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FILED
ALAMEDA COUNTY

JUN 21 2013

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

IN THE SUPERIOR COURT OF ALAMEDA COUNTY
IN AND FOR THE STATE OF CALIFORNIA

In re Matter of Patricia L. Francis,
Deceased.

DAVID SHEVICK,
Petitioner,

ERROLD F. MOODY, JR. and
MATTHEW J. GONSALVES,
Respondents.

CASE NO. RP 09478054
~~**SECOND AMENDED PROPOSED**~~ *ZOR*
JUDGMENT

1 **INTRODUCTION**

2 This case presented the question of whether respondent Errol F. Moody, Jr., breached
3 his fiduciary duties as trustee of the Patricia L. Francis Trust during the period of his trusteeship.
4 For the reasons that follow, the Court finds that he did and that he must make restitution to the
5 trust in the amount of \$191,955.03 and to Mr. Shevick in the amount of \$95,899.41.

6 **PROCEDURAL HISTORY**

7 This case involved a trust established by the late Patricia L. Francis. It is undisputed that
8 Ms. Francis died on December 18, 2007, that petitioner David Shevick is decedent's son and a
9 beneficiary of her trust, and that respondent Moody served as trustee from Ms. Francis' death
10 until he was suspended by the Court (Hon. Sandra K. Bean) on April 13, 2011. Judge Bean
11 ordered that an accounting be filed by May 13, 2011, and ordered that all trust files be delivered
12 to the newly appointed temporary trustee, attorney Ruben Sundeen. On June 14, 2011, Judge
13 Bean removed Moody as trustee and appointed Mr. Sundeen as successor trustee.

14 Moody's second counsel, Matthew J. Gonsalves, substituted out of the case on October
15 14, 2011, and Moody began to represent himself. Two earlier trial dates were scheduled and
16 vacated, and on August 16, 2012, the Court (Hon. Cecilia Castellanos) set this case for trial in
17 Dept. 1 for December 14, 2012.

18 On October 22, 2012, the Court denied Gonsalves' application for good faith settlement
19 determination. On December 14, 2012, the Presiding Judge continued the trial to January 4,
20 2013, a date agreed upon by the parties, so that a revised application for good faith settlement
21 determination could be heard by the (Hon. Cecilia Castellanos) on December 19, 2012. On that
22 date the Court granted Gonsalves' motion for good faith settlement determination (to which all
23 parties stipulated), leaving Shevick and Moody as the remaining parties in this matter.

24 On January 4, 2013, this case was assigned to the Hon. Steven Brick, Dept. 17 of this
25 court, by Presiding Judge Clay, as a three to four day probate hearing. Trial commenced on
26 January 4, 2013, continued on January 7, 2013, and then recessed until January 14, 2013. The
27 evidence was completed on January 17, 2013. Counsel offered their closing arguments on the
28 afternoon of January 18, 2013.

1 The matter was then submitted for decision, subject to ruling on respondent's motion to
2 disqualify the trial judge pursuant to C.C.P. section 170.3, which was submitted just before
3 closing arguments. On February 28, 2013 the Honorable Kelly V. Simmon's Marin County
4 Superior Court, denied respondent's motion to disqualify.

5 **FINDINGS OF FACT ESTABLISHING LIABILITY AND DAMAGES**

6 1. The testimony at trial established that Moody had been decedent's friend and paid
7 financial consultant for some 20 years at the time of her death. Nonetheless, he claimed to have
8 no knowledge of decedent's many investments.

9 2. When Moody arrived at decedent's house shortly after her death and began his work as
10 trustee he made no inventory of the furnishings of the house. He said he took pictures of each of
11 the rooms, but subsequently lost the pictures. He began selling and giving away various items
12 but did not set up any system for keeping track of income and expenses of the trust or what items
13 had gone to whom. He lost any receipts he may have obtained for the sale of furnishings and
14 furniture.

15 3. Moody was capable of using computers (indeed, he testified to having owned several
16 computers which crashed during the period of his trusteeship), but did not turn on Ms. Francis'
17 computer to see whether she had information which would have been helpful with his
18 administration of the trust (she did, in a Quicken program that was easily accessible). Instead, he
19 sold the computer at a garage sale.

20 4. As trustee, Moody made a habit of paying expenses with cashiers' checks or cash. He
21 did not keep the "stubs" of the cashiers checks.

22 5. Moody also acknowledged that he took for himself a teak grandfather's clock from
23 *decedent's home* without the knowledge or permission of the beneficiaries. He still has it. He
24 also took some \$5,000 of trust money and used it to go to Florida for his own personal reasons.
25 He later returned the money to the trust.

26 6. Based upon information he says decedent told him over the years before her death,
27 Moody distrusted petitioner and his sister at the time of decedent's death (and earlier) and
28 thought them capable of taking trust property without permission. In fact Moody knows of no

1 such property that was taken. Petitioner asked for and received permission from Moody to take
2 some family photographs from decedent's home on the day of the funeral. His sister, Sarah,
3 asked for and received permission to take two sets of silver from decedent's home.

4 7. When, in December 2008, after a year of Moody's managing the trust, petitioner first
5 asked Moody what assets remained and how much he had charged the estate, Moody did not
6 respond to that request for information.

7 8. When, in March 2009, petitioner complained that his prior request had gone unanswered,
8 and asked for a full accounting, Moody insisted that petitioner make his request through a
9 lawyer, citing the "privacy" of the estate. Of course, the trust had no privacy interest vis a vis a
10 beneficiary.

11 9. When petitioner correctly pointed out that as a beneficiary he had a right to the
12 information he was asking for, Moody, nonetheless, insisted on petitioner hiring a lawyer. When
13 petitioner did hire a lawyer, Moody hired his own lawyer and began charging the legal fees he
14 incurred to the trust.

15 10. In fact, in the spring of 2009, Moody had not organized the decedent's files and could not
16 have provided a meaningful accounting. Correspondence from the fall of 2008 through the fall
17 of 2009 between Moody and the CPA firm charged with filing the trust's IRS form 706 showed
18 that, contrary to Moody's representations to the beneficiaries, he had not provided to the CPAs
19 the documents they needed to complete and file form 706. Indeed, despite having obtained a one
20 year extension of form 706 filing deadline, Moody's delays in providing the required documents
21 to the CPAs caused the trust to incur IRS penalties.

22 11. The fees Moody charged the trust for his own time were plainly excessive. In the
23 accounting he claims that he paid himself \$33,330.79 for probate of the Oregon condominium.
24 A document produced by Moody in discovery, "MOODY RPD 003007, instead shows that his
25 fee for the probate was \$37,330.97, which included \$7,036.40 for the probate of the Oregon
26 condominium, plus \$30,294.57 as 1% of the value of the gross estate that he reported in Oregon.
27 Thus the amount of Moody's fees, was misrepresented as \$101,623.97 when with the correct
28 Oregon number added, it was \$105,624.17. Adding in the value of the Cadillac that Moody also

1 took for himself as a portion of his trustee's fees, \$4,000.00, brings Moody's total trustee's fees
2 to \$109,624.17.

3 12. Ruben Sundeen, Esq., the successor trustee, is the founding partner of his law firm,
4 specializes in trust and estates litigation, and has been involved in more than 200 cases involving
5 fee disputes. He testified that a nonprofessional trustee such as Moody would be allowed
6 \$40.00/hr. in Alameda County, not the \$250.00/hr. that Moody charged to the trust. Mr.
7 Sundeen also testified that this amount would be capped at 1% of the value of the administered
8 estate, or up to 1.5% if the estate was complex. Mr. Sundeen testified that the trust was not
9 complex, involving two residential properties and approximately 25 investment and bank
10 accounts. Moody agreed with Mr. Sundeen's characterization, and testified that it was his own
11 inept state of mind and disorganization that led to the difficulty in producing an accounting. The
12 value of the estate administered by Moody was \$2,097,529.38. Thus the maximum 1% fee
13 should have been \$20,975.94. The Oregon Probate fee of \$37,330.97 was excessive. In trial
14 Moody refused to stipulate to the amount listed as compensation for the Oregon condominium
15 probate, and instead testified that he spent about twenty hours on that matter. Using the rate
16 commonly allowed for non-professional trustees in Alameda County, \$40.00 an hour, that leaves
17 Moody with a fee of \$800.00 for the Oregon probate. Although Moody did not testify in detail
18 as to the extent of his work to sell the house in Riverside, he did testify that he made several trips
19 there, stayed at the home, and helped to prepare it for sale. The Court will allow \$5,000.00 in
20 fees for the sale of the Riverside residence. An appropriate fee for Moody's work in this matter
21 was \$26,775.94. Subtracting this from the \$109,624.17 that Moody wrongfully took for his fees,
22 he is ordered to reimburse \$82,848.23 to the trust.

23 13. In addition, he caused the trust to incur unnecessary fees of his attorney, the CPA firm
24 which worked on the tax filings, the Mowat, Mackie CPA firm which created the final
25 accounting, and a bookkeeper who sought to organize the trust records after Moody had made a
26 shambles of them. The amounts of these excessive and unnecessary charges are detailed below.

27 14. The form 706 CPA, through deposition testimony read out in Court, stated that her firm's
28 usual fee for preparing a form 706 accounting for this size of estate would be less than

1 \$15,000.00, and that because of Moody's noncooperation and delays, the final cost of the trust
2 accounting was \$40,500.00. Moody is ordered to reimburse the trust \$25,500.00 for these
3 excess fees.

4 15. Additionally, Mr. Sundeen testified that the final accounting for the trust should have cost
5 no more than \$15,000.00. In testimony and evidence presented to the court, Moody showed the
6 same pattern of disorganization and failure to timely provide documents to the Mowat, Mackie
7 accounting firm as he did with the CPA that completed the IRS form 706 accounting. In
8 December of 2012, more than three years after Ms. Francis' passing, Moody still was missing
9 seventeen categories of account statements, including many bank statements. The accounting
10 took more than six months, and the Mowat, Mackie firm charged \$42,000.00 for the accounting.
11 The excess amount of \$27,000.00 will be added to the amount that Moody is ordered to pay to
12 the trust.

13 16. Moody hired a bookkeeper to organize the files, and he should have done that work
14 himself. The total paid to the bookkeeper was \$8,435.80. The total accounting and bookkeeping
15 reimbursement to the trust for the two accounting firms and for the bookkeeper is \$60,935.80

16 17. When asked on adverse examination why he had done such a poor job of managing the
17 trust's assets and documenting his work, Moody explained that he had health problems which
18 made him incapable of fulfilling his duties. In his words, he had a "meltdown." He again
19 pointed to his health issues as a reason for not responding to petitioner's December 2008 request
20 for information and for going to Florida using trust money, and for disobeying the probate
21 court's order to turn over documents and complete the final accounting in 2010. Moody
22 volunteered that he had similar health problems in the late 1990s and had to struggle to
23 *reestablish his business* as a financial consultant because he had pretty much destroyed it.

24 18. When asked on adverse examination why he had insisted that petitioner make his
25 requests for an accounting through a lawyer, Moody acknowledged that he wanted to hire a
26 lawyer to protect himself because of his negative perception of petitioner and his sister, not based
27 on anything they had said or done after decedent's death, but based on things decedent
28 supposedly confided in him over the years before her death.

1 19. In sum, Moody acknowledged multiple breaches of his duties as a fiduciary, by not
2 properly administering the assets of the trust, not keeping records of the disposition of trust
3 property, taking trust property for his own use, causing the trust to incur unnecessary and
4 unreasonable professional expenses, overcharging the trust for his fees and not responding to the
5 reasonable requests for information by petitioner, instead causing petitioner to incur the expenses
6 of his own attorneys' fees to pursue his rights as a beneficiary. Moody offered no legitimate
7 excuse for his behavior, which can only be viewed as malicious and oppressive (which was
8 proven by clear and convincing evidence) within the meaning of Civil Code section 3294.

9 **CONCLUSIONS OF LAW**

10 The duty of loyalty, requiring a trustee to administer the trust solely in the interest of the
11 beneficiaries (§ 16002, subd. (a)), is the most fundamental duty of a trustee. (Bogert & Bogert,
12 The Law of Trusts and Trustees (rev. 2d ed. 1993) § 543, p. 217 (Bogert); 2A Scott & Fratcher,
13 The Law of Trusts (4th ed. 1987) § 170, p. 311.) Its purpose is to protect the best interests of the
14 beneficiaries. The duty of loyalty requires a trustee to subordinate his or her interests to those of
15 the beneficiaries in every regard. (Bogert, *supra*, § 543, pp. 217-219.) Moody's failure to take
16 an inventory, taking of trust property and cash, paying expenses with cash and cashier's checks,
17 misrepresenting facts to beneficiaries, paying for his attorney from trust funds, forcing petitioner
18 to hire an attorney to seek an accounting, failure to work competently with accountants, and
19 other actions comprise multiple and severe breaches of what was Moody's foremost duty.

20 Moody violated several provisions of the California Probate Code, including the
21 following, evidenced by the foregoing findings of fact:

22 P.C. § 16000 (duty to follow the terms of the trust and the law governing trusts);

23 P.C. § 16002 (duty to administer the trust solely for the benefit of the beneficiaries of the trust);

24 P.C. § 16004 (duty to avoid transactions with the trust that will benefit the trustee personally);

25 P.C. § 16006 (duty to marshal trust assets and take reasonable steps to preserve them);

26 P.C. § 16009 (duty to keep the assets of the trust separate from the trustee's assets);

27 P.C. § 16012 (duty to perform actions on behalf of the trust rather than having others act on
28 behalf of the trust); and

1 P.C. § 16040 (duty to manage other professionals competently).

2 The court finds clear and convincing evidence that Moody's mismanagement of the trust
3 went beyond ordinary breaches of trust into the realm of intentional malice and oppression.

4 Under Civil Code section 3294, malice means conduct which is intended by the
5 defendant to cause injury to the plaintiff or despicable conduct which is carried on by the
6 defendant with a willful and conscious disregard of the rights or safety of others. Moody's
7 taking of trust property and funds and the teak grandfather clock, and failing to keep any records,
8 and in trial not only failing to take responsibility but trying to blame Shevick and his sister were
9 despicable and malicious.

10 Under Civil Code section 3294, oppression means despicable conduct that subjects a
11 person to cruel and unjust hardship in conscious disregard of that person's rights. Moody's
12 conduct as described above was also oppressive in that it put Shevick and all other beneficiaries
13 through years of delay, the stress and costs of litigation, and reduction in the value of their
14 mother's estate and their inheritance, which were unjust hardships in conscious disregard of their
15 rights.

16 Based upon Moody's malicious and oppressive behavior, the court assesses punitive
17 damages. Moody testified that "there is no money", and no evidence was offered that Moody
18 has any substantial assets or net worth. Based upon this lack of financial information, the Court
19 assesses the minimum punitive damages award of \$1.00. This amount does not diminish the
20 seriousness of the Court's finding.

21 Moody is also ordered to turn over the grandfather clock to successor trustee Sundeen.

22 Probate Code Section 17211(b) provides that the trustee is liable for a petitioner's legal
23 fees if the court determines that the trustee's opposition to a petition contesting the account was
24 without reasonable cause and in bad faith. Petitioner did challenge Moody's account, including
25 the inept process by which he failed to account for trust property, failed to keep receipts, failed to
26 track cash transactions, and caused excessive accounting fees to create the final, deficient
27 accounting (which, for example, understated Moody's fee by \$8,000.00).

28 This Court concludes that Moody did not have the capacity to function as a competent

1 trustee at all times pertinent to this matter. He was asked several times to resign, did not, and
2 continued to overcharge the trust over \$75,000.00 for his inept work. He ran up excessive
3 accounting fees through not gathering trust account data and records, and not cooperating in
4 good faith with the accountants. Worse, he paid his attorneys from trust funds to defend his
5 indefensible actions. These were all bad faith actions. At trial, Moody and his attorney put forth
6 no substantive or successful defense, and with the one-sided documentary evidence clearly and
7 convincingly showing Moody's many breaches of trust, and Moody's own testimony, his
8 opposition to Shevick's petition was without reasonable cause. Moody must reimburse Shevick
9 for all reasonable attorneys fees and costs in this case, reduced by the amount that Shevick
10 previously received from the settlement with Gonsalves.

11 RESTITUTION

12 Respondent and his counsel did not address the amount of damages or restitution Shevick
13 claimed in this matter, except that Moody did stipulate to turn over the grandfather clock and the
14 Cadillac. With the amounts of restitution to the trust essentially uncontested, the Court finds that
15 judgment should be entered against Moody and in favor of Shevick, and that the following
16 amounts must be repaid by Moody to the trust as restitution:

17	Excessive Accounting and Bookkeeping Fees:	\$65,485.80
18	Excessive Trustee's Fees:	82,848.23
19	IRS Penalty:	12,000.00
20	Improperly Incurred Attorneys' Fees:	20,720.00
21	Portion of Mr. Sundeen's Fees Improperly Caused	
22	By Moody's Obstructive Conduct During Litigation:	20,450.00
23	Punitive Damages:	1.00
24	Less Amount Paid to Trust by Gonsalves:	(15,000.00)
25	Total Restitution to to the trust:	\$191,955.03

26 The amount to be paid to Mr. Shevick for attorneys fees and costs is as follows:

27	Shevick's Attorneys Fees and Costs:	125,899.41
28	Less Amount paid to Shevick by Gonsalves:	(30,000.00)

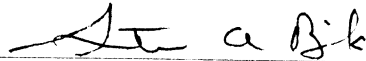
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Total Restitution to Mr. Shevick:

\$95,899.41

In addition, Moody must return the teak grandfather clock to successor trustee Ruben Sundeen. If Moody does not make a restitution payment of at least \$4,000 within 60 days of his receipt of service of the executed Judgment in this matter, he shall turn over the Cadillac, with signed deed for the transfer, to Ruben Sundeen, trustee.

Date: 6/20/2013



HONORABLE STEVEN A. BRICK
Judge of the Superior Court

Approved as to form:

