, Florida Appellate Practice, 2007 ed. at §28.3, ("As with the improper exercise of jurisdiction, the improper use of judicial power by a particular judge causes harm that cannot be adequately corrected on appeal.") The dynamics of a global settlement are adversely effected by the order which WEISS seeks to quash.

WHEREFORE, the undersigned respectfully requests that the Court grant the relief requested in this Petition and such other relief as the Court deems just and proper.

Dated: December 13, 2006

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*Admitted to practice in NY (active)
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CERTIFICATE OF MAILING

I, PATRICIA POLLAK WEISS, hereby certify that a true and correct copy of the foregoing, together with the accompanying separately bound Appendix, was sent via U.S. Priority Mail on December 13, 2006 to:

1. Joel Hirschhorn, Esq.
(Counsel for PHYLLIS POLLAK BERKETT & LLOYD S. BERKETT)
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3. Clerk Harvey Ruvin
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CERTIFICATE OF COMPLIANCE

I, PATRICIA POLLAK WEISS, hereby certify that this petition complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure. It is 12 point New Courier.

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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

CASE No. 3D06- _____

From THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

PROBATE DIVISION-Judge A. Rothenberg
[Old File No. 63-58160]

Adversary Proceeding Case # 05-4206 CP (02)
Related adversary cases #91-5143(02) & 92-4413(02)]

In Re:
T/U/W ALBERT POLLAK, DECEASED

PATRICIA POLLAK WEISS,
Petitioner,

vs.

PHYLLIS POLLAK BERKETT, Individually and
as the Successor Interim Trustee of
THE TRUSTS UNDER THE WILL OF ALBERT POLLAK,
DECEASED, and the ALBERT POLLAK INTERVIVOS
TRUSTS and LLOYD S. BERKETT, and CLERK OF
THE COURTS HARVEY RUVIN,
Respondents

PETITIONER PATRICIA POLLAK WEISS' FLA.R.APP.P. 9.100
PETITION FOR A WRIT OF PROHIBITION PROHIBITING THE
CIRCUIT COURT FROM A SUA SPONTE DISMISSAL OF A PROBATE
ADVERSARY PROCEEDING IN ANY MANNER INCONSISTENT WITH
FLA.R.CIV.P. 1.420(e) (as amended effective January 1,
2006) AND FOR A WRIT OF MANDAMUS DIRECTING THE CLERK TO
REINSTATE THE SUIT IF A DISMISSAL OCCURS PENDENTE LITE

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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

CASE No. 3D06- _____

From THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

PROBATE DIVISION-Judge A. Rothenberg
[Old File No. 63-58160]

Adversary Proceeding Case # 05-4206 CP (02)
Related adversary cases #91-5143(02) & 92-4413(02)]

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DECEASED, and the ALBERT POLLAK INTERVIVOS
TRUSTS and LLOYD S. BERKETT, and CLERK OF
THE COURTS HARVEY RUVIN,
Respondents

PETITIONER PATRICIA POLLAK WEISS'

APPENDIX TO PETITION

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TABLE OF CONTENTS OF APPENDIX TO PETITION

SUA SPONTE COMBINING NOTICE OF INTENTION TO DISMISS AND
ORDER OF DISMISSAL (Rothenberg, J.) dated November 16, 2006... 1

(Redacted) Complaint (pages 1 & 2 of 34 pages with 10 exhibits.) 2

Civil Action Summons and Proof of Service upon Phyllis Pollak
Berkett of Complaint, Civil Action Summons and Declaration That
Proceeding is Adversary 4

Civil/Family/Probate Justice System **On-line Docket** Information. 8

(Redacted) Transcript of October 16, 2006 hearing in Related
Case #91-5143 (02) 9

Weiss v. Berkett, 883 So.2d 299 (Fla. 3d DCA 2004) [#3D03-3171]. 14

Bruce J. Berman, Florida Civil Procedure, vol. 4, 2007 ed.,
Sections explaining Rule 1.420 (e) 15

Florida Rule of Civil Procedure 1.420 (2006) 30

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