IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NOS. 4D09-5143 & 4D09-5145
L.T. CASE NOS. 502008CP005732XXXXMB
502009CP002379XXXXMB

IN RE: ESTATE OF
SHIRLEY SUNSHINE LEVIN,
Deceased.
_____/

GAIL LEVIN,
Appellant,
vs.

WILLIAM LEVIN, individually, and as Personal Representative of the Estate of Shirley Sunshine Levin, and as Trustee, *et al*,
Appellees.
_____/

CONSOLIDATED APPEALS FROM THE
FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PALM BEACH COUNTY

APPELLANT'S REPLY BRIEF

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PREFACE

Appellant, Gail Levin, was the Petitioner below and will be referred to in this brief as Appellant, Beneficiary, Petitioner, or by name. Appellee, William Levin, was the Respondent below and will be referred to as Appellee, Respondent, Personal Representative, or by name. Shirley Sunshine Levin was the testatrix and will be referred to throughout this brief as Shirley, testatrix, or mother.

The following references will be used in this brief:

[A.I.B.]	Appellant's Initial Brief in main appeal – Case Nos. 4D09-4291 and 4D09-4293.
[AB.]	Appellees' Answer Brief in Attorney's Fee Appeal
[AA.1]	Hearing Transcript on Motion for Attorney's Fees

This appeal is consolidated, for record purposes, with the pending appeal on the merits - - Case Nos. 4D09-4291 and 4D09-4293, In re Estate of Shirley Sunshine Levin.

REBUTTAL TO STATEMENT OF CASE AND FACTS

Appellant objects to Appellee's Statement of the Case and Facts on the grounds that it is not an objective statement but rather is argumentative and misleading. These facts have previously been rebutted by Appellant in her briefs in both appeals, and will be rebutted throughout this Reply Brief.

REBUTTAL ARGUMENT

I. THERE WAS AMPLE EVIDENCE AND LAW SUPPORTING PETITIONER'S CLAIMS OF UNDUE INFLUENCE AND LACK OF CAPACITY IN THIS CASE.

First, there was ample evidence and law supporting Petitioner's claim of undue influence and lack of capacity in this case. There is no basis justifying the imposition of fees against this beneficiary under any standard, whether under the correct legal standard set forth in this district, the incorrect standard created by the trial judge, or the incorrect standard advocated by the Appellee in this case.

Appellee completely overlooks the record evidence set forth in Appellant's Initial and Reply Brief on the main appeal (Case Nos: 4D09-4291 and 4D09-4293), as well as the record facts set forth in the Initial Brief on the attorney's fee appeal (Case Nos: 4D09-5143 and 4D09-5145). Appellee also ignores the cases cited in Appellant's Briefs on the issues of undue influence and lack of capacity.

Appellant demonstrated her entitlement to the presumption of undue influence by both circumstantial[1] as well as direct proof -- proof ignored by Appellee in his Answer Brief on the main appeal as well as his Answer Brief on the attorney's fees appeal.

In her Initial and Reply Brief on the main appeal, as well as the Initial Brief in the attorney's fee appeal, Appellant sets forth the record support for these claims. To summarize:

SUMMARY OF EVIDENCE

UNDUE INFLUENCE

1. Bill Levin conceded he was a substantial beneficiary under the new will and trust, and that he had a confidential relationship with Shirley.

2. The record further establishes that Bill Levin "actively procured" the new will:

> *(1) The estate attorney admitted Bill Levin was "intricately involved" in Shirley's estate planning from January, 2008 through her death;*
> *(2) Bill Levin gave instructions to the estate attorney drafting the will and trust;*
> *(3) Bill Levin knew the contents of the trust prior to execution;*
> *(4) Bill Levin admitted to discussing the will and trust provisions with Shirley;*
> *(5) Bill Levin obtained the attorney who drafted the will and trust; he obtained the name based on referrals; he made the first call to*

[1] The law recognizes that there is "seldom ever any direct proof of undue influence since it usually occurs when no one else is present and it is accomplished in a subtle way." Therefore, it is rarely susceptible to direct proof, but may be proved by "indirect evidence of facts and circumstances by which it may be inferred." Gardiner v. Goertner, 149 So.2d 186, 190 (Fla. 1932).

this lawyer, and discussed Shirley's estate planning; he set up the first appointment;
(6) Bill Levin kept the will and trust in a safety deposit box, which he co-owned, subsequent to execution.

3. Other circumstantial evidence demonstrating undue influence in this case includes the following:

(1) The May 22, 2008 will and trust was an entire change from Shirley's prior testamentary disposition;
(2) Bill Levin knew about Shirley's prior executed will, but he never told Gene Glasser, the estate attorney, about this will;
(3) Shirley thought she did not have a will at all, even though she had a perfectly valid prior will;
(4) Bill Levin never reminded Shirley that she had a prior will;
(5) Bill Levin put pressure on Shirley to finish the will and trust documents;
(6) Bill Levin was co-owner of Shirley's bank accounts prior to May 22, 2008;
(7) Bill Levin attempted to influence Shirley's psychiatric evaluation by Dr. Davis;
(8) It was Shirley's estate lawyer who recommended leaving something to Gail Levin;
(9) Shirley's estate attorney stated that "this has all the telltale signs of a will contest";
(10) Shirley died three months after the execution of the will and trust;
(11) Bill Levin never told his sister, Gail Levin, about the estate planning arrangements he was involved in for his mother's estate.[2]

4. At a minimum, Petitioner was entitled to the presumption of undue influence.

INSANE DELUSION AND LACK OF CAPACITY

1. Starting in January, 2008, Shirley began to fixate on a delusion that she had not seen her daughter, Gail, in ten years. She shared this

[2] *See* Appellant's briefs in both appeals for detailed record cites for facts referenced.

delusion with her estate attorney, her son, and her daughter; she emphasized this delusion in her March, 2008 psychiatric questionnaire with Dr. Davis; and she reiterated this delusion at the time of the will/trust execution. This delusion had no basis in reality. Shirley held fast to this delusion and used this delusion as her justification for treating Gail Levin differently under the new will and trust. She held onto this delusion despite being repeatedly shown that it was not true.[3] (Pages 41-46 of A.I.B.)

2. Shirley lacked testamentary capacity at the time she executed the May, 2008 will and trust. During the will signing, Shirley stated that "I may be signing something I don't want to sign", and "I don't know what all of this is I'm signing." [T.163; G.L. Exh.19] Further, there were concerns Shirley expressed during the will signing that were essentially ignored by those in attendance. And during the will execution, Shirley was asked leading questions, and she was often redirected when her mind ventured off course.

Throughout his Answer Brief, Appellee attempts to exploit the emotional interaction between Gail and her mother, and attempts to use isolated emails in an attempt to distract this court from the true legal issues on appeal. As demonstrated in Appellant's Initial Brief on the main appeal, and as demonstrated throughout this extensive record, Shirley Sunshine Levin had a difficult personality when it came to both of her children. Everyone agreed below, including the trial judge, that this was a dysfunctional family. Appellee tries hard to create a negative impression on the daughter in this case, again in an attempt to distract the court from the true issues before it. Appellant refers this court to pages 3-6 of the Initial Brief on the main appeal, which places these "select emails" in the context of the complex relationship of

[3] Appellee acknowledges in his Answer Brief that Gail had seen her mother as late as 2007.

this mother and daughter. Remember this brother and sister are in their sixties. Despite the issues which existed between Shirley Sunshine Levin and her daughter, and Shirley Sunshine Levin and her son, she still loved both her children and always treated them equally in prior testamentary dispositions. [See A.I.B. at pages 6-7]

Furthermore, it is understandable that any reasonable individual, in the position in which this Appellant found herself -- i.e. confronted with the evidence set forth in Appellant's Initial Briefs and summarized above -- would be upset and emotional over what had transpired. Emotions in such a situation, following the loss of a loved parent, and an individual's reaction and anxiety to such a situation, should not be exploited in a case such as this, and certainly should not constitute determinative factors in setting the standard for the assessment of attorney's fees under Chapter 733.

Further, Appellee's reliance on statements made by this Petitioner during depositions which lasted several hours is misplaced.[4] These statements reflected this daughter's serious concern over what had transpired over the eight (8) months prior to her mother's death, and further reflected that money was not the real issue to her: rather, *getting to the truth* of what had transpired became Gail's primary focus.

(A.B. p. 31)

[4] Appellant was subjected to two depositions lasting approximately 17 hours in a combined total. Appellee's trial counsel took full advantage of the emotional nature of these types of cases. Petitioner's trial counsel characterized the questioning at Gail Levin's deposition as "harassing to the witness". [R. 3, 924; GL Depo at p.77]

II. THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD IN CHARGING DEFENSE FEES AGAINST GAIL LEVIN'S SHARE OF THE ESTATE.

The standard of review applicable to the issue of whether a trial court applied an improper legal standard is *de novo*. See cases cited at pages 7-8 of Appellant's Initial Brief. **This District** has specifically set forth the applicable standard to be applied by a trial court under Section 733.106(4), Florida Statutes. In Geary v. Butzel Long, PC 13 So.3d 149 (Fla. 4th DCA 2009), **this district** specifically held that a trial court cannot impose litigation fees against a particular individual's share of the estate "without a finding of wrongful conduct, bad faith, or frivolousness." Geary v. Butzel Long, PC 13 So.3d at 150.

Appellee has essentially ignored this very specific holding. Instead, Appellee cites cases from other districts which have no relevance or precedential value to this case.[5]

[5] Appellee's reliance on the Williams v. King case is misplaced. First, Williams is a two paragraph opinion, without any recitation of facts, that has only been cited one time by the Fifth District in a dissolution proceeding for the proposition that Rule 57.105 is not appropriate unless there is a complete absence of a justifiable issue of either law or fact. Depadovad v. Depadovad, 717 So.2d 147 (Fla. 5th DCA 1998) Second, in the prior order on appeal in the Williams' case, which apparently relied on Section 733.106, and was separate from the subsequent Section 57.105 order, the trial judge made a specific finding that "Appellant's efforts were frivolous and without merit." In its short opinion, it appears that the Fifth District was upholding the assessment of fees under Section 733.106 against a beneficiary's share of the estate -- based on frivolousness. The evidence in this case establishes that Petitioner's claims were not friviolous under any standard.

Appellee specifically argued to the trail judge at the hearing below and argues in his brief on appeal that neither wrongful conduct,[6] bad faith, nor frivolousness is required to charge defense fees to a beneficiary under Section 733.106(4). [A.B. at pp. 13; AA.1, p.118, 104] As stated by Appellee at the Attorney's Fee Hearing:

> The court will note that in neither one of these statutes does it say that bad faith or frivolousness needs to be shown. It is simply left to the court's discretion.

[AA.1, at 104, 118][7]

Such a position is contrary to the legal standard which has been established by this district.

Further, Appellee claims that he is relying on the statutes, and the trial court applied the statutes. But the language of these statutes does not define any specific legal standard. The specific legal standards have been defined by the case law in this district.

Section 733.106(4) states only that:

> *Costs and Attorney's fees*
>
> ***
>
> *(4) when costs and attorney's fees are to be paid by the estate, the court may direct what part of the estate they shall be paid.*

---

[6] As recognized by the Fourth District in Lane, such examples of wrongful conduct include a wrongful procurement of the exercise of the power of appointment. *See* Dayton v. Conger, 448 So.2d 609 (Fla. 3rd DCA 1984). The court in Lane also cited Cohen v. Schwartz, 538 So.2d 922 (Fla. 3rd DCA 1989), in which the appellate court advised the trial court that it could consider assessing attorney's fees against a beneficiary's portion of the estate for "frivolous" litigation. In re Estate of Lane, 562 So.2d at 353, (Fla. 4th DCA 1990).

[7] A copy of the Attorney's Fee Hearing transcript is attached as AA.1 to this Reply Brief.

The case law has made clear that Section 733.106(4) does not give the circuit court *unbridled discretion* to award fees from any part of the estate. Before fees can be assessed against a beneficiary's share of the estate, it is essential that there be a "finding of wrongful conduct, bad faith or frivolousness". Geary v. Butzel Long, PC 13 So.3d 149, 153 (Fla. 4th DCA 2009); *See also* In Re Estate of Lane, 562 So.2d 352 (Fla. 4th DCA 1990).

Cases cited in Appellant's Initial Brief in this appeal are cases from the appellate courts of this state which have defined the term "frivolousness," and are certainly applicable to any analysis of the "frivolousness" standard articulated by this district in the Geary case. "Frivolous" means "frivolous" as that term has been defined under the law. Its meaning does not change depending on what area of the law it is involved – whether the subject matter concerns tort litigation, commercial litigation or probate litigation.

It is worth noting that the Appellee never moved for summary judgment in this case alleging that there was a lack of genuine issues of material fact.[8] Nor did Appellee ever seek Section 57.105 fees. Nor did Appellee file a motion to dismiss. [AA.1 (Attorney's Fee Hearing), at p. 40]

[8] Rather, Petitioner had moved for summary judgment on the undue influence issue and her entitlement to the presumption. Because of the rush to trial on this case, however, (*see* Appellant's argument regarding denial of her motion for continuance in Appellant's Initial Brief in Case Nos. 4D09-4291 & 4293), the trial court never rendered a ruling on Petitioner's motion.

Further, this case went to trial within one year of the filing of the initial complaint. Appellant's actions never created any delay whatsoever in the case.

The trial court does not use the word "frivolous" in its judgment. Rather, the trial judge admits he is not using the frivolous standard – but rather a standard of "sufficient weakness" of the case when weighed against "a very heavy burden." [R2.219] The trial court states:

> The standard is a lower bar than that faced by the movant in Chapter 57.105 ...

[R2.218-19][9]

This is not the standard in this district. To warrant a fee award against the beneficiary for bringing a challenge against a will/trust based on undue influence or lack of testamentary capacity, there must be a finding, and evidence supporting that finding, that there was "bad faith, wrongful conduct, or frivolousness." Geary v. Butzel Long, 13 So.3d 149 (Fla. 4th DCA 2009). No such finding was made in this case. Nor was there evidence which would support such a finding.

The trial judge did not make any findings that the Petitioner acted in bad faith. Nor did the trial judge find that there was wrongdoing by this beneficiary. The trial judge's sole basis for charging this beneficiary with the defense costs was the trial

[9] It is Appellant's position that her claims regarding undue influence and lack of testamentary capacity well exceed the trial judge's new standard, and in fact her claims were well supported by the evidence.

judge's opinion that the beneficiary had a "weak" case, "especially when viewed against the very heavy burden" on a beneficiary in these types of cases. [R2.219-20]

The trial court further deviated from this district's standard by imposing a "timeline" standard. There was never a finding that Petitioner's case was weak from the outset, i.e., when the petition was originally filed. Instead, the court believed that after a certain amount of discovery had been completed, the Petitioner should have viewed the evidence in the same light as the trial judge.

But certainly a litigant has a fundamental right to view the evidence in light of her theory of the case. Certainly a litigant has a fundamental right to interpret the evidence differently from the trial judge. But a different interpretation should never open the door to expose the beneficiary to fees under Section 733.106(4). *See* Peyton v. Horner, 920 So.2d 180 (Fla. 2nd DCA 2006) (Trial court's determination that a party's interpretation is incorrect does not mean that a party's case is frivolous. The appellate court found that the issue in that case was not so "cut and dried" that either the association or its attorney knew or should have known it was not supported by the materials or facts necessary to establish standing.) Such a standard is not what was contemplated by this statute. Such a standard is simply unconscionable.

Appellee argues in his brief that "the unrebutted evidence presented at the fee hearing demonstrates the bad faith and misconduct of Appellant in her pursuit of a baseless case." [A.B. pages 21-22] The attorney's fee hearing consisted primarily of

Appellee's attorney's "argument" – and not evidence. As acknowledged by Appellee's attorney at that hearing:

> As far as the evidence today, your honor, I am going to testify, and other than my testimony and a couple of exhibits that I am going to offer, that will conclude our case.

[AA.1, page 10, lines 21-24]

Throughout these two appeals, Appellee ignores the record evidence submitted by Petitioner in support of her claims in this case. Instead, Appellee focuses only on his one-sided self-serving view of the case – without any consideration of all the evidence which was presented in this case.

Furthermore, at the attorney's fee hearing, Appellee's attorney submitted to the trial court an article written by Rohan Kelly which advances a theory of what he personally believes the law should be:

> THE COURT: It is some guy's opinion written in an article.
>
> MR. PRESSLY: What Mr. Kelly states is that 733.106(4) is the trust statute ought to be construed to create, essentially, a bright line test, which is that a beneficiary who contests the (a) [sic] will and loses ought to have all of the defense costs charged against that beneficiary without the requirement of any findings by the court.
>
> Again, we cited several cases <u>not</u> from the Fourth DCA in our memorandum to the court, the Appellate Court made no statement at all about any findings but simply the fees of the losing party up to the amount of their bequest were charged against them.
>
> We can't ask you to fly in the face of the Fourth DCA, and so I am not contending that today, but I am just preserving that argument that if and when we have the opportunity, **we would advance the argument to the Fourth that the law of Florida *ought to be changed on that point.***

[AA.1, at 105, 106] [e.s.]

Despite Appellee's comments to the contrary - - Appellee was in fact advocating the application of a *new* standard. Appellee continued to argue to the trial court that he is not required to show bad faith, misconduct, or frivolousness -- contrary to this district's holding in Geary and Lane. [AA.1, pp. 104, 118]

It is also worth noting that Appellee emphasized to the trial court the fact that the decedent had an "in terrorem clause". [AA.1, p.123] Appellee argued that this showed the decedent's intent that "Gail Levin should forfeit every dime of her inheritance, not just the defense costs if she challenged the will." [AA.1, p. 123] But Appellee stated to the court that they were not asking the court to apply the "in terrorem clause" -- *yet* he continued to emphasize to the court that "that that was the intent of the decedent." [AA.1, p.123] Despite Appellee's arguments, it is clear from the Appellee's "double speak" argument to the trial court that he was in fact advocating the imposition of an "in terrorem clause," which is directly contrary to Section 732.517, Florida Statutes, against the public policy of this state, and is unenforceable. In this case, the trial court in effect created a judicially imposed "in terrorem clause," contrary to Florida law.

CONCLUSION

The record in this case establishes that Petitioner's claims were not frivolous. The evidence establishes that the Petitioner's claims were not weak. To the contrary,

as evident from the facts set forth in his brief as well as Appellant's briefs in Case Nos. 4D09-4291 and 4D09-4293, Petitioner's claims were supported by the evidence and the law.

Significantly, with respect to assessing fees against a beneficiary for challenging a will and trust, the standard is not based on the trial judge's personal view of the evidence. In this case, the trial judge has imposed a standard that no litigant could ever meet. In essence, this trial judge imposed a standard that unless the Petitioner had the same view of the evidence as the trial judge himself, and can in fact anticipate the trial judge's view after a certain amount of discovery has been completed, that Petitioner will be liable for fees under Section 733.106. This is an unfair standard, and it is contrary to the standards established by this district.

For the reasons set forth above, Appellant respectfully requests this court to reverse the judgment assessing defense fees and costs against her share of the estate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James G. Pressly, Jr., Esq., and David S. Pressly, Pressly & Pressly, P.A., 222 Lakeview Ave., Ste. 910, West Palm Beach, FL 33401; by U.S. mail, on December 8th, 2010.

Jennifer S. Carroll

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font standards, i.e., Times New Roman 14-point font, as set forth in Florida Rule of Appellate Procedure 9.210.

Jennifer S. Carroll