

**TENTATIVE RULINGS**

**FOR: May 30, 2018**

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

**Unlawful Detainer Cases** – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

**Court Reporting Services** – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

**PROBATE CALENDAR – Hon. Diane Price, Dept. C (Historic Courthouse) at 2:00 p.m.**

**In the Matter of Roberto Gonzalez Leocadio, et al.**

**18CV000437**

PETITION FOR CHANGE OF NAME

**TENTATIVE RULING:** Notice has been properly published and no written objections have been filed. The petition for name change is GRANTED without need for appearance.

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**Estate of Barbara A. Steen**

**18PR000103**

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

**TENTATIVE RULING:** GRANT Petition.

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**Conservatorship of Richardson, Clara Jo**

**26-60143**

AMENDED ACCOUNT OF CONSERVATOR OF FUNDS AND PETITION REQUESTING APPROVAL OF ACCOUNTING AND DISCHARGE OF CONSERVATORSHIP

**TENTATIVE RULING:** The Petition is GRANTED.

**CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. C (Historic Courthouse) at 2:00 p.m.**

**Estate of Elena Duke Benedict v. Patricia**

**17CV000948**

(1) MOTION FOR ALTERNATIVE MEANS OF SERVICE OF THE POST-JUDGMENT ORDER FOR EXAMINATION OF THE JUDGMENT DEBTOR AND HER SPOUSE; (2) MOTION ADJOURNING JUDGE STONE'S APRIL 4, 2018 MINUTE ORDER FOR JUDGMENT DEBTOR AND HER SPOUSE TO APPEAR FOR EXAMINATION ON MAY 30 AND 31, 2018, RESPECTIVELY; AND (3) MOTION FOR ORDER REQUIRING JUDGMENT DEBTOR AND HER SPOUSE TO PROVIDE VERIFIED STATEMENT OF ASSETS

**TENTATIVE RULING:** Preliminarily, the Court addresses Plaintiff's request that the Court disregard the opposition filed on May 15, 2018, on behalf of Defendant Patricia Benedict (aka Patricia Benedict Ryan) by Attorney Douglas Provencher. While the Court's file reflects that Attorney Provencher withdrew as counsel for Defendant on April 6, 2018, the opposition filed on May 15, 2018 constitutes a general appearance on behalf of Defendant and the Court has considered the opposition in ruling on Plaintiff's motion.

Defendant's nine (9) evidentiary objections lodged against the declaration of Attorney Patrick Monaghan are SUSTAINED. Plaintiff's reply papers are procedurally improper. Pursuant to California Rule of Court 3.1112, "a motion must consist of at least the following: (1) A notice of hearing on the motion; (2) The motion itself; and (3) A memorandum in support of the motion or demurrer." Additionally, "[o]ther papers may be filed in support of a motion, including declarations, exhibits, appendices, and other documents or pleadings." Plaintiff's reply consists only of the declaration of Attorney Patrick Monaghan. The declaration contains argument and authority, in contravention of California procedure. In the future, all argument and authority must be set forth in Plaintiff's supporting memorandum. Also problematic is Plaintiff's introduction of argument and authority in her reply that was not previously raised in her moving papers, depriving Defendant of the requisite due process to which she is entitled.

Plaintiff's motion for leave to serve Defendant and her spouse, James Timothy Ryan, through alternative means is DENIED. (Code Civ. Proc., § 708.110, 708.120.) While the evidence presented by Plaintiff demonstrates that efforts to personally serve Defendant and Mr. Ryan have been unsuccessful and arguably difficult, Code of Civil Procedure § 708.110(d) provides: "The judgment creditor shall personally serve a copy of the order on the judgment debtor not less than 10 days before the date set for the examination. Service shall be made in the manner specified in Section 415.10." Section 415.10 states in relevant part: "A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery." Plaintiff has neglected to present or discuss any authority contravening the requirements of Sections 708.110, 708.120 (requiring personal service on third parties), and 415.10.

Plaintiff's alternative requests to continue the judgment debtor examinations of Defendant and James Timothy Ryan, and for an order requiring Defendant to produce a verified statement of assets are GRANTED.

This Court previously ordered Defendant to produce a verified statement of assets on March 7, 2018. The instant motion establishes Defendant has defied the order.

The Court continues the Orders of Examination as to Defendant Patricia Benedict Ryan and James Timothy Ryan to June 28, 2018, at 2:00 p.m. in Department C, and June 29, 2018, at 2:00 p.m., in Department C, respectively.

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**Paula Blank v. Kevin Fitzgerald**

**18CV000295**

APPLICATION FOR RIGHT TO ATTACH ORDER BY PLAINTIFF PAULA BLANK

**TENTATIVE RULING:** This is a collection case stemming from four unpaid loans between non-party Joel Blank (hereinafter "Joel") and defendant Kevin Fitzgerald (hereinafter "defendant"). Those loans were made long ago (one in 2009, and three in 2010) in various amounts totaling \$190,000 (net). The loans were memorialized in a consolidated memorandum dated 05/06/14. Plaintiff Paul Blank (hereinafter "plaintiff") is Joel's surviving spouse, and recently filed suit to collect the unpaid loans (plus interest). Before the Court this day is an application by plaintiff for provisional relief in the form of a right to attach order.

Pursuant to Code of Civil Procedure section 484.090(a), the trial court shall issue a right to attach order if it finds:

- (1) the claim upon which attachment is based is one upon which an attachment may be issued;
- (2) the plaintiff has established the probable validity of the claim upon which the attachment is based;
- (3) the attachment is not sought for an improper purpose; and
- (4) the amount to be secured by the attachment is greater than zero.

The issue here is whether the debt is personal or business, for attachment may only issue against individuals to the extent the claim arose out of that person's trade, business or profession. (Code Civ. Proc., §§ 483.010(c), 487.010(c)(2).) Since this is plaintiff's application for provisional relief, she has the burden of producing competent evidence to show that Joel made the loans to assist defendant's business endeavors. Since Joel is now deceased, plaintiff relies on her understanding of the loans and circumstantial evidence.

The first loan was by personal check from Joel to defendant. According to plaintiff, her understanding was that loan was to help [defendant] retain employees and hold onto to his

existing businesses which were generating income so that he could pay us back what is owed. See Blank Para 16. Defendant says the funds were used for personal obligations, such as my home mortgage arrearages and personal credit card debt (see Fitzgerald Decl. para. 6-7). Contemporaneous emails from defendant and Joel support plaintiff's interpretation. One email explains that defendant's business U.S. Advisor was hemorrhaging employees due to cash flow issues, and that a cash influx from investors was needed.

Regarding the remaining three loans, these were memorialized by written promissory notes. The notes did not reference the business entities, and were signed by defendant personally. However, they were formal, applied high interest rates, and had a short maturity window. These are hallmarks of business bridge loans, not personal loans to bail out friends. Again, emails from Joel in 2009 and 2010 further support that the loans were intended for business purposes. The emails describe monies given to defendant's companies, U.S. Select Holdings and U.S. Advisor, and not to defendant as a personal loan. The emails further reflect that Joel believed defendant had \$1 million in equity in his home, which belies the contention that the loans were to bail defendant out from personal financial mountains. Finally, the actual loan funds were deposited directly into defendant's business accounts for U.S. Select Holdings and U.S. Advisor LLC. Personal loans should never be commingled into business accounts.

Defendant's own words aid plaintiff. According to defendant (see para 4), "the substantial majority of business transactions with [Joel] involved short-term bridge loans. The purpose of these loans was to provide US SELECT or US ADVISORS with funds to pay property purchase deposits and related expenses. The term would typically be 6-months or less." The original promissory notes were for relatively short periods and based on emails and contemporaneous notes did seem like bridge loans for something. Since the funds all went into defendant's business accounts, the only reasonable conclusion at this time is that the loans were for business purposes (from Joel's perspective).

On an application for attachment, evidence is properly presented by way of affidavit by persons "with knowledge of the facts" provided that those facts are "set forth with particularity." (Code Civ. Proc., §§ 482.040, 484.030.) Plaintiff has provided sufficient evidence from which this Court can conclude that the loans appear to have been made for the benefit of defendant's business and not personal needs. The fact that defendant pulled the funds from his business accounts to use for personal needs suggests a different problem altogether.

Plaintiff wishes to attach a bounty of assets. First, this is a debt owed by defendant personally, not the business entities he operates. Second, the application itself only identifies the arbitration award as subject to attachment (see Application Para 9.c.). Therefore, application for writ of attachment is GRANTED as to the arbitration award in the amount of \$300,000.00. Since the evidence strongly indicates that plaintiff will prevail on the merits, this Court elects to impose the statutory minimum bond of \$10,000. (Code Civ. Proc., §489.220(a); *Film Packages, Inc. v. Brandywine Film Productions, Ltd.* (1987) 193 Cal.App.3d 824, 828; *North Hollywood Marble Co. v. Superior Court* (1984) 157 Cal.App.3d 683, 690-691.)

**CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.**

**Monica Davis v. Hamilton Nichol森**

**16CV000201**

1) MOTION TO ENFORCE SETTLEMENT AGREEMENT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 664.6

**APPEARANCE REQUIRED.** The Motion is GRANTED. Plaintiff agreed in the October 4, 2017 Settlement Agreement, at No. 8, to select either Terra Firma or Albion Surveys to survey a lot line adjustment and amendment to deeded easement. Plaintiff has provided no reasonable explanation for failing to do so. In addition, Plaintiff agreed at No. 11 to sign a final full-form binding settlement agreement consistent with the terms of the October 4, 2017 Settlement Agreement. Plaintiff's asserted misunderstandings regarding the lot line adjustment do not appear to be actual disagreements as Defendant is in agreement regarding the lot line adjustment. Plaintiff has delayed and is failing to abide by the settlement agreement. Plaintiff is to appear at the hearing prepared to select a surveyor and address any outstanding issues with the full-form settlement agreement.

As to the request for sanctions, Defendant has not provided the Court with any authority for an award of sanctions, and therefore the Court denies the request for sanctions.

2) MOTION TO BE RELIEVED AS COUNSEL - CIVIL

**APPEARANCE REQUIRED**