TENTATIVE RULINGS

FOR: October 11, 2019

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. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. 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. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Conservatorship of Carson Wesley Power **19PR000184**

PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON – LIMITED CONSERVATORSHIP

APPEARANCE REQUIRED

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

James A. Smith v. Dona Alves, et al. **18CV001364**

REFEREE'S MOTION FOR ORDER CONFIRMING SALE OF REAL PROPERTY

TENTATIVE RULING: There is no proof of service of the notice of motion on the purchasers. (Code Civ. Proc. § 873.720, subd. (b)(1).) If proof of service of the notice of motion on the purchasers is filed prior to the hearing, the motion will be GRANTED without need for appearance. If no such proof of service is filed, the matter will be continued, to November 13, 2019, to permit the Referee to serve notice of the new hearing on all parties entitled to notice pursuant to Code of Civil Procedure section 873.720.

PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Estate of Ryan Donovan **19PR000077**

FIRST AND FINAL ACCOUNT OF ADMINISTRATOR AND PETITION FOR ITS SETTLEMENT, FOR DISTRIBUTION AND FOR FEES (Final Distrib., Pr.C. 11640)

TENTATIVE RULING: The Petition is GRANTED, including fees as prayed.

In the Matter of The Luke and Catherine Miholovich Trust **19PR000135**

PETITION CONCERNING INTERNAL AFFAIRS OF TRUST AND FOR ORDER CONSTRUING AND REFORMING SECOND AMENDMENT TO TRUST [Pr.C §17200]

TENTATIVE RULING: The Petition is DENIED.

The verified petition alleges that, as of the date of death of Luke M. Miholovich, March 23, 2007, 50% interest in and to the subject real property was held in the Bypass Trust (Luke's Trust) described in Article Six of the Restatement of Declaration of Trust of Luke and Catherine Miholovich. (Petition at Exh. A.) Luke's Trust was, from that time, irrevocable. (See Petition at Exh. A, ¶3.2) Formal title of this 50% interest was transferred to Luke's Trust in 2008. (See *Id.* at Exh. D.)

For this reason, as of January 17, 2015, Catherine Ann Micholovich was without right and/or authority to grant, by an amendment to her will and trust, an option for the purchase of the 50% ownership interest in and to the subject real property held in Luke's Trust. This is true regardless of whether the option price (for the 50% held in Luke's Trust) is $621,500 (as proposed by Petitioner) or $250,000 as urged by Nahed Fahmy through the document titled "Petition of Nahed Fahmy to Contest and Grounds of Opposition to Order Construing and Reforming Second Amendment to Trust of Kay Miholovich" filed September 27, 2019 ("Fahmy Petition").

The Court is mindful of the statutory rule of construction providing that "[t]he words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (Prob. Code § 21120.) The only construction of the Second Amendment option language that appears, to the Court, to be supportable, is one reflecting an intention to grant an option to purchase the 50% interest in and to the subject property then belonging to the Catherine Trust, for $500,000. But that issue is not properly before the Court on the present Petition.

Based on the foregoing, the Petition to reform the Trust is DENIED.

It appears to the Court that the Fahmy Petition was filed as an Opposition to the Petition filed by Trustee Bart Kemp. To the extent that Ms. Fahmy intended to file an independent Petition, it fails for lack of notice. (Probate Code § 17203.)

In the Matter of In Re: The A.I. Weber Trust **19PR000163**

PETITION FOR ORDER DETERMINING TITLE TO PROPERTY

TENTATIVE RULING: The Petition is GRANTED.

Conservatorship of Bianchi **26-61407**

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the Court finds the co-conservators are acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on October 12, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

JoAnne Strickland, et al. v. Mark Capalongan, et al. **19CV000899**

MOTION TO SET ASIDE DEFAULT

TENTATIVE RULING: The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Defendants' counsel is directed to contact plaintiffs' counsel forthwith and advise plaintiffs' counsel of Local Rule 2.9 and the Court's tentative ruling procedure. If defendants' counsel is unable to contact plaintiffs' counsel prior to the hearing, defendants' counsel shall be available at the hearing, in person or by telephone, in the event plaintiffs' counsel appears without following the procedures set forth in Local Rule 2.9.

Defendant Gilbert Choy's motion to set aside default pursuant to Code of Civil Procedure section 473, subdivision (b), is DENIED WITHOUT PREJUDICE. The motion is not code-compliant. Choy failed to include "an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . ." (Code Civ. Proc., § 473, subd. (b).) Although unclear from the memorandum of points and authorities, Choy clarifies in the reply that counsel's mistake is the reason he was not included in the initial appearances. Because the motion is based on counsel's mistake, the submitted attorney declaration is not sufficient to meet the requirement.

The parties are requested to meet-and-confer to see if they can resolve this matter instead of having it come back on calendar for a renewed motion. The Court is inclined to grant the motion if the requisite declaration is submitted and award $1,000 in attorney's fees to plaintiffs' counsel under Code of Civil Procedure section 473, subdivision (c)(1)(A).

John P. McGill, et al. v. Gene Webb **19CV000903**

REVIEW OF THE REMEDIAL/REPAIR PLAN

TENTATIVE RULING: On September 27, 2019, the Court granted plaintiffs John P. and Wanda McGill's (individually and as trustees for the McGill Family Trust 2018) motion for a preliminary injunction. The Court ordered defendant Gene Webb to remediate/repair his property from further encroaching and sliding over the driveway leading to plaintiffs' home. Webb was ordered to submit a remedial/repair plan to the Court, which he filed on October 3, 2019. The Court set the current hearing to review the plan. The Court noted the expedited schedule was due to the fact the winter rains are approaching and plaintiffs' access to their property is in serious jeopardy, and the parties had an opportunity to hammer out a plan before a prior continuance. The Court deferred ruling on the bond issue until the costs of any plan were known.

Webb offers a two-step plan based on Jeff Raines' (civil engineer and geotechnical engineer) recommendation regarding the old slide location from his Terraphase Engineering Technical Memorandum: winterization and slope stabilization. For the first step, Webb will winterize the slide that is present above the driveway, which consists of: (1) covering the slide with plastic; (2) collecting any precipitation that lands on the plastic, and routing the water to Redwood Creek; (3) extending the plastic onto the driveway with the use of sandbags to weigh the ends down; and (4) routing the water down the driveway into the collection system on the uphill side of plaintiffs' driveway. According to the RWR Construction "Allowance" Webb submitted, winterization installation will cost $14,245.51.

For the second step, Webb will perform borings in the landslide and collect soil samples for analysis in a geotechnical laboratory. Based on the results of the laboratory analysis, Webb will design a retaining wall to pin the bottom of the landslide. The pre-slide geometry likely will not be restored as that would add weight to the hillside and destabilize the downhill slope. Raines' technical memorandum mentions slope stabilization typically takes at least a year, and it is unlikely the process can be completed prior to the rainy season. Webb states he will follow a similar process to repair the slide Jim Glomb (plaintiffs' geologist and certified engineering geologist) identified if he is willing to come to the site to show Raines where there is another slide location. The cost for the retaining wall is not known as no bid or estimate was presented.

Plaintiffs take umbrage with the two-step plan as they believe it is neither a repair nor a remediation plan. Plaintiffs claim the plastic will not prevent anything except the surface from getting wet and may cause further slope failure. Plaintiffs believe the sandbags and plastic will further obstruct access to the property by constraining the area for driving. Plaintiffs blast the RWR Construction "Allowance" as it is not a bid, not a proposal, not signed, and is completely

at odds with what Raines proposes to do for winterization. Whatever RWR Construction is estimating, according to plaintiffs, it is not the slide mass being covered with plastic and the use of sandbags.

Webb states he attempted to arrange a meeting between Glomb and Raines. Webb reports plaintiffs initially agreed and then refused to cooperate. Webb asserts plaintiffs' refusal to cooperate has made compliance with the Court's order difficult. Plaintiffs explain they do not want Glomb to meet with Raines because plaintiffs want Raines to decide what the problem is with the slope; plaintiffs do not want to incur the risk of having liability shifted to them.

Based on this information, it does not appear Webb's two-step proposed plan is fully developed for implementation. The first step of the plan may be a good idea to the extent it is a stop-gap measure to reduce the water falling on the slide zone if step two remains unfinished when the rains come. However, the RWR Construction "Allowance" for the winterization plan is woefully inadequate. The RWR Construction estimate states it will take 16 hours to complete winterization. But it is not consistent with Raines' proposal to cover the slide in plastic and sandbags. The identified materials in the "Allowance," for example, are from Shamrock (a redi-mix concrete provider), contain water components (whatever that means), and need Rafael Lumber. It is unknown why concrete, "water components," or lumber are needed to cover a slide area with plastic and sandbags. More importantly, plastic and sandbags are not mentioned in the materials. It also is unknown why it will take a supervisor, foreman, and apprentice carpenter 16 hours to place plastic and sandbags on the slide area. Thus, the RWR Construction "Allowance" submitted does not support Raines's winterization plan.

For the second step of the plan, designing and installing a retaining wall to pin the bottom of the landslide sounds appropriate under the circumstances. Webb, however, has not submitted a bid, proposal, cost estimate or otherwise shown the scope of the project. To make matters worse, in the Terraphase Engineering Technical Memorandum, Raines states that "[w]e have not analyzed the stability of the slope above the driveway cut. It likely has a very small factor of safety and could fail at any time. This is also true of the down slope side of the driveway cut."[1] Raines has effectively conceded a dangerous condition exists on the property and must be repaired now. As time is of the essence, plastic coverings and sandbags alone will not suffice. There certainly is not enough information provided as to why the slide mass cannot be cleared now and a retaining wall installed to prevent further movement. Webb needs to expedite the repair, and the failure to take any action or delay the project may cause further damage.

Under these circumstances, Webb's current plan for slope stabilization fails as it is not supported with a proposal or time and cost estimates. The Court's preference is to have a retaining wall installed on an expedited basis for the slide area above the driveway. Because plaintiffs agree RWR Construction is a good choice to install the retaining wall Raines indicates needs to be installed above the slide area, Webb shall obtain a bid for the retaining wall from that

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[1] This appears to conflict with Raines' position in his declaration before the Court on the motion for preliminary injunction. As mentioned in the Court's order, Raines previously concluded that based on the length of the slide and the modest height of the head scarp, it is a shallow failure, and given the much steeper slope on the other side of the driveway and the age of the slide, he did not expect the uphill slide to move "significantly" in the future.

company, which includes a proposal for the entire project with a time estimate. Webb also shall talk to grading and excavating contractors for suggestions on how to comply with the Court's order and to expedite any remediation repair effort. Thus, in addition to obtaining a bid from RWR Construction and talking with grading and excavating contractors, Webb shall obtain a bid from at least two other companies similar to RWR Construction. Plaintiffs may offer company recommendations to Webb. This will provide a preliminary estimate of time, cost, and how best to control those costs as well as the complexity of any plan. The parties shall meet-and-confer to see if they can agree on one of these companies to start the project on an expedited basis. If the parties cannot agree, Webb shall submit the three bids/proposals to the Court as part of a revised plan. The Court will then make the selection.

The winterization plan is rejected in its current iteration. Webb shall submit a revised winterization plan supported with an adequate estimate and proposal/bid with a time estimate to protect the slide area from the winter rains. Although plaintiffs may disagree, the Court believes this will provide a stop-gap back-up plan if the slope stabilization cannot be completed on an expedited basis (based on information from the three contractor bids). Any revised plan must include a provision that the sandbags and plastic will not interfere with emergency personnel's access to the property.

The Court acknowledges the two experts may have discussed different slides at different locations. If plaintiffs want the slide Glomb identified included in the stabilization plan, if different from what Raines now is proposing to remediate, Glomb needs to meet with Raines to show the location of any other slide.

Webb's request for an undertaking is premature for the reasons mentioned. The Court again defers on the issue.

The Court has not considered the arguments attacking the evidence from the motion for preliminary injunction.

The matter is set for a second review hearing on the remediation/repair plan on November 1, 2019, at 8:30 a.m. in Dept. B. Webb shall file his revised winterization plan and slope stabilization plan on or before October 25, 2019. Webb shall serve plaintiffs via email. Plaintiffs may file any objections to the plans to the Court on or before October 28, 2019. Plaintiffs shall serve Webb's counsel via email. Webb may file a reply on or before October 30, 2019, and serve plaintiffs via email. The slightly longer schedule is to accommodate the requirement to obtain bids from three companies.

As always, the parties are encouraged to work together to find a solution as they are in a better position to find an appropriate remedy to this problem without the further delay and expense of having the Court craft a remedial/repair plan.