

Shulman v. Estate of Jack Collison  
Hearing Date:  
Motion: Trial Preference

Case No. 24CV02047  
July 9, 2024

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**PARTIES/ATTORNEYS**

Plaintiff	Barry Shulman Francine Shulman Shulman Family Trust	GLICKMAN & GLICKMAN Steven C. Glickman, Esq.
Defendant	Estate of Jack Collison Jack Collison, Inc.	Whitney, Thompson & Jeffcoach LLP Marshall C. Whitney Devon R. McTeer Jessica L. Thomason

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Plaintiffs Barry Shulman, Francine Shulman, and the Shulman Family Trust retained Jack Collison<sup>1</sup> and Jack Collison, Inc. to represent plaintiffs in securing all appropriate easements for water rights as to the parcels of property forming what is known as 5930 Santa Rosa Rd., Lompoc, CA. Plaintiffs subsequently entered into a sale of the property. During the course of escrow for the sale, plaintiffs discovered that defendants had failed to properly secure an easement which resulted in a reduction of plantable acreage by approximately 37%. As a result, plaintiffs and the buyers of the property negotiated a reduction in the purchase price of at least \$500,000 to compensate for the lack of the easement. Plaintiffs filed a malpractice action on April 11, 2024.

Plaintiffs now move for an order establishing trial preference. Code of Civil Procedure section 36 provides:

“(a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:

- (1) The party has a substantial interest in the action as a whole.

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<sup>1</sup> Jack Collison died in 2021. “Estate of Jack Collison” is a named defendant. A probate or trust estate is not a legal entity; it is simply a collection of assets and liabilities. As such, it has no capacity to sue, be sued or defend an action. Any litigation must be maintained by, or against, the executor, administrator or trustee of the estate. (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1344; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 496; *Portico Mgmt. Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 474—judgment against trust was meaningless and unenforceable.) Thus, the “Estate of Jack Collison” is not a proper party.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.”

The purpose of section 36, subdivision (a), is to ensure that elderly litigants who are in poor health receive their day in court while their health permits. (See *Swaithe v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085 [“The clear intent of the Legislature is to safeguard litigants who qualify under subdivision (a) of section 36 against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and to obtain the appropriate recovery.”].) “Where a party meets the requisite standard for calendar preference under subdivision (a), preference must be granted. No weighing of interests is involved.” (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535 (granting the mandatory motion for trial preference and disregarding defendant's arguments that the court must balance the interests of the parties and give weight to defendant's due process rights).) “[T]he decision to grant or deny a preferential trial setting rests at all times in the sound discretion of the trial court in light of the totality of the circumstances.” (*Salas v. Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 344.)

### Request for Judicial Notice

Defendants request the court to take judicial notice of three documents:

- December 24, 2014 grant deed from Russel and Susan Lugli as trustees of the Lugli Family Trust conveying the property to “Kim L. Marienthal and Barbara M. Marienthal, Trustees of the Kim L Marienthal and Barbara M Marienthal 2003 trust” as to an undivided 30% interest; and “Barry Shulman and Francine Shulman, Trustees of the Shulman Family Trust” as to an undivided 70% interest (RJN, Exh. A)<sup>2</sup>;
- December 24, 2014 Grant of Easement from Russel and Susan Lugli as trustees of the Lugli Family Trust to “FRANCINE AND BARRY SHULMAN AND KIM AND BARBARA MARIENTHAL as their interest may be” for “the use of the existing water well, and the right to take and use the water produced from said well” along with the right to drill an additional water well on Lugli’s property within two years. (RJN, Exh. B);<sup>3</sup>
- 2015 Grant of Easement (prepared by Jack Collison) “for a water well site, water lines and public utilities collectively referred to as the “Water System,” and ingress and egress for the installation, operation, and maintenance thereof” from “RUSSELL V. LUGLI AND SUSAN K. LUGLI, TRUSTEES OF THE LUGLI FAMILY TRUST DATED

<sup>2</sup> The property consisted of two parcels. Parcel One was comprised of APN # 083-150-06 and 083-310-01. Parcel Two was comprised of APN # 083-160-01 and 083-310-02, and 083-310-04.

<sup>3</sup> This easement was granted to APN # 083-150-06 and 083-310-01 (Parcel One) only.

OCTOBER 3, 1983, ("Grantor"), and FRANCINE AND BARRY SHULMAN and KIM AND BARBARA MARIENTHAL, ("Grantee") (RJN, Exh. C).<sup>4</sup>

There is no opposition to these requests. The requests are granted.

### Merits

Plaintiffs assert as follows: Barry Shulman was born March 24, 1939 and is currently 85 years old. (See Declaration of Barry Shulman ("Barry Dec."), ¶ 2.) Barry has been diagnosed with a large number of severe illnesses and injuries which continue to affect his daily life. (*Id.*, ¶ 3.) These conditions include but are not limited to triple bypass surgery, thyroid cancer surgery, prostate cancer surgery, back surgery, mitral valve surgery, and a TIA. (*Id.*) Barry is on a daily regimen of at least fourteen different medications in order to control and abate his various medical issues, the most serious of which is metastatic prostate cancer, and he is constantly monitored by doctors for heart disease and cancer. (*Id.*) Barry also suffers from problems with bladder control, chronic pain from back surgery and fatigue, no exercise tolerance, and shortness of breath from heart disease. (*Id.*) They assert that as "one of two plaintiffs prosecuting this legal malpractice action against Defendants; [] he has a substantial interest in the action."

#### 1. Substantial Interest

Defendants argue that Barry's interest in the action has not been established because, they assert, the Shulman Trust are the owners of the property, not the Shulmans individually. Defendants assert that the Shulman Family Trust, not Barry and Francine Shulman in their individual capacities, have an interest in this litigation<sup>5</sup> because he will not obtain any monetary relief as a result of this action. As such, they allege that plaintiffs have failed to show that Barry Shulman has a substantial interest to be protected by trial preference. Plaintiffs assert that they have a substantial interest precisely because they are trustees since the trust otherwise has no capacity to sue. (See footnote 1.)

It does not appear that any definition for "substantial interest in the action as a whole" has emerged. The parties have cited no cases in which it is discussed. Nevertheless, the definition seems capable of having a broader definition than that suggested by defendant (e.g., financial interest in the ultimate judgment that might be rendered). A trustee has a fiduciary duty to "take reasonable steps to enforce claims that are part of the trust property." (Prob. Code, § 16010.) Moreover, as co-trustees, they must act unanimously. (Prob. Code, § 15620—"Unless otherwise

<sup>4</sup> This easement was also granted to Parcel One only.

<sup>5</sup> Both parties ignore the language in the easements identifying as grantees (in part) as "FRANCINE AND BARRY SHULMAN." The Shulman Family Trust is not identified in either the definition of grantee or as signatory.

provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action.”) As such, the court finds that Barry and Francine Shulman, as trustees, have a substantial interest in the action as a whole.

## 2. Health of the Party

A party moving for preference based on subdivision (a) only needs to provide an affidavit “signed by the attorney for the party seeking preference based upon information and belief as to the medical diagnosis and prognosis of any party.” (Code Civ. Proc., § 36.5.) After the granting of motion for preference, the clerk will set the matter for trial within 120 days and the availability of continuances will be limited. (Code Civ. Proc., § 36, subd. (f).)

As noted above, Barry has submitted his own declaration describing his health. Defendants argue this is insufficient to support the request since “[t]he code makes clear that *an attorney* is permitted to submit a declaration upon information and belief as to the medical diagnosis and prognosis of the client . . . However, it does not expressly allow for *the petitioning party* to submit such a declaration.” (Emphasis added.) Defendants cite no authority for this position, and the court rejects it. A motion under subdivision (a) may be supported by nothing more than an attorney's declaration “based upon information and belief as to the medical diagnosis and prognosis of any party.” (§ 36.5; accord Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2024) ¶ 12:247.1, p. 12(I)-44 [attorney declaration under section 36.5 “can consist entirely of hearsay and conclusions”].) The fact that Barry submitted his own declaration, which is based on personal knowledge instead of hearsay, does not undermine the evidence.

Nevertheless, the court finds the declaration to be insufficient. While the court empathizes with Barry's reported conditions, it finds that nothing in the declaration shows that Barry will be prejudiced if trial preference is not granted, or that Plaintiff's ability to participate in the trial will be reduced if the trial is not set on preference. *Fox v. Superior Court* (2018) 21 Cal.App.5th 529 is the leading case here. In that matter, the court observed that the following was sufficient to support a finding that the litigant's health was such that preference was necessary: “It is uncontroverted Ms. Fox suffers from stage IV lung cancer and severe coronary artery disease, among other ailments. She is undergoing chemotherapy treatments, but is in constant discomfort and has difficulty performing basic life functions. And critically, her mental state has deteriorated to a point where she becomes confused and forgetful. All told, the evidence shows that while Ms. Fox is currently able to participate in a trial, she has good reason for concern that will not be the case for much longer as her health deteriorates.” (*Id.* at 535—“All told, the evidence shows that while Ms. Fox is currently able to participate in a trial, she has good reason for concern that will not be the case for much longer as her health deteriorates.”)

The court is not convinced on this showing that Barry's health issues demonstrate that he will not be able to participate in trial without a preferential setting, which was the case in *Fox, supra*. For example, some of his reported health concerns have existed for over 20 years. And while he must take many daily medications and he requires monitoring by his physicians, there is no evidence that Barry's health is currently deteriorating, as was the litigant's health was in *Fox*. The court acknowledges that the statute does not require that a petitioning party have any specific diagnosis or prognosis. (See, e.g., *Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535-536 [noting the inherent uncertainty of cancer diagnoses which can cause "the end [to] come quickly with little warning; [or] years may pass with gradual, relentless decline before the battle is lost; or, happily, there may be sustained remission after episodic periods of improvement and relapse," and holding that "the absence of more specifics about [one plaintiff's] prognosis was insufficient reason to deny the [plaintiffs'] request for calendar preference."].) Nevertheless, a showing of expected deterioration is required. The court intends to deny the motion, without prejudice to its renewal should circumstances change.

The parties are instructed to appear at the hearing for oral argument and be prepared to address this issue. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See [Remote Appearance \(Zoom\) Information | Superior Court of California | County of Santa Barbara](#).)