

APPENDIX B

Filed 2/6/20 Thomas v. Blevins CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Plaintiff and Appellant,

v.

JAMES SCOTT BLEVINS, as Trustee, etc.,

Defendant and Respondent.

F078333

(Super. Ct. No. 428536)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Stacy P. Speiller, Judge.

Jozlyn Thomas, in propria persona, for Plaintiff and Appellant.

Gianelli/Nielsen, Eric Thomas Nielsen and Michael Louis Gianelli for Defendant and Respondent.

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Appellant, Jozlyn Thomas, a beneficiary of the Giles Revocable Trust (or the trust), appeals from the trial court’s denial of her motion to vacate¹ an order issued nine years earlier concerning the administration of the trust (the 2009 order). The 2009 order had granted an amended petition by the trustee, respondent James Scott Blevins (respondent or trustee), seeking court approval of his account and report, plan of distribution, and settlement agreement with another beneficiary, Dawn Morin. By 2011, presumably in reliance on the 2009 order, all the assets of the trust were distributed to the various beneficiaries, including appellant, and the trust administration was completed. In her motion to vacate, appellant claimed the 2009 order should be set aside as void, and the trust administration and/or distribution “reopened,” because there was a lack of proper service of process on her relating to the subject petition; that is, the trustee mailed the relevant pleadings and notices to an incorrect address. The trial court denied appellant’s motion on the primary ground that appellant’s “attack on the Court’s May 2009 Order comes far too late.” In her appeal, appellant contends the trial court erred because the 2009 order had to be set aside as void regardless of when the invalidity was brought to the trial court’s attention. We disagree. Under the unique circumstances of this case, and for reasons explained below, we conclude the trial court did not abuse its discretion in declining to vacate the 2009 order. Accordingly, the order of the trial court denying appellant’s motion to vacate is hereby affirmed.

FACTS AND PROCEDURAL HISTORY

Background Regarding Giles Revocable Trust

For purposes of the present appeal, neither party disputes the basic accuracy of the background facts set forth in the trial court’s order denying appellant’s motion to vacate.

¹ Appellant’s motion to vacate was formally entitled a “Petition to Reopen Estate Administration and to Vacate and Set Aside Order” For ease of expression, we refer to it as simply the motion to vacate. Although the motion was made on appellant’s behalf by one of her guardians, Daniel Thomas, we describe it herein as appellant’s motion.

The following is a reiteration of the trial court's description and history of the Giles Revocable Trust and of the relevant court proceedings relating thereto which resulted in the 2009 order.²

The settlors/trustors of the Giles Revocable Trust were Charles L. Giles and Bobette Giles, husband and wife. The trust was established in January 2002. At the time, Charles had two sons from a former marriage—Charles W. Giles (deceased) and Joseph Giles (appellant's father). Bobette had five children from a former marriage—James Scott Blevins, William Blevins, Brent Blevins, Bryan Blevins, and Kelly Bergman. Charles and Bobette were the initial trustees of the Giles Revocable Trust—it was created as a revocable living trust. Bobette's son James was designated as the successor trustee—i.e., the person who would take over administration of the trust upon the death of both Charles and Bobette.

In the Giles Revocable Trust, Charles specifically provided for some of his grandchildren. This included his grandchildren through his deceased son Charles W. (i.e., Charles W. Giles, Jr., Anthony Giles, and Michael Giles), and his grandchild through his son Joseph—i.e., Joseph's daughter, appellant herein. Charles left his son Joseph a small bequest (\$50,000 in trust) that was dependent on Joseph refraining from use of illicit drugs.

Charles also treated Dawn Morin as his own daughter, though she was never adopted by him, according to the pleadings. As will be noted below, Dawn Morin was one of the beneficiaries of the trust.

² We have at times shortened or made a few minor wording changes to the trial court's factual summary, but the substance thereof is retained. We follow the trial court's occasional use of first names, which is solely for convenience. No disrespect is intended. We also retain some of the trial court's use of middle initials where it appeared helpful to distinguish between persons with the same first and last names.

The trust assets were supposed to be placed into three different sub-trusts upon the death of the first spouse. First, a marital share trust was supposed to be created and funded to the extent of the federal marital estate tax exemption amount to reduce and/or eliminate taxes at the time of the surviving spouse's death. Second, a family share trust was to be created, which would hold the community property share of the deceased spouse as well as the balance of that spouse's separate property, if any. Third, a surviving spouse trust was supposed to be created to hold the surviving spouse's share of the community property as well as that spouse's separate property, if any. The surviving spouse was to maintain control over all the assets in the surviving spouse trust and upon death, those assets were to be equally divided among the surviving spouse's beneficiaries.

Depending on who died first, the applicable distribution provisions in the trust were slightly different. However, since Charles died first, this is what was supposed to happen: First, immediately upon his death, Stoney Dahlberg was to receive \$1,000, Dawn Morin was to receive \$25,000, and "each living grandchild" was to receive \$25,000, including appellant.³

Then, upon Bobette's death, Charles's beneficiaries (who inherit the balance of the marital share and family share sub-trusts) were to receive as follows: \$50,000 to Joseph Giles (conditional on his refraining from use of illicit drugs), 10 percent of the value of the sub-trusts to the Boys & Girls Club of Manteca, 10 percent to St. Vincent de Paul's, and 10 percent to each living grandchild (there were four at the time of Bobette's death—including appellant). The remainder of the marital share and family share sub-trusts was left to Dawn Morin. Thus, appellant was to inherit about 10 percent of the remaining value of the marital share and family share sub-trusts, and Dawn Morin about 40 percent of the assets left in those two sub-trusts. Under the terms of the Giles Revocable Trust,

³ According to appellant, Charles died on April 2, 2003; and Bobette died on December 31, 2004.

Bobette's five children, including respondent James Scott Blevins, inherited equal shares in the third sub-trust—the surviving spouse trust.

Trust Litigation and Proceedings Leading to the 2009 Order

After the death of the trustors, respondent James Scott Blevins became the successor trustee. The administration of the Giles Revocable Trust took several years. In June 2008, Dawn Morin filed a petition seeking "information and an accounting" from respondent in his capacity as trustee, alleging that respondent was improperly attempting to sell trust property to his brother at an inappropriate discount. Additionally, Dawn Morin raised some questions regarding the delay in funding the sub-trusts, the propriety of transactions Bobette had undertaken in her lifetime and of the allocation of certain shares of stock to respondent.

Respondent objected to Dawn Morin's petition, offering explanations for each of the challenged actions. After settlement negotiations, the parties reached an agreement in March 2009. Therefore, on March 25, 2009, respondent filed an amended petition⁴ seeking, among other things, court approval of a proposed plan of distribution pursuant to which Dawn Morin would receive slightly less than her designated 40 percent of the two sub-trusts. Notably, pursuant to the proposed plan, appellant also would receive slightly less than 10 percent of the sub-trusts.

On April 29, 2009, pursuant to the settlement agreement, Dawn Morin dismissed her petition for information and an accounting, with prejudice.

On May 5, 2009, the trial court granted respondent's amended petition and signed what we have referred to as the 2009 order approving, among other things, the distribution plan proposed by the trustee. Distribution of the trust assets to the various

⁴ Though not part of the record, there was apparently an earlier version of respondent's petition. Presumably, the petition was amended to account for the settlement agreement with Dawn Morin.

beneficiaries was completed in 2011. Since that time, appellant has become a record owner of a number of assets pursuant to the distribution plan and she has, according to the pleadings, received income from those assets through her guardians and maternal grandparents, Daniel Thomas and Mary Thomas.

Appellant's Motion to Vacate

On March 26, 2018, appellant filed her motion to vacate the trial court's 2009 order and, as a corollary to that relief, to reopen the trust administration. Preliminarily, appellant's motion pointed out that she was born in June of 2000, and as a minor she was under the care of her maternal grandparents, Daniel and Mary Thomas, who have been guardians of her person and estate. The reason for this guardianship was that appellant's parents, Joseph Giles and Lisa Thomas, were unable to take care of her due to their drug abuse and her father Joseph's incarceration in Florida. Appellant was first placed with Daniel and Mary Thomas in June of 2007, and their guardianship was formally approved in February of 2008 by a Wisconsin court. Since June of 2007, appellant has resided with her grandparents, the Thomases, at their home in Punta Gorda, Florida.

Appellant and her grandparents asserted in support of the motion that they were not aware that the Giles Revocable Trust existed or that appellant was a beneficiary until 2009, when the wife of the trustee called and disclosed that appellant was a beneficiary of the trust entitled to distribution of a portion of its assets. However, it was not disclosed at that time that a "lawsuit" had been initiated by Dawn Morin or a petition filed by the trustee. Nor was it disclosed at that time that a final order of the trial court had been entered concerning those matters. These relevant facts allegedly were not discovered by appellant until superior court files were inspected in 2017.

According to appellant's motion to vacate, neither appellant nor her grandparents as guardians received service of process or other notice of the 2008-2009 proceedings in the trial court, including Dawn Morin's petition and the trustee's amended petition, which

proceedings led to the trial court's 2009 order affecting appellant's rights under the trust. The proofs of service regarding those matters showed that the trustee and Dawn Morin had utilized an incorrect address to serve by mail the relevant pleadings and notices. Specifically, a numerical address or addresses on "Sandhill" in Punta Gorda, Florida, had been set forth in the proofs of service rather than the correct address, which was and is on Belem Street in Punta Gorda, Florida. Appellant's motion argued that the failure to properly serve process on her or her guardians caused the 2009 order to be void. Additionally, appellant's motion asserted the 2009 order was a result of extrinsic fraud. According to appellant, the void order could be set aside at any time, and she requested the trial court do so to protect her due process rights.

Respondent Trustee's Opposition to the Motion to Vacate

Respondent opposed the motion to vacate. Respondent's declaration in opposition to the motion stated that he was first alerted to the Thomases' involvement as guardians for appellant in 2009, by his then wife Deena Blevins. He stated that his wife Deena had a phone call with Mary Thomas on May 18, 2009, wherein Mary Thomas explained to Deena that she and Daniel Thomas were the guardians for appellant and that all mailings should be sent to their address on Belem Street in Punta Gorda, Florida. According to respondent, prior to learning of appellant's correct address, all correspondence and court filings for appellant were sent to addresses that, based on information and belief, were provided to him from either appellant's father, Joseph Giles, and/or Bobette Giles prior to her death. Respondent asserted that once he learned, on or about May 18, 2009, that appellant lived with the Thomases, "I caused all communications and filings to be sent to [the Thomases] at their address." Respondent's declaration further stated that from that point forward, he had countless discussions with Daniel Thomas over the years regarding the trust estate and the various distributions made from it, including the initial \$25,000

distribution made to appellant, plus interest, which was confirmed by attached emails and other correspondence.

Finally, according to respondent's declaration, it would be prejudicial to the interests of all beneficiaries to grant appellant's motion. In that regard, respondent stated: "From 2011 to the present, the various beneficiaries of the Trust, *including [appellant]*, have continued to own various pieces of real estate together as a result of the Trust distribution; and, they continue to own an interest in at least one general partnership. Put differently, reopening this estate and unwinding the past seven years of very regular and active involvement by these former beneficiaries in real estate ventures and in business will be cataclysmic for all involved—including [appellant]."

Respondent's attorney, Eric Nielsen, also filed a declaration in support of respondent's opposition to the motion. Nielsen's declaration attached documents that had been sent in 2011 to appellant's guardians, the Thomases. The documents included: (1) a release of liability of trustee and waiver of accounting executed by the Thomases as appellant's guardians on September 30, 2011 (the release of liability); (2) a February 17, 2011 letter from attorney Nielsen to the Thomases as appellant's guardians, and (3) a September 8, 2011 letter from attorney Nielsen to the Thomases as appellant's guardians. According to respondent's opposition, these documents showed that appellant's guardians were made aware of the relevant history of the administration of the trust, including the settlement agreement and the 2009 order, by 2011.

In his points and authorities in opposition to the motion, respondent argued the motion should be denied for several reasons, including that the signed release of liability precluded appellant's action and that the motion was untimely under applicable law. On the latter point, respondent observed it is "well settled that where a party moves under section 473, subdivision (d), of the Code of Civil Procedure to set aside 'a judgment that, though valid on its face, is **void** for lack of proper service, the courts have adopted by

analogy the statutory period for relief from a default judgment' provided by section 473.5 of the Code of Civil Procedure, that is, the two-year outer limit. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175; [Citations.].)"

In her reply in support of the motion to vacate, appellant conceded that "*Trackman* ... correctly cites that where a defendant seeks to void a judgment due to failure of service, as herein, the defendant must bring his action to set aside the judgment no later than two years after entry of the judgment." Appellant argued she fit within an exception stated in *Trackman v. Kenney, supra*, 187 Cal.App.4th 175 (*Trackman*) where the judgment was a result of extrinsic fraud, such as a falsified proof of service, in which case the motion may be made at any time provided the party acts with reasonable diligence upon learning of the relevant facts. Appellant argued that "[s]imply stated, extrinsic fraud exists and [appellant] acted with due diligence when the true facts were discovered"

Trial Court's Order Denying Motion to Vacate

A hearing was held on appellant's motion to vacate on August 31, 2018, after which the trial court took the matter under submission. On October 1, 2018, the trial court issued its order denying appellant's motion. The trial court began by reciting the background history of the Giles Revocable Trust and of the court proceedings leading to the 2009 order. The trial court then carefully reviewed the grounds presented for appellant's motion and the opposition. The trial court agreed with respondent that the two-year outer limit was applicable to appellant's motion under the rule set forth in *Trackman*, and it was clear the two-year period had long ago expired. The trial court acknowledged an exception exists where extrinsic fraud is shown, if the party acts with diligence upon learning the relevant facts. The trial court found there was insufficient evidence to establish extrinsic fraud, but in any event, even assuming such extrinsic fraud existed, the trial court held that the 2011 letters and release of liability put appellant's

guardians on notice of the relevant facts and they failed to exercise due diligence to bring the motion to vacate within a reasonable time. Accordingly, the motion to vacate the 2009 order and to reopen administration of the trust assets was denied.

Respondent timely filed a notice of appeal from the denial of her motion.

DISCUSSION

I. Standard of Review

Whether a judgment or order is void due to lack of proper service is a question of law that we review de novo. (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858.) However, our review of the trial court's decision whether to set aside a void judgment or order under the facts and circumstances before it is governed by the abuse of discretion standard. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1020; *Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822; *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440–1441; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) In applying the abuse of discretion standard, we determine whether the decision of the trial court exceeded the bounds of reason in light of the circumstances before it. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.)

II. No Abuse of Discretion Shown in Denial of Motion to Vacate

Code of Civil Procedure section 473, subdivision (d), provides a trial court “may, on motion of either party after notice to the other party, set aside any void judgment or order.” In connection with such a motion, courts generally distinguish between (i) orders that are void on the face of the record and (ii) orders that appear valid on the face of the record but are shown to be void through consideration of extrinsic evidence. (*Pittman v. Beck Park Apartments Ltd.*, *supra*, 20 Cal.App.5th at p. 1020.)⁵ “This distinction may be

⁵ As noted in *Pittman v. Beck Park Apartments Ltd.*, *supra*, 20 Cal.App.5th at p. 1020, the inclusion of the word “may” in the language of Code of Civil Procedure

important in a particular case because it impacts the procedural mechanism available to attack the judgment [or order], *when* the judgment [or order] may be attacked, and how the party challenging the judgment [or order] proves that [it] is void.” (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1326, italics added.)

A. Motion Untimely Under Statutory Time Limits.

A judgment or order that is void on the face of the record may be attacked *at any time*. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC*, *supra*, 7 Cal.App.5th at p. 1327.) However, it is clear we are not dealing with that sort of order in this case. Here, the purported ground of invalidity of the trial court’s 2009 order (i.e., lack of proper service on appellant) was not apparent on the face of the record but required the presentation of *extrinsic evidence* such as the declarations by appellant and her guardians regarding appellant’s correct mailing address and her alleged lack of actual notice of the trust proceedings or the lack of service of the applicable pleadings during the relevant period. To be void on the face of the record, the invalidity must be evident from the judgment roll, *not* extrinsic evidence. (*Id.* at pp. 1327–1328.) Therefore, the 2009 order was *not* facially void or void on the face of the record, and consequently the trial court properly considered the applicability of recognized time limits for appellant’s attack on the 2009 order.

“Where a party moves under [Code of Civil Procedure] section 473, subdivision (d) to set aside ‘a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment’ provided by [Code of Civil Procedure] section 473.5, that is, the two-year outer limit.” (*Trackman, supra*, 187 Cal.App.4th 175, 180, quoting 8 Witkin, Cal.

section 473, subdivision (d), makes it clear that a trial court retains discretion to grant or deny a motion to set aside a void judgment or order.

Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814–815; accord, *Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301, fn. 3; *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1120–1124.) As the trial court correctly found in denying appellant’s motion to vacate, the present case plainly comes within the above stated standard in *Trackman* for application of the two-year limitation period. The 2009 order, though valid on its face, was claimed by appellant to be void due to lack of proper service; *however*, appellant’s attack in 2018 on the 2009 order obviously came long after expiration of the two-year outer limit. Accordingly, unless an exception or an alternative basis for relief has been shown, appellant’s motion to vacate was clearly untimely under the two-year limitation period stated in *Trackman*.

In the trial court, appellant conceded that pursuant to *Trackman*, her challenge of the 2009 order had to be made within the two-year limitation unless an exception applied. Appellant’s position was that an exception *did* apply, based on the purported existence of extrinsic fraud in this case. In her appeal, appellant continues to argue that her motion to vacate was timely on the theory that the 2009 order was obtained as a result of extrinsic fraud. As more fully explained below, we conclude appellant’s extrinsic fraud argument fails to establish the trial court abused its discretion in denying the motion to vacate. In addressing this matter, the trial court found there was an inadequate showing to substantiate the occurrence of extrinsic fraud, and we believe that finding was within the bounds of reason in light of the circumstances presented in the record. In any event, *even if* extrinsic fraud did occur, the law still requires appellant to act with reasonable diligence upon learning the true facts. She did not do so here, as the trial court properly found in the alternative.

B. Appellant's Claim of Extrinsic Fraud

Even after statutory deadlines have passed, a trial court may still set aside a judgment or order under its inherent equitable powers where the moving party has demonstrated the judgment or order was obtained as a result of extrinsic fraud or mistake. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 215, p. 823 [noting such equitable relief is allowed even after the time that statutory means for review thereof have expired].) As noted in *Trackman*, extrinsic fraud or mistake is a distinct avenue for setting aside a void judgment or order, and “such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts.” (*Trackman, supra*, 187 Cal.App.4th at p. 181.) To illustrate a situation where such relief might typically be granted, *Trackman* noted the example of “a falsified proof of service.” (*Ibid.*)

Here, appellant claimed there was extrinsic fraud perpetrated by respondent, based primarily on the asserted lack of proper service at appellant’s correct address. “Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been ‘deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.’” (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.) The court may grant relief under its inherent equity power if, because of the fraud of a party’s opponent, the aggrieved party was prevented from presenting his claim or defense to the court. (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1068.) Extrinsic fraud has been found to occur when “‘the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff.’” [Citation.]” (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47.) The “essential characteristic” of extrinsic fraud

“is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting that party’s claim or defense.” (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 225, p. 832; accord, *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 827.)

As noted, the trial court concluded the evidence failed to demonstrate extrinsic fraud on the part of respondent as trustee. In its written decision denying the motion to vacate, the trial court appears to have credited the evidence presented by respondent indicating that, although initial court filings were apparently mailed to an incorrect or obsolete address, that error was based on an address provided to respondent from either appellant’s father, Joseph Giles, and/or Bobette Giles prior to her death. Further, once the error was learned, respondent caused all further communications and filings to be sent to appellant’s correct address. Not only was appellant notified of the trust and of her status as beneficiary in mid-May of 2009, but as the trial court observed, the letters and release of liability form sent to her guardians in 2011 “included a detailed description of the various aspects of trust administration which petitioner now challenges, including the fact that *all* of the beneficiaries were receiving proportionately less than what was indicated in the [trust].” As the trial court further pointed out, the release of liability executed by appellant’s guardians expressly acknowledged receipt of respondent’s accountings for the relevant time period, and further acknowledged that “[appellant’s] share of the current balance on hand has been adjusted to 9.976855% due to the fact that the final share to beneficiary Dawn Morin has already been distributed as mandated by prior Court order.”

Based on the above, the trial court concluded that appellant failed to present evidence demonstrating respondent’s actions “truly amount[ed] to ‘extrinsic fraud.’ ” The record supports that conclusion. As the above summary indicates, the evidence did

not reflect that respondent deliberately kept appellant in ignorance of the trust proceedings, or that respondent in any other way sought to prevent appellant's knowledge of her rights or her involvement in the proceedings. Instead, a reasonable inference was that respondent, rather than deliberately committing an extrinsic fraud upon the court or appellant, initially utilized an incorrect address for service based on obsolete information, but promptly sought to correct that error when brought to his attention. (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479 [when two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court]; see also *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291 [policy favoring finality of judgments requires showing of exceptional circumstances after statutory period for relief expired].)

In any event, even assuming extrinsic fraud did potentially occur in this case, it was incumbent on appellant as moving party to show that she sought relief by filing the motion to vacate within a reasonable time after learning the facts. (See *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 291 [moving party must show reasonable diligence]; *Trackman, supra*, 187 Cal.App.4th at p. 180 [in seeking relief based on extrinsic fraud or mistake, the party must act with diligence upon learning of the relevant facts]; *In re Marriage of Stevenot, supra*, 154 Cal.App.3d at p. 1071 [party must show diligence in seeking to set aside the default once fraud is discovered]; *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147–1148; *McGuinness v. Superior Court* (1925) 196 Cal. 222, 232 [court has inherent equitable power to vacate upon motion a judgment obtained by fraud, provided that such motion is made “within a reasonable time”]; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 219, p. 826 [in raising grounds for equitable relief against judgment, the motion must be “made within a reasonable time”].)

The trial court not only held that appellant failed to prove extrinsic fraud, but as an additional or alternative ground for denial of the motion, the trial court *also* concluded

that appellant failed to bring her motion to vacate the 2009 order within a reasonable time. The trial court's finding that appellant failed to act with reasonable diligence is clearly supported by the record. In 2011, two letters and the release of liability form were sent by respondent's attorney, Eric Nielsen, to appellant's guardians. A letter dated February 17, 2011 advised the beneficiaries, including appellant, of the status of the trust administration. The letter included the following information: "We recently provided Dawn Morin with her percentage share of the Trust reserve account as required by the terms of the prior settlement agreement between the Trust and Dawn. The Court order dated May 6, 2009 that was entered in connection with this particular dispute mandated that Dawn was to receive her percentage of the reserve account no later than December 31, 2009." Later that year, a letter dated September 8, 2011 informed beneficiaries, including appellant, that the final trust distribution was ready to be made of the remaining asset in the trust, consisting of the funds in a reserve account. The September 8, 2011 letter explained that the reserve account balance had been held for various reasons, one of which was related to "the distribution of Dawn Morin's share of the Trust reserve account as mandated by the previously entered Court order dated May 6, 2009." Finally, in September 2011, the release of liability form was sent to appellant's guardians. The release of liability form, which was signed by appellant's guardians on September 30, 2011, stated their acknowledgement of receipt of formal accountings for the period April 3, 2003 through December 31, 2008 and for the period of January 1, 2009 through March 14, 2010. Moreover, the release of liability form further acknowledged that appellant's share of the net trust estate "has been adjusted to 9.976855% due to the fact that the final share to beneficiary Dawn Morin has already been distributed as mandated by prior Court order."

It is clear from the above documents provided to appellant's guardians in 2011 that they were apprised of the existence of the settlement agreement with Dawn Morin

and of the essential impact thereof, which, as embodied in the 2009 order, resulted in a slight reduction in the beneficiaries' (including appellant's) percentages or shares to which they were entitled under the trust. Despite this notice in 2011 regarding the 2009 order and the Dawn Morin settlement, appellant's guardians delayed until 2018 to file appellant's motion to vacate the 2009 order. No excuse for that lengthy delay has been presented. We conclude the trial court properly found that appellant's motion to vacate was not made within a reasonable time after learning of the 2009 order.

For the reasons discussed hereinabove, we conclude the trial court did not abuse its discretion in denying appellant's motion to vacate. Even if extrinsic fraud existed, appellant failed to diligently bring the motion to vacate within a reasonable time.

C. County of San Diego v. Gorham, supra, 186 Cal.App.4th 1215 is Distinguishable⁶

In arguing the trial court nevertheless erred, appellant refers this court to *County of San Diego v. Gorham, supra, 186 Cal.App.4th 1215 (Gorham)*. In that case, a paternity and child support complaint and summons were purportedly personally served on the defendant Gorham in 1998 at an address in San Diego. A default judgment was entered against him in 1998, and he was ordered to pay monthly child support, plus arrearages. (*Id.* at pp. 1221–1222.) In 2002, a San Diego County Department of Child Support Services worker informed Gorham of the existence of the default judgment. Sometime later, Gorham discovered that the process server had falsified the proof of service of summons and complaint because Gorham had been incarcerated on the date of the purported service. (*Id.* at pp. 1222, 1231.) In 2008, in light of the fraudulent return of service and the complete failure of any service of process, Gorham moved to set aside the

⁶ Appellant also referenced *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115. We find this case distinguishable since it addressed special issues of service on an overseas business entity under the Hague Convention. Further, the Supreme Court granted review thereof on September 26, 2018 (see S249923. 2018 Cal. Lexis 7239, 238 Cal.Rptr.3d 118).

1998 default judgment. The trial court denied the motion on the ground that since the invalidity was not apparent on the face of the record, the motion had to be brought within recognized time periods—i.e., either the two-year outer limit adopted by analogy to Code of Civil Procedure section 473.5, or the shorter period set forth in Family Code section 3691, or if premised on extrinsic fraud then at least within a reasonable time after learning the facts. In short, the trial court found that Gorham waited too long, and relief was denied. (*Gorham*, at pp. 1223–1224.)

Gorham appealed, and the appellate court reversed. (*Gorham, supra*, 186 Cal.App.4th at pp. 1234–1235.) In essence, *Gorham* concluded that where a fraudulent return of service results in a complete failure of service of process on the defendant whose rights were at stake, there is a fundamental lack of jurisdiction over that party and any resulting order or judgment against him or her is void and may be set aside at any time. (*Id.* at pp. 1228–1229, 1234–1235.) In reaching that conclusion, *Gorham* acknowledged that where the invalidity of a judgment does not appear on the face of the record, it may be attacked by a motion in the action in which the judgment was entered, but such motion would ordinarily have to be made under a statute providing for relief within certain time limits or a reasonable time. (*Id.* at p. 1228.) However, the opinion also recognized that even if relief is no longer available under statutory provisions, a trial court retains the power to vacate a judgment on equitable grounds where it resulted from extrinsic fraud or mistake, or where it was established as a matter of law to be void for lack of due process. (*Ibid.*) In that regard, *Gorham* emphasized that a false return of summons proves “both” extrinsic fraud and mistake *and* that the judgment or order is void. (*Id.* at p. 1229.) Under the unique circumstances in that case of a false return of service establishing both extrinsic fraud and a complete lack of service of process, *Gorham* concluded that relief from the resulting void default judgment could be sought at any time. (*Id.* at pp. 1229–1230, 1234.) Further, under the conditions that occurred in

Gorham, the court indicated that since the void default judgment was a nullity, the aggrieved party would have no duty to act diligently to protect his rights after he had obtained knowledge of it. (*Id.* at p. 1229.)

Based on the above synopsis of *Gorham*, we believe that it is distinguishable from the case now before us. As noted, *Gorham* involved extrinsic fraud in the form of a fraudulent return of service, which fact was dispositive to the court's analysis. In the present appeal, however, no such false or fraudulent return of service was shown. Furthermore, although an exception to the statutory time limits for moving to vacate a void judgment due to improper service of process has of course been recognized in cases where there was extrinsic fraud involved (see, e.g., *Sullivan v. Sullivan* (1967) 256 Cal.App.2d 301, 303), it was still required in those cases that such a motion be made with diligence or within a reasonable time. (See, e.g., *Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 181–182 [where false recital of service, motion must be made within reasonable time from discovery]; *Washko v. Stewart* (1941) 44 Cal.App.2d 311, 317–318; *Smith v. Jones* (1917) 174 Cal. 513, 515–516.) In any event, this was *not* a fraudulent return of service case, so the apparent ruling in *Gorham* that no diligence would be required in such unique cases may be distinguished. Therefore, we hold it was not an abuse of discretion for the trial court to require appellant to bring her motion to vacate the 2009 order, premised on alleged extrinsic fraud, within a reasonable time. (See *Trackman, supra*, 187 Cal.App.4th at p. 181 [a party “can show that extrinsic fraud or mistake exists, such as a falsified proof of service, and such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts”].) — — —

Appellant also asserts, based on principles noted in *Gorham* and other decisions, that if a party admits facts showing that a judgment is void, or allows such facts to be established without opposition, a court must treat the judgment as void upon its face, regardless of when such facts are brought to the court's attention. (*Gorham, supra*, 186

Cal.App.4th at pp. 1229, 1231; *OC Interior Services, LLC v. Nationstar Mortgage, LLC, supra*, 7 Cal.App.5th 1318, 1328–1329; *Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191.) This is sometimes referred to as “the *Hill* rule.” (*OC Interior Services, LLC v. Nationstar Mortgage, LLC, supra*, 7 Cal.App.5th at p. 1329.) Appellant’s argument is apparently that since respondent/trustee admitted to sending the initial court filings relating to the petition to an incorrect or obsolete address, the trial court’s 2009 order should have been treated as void on its face and set aside, regardless of how long it took for appellant to bring her motion to vacate. We reject that argument for two reasons. First, appellant failed to raise that theory in the trial court, but instead expressly agreed with respondent that in seeking relief based on extrinsic fraud she had to act with reasonable diligence. (See *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143 [appellate courts generally will not consider matters presented for first time on appeal]; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 [failure to raise issue in trial court waives or forfeits issue on appeal].)

Second, even if not forfeited, we would decline to apply the *Hill* rule on the unusual facts of this case, based on an additional principle of discretion set forth in *Gorham*. After reciting the *Hill* rule (as that rule was reiterated in *Thompson v. Cook* (1942) 20 Cal.2d 564, 569), the *Gorham* decision stated as follows: “Nonetheless, a court sitting in equity in such situation may ‘refuse to exercise its jurisdiction in a proper case by declining to grant affirmative relief’ [citation], such as where ‘(1) The party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and [¶] (2) Granting the relief would impair another person’s substantial interest of reliance on the judgment.’ [Citation.]” (*Gorham, supra*, 186 Cal.App.4th at p. 1229.) These discretionary reasons for denying relief were conspicuously present here. As noted, appellant’s guardians received, via the 2011 letters from respondent’s attorney and the 2011 release of liability, sufficient information to put

them on notice of the existence of the Dawn Morin settlement and its impact on the beneficiaries' shares as implemented under the 2009 order. Despite having notice of such matters in 2011, and instead of seeking to promptly set aside the 2009 order, the evidence showed that appellant "has received (or will receive) all property she is entitled to under the terms of the trust pursuant to the Court's 2009 Order—which amounts to just slightly less than 10% of the assets remaining in the sub-trusts of which she is a beneficiary." Thus, appellant and/or her guardians appear to have accepted the validity of the 2009 order. More than that, other beneficiaries also have relied on the 2009 order and the distribution of trust assets based thereon. As shown by respondent, not only was distribution of trust assets completed in 2011, but from 2011 to the present, "the various beneficiaries of the trust, *including [appellant]*, have continued to own various pieces of real estate together as a result of the Trust distribution; and, they continue to own an interest in at least one general partnership." As asserted by respondent, "[t]he relief sought by [a]ppellant will effectively create an unprecedented mechanism to reopen a completed trust administration and unwind the past seven years of spending, investing, selling, devising, donating, etc. the distributed Trust corpus from ten years ago." According to respondent, granting such relief under the circumstances and after so many years have passed would be "cataclysmic." Under all the circumstances, including the above referenced principle of discretion recognized in *Gorham*, we conclude the trial court did not abuse its discretion in denying appellant's motion to vacate the 2009 order.

In conclusion, we affirm the trial court's order denying appellant's motion to vacate the 2009 order. The trial court was correct in holding that diligence was not shown; that is, the motion to vacate was not brought within a reasonable time. Further, as discussed above, the *Gorham* case is distinguishable and, in any event, does not establish an abuse of discretion in this case or require a reversal of the trial court's denial of the motion to vacate. In short, appellant has failed to demonstrate that, under all the

circumstances, the trial court abused its discretion when it denied her motion to vacate the 2009 order.⁷

DISPOSITION

The order of the trial court is affirmed. Costs on appeal are awarded to respondent.

LEVY, Acting P.J.

WE CONCUR:

FRANSON, J.

MEEHAN, J.

⁷ Having rejected the grounds raised by appellant in her appeal, we find it unnecessary to address the additional arguments offered by respondent for affirming the trial court's order, such as his argument the trustee was not properly identified in the petition and/or that the release of liability did not violate Probate Code section 16004.5 and should be deemed effective.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Appellant/Petitioner,

vs.

Court of Appeal
No. F078333

(Superior Court Case No. 428536)

JAMES SCOTT BLEVINS,

Respondent.

Appeal from a final order denying Appellant's Motion to vacate and set aside Final Ruling the superior court of California, County of Stanislaus
The Honorable Stacy P. Speiller, Judge

APPELLANT'S OPENING BRIEF

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25a
TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL	FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: F078333
ATTORNEY OR PARTY WITHOUT ATTORNEY: NAME: JOZLYN THOMAS FIRM NAME: IN PRO PER STREET ADDRESS: 10 BELEM STREET CITY: PUNTA GORDA TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (name): APPELLANT/ JOZLYN THOMAS PETITIONER: RESPONDENT/ JAMES SCOTT BLEVINS REAL PARTY IN INTEREST:		STATE BAR NUMBER: STATE: FLA ZIP CODE: 33983 FAX NO.:
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS		
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): JOZLYN THOMAS
2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) ANTHONY GILES	BENEFICIARY - GILES REVOCABLE TRUST
(2) WILLIAM BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(3) BOYS & GIRLS CLUB OF MANTECA	BENEFICIARY - GILES REVOCABLE TRUST
(4) BRENT BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(5) CHARLES W. GILES	BENEFICIARY - GILES REVOCABLE TRUST

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: JUNE 1, 2019

JOZLYN THOMAS
(TYPE OR PRINT NAME)

/s/

(SIGNATURE OF APPELLANT OR ATTORNEY)

ATTACHMENT 2
TO CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

<u>NAMES OF INTERESTED PERSONS</u>	<u>NATURE OF INTEREST:</u>
Bryan Blevins	BENEFICIARY - GILES REVOCABLE TRUST
Dawn Morin	BENEFICIARY - GILES REVOCABLE TRUST
James Scott Blevins	BENEFICIARY AND TRUSTEE OF GILES REVOCABLE TRUST
Joseph Giles	BENEFICIARY - GILES REVOCABLE TRUST
Kelly Bergman	BENEFICIARY - GILES REVOCABLE TRUST
Michael Giles	BENEFICIARY - GILES REVOCABLE TRUST
St. Vincent de Pauls Society	BENEFICIARY - GILES REVOCABLE TRUST
Stoney Dahlberg	BENEFICIARY - GILES REVOCABLE TRUST

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Appellant/Petitioner,

vs.

Court of Appeal
No. F078333

(Superior Court Case No. 428536)

JAMES SCOTT BLEVINS,

Respondent.

Appeal from a final order denying Appellant's Motion to vacate and set aside Final Ruling the superior court of California, County of Stanislaus
The Honorable Stacy P. Speiller, Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

This appeal challenges the final ruling of the trial court which denied Appellant's "Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees" ("Petition to Vacate and Set Aside") (1 CT 129). Appellant, a minor until June 2018, alleges that neither she, nor her parents, nor her guardian/grandparents were served with process on her behalf in this probate trust distribution case in which Appellant was named a beneficiary to a revocable family trust. (1 CT 10, 15, 18) With almost no exceptions, Appellant does not object to the facts and descriptions described by the trial court in its ruling. Without waiving her rights, if any, to object to facts contained in the ruling of the trial court, and for the purpose of this opening brief, Appellant does not object to the facts as described by the trial court in its ruling.

II. STATEMENT OF FACTS

Appellant was born on June 20, 2000. (1 CT 8, 17) On or about 2006 Appellant was constructively abandoned in Wisconsin by her parents caused by their excessive drug use. In June 2006 when Appellant was 6 years old, the Racine County (Wisconsin) Human Services, took custody of Appellant.

In that same year, Appellant's maternal grandparents, Daniel and Mary Thomas, stepped forward and filed for guardianship of the person and the estate of the Appellant. Guardianship was granted by the Wisconsin Court, and until June 20, 2018, when Appellant reached the age of majority, Dan and Mary Thomas raised their grandchild, the Appellant. (1 CT 8, 13)

On January 18, 2002, Charles L. Giles, Appellant's paternal grandfather and Bobette Giles, Appellant's step-grandmother created a revocable family

trust entitled Giles Revocable Trust, (hereafter "Trust"). At the time, Charles had two sons from a former marriage; Charles W. Giles (deceased) and Joseph Giles (Appellant's father). Bobette had five (5) children from a former marriage; James Scott Blevins, William Blevins, Brent Blevins, Bryan Blevins and Kelly Bergman. Charles and Bobette were the initial trustees of the Trust created as a revocable inter vivos trust. Bobette's son James was designated as the successor trustee upon the death of the settlors, Charles and Bobette. (1 CT 129)

The Trust specifically provided for some of Charles L. Giles' grandchildren through his deceased son Charles W. Giles. They were Charles W. Giles, Jr., Anthony L. Giles, and Michael Giles. Charles also provided for his son Joseph's daughter, the Appellant. (1 CT 130)

Essentially the Trust assets, valued in the millions of dollars, were supposed to be placed into three different sub-trusts upon the death of the first spouse; here Charles who died on April 2, 2003. (1 CT 130)

Upon Charles' death a marital share trust was supposed to be created and funded to the extent of the federal marital estate tax exemption amount in order to reduce and/or eliminate taxes at the time of the surviving spouse's death. Second, a family share trust was to be created, which would hold the "community property share" of the deceased spouse as well as the balance of that spouse's separate property (if any). Third, a "surviving spouse" trust was supposed to be created to hold the surviving spouse's share of the community property as well as that spouse's separate property (if any). The "surviving spouse" was to maintain control over all the "assets" in the surviving spouse trust and upon his or her death, those assets were to be equally divided between the surviving spouse's beneficiaries. (1 CT 130)

Trustor Charles died first, and this is what was supposed to happen:

Immediately upon Charles' death, Stoney Dahlberg, a granddaughter of Charles L. Giles and daughter of Charles W. Giles, was to receive \$1,000. Dawn Morin, who Charles L. Giles treated as a daughter, but who was not, was to receive \$25,000, and "each living grandchild" was to receive \$25,000, including Appellant. (1 CT 130)

Then, upon Bobette's death on December 31, 2004, the following beneficiaries inheriting the balance of the marital share and family share sub-trusts were: Joseph Giles (\$50,000 conditional upon his refraining from the use of illicit drugs); 10% to the Boys & Girls Club of Manteca, 10% to St. Vincent de Paul's; and 10% to "each living grandchild" (there were four (4) at the time of Bobette's death including the Appellant). The "remainder" of the marital share and family share sub-trusts were left to Dawn Morin. Thus, Appellant was to inherit 10% of the remaining value of the marital share and family share sub-trusts, and Dawn Morin would receive about 40% of the assets left in those two sub-trusts. (1 CT 130)

James Blevins, the successor trustee did not Administer the Trust nor did he submit and accounting to the court or the beneficiaries of the Trust until, finally, in June 2008 Dawn Morin filed a declaratory relief action in Federal Court to secure a decision that her petition would not be deemed a "contest" of the trust's provisions which would invoke the "no contest clause" of the Trust. This federal action was dismissed. Dawn Morin then filed a petition seeking "information and an accounting" from James Blevins, the successor trustee. This petition also alleged that James Blevins was improperly attempting to sell trust property to his brother (another of Bobette's

beneficiaries) at an inappropriate discount. Additionally, there were questions as to the delay in funding the sub-trusts, as well as questions concerning some transactions Bobette had undertaken during her lifetime (with regard to inappropriately giving her children money), and the allocation to Respondent James Blevins of shares of stock in a trucking company, Mountain Valley Express ("MVE") owned by the Trust. (1 CT 131)

On April 10, 2008, trustee Blevins file a PETITION TO APPROVE AND CONFIRM ACCOUNT AND REPORT OF TRUSTEE; APPROVAL OF PROPOSED DISTRIBUTION AND PAYMENT OF TRUSTEE'S FEES; CONSENT OF TRUSTEE OF BENEFICIARIES' TRUST.

On June 11, 2008, Dawn Morin filed her PETITION TO COMPEL PERFORMANCE OF RESPONDENT'S DUTIES AS TRUSTEE OR IN THE ALTERNATIVE REMOVE THE TRUSTEE PURSUANT TO PROBATE CODE §§ 17200 AND 16420.

James Blevins as the trustee of the Trust objected to Dawn Morin's petition, offering expected explanations for each of the challenged actions. After settlement negotiations, the parties reached an agreement in March 2009. Thereafter, on March 25, 2009, James filed an amended petition seeking approval of a distribution plan pursuant to which Dawn Morin received slightly less than her designated 40% of the two sub-trusts. Notably, pursuant to the plan, Petitioner also received less than 10% of the sub-trusts. (1 CT 131)

On April 10, 2008, trustee James Blevins filed his verified "Petition to Approve and Confirm Account and Report of the Trustee; Approval of

Proposed Distribution and Payment of Trustee's Fees; Consent of Trustee of Beneficiaries' Trust [Probate Code § 17200]". ("Respondent's Verified Petition" attached to Notice of Lodgment as Exhibit C to "Points and Authorities in Support of Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees (Probate Code § 17200, *et seq.*; CCP § 473(d))" ("Appellant's Points and Authorities to Motion to Set Aside and Vacate") (1 CT 22)

On March 25, 2009, trustee Blevins filed a verified "Amended Petition to Approve and Confirm Account and Report of the Trustee; Petition to Approve Agreement Between Trustee and Dawn Morin; Approval of Distribution Plan and Payment of Trustee's Fees; [Probate Code § 17200]". ("Respondent's Amended Verified Petition") (Attached to Notice of Lodgment as Exhibit G to Appellant's Points and Authorities to Motion to Set Aside and Vacate") (1 CT 22)

It is important to note that Trustee Blevins declares on page 3, at ¶ 4., lines 2-10 of Respondent's Verified Petition and again on page 3, at ¶ 4., lines 1-9 of Respondent's Amended Verified petition, that \$25,000.00 had already been distributed to Jozlyn Thomas. (Please see Exhibits C) (1 CT 22)

This allegation is patently untrue, and Respondent admits the same when in his "Declaration of James Scott Blevins in Support of Opposition to Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee and Dawn

Morin; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees" he declares under penalty of perjury that the check sent to Dan and Mary Thomas as guardians of the estate of Jozlyn Thomas was part of the distribution required after Charles L. Giles' death. It is attached as Exhibit A to this declaration and dated March 3, 2010. (1 CT 59-60) Yet, in his verified April 10, 2008 petition and his March 25, 2009, amended petition he declared to the court that this amount had already been paid.

It is further alleged in the same documents, Respondent's Verified Petition on p. 4, ¶ 4, at lines 14-15, (Exhibit C) and again in Respondent's Amended Verified Petition on p. 4, ¶ 4, at lines 6-7, (Exhibit G) the Respondent declares:

"At all time herein relevant, the above beneficiaries are adults. Below is a list of all beneficiaries and interested persons who are at all times herein mentioned adults, and their addresses: . . ." (Emphasis added.)

He then goes on to list the names and addresses of a group of beneficiaries/interested persons including the Appellant herein as:

Jozlyn Thomas
25030 Sandhill Blvd., #4b2
Punta Gorda, FL 33983

(Emphasis added.)

As described below, this was not her address. The address as written is a vacant lot filled with brush and weeds. (1 CT 30)

This allegation was false also. At the time Respondent Trustee Blevins filed Respondent's Verified Petition was only 6 years old and was 8 years old when Respondent's Verified Amended Petition was filed.

Respondent trustee actually knew both of the above allegation were false, yet, he was willing to lie and misrepresent facts to the court in order to push the settlement agreement through to allow the judge to approve of the agreement entered into by the Respondent and Dawn Morin. It seems likely the trial court would not have approved the settlement agreement but for the lies.

On April 29, 2009, pursuant to the settlement agreement, Dawn Morin dismissed her petition for "information and an accounting" with prejudice. (1 CT 131)

Appellant did not receive notice of this litigation. (1 CT 131, 132) The trial court found (1 CT 131-132) that service on Appellant was made by mail to two "incorrect" addresses. Respondent mailed numerous notices to Petitioner at the following two addresses: 25030 Sandhill Boulevard, #4b2, Punta Gorda, Florida 33983 and 25050 Sandhill Boulevard, #4b2, Punta Gorda, Florida 33983. Most were sent to the 25030 address which was a vacant lot. However, two notices were mailed to the 25050 address which Appellant and her parents resided for a short period of time, June and July 2003, when Appellant was three (3) years old. (1 CT 133)

The Court in its final ruling on Appellant's Motion to Vacate and Set Aside argued at 1 CT 132 that the various services of process at the 25050 address was "*actually correct*". (1 CT 132) It was unreasonable for Dawn Morin, the original petitioner and James Scott Blevins, the Trustee, to assume

that the six year old Jozlyn still resided at the 25050 address when (1) the petitioner, Dawn Morin, and the trustee James Scott Blevins, knew that Jozlyn's father, Joseph Giles, was housed in the Florida state prison system, and he was served while in prison, and he knew the correct address for Jozlyn; all they had to do was ask; (2) they should have served Joseph on behalf of Jozlyn if they had no knowledge of the Wisconsin guardianship; and (3) they served Jozlyn at two different addresses. (Basic reasoning should indicate that they had to know that one of the addresses was wrong.) This should have prompted further diligence on the part of Dawn Morin and James Scott Blevins' to exert further effort (such as asking Jozlyn's father for her address) to ascertain the Appellant Jozlyn's accurate address. They did not do this. Instead, they continued to serve Jozlyn at the wrong address(es) having the impact of preventing Jozlyn from asserting her rights in the trial court proceedings. (Please see Proofs of Service attached as Exhibit 1 to Notice of Lodgment.)

As a result, neither Jozlyn nor her Grandparents/Guardians had actual notice or legal notice of the existence of the Trust, and it was not until 2009 (1 CT 132, 133, 10, 15, 18) when the wife of the Trustee, Deena Blevins, telephoned the Grandparents/Guardians did they learn that the Trust, but not Dawn Morin's case, existed and Jozlyn was a beneficiary entitled to distribution of a portion of its assets. (1 CT 9, 14)

III. PROCEDURAL FACTS

April 3, 2003: Charles Giles' died.

Dec. 31, 2004: Bobette Giles, died.

July 24, 2007: Dawn Morin, a 40% beneficiary of the Family and Marital Trusts, filed a Petition for Declaratory Relief in the Federal Court which was later dismissed for lack of subject matter jurisdiction.

April 8, 2008: Dawn Morin filed the initial (“safe harbor”) Petition for Declaratory Relief with the Stanislaus County Superior Court.

April 10, 2008: Trustee Blevins filed a PETITION TO APPROVE AND CONFIRM ACCOUNT AND REPORT OF TRUSTEE; APPROVAL OF PROPOSED DISTRIBUTION AND PAYMENT OF TRUSTEE'S FEES; CONSENT OF TRUSTEE OF BENEFICIARIES' TRUST

May 13, 2008: Pursuant to a stipulation between Blevins and Morin, the Court ordered Dawn Morin's case consolidated with Trustee Blevin's case.

June 11, 2008: Dawn Morin filed the PETITION TO COMPEL PERFORMANCE OF RESPONDENT'S DUTIES AS TRUSTEE OR IN THE ALTERNATIVE REMOVE THE TRUSTEE PURSUANT TO PROBATE CODE § 17200 AND 16420

March 2, 2009: At the Trial Settlement Conference of the consolidated cases, the parties entered into a settlement agreement and the Court issued its Minute Order incorporating the

settlement agreement pursuant thereto.

March 25, 2009: James Scott Blevins as Trustee to The Administrative Trust, The Survivor's Trust, The Family Trust and The Marital Trust filed the Trustee's Amended Petition.

April 29, 2009: Petitioner Dawn Morin filed a Request for Dismissal with prejudice of her case.

May 5, 2009: The Court issued an Order pursuant to the settlement agreement which was entered on May 6, 2009.

May 6, 2009: Petitioner Dawn Morin filed a Notice of Entry of Dismissal and Proof of Service.

March 26, 2018: Appellant filed her Petition to Vacate and Set Aside the May 5, 2009, Order.

May 4, 2018: Opposition to Appellant's Petition to Vacate and Set Aside filed.

November 1, 2018: Appellant filed Notice of Appeal.

IV. LEGAL FINDINGS OF THE TRIAL COURT

It is difficult to excise the legal findings of the trial court due to ambiguity as to whether the Opposition to Appellant's Petition is, in actuality, the legal findings of the Trial Court.

In her final ruling on Appellant's Petition to Vacate and Set Aside, stated in a sub-heading entitled, "**Opposition to Motion by Successor Trustee**" (1 CT 136) The first three (3) paragraphs under this sub-heading makes clear that these paragraphs are truly the arguments of the Respondent Blevins.

However the sub-headings to the sub-heading including “Guardian of the Estate’s Objection:” (1 CT 136), “Waiver and Signed Release:” (1 CT 136), “Two-Year “Statute of Limitations” Applies” (1 CT 137), and “Trackman Applies But Extrinsic Fraud Exists” (1 CT 139) notwithstanding they appear to be sub-headings to the subheading “**Opposition to Motion by Successor Trustee**” (1 CT 136), they, in fact are legal “findings” of the court (1 CT 136 - 139) which act foundationally to support the court’s ruling as the trial court concludes: “**Conclusion:** For all of the above-stated reasons, the motion/petition to reopen distribution of the trust assets is denied.”

V. STATEMENT OF APPEALABILITY

This appeal is from a Ruling of the Stanislaus Superior Court which denied Appellant’s petition to vacate and set aside a previous Order of this court made on May 5, 2009, pursuant to a settlement agreement. The ruling denied Appellant’s petition and was final. This appeal is authorized by the Code of Civil Procedure, § 904.1, subdivision (a)(2) and California Rules of Court, Rule 8204(a)(2)(B).

VI. THE STANDARD OF REVIEW

The standard of review is *de novo*.

If the trial court’s decision did not turn on few, if any disputed facts, the trial court’s decision is subject to *de novo* review. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032 [56 Cal.Rptr.3d 814, 155 P.3d 226].)

Though Appellant disputes a few, but not many, of the facts stated in

the trial court ruling, such facts are not disputed or described here.

The issues in this appeal do not involve any disputed questions of fact. The issue of whether a judgment is void due to improper service is a question of law that should be reviewed *de novo*. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175 [114 Cal.Rptr.3d 619]; *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858 [92 Cal.Rptr.3d 717].)

When reviewing questions of law, an appellate court is not bound by the trial court's reasons supporting its ruling. Instead, the Court of Appeal reviews the ruling, but not the trial court's rationale, independently. (*Stratton v. First Nat'l Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.)

As a matter of law, only, Appellant appeals the October 1, 2018, ruling of the trial court as follows and claims that the trial court abused its discretion when it denied Appellant's Petition to Vacate and Set Aside.

VIII. ARGUMENT

A. THE SETTLEMENT ORDER OF THE TRIAL COURT IS VOID AND SHOULD BE VACATED AND SET ASIDE BECAUSE:

1. The Judgment in the Trial Court Proceedings is Void Because the Trial Court Failed to Obtain Personal Fundamental Jurisdiction Over the Appellant Caused by Respondent's Failure to Serve Notice of the Trial Court Proceedings on the Appellant.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the

pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). Failure to give notice violates "the most rudimentary demands of due process of law." (*Armstrong v. Manzo*, 380 U. S. 545, 550 (1965). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 291 (1980); *Mathews v. Eldridge*, 424 U. S. 319, 333 (1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969); *Pennoyer v. Neff*, 95 U. S. 714, 733 (1878).)

Appellant alleges that the final underlying settlement order and the subsequent final ruling on Appellant's Petition to Vacate and Set Aside by the trial court were void because she was never served process and had no actual notice of the proceedings. Cases have distinguished between "void" and "voidable" judgments as being whether the trial court acted in excess of its jurisdictional authority, making the judgment voidable, versus issuing a judgment without jurisdictional authority, making the judgment void. (*Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115 [233 Cal.Rptr.3d 814]; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215 [113 Cal.Rptr.3d 147].) Therefore, because the trial court did not obtain jurisdiction over Appellant, the settlement order issued by the trial court was void.

In its final ruling on Appellant's Motion to Vacate and Set Aside, the trial court discusses Appellant's argument that California Code of Civil Procedure ("CCP") §473(d) applies to allow the court

the authority to vacate and set aside a void judgment. (1 CT 137-140). It adopts, when possible, the application § 473.5 as a time limitation to § 473 challenge to the judgment as being void for two years post entry of judgment. With exceptions, CCP § 473.5 sets a “reasonable” time limitation, not to exceed two (2) years from the date of entry of the judgment. As the facts show, Appellant has exceeded this limitation.

However, lack of service of process on an interested party who has property interests in the outcome, violates that person’s fundamental rights established under the 5th and 14th Amendments to the U.S. Constitution which states that a person cannot be deprived of “life, liberty, and property” without due process of law.

As a fundamental right, due process requires that an indispensable interested party be given adequate notice of the suit and be subject to the personal jurisdiction of the Court. (*World-Wide Volkswagen Corp. v. Woodson* (1980), *supra*.)

Such notice must be reasonably calculated, under all the circumstances, to apprise an interested party of the pendency of the action and afford that person an opportunity to present his or her objections. (*Mullane v. Cent. Hanover Bank & Trust Co.*, *supra*; *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260; *Dusenberry v. United States*, 534 U.S. 161; see also *Duran v. Obesity Research Institute, LLC*, 1 Cal. App. 5th 635 (2016); *Estate of Reed*, *supra*; *Estate of Lacy* (1975) 54 Cal. App. 3d 172.)

Appellant was a named beneficiary of the Trust and thus an interested and indispensable party to the proceedings. In the trial court, the underlying consolidated proceeding negatively affected her rights as a beneficiary and, therefore, she was entitled to reasonable due process notice to allow her to present objections. The failure of Dawn Morin, the Petitioner in the trial court proceedings, and the Trustee, James Scott Blevins, to give Jozlyn constitutionally adequate notice rendered the subsequent final settlement judgment void. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal. App. 5th 1318; *Strathvale Holdings v. E.B.H.; People v. American Contractors Indemnity Co.*, (2004) 33 Cal. 4th 653; *Estate of Lacy* *supra*; *Estate of Reed* (1968) 259 Cal. App. 2d 14.)

In the recent case of *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) [24 Cal.App.5th 115 [233 Cal.Rptr.3d 814]], where a Chinese company was not properly served with process as required by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, the court found that because the company was not properly served with the summons and petition pursuant to the Hague Convention, the trial court did not acquire jurisdiction over it, and the resulting judgment was void. (*Id.* at p. 134.) The court further stated that “California is a jurisdiction where the original service of process, which confers jurisdiction, must

conform to statutory requirements or all that follows is void.” (*Id.*)

The *Rockefeller* court further stated:

“Where the defendant establishes that he or she has not been served as mandated by the statutory scheme, “**no personal jurisdiction by the court will have been obtained and the resulting judgment will be void as violating fundamental due process.** (*See Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. [80,] 84 [99 L.Ed.2d 75, 108 S.Ct. 896].)” (*Gorham, supra*, 186 Cal.App.4th 1215, 1227, . . . [reversing order denying motion to set aside a default judgment because plaintiff had not been properly served with the summons and complaint]; see also *Renoir*, *supra*, 123 Cal.App.4th at p. 1154 [“Because no summons was served on any of the defendants and the defendants did not generally appear in the proceeding, the trial court had no jurisdiction over them. Therefore, the California judgment was void, **as is the order denying the motion to vacate the California judgment.**”]; *Lee v. An* (2008) 168 Cal.App.4th 558, 564 [85 Cal. Rptr. 3d 620] [“[I]f a defendant is not validly served with a summons and complaint, the court lacks personal jurisdiction and a . . . judgment in such action is subject to being set aside as void.”].) *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018), *supra*, at pp. 134-135. (Emphasis added..)

In its final ruling on Appellant’s Petition to Vacate and Set Aside, the trial court herein argues that the Petition to Vacate and Set Aside whether the two (2) year time limitations of Probate Code § 473.5 are applied, the Petition to Vacate and Set Aside was unreasonably late. (1 CT 138) It is arguable whether Dan and Mary Thomas knew or should have known of the original

proceedings before 2017. This issue is irrelevant.

In the case *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215 [113 Cal.Rptr.3d 147], (“Gorham”) in this family law matter, the father knew a default judgment was entered against him in 2002, but did not challenge the judgment as being void for lack of service until 2008. (*Id.* at pp, 1223-1225) The trial court found that the motion to set aside the default judgment was untimely and denied the motion, (*Id.* at p. 1225)

On appeal from this judgment, the appellant alleged that the trial court abused its discretion when it denied his motion to set aside default judgment based on lack of service. In agreeing with the appellant, the appellate court reasoned that the trial court never obtained jurisdiction and the trial court’s order violated the appellant’s fundamental rights. (*Id.* at 1225-1226). It further reasoned that where it is shown that there has been a complete failure of service of process upon a person, he generally has no duty to take affirmative action to preserve his right to challenge the judgment or order even if he later obtains actual knowledge of it because “[w]hat is initially void is ever void and life may not be breathed into it by lapse of time.” (citing *Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 731).

The *Gorham* court in reversing the trial court’s order denying the Appellant’s Motion to Vacate and Set Aside the default judgment entered against him stated:

“. . .because Gorham established through extrinsic evidence that the default judgment was void for want of personal jurisdiction over him, it had the same effect as if it had been void on its face and the court had the inherent

power to set it aside even though any statutory periods had run." Citing *Thompson v. Cook* (1942) 20 Cal.2d 564, 569; *Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 182-183; *Morgan*, *supra*, 105 Cal.App.2d at p.732.

The argument is the Appellant herein was never served with process of the underlying litigation. This lack of service violated Appellant's fundamental rights under the 5th and 14th Amendments to the U.S. Constitution and the trial court failed to obtain jurisdiction over the Appellant. Therefore, it lacked authority to issue the judgment in the underlying litigation and the power to issue the final ruling denying the Appellant's Petition to Vacate and Set Aside the judgment in the underlying case.

2. The Settlement Order Is Void Because the Respondent Trustee Admitted He Sent Notices to the Wrong Address And Failed to Act Diligently to Discover Petitioner's True Address

In his declaration in opposition to Appellants, Trustee James Scott Blevins declared as follows:

"3. I was first alerted to Movants' involvement as guardians for Jozlyn Thomas in 2009 by my then wife Deena Blevins. My wife Deena had a phone call with Mary Thomas on May 18, 2009 wherein Mary Thomas explained to Deena that her and Daniel Thomas were the guardians for Jozlyn Thomas and that all mailings should be sent to 10 Belem Street, in Punta Gorda Florida. Prior to learning of Movants' involvement, all correspondence and court filings for Jozlyn Thomas were sent to addresses that based on information and belief, were provided to me from either Jozlyn Thomas' father, Joseph Giles, and/or Bobbette Giles

prior to her death. These include the addresses Movants claim that Jozlyn Thomas never resided at. Once I learned, on or about May 18, 2009, that Jozlyn Thomas lived with Movants I caused all communications and filings to be sent to Movants at their address.” (1 CT 60 at ¶ 3, lines 9-19)

In this declaration made under oath and dated and entered on May 4, 2018, trustee Blevins admits that the process required to be served on Appellant as a beneficiary of the Trust, were sent to the wrong address during the litigation of the underlying lawsuit, and that he did not know the Appellant’s true address until the May 18, 2009, telephone call which occurred almost two weeks after the entry of the Settlement Order on May 8, 2009.

Case law has established that if a party admits facts showing that a judgment is void, or allows such facts to be established without opposition, then, as a question of law, a court must treat the judgment as void upon its face. (*Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191 [21 P. 728]; *OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1328-1329 [213 Cal.Rptr.3d 395].)

In this case the Respondent has admitted he sent required pleadings to the wrong address (*see above; see also* California Rules of Court, Rule 7.51(d) and California Probate Code § 14601.1). Thus, the settlement order is void, and it is the duty of the court to so declare as a matter of law. (*Id.; Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 205 [106 Cal.Rptr.2d 854].)

Further, Respondent did not act diligently to find the correct address. On information, he claims that the address(es) were given to him either by

trustor Bobette Giles before she died in 2004, which is highly unlikely, and Appellant lived at one of the addresses on the proofs of service for only two months, June and July, 2003. Further, had the Respondent asked, which he failed to do, Appellant's father, Joseph, incarcerated in the Florida Penal System could have told Respondent the Appellant's correct address. (1 CT 117 at ¶¶ 3, 4 lines 12-24.)

2. The Settlement Order Issued by the Trial Court Is Void Because Extrinsic Fraud Existed to Prevent Appellant from Protecting Her Interests as a Beneficiary of the Trust.

Extrinsic fraud is a concept that tends to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. *Estate of Beard* (1999) 71 Cal.4th 753, 772-773; *In re Marriage of Modnick* (1983) 33 Cal.3d 897, 904-905 [191 Cal.Rptr. 629, 663 P.2d 187]; *In re Marriage of Park* (1980) 27 Cal.3d 337, 342 [165 Cal.Rptr. 792, 612 P.2d 882]. Generally, it arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. (*In re Marriage of Modnick*, *supra*, 33 Cal.3d at p. 905; *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470-471 [82 Cal.Rptr. 489, 462 P.2d 17, 39 A.L.R.3d 1368].)

It is well settled law that the probate court is mandated to set aside court orders procured or based on any order(s) procured by extrinsic fraud. *Estate of Sanders*, (1985) 40 Cal.3d. 607, 614; *Estate of Charters* (1956) 46 Cal.2d 227, 234. An appellate court has inherent equitable power to set aside a decree for extrinsic fraud. (*Cross v. Tustin* (1951) 37 Cal.2d 821, 825 [236 P.2d 142].)

A final ruling, order, or judgment may be set aside based on extrinsic

fraud.

As in the instant case an example of extrinsic fraud are misrepresentations that cause a party to be unaware of a court date in a case in which they are an interested party, to miss that date and to thereby not have his or her day in court.

The appellate court in its final ruling on Appellant's Petition to Vacate and Set Aside apparently states that extrinsic fraud exists in this case (1 CT 10) when the courts writes "at sub-heading:

"Trackman Applies But Extrinsic Fraud Exists:"

The court's ruling seems to agree with Appellant that extrinsic fraud existed, e.g., (1) Appellant was not served with process; (2) that process was served at two separate addresses which neither were the residential address of Appellant; (3) that Respondent could have discovered Appellant's correct address by asking Appellant's father; (4) that but for Respondent's lies and misrepresentations in its verified pleadings that Appellant was an adult who already received \$25,000.00 and did not object to the settlement agreement, it is likely that the trial court would not have accepted settlement agreement and made it the central part of its final order.

A motion to vacate and set aside a final court order, ruling, or judgment based on extrinsic fraud can be brought at any time and is not restricted by the time limitations of CCP § 473.5 if the motion is brought diligently and within a reasonable time from the date of discovery of the judgment. (*Trackman v. Kenney* (2010), *supra*, at p. 181.)

**a. Appellant Through Her Grandparents/Guardians
Had No Actual Knowledge of the State Court
Litigation.**

Appellant was a minor and was the ward of the guardian/grandparents and Appellant's legal and personal interests at all times were protected by them.

Respondent in his response to Appellant's Petition to Vacate and Set Aside, argues that two 2011 letters, one dated February 15, 2011 and September 8, 2011, along with an attached waiver and release form provided adequate notice to Petitioner of Dawn Morin's lawsuit herein. (1 CT 89-90)

Certainly, there is general reference to Dawn Morin's case as alleged in the Response. However, Respondents have not shown that the relevance of the references alluded to in the letters offered sufficient notice or were understood by the Appellant. There are no references to or descriptions of the court or the county in which it presides or to any case number. Appellant's guardian/ grandparents, who were elderly and retired and were not versed in the intricacies, nuances, or complexities of the law. They cannot be expected to understand and comprehend the legal and factual impact of what they were reading. They certainly understood their granddaughter was receiving an inheritance from her paternal grandfather but had no idea that there was a contested lawsuit in which the Appellant was an interested indispensable party. Had they known and understood this fact, they would have objected to the settlement as being against the interest of the Appellant and the intent of the settlors.

Further, the Grandparents/Guardians have declared under penalty

of perjury that they did not know that the case existed until on or about October 25-27, 2017. (Coming from these credible people, this should carry much weight.) (1 CT 9-10; 1 CT 6)

B. THE WAIVER AND RELEASE SIGNED BY APPELLANT'S GUARDIAN/GRANDPARENTS IS A NULLITY WITHOUT EFFECT.

In the court's final ruling on Appellant's Motion to Set Aside and Vacate, the court states:

In addition, parties may waive the protection of *Civil Code section 1542* if they understand and consciously agree to such waiver, and there is no ambiguity or evidence of fraud, undue influence or mistake. *Jefferson v. California Dept. of Youth Authority* (2002) 28 Cal.4th 299, 307 (1 CT 3, lines 8-11)

Attached to the September 8, 2011, letter is a form entitled "Release of Liability of Trustee and Waiver of Accounting". ("Release and Waiver") (Please see September 8, 2011, letter attached as Exhibit C to Notice of Lodgment. [1 CT 121, lines 15-17.] This Release and Waiver was signed by the Grandparents/Guardians of Appellant, Daniel and Mary Thomas.

However, a close reading of the letter the onto which the Release and Waiver is attached, at the end of the letter, is the following:

"With regard to distribution of your respective shares of the Reserve Account, I am also enclosing a Waiver of Accounting and Release of Liability of Trustee. Please review the waiver and release, and sign where indicated. Please return the original document to me in the envelope provided. **Once all signed waivers are received, original checks will be immediately forwarded directly to each of you.**" (Emphasis added.) (Please see September 8, 2011, letter attached hereto as Exhibit B.)

A reasonable and compelling interpretation of that paragraph would be that disbursement of the funds in the reserve account would be sent to the addressed beneficiaries only if all addressed beneficiaries signed the Release and Waiver form and returned using the envelope provided.

Appellant herein alleges that this is the correct interpretation of this paragraph and that Appellant's understood its coerciveness and signed the release.

Probate Code § 16004.5 applies. It states:

§ 16004.5. Relief of trustee from liability as condition for making distribution or payment prohibited

- (a) **A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument.**
- (b) . . . (Emphasis added.)

Since the Trust requires the disbursement of the Trust assets, and since the funds reposing in the Reserve Account are Trust assets, § 16004.5 is on point and applies here. The September 8, 2011, makes clear that release of funds of the Trust to the beneficiaries, including Appellant, was conditioned upon the signing of the Release and Waiver. This is prohibited by § 16004.5, and the legal impact of the signed Release and Waiver is nullified. *Bellows v. Bellows* (2011) 196 Cal.App.4th 505 [125 Cal.Rptr.3d 401]; *Lawson v. Lawson* (D.Nev. Nov. 13, 2014, No. 3:14-cv-00345-LRH-WGC) 2014 U.S. Dist. LEXIS 160354.

VII. CONCLUSION

For the reasons stated above, Appellant respectfully requests this court to remand the case back to the Stanislaus County Superior Court with directions to vacate and set aside the final Order entered May 5, 2009, in which the settlement agreement was affirmed. Further, Appellant requests this court remand this case back to the trial court with further directions that the Trial Judge conduct further proceedings consistent with this court's ruling.

Appellant requests that attorney's fees and costs be assessed against Respondent.

Respectfully submitted,

Dated: June 1, 2019.

/s/ _____
Jozlyn Thomas
Appellant

CERTIFICATE OF WORD COUNT

I certify that according to the computer program used to prepare this brief, the Appellant's Opening Brief contains 6,321 words, not including the cover, the Tables of Contents and Authorities, the Certificate of Interested Entities or Persons, this certificate and the signature block.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 1, 2019.

/s/ _____
Jozlyn Thomas
Appellant

PROOF OF SERVICE

I Do Hereby Declare As Follows:

That I am a citizen, over the legal age of 18 years and not a party to the
within litigation

That my residence address is 2838 The Esplanade, #15, Chico, California 95973

That on the date entered below, I served the attached **Appellant's Opening Brief** by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing that envelope in the United States Mail at Chico, California, with fully prepaid postage. There is delivery service by the United States Postal Service to each of the places so addressed.

This Appellant's Opening Brief was served on the interested parties at the addresses as listed below:

California Supreme Court
350 McAllister Street Second Floor
San Francisco, CA 94102

Michael Gianelli
Gianelli & Associates
1014 16th Street
Modesto, CA 95354

Anthony Giles
5613 Lowell Street
Everett, Washington 98203-3910

Boys & Girls Club of Manteca
Beneficiary
545 W. Alameda Street
Manteca, CA 95336

Stanislaus County Superior Court
800 11th St.
Modesto, CA 95354

Christopher Ramey
Ramey Litigation Group APC
3838 Camino Del Rio N, Suite 120
San Diego, CA 92108-1762

William Blevins
337 Ruess Road
Ripon, CA 95366

Brent Blevins
7887 Koftinow Ct.
Manteca, CA 95336

Bryan Blevins
2091 Willow Lane
Lakewood, Colorado 80215

Charles W. Giles, Jr.
P.O. Box 13282
Everett, Washington 98206

Dawn Morin
Beneficiary
P.O. Box 8198
Surprise, Arizona 85374

James Scott Blevins
901 Opal Lane
Ripon, CA 95366

Joseph Giles
20683 Waalew Road, Space 123-B
Apple Valley, CA 92307

Kelly Bergman
172 Joseph Court
Ripon, CA 95366

Michael Giles
5613 Lowell Street
Everett, Washington 98203-3910

St. Vincent de Pauls Society
525 East North Street
Manteca, CA 95336

Stoney Dahlberg
P.O. Box 578217
Modesto, CA 95357

Dated: June 28, 2019.

/s/ _____
Larry Dick

PROOF OF SERVICE

I Do Hereby Declare As Follows:

That I am a citizen, over the legal age of 18 years and not a party to the within litigation.

That my residence address is 2838 The Esplanade, #15, Chico, California 95973

That on the date entered below, I served a true copy of:

APPELLANT'S OPENING BRIEF

by placing in an envelope addressed to the court named below at the address shown, and by sealing and depositing that envelope in the United States Mail at Chico, California, with fully prepaid postage. There is delivery service by the United States Postal Service to the place so addressed.

This Appellant's Opening Brief was served on the interested parties at the address as listed below:

**Stanislaus County Superior Court
800 11th St,**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

June 3, 2019.

/s/

Larry Dick

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Appellant/Petitioner,

vs.

Court of Appeal
No. F07833

(Superior Court Case No. 428536)

JAMES SCOTT BLEVINS,

Respondent.

Appeal from a final order denying Appellant's Motion to vacate and set aside Final Ruling the superior court of California, County of Stanislaus
The Honorable Stacy P. Speiller, Judge

APPELLANT'S OPENING BRIEF

Jozlyn Thomas
10 Belem Street
Punta Gorda, Florida 33983

Tel: (941) 456-4000

25a
TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL	FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: F078333
ATTORNEY OR PARTY WITHOUT ATTORNEY: NAME: JOZLYN THOMAS FIRM NAME: IN PRO PER STREET ADDRESS: 10 BELEM STREET CITY: PUNTA GORDA TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (name): APPELLANT/ JOZLYN THOMAS PETITIONER: RESPONDENT/ JAMES SCOTT BLEVINS REAL PARTY IN INTEREST:		STATE BAR NUMBER: SUPERIOR COURT CASE NUMBER: 428536
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
<p>Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.</p>		

1. This form is being submitted on behalf of the following party (name): JOZLYN THOMAS
2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) ANTHONY GILES	BENEFICIARY - GILES REVOCABLE TRUST
(2) WILLIAM BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(3) BOYS & GIRLS CLUB OF MANTECA	BENEFICIARY - GILES REVOCABLE TRUST
(4) BRENT BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(5) CHARLES W. GILES	BENEFICIARY - GILES REVOCABLE TRUST

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: JUNE 1, 2019

JOZLYN THOMAS
(TYPE OR PRINT NAME)

► /s/

(SIGNATURE OF APPELLANT OR ATTORNEY)

ATTACHMENT 2
TO CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

<u>NAMES OF INTERESTED PERSONS</u>	<u>NATURE OF INTEREST:</u>
Bryan Blevins	BENEFICIARY - GILES REVOCABLE TRUST
Dawn Morin	BENEFICIARY - GILES REVOCABLE TRUST
James Scott Blevins	BENEFICIARY AND TRUSTEE OF GILES REVOCABLE TRUST
Joseph Giles	BENEFICIARY - GILES REVOCABLE TRUST
Kelly Bergman	BENEFICIARY - GILES REVOCABLE TRUST
Michael Giles	BENEFICIARY - GILES REVOCABLE TRUST
St. Vincent de Pauls Society	BENEFICIARY - GILES REVOCABLE TRUST
Stoney Dahlberg	BENEFICIARY - GILES REVOCABLE TRUST

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Appellant/Petitioner,

vs.

Court of Appeal
No. F078333

(Superior Court Case No. 428536)

JAMES SCOTT BLEVINS,

Respondent.

/

Appeal from a final order denying Appellant's Motion to vacate and set aside Final Ruling the superior court of California, County of Stanislaus
The Honorable Stacy P. Speiller, Judge

APPELLANT'S OPENING BRIEF

Jozlyn Thomas
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I. STATEMENT OF THE CASE

This appeal challenges the final ruling of the trial court which denied Appellant's "Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees" ("Petition to Vacate and Set Aside") (1 CT 129). Appellant, a minor until June 2018, alleges that neither she, nor her parents, nor her guardian/grandparents were served with process on her behalf in this probate trust distribution case in which Appellant was named a beneficiary to a revocable family trust. (1 CT 10, 15, 18) With almost no exceptions, Appellant does not object to the facts and descriptions described by the trial court in its ruling. Without waiving her rights, if any, to object to facts contained in the ruling of the trial court, and for the purpose of this opening brief, Appellant does not object to the facts as described by the trial court in its ruling.

II. STATEMENT OF FACTS

Appellant was born on June 20, 2000. (1 CT 8, 17) On or about 2006 Appellant was constructively abandoned in Wisconsin by her parents caused by their excessive drug use. In June 2006 when Appellant was 6 years old, the Racine County (Wisconsin) Human Services, took custody of Appellant.

In that same year, Appellant's maternal grandparents, Daniel and Mary Thomas, stepped forward and filed for guardianship of the person and the estate of the Appellant. Guardianship was granted by the Wisconsin Court, and until June 20, 2018, when Appellant reached the age of majority, Dan and Mary Thomas raised their grandchild, the Appellant. (1 CT 8, 13)

On January 18, 2002, Charles L. Giles, Appellant's paternal grandfather and Bobette Giles, Appellant's step-grandmother created a revocable family

trust entitled Giles Revocable Trust, (hereafter "Trust"). At the time, Charles had two sons from a former marriage; Charles W. Giles (deceased) and Joseph Giles (Appellant's father). Bobette had five (5) children from a former marriage; James Scott Blevins, William Blevins, Brent Blevins, Bryan Blevins and Kelly Bergman. Charles and Bobette were the initial trustees of the Trust created as a revocable inter vivos trust. Bobette's son James was designated as the successor trustee upon the death of the settlors, Charles and Bobette. (1 CT 129)

The Trust specifically provided for some of Charles L. Giles' grandchildren through his deceased son Charles W. Giles. They were Charles W. Giles, Jr. , Anthony L. Giles, and Michael Giles. Charles also provided for his son Joseph's daughter, the Appellant. (1 CT 130)

Essentially the Trust assets, valued in the millions of dollars, were supposed to be placed into three different sub-trusts upon the death of the first spouse; here Charles who died on April 2, 2003. (1 CT 130)

Upon Charles' death a marital share trust was supposed to be created and funded to the extent of the federal marital estate tax exemption amount in order to reduce and/or eliminate taxes at the time of the surviving spouse's death. Second, a family share trust was to be created, which would hold the "community property share" of the deceased spouse as well as the balance of that spouse's separate property (if any). Third, a "surviving spouse" trust was supposed to be created to hold the surviving spouse's share of the community property as well as that spouse's separate property (if any). The "surviving spouse" was to maintain control over all the "assets" in the surviving spouse trust and upon his or her death, those assets were to be equally divided between the surviving spouse's beneficiaries. (1 CT 130)

Trustor Charles died first, and this is what was supposed to happen:

Immediately upon Charles' death, Stoney Dahlberg, a granddaughter of Charles L. Giles and daughter of Charles W. Giles, was to receive \$1,000. Dawn Morin, who Charles L. Giles treated as a daughter, but who was not, was to receive \$25,000, and "each living grandchild" was to receive \$25,000, including Appellant. (1 CT 130)

Then, upon Bobette's death on December 31, 2004, the following beneficiaries inheriting the balance of the marital share and family share sub-trusts were: Joseph Giles (\$50,000 conditional upon his refraining from the use of illicit drugs); 10% to the Boys & Girls Club of Manteca, 10% to St. Vincent de Paul's; and 10% to "each living grandchild" (there were four (4) at the time of Bobette's death including the Appellant). The "remainder" of the marital share and family share sub-trusts were left to Dawn Morin. Thus, Appellant was to inherit 10% of the remaining value of the marital share and family share sub-trusts, and Dawn Morin would receive about 40% of the assets left in those two sub-trusts. (1 CT 130)

James Blevins, the successor trustee did not Administer the Trust nor did he submit and accounting to the court or the beneficiaries of the Trust until, finally, in June 2008 Dawn Morin filed a declaratory relief action in Federal Court to secure a decision that her petition would not be deemed a "contest" of the trust's provisions which would invoke the "no contest clause" of the Trust. This federal action was dismissed. Dawn Morin then filed a petition seeking "information and an accounting" from James Blevins, the successor trustee. This petition also alleged that James Blevins was improperly attempting to sell trust property to his brother (another of Bobette's

beneficiaries) at an inappropriate discount. Additionally, there were questions as to the delay in funding the sub-trusts, as well as questions concerning some transactions Bobette had undertaken during her lifetime (with regard to inappropriately giving her children money), and the allocation to Respondent James Blevins of shares of stock in a trucking company, Mountain Valley Express ("MVE") owned by the Trust. (1 CT 131)

On April 10, 2008, trustee Blevins file a PETITION TO APPROVE AND CONFIRM ACCOUNT AND REPORT OF TRUSTEE; APPROVAL OF PROPOSED DISTRIBUTION AND PAYMENT OF TRUSTEE'S FEES; CONSENT OF TRUSTEE OF BENEFICIARIES' TRUST.

On June 11, 2008, Dawn Morin filed her PETITION TO COMPEL PERFORMANCE OF RESPONDENT'S DUTIES AS TRUSTEE OR IN THE ALTERNATIVE REMOVE THE TRUSTEE PURSUANT TO PROBATE CODE §§ 17200 AND 16420.

James Blevins as the trustee of the Trust objected to Dawn Morin's petition, offering expected explanations for each of the challenged actions. After settlement negotiations, the parties reached an agreement in March 2009. Thereafter, on March 25, 2009, James filed an amended petition seeking approval of a distribution plan pursuant to which Dawn Morin received slightly less than her designated 40% of the two sub-trusts. Notably, pursuant to the plan, Petitioner also received less than 10% of the sub-trusts. (1 CT 131)

On April 10, 2008, trustee James Blevins filed his verified "Petition to Approve and Confirm Account and Report of the Trustee; Approval of

Proposed Distribution and Payment of Trustee's Fees; Consent of Trustee of Beneficiaries' Trust [Probate Code § 17200]". ("Respondent's Verified Petition" attached to Notice of Lodgment as Exhibit C to "Points and Authorities in Support of Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees (Probate Code § 17200, *et seq.*; CCP § 473(d))" ("Appellant's Points and Authorities to Motion to Set Aside and Vacate") (1 CT 22)

On March 25, 2009, trustee Blevins filed a verified "Amended Petition to Approve and Confirm Account and Report of the Trustee; Petition to Approve Agreement Between Trustee and Dawn Morin; Approval of Distribution Plan and Payment of Trustee's Fees; [Probate Code § 17200]". ("Respondent's Amended Verified Petition") (Attached to Notice of Lodgment as Exhibit G to Appellant's Points and Authorities to Motion to Set Aside and Vacate") (1 CT 22)

It is important to note that Trustee Blevins declares on page 3, at ¶ 4., lines 2-10 of Respondent's Verified Petition and again on page 3, at ¶ 4., lines 1-9 of Respondent's Amended Verified petition, that \$25,000.00 had already been distributed to Jozlyn Thomas. (Please see Exhibits C) (1 CT 22)

This allegation is patently untrue, and Respondent admits the same when in his "Declaration of James Scott Blevins in Support of Opposition to Petition to Reopen Estate Administration and to Vacate and Set Aside Order Approving and Settling Amended Account and Report of Trustee and Dawn

Morin; Order Approving Agreement Between Trustee and Dawn Morin; Order Approving Distribution Plan and Allowing Payment of Trustee's Fees" he declares under penalty of perjury that the check sent to Dan and Mary Thomas as guardians of the estate of Jozlyn Thomas was part of the distribution required after Charles L. Giles' death. It is attached as Exhibit A to this declaration and dated March 3, 2010. (1 CT 59-60) Yet, in his verified April 10, 2008 petition and his March 25, 2009, amended petition he declared to the court that this amount had already been paid.

It is further alleged in the same documents, Respondent's Verified Petition on p. 4, ¶ 4, at lines 14-15, (Exhibit C) and again in Respondent's Amended Verified Petition on p. 4, ¶ 4, at lines 6-7, (Exhibit G) the Respondent declares:

"At all time herein relevant, the above beneficiaries are adults. Below is a list of all beneficiaries and interested persons who are at all times herein mentioned adults, and their addresses: . . ." (Emphasis added.)

He then goes on to list the names and addresses of a group of beneficiaries/interested persons including the Appellant herein as:

Jozlyn Thomas
25030 Sandhill Blvd., #4b2
Punta Gorda, FL 33983

(Emphasis added.)

As described below, this was not her address. The address as written is a vacant lot filled with brush and weeds. (1 CT 30)

This allegation was false also. At the time Respondent Trustee Blevins filed Respondent's Verified Petition was only 6 years old and was 8 years old when Respondent's Verified Amended Petition was filed.

Respondent trustee actually knew both of the above allegation were false, yet, he was willing to lie and misrepresent facts to the court in order to push the settlement agreement through to allow the judge to approve of the agreement entered into by the Respondent and Dawn Morin. It seems likely the trial court would not have approved the settlement agreement but for the lies.

On April 29, 2009, pursuant to the settlement agreement, Dawn Morin dismissed her petition for "information and an accounting" with prejudice. (1 CT 131)

Appellant did not receive notice of this litigation. (1 CT 131, 132) The trial court found (1 CT 131-132) that service on Appellant was made by mail to two "incorrect" addresses. Respondent mailed numerous notices to Petitioner at the following two addresses: 25030 Sandhill Boulevard, #4b2, Punta Gorda, Florida 33983 and 25050 Sandhill Boulevard, #4b2, Punta Gorda, Florida 33983. Most were sent to the 25030 address which was a vacant lot. However, two notices were mailed to the 25050 address which Appellant and her parents resided for a short period of time, June and July 2003, when Appellant was three (3) years old. (1 CT 133)

The Court in its final ruling on Appellant's Motion to Vacate and Set Aside argued at 1 CT 132 that the various services of process at the 25050 address was "*actually correct* ". (1 CT 132) It was unreasonable for Dawn Morin, the original petitioner and James Scott Blevins, the Trustee, to assume

that the six year old Jozlyn still resided at the 25050 address when (1) the petitioner, Dawn Morin, and the trustee James Scott Blevins, knew that Jozlyn's father, Joseph Giles, was housed in the Florida state prison system, and he was served while in prison, and he knew the correct address for Jozlyn; all they had to do was ask; (2) they should have served Joseph on behalf of Jozlyn if they had no knowledge of the Wisconsin guardianship; and (3) they served Jozlyn at two different addresses. (Basic reasoning should indicate that they had to know that one of the addresses was wrong.) This should have prompted further diligence on the part of Dawn Morin and James Scott Blevins' to exert further effort (such as asking Jozlyn's father for her address) to ascertain the Appellant Jozlyn's accurate address. They did not do this. Instead, they continued to serve Jozlyn at the wrong address(es) having the impact of preventing Jozlyn from asserting her rights in the trial court proceedings. (Please see Proofs of Service attached as Exhibit 1 to Notice of Lodgment.)

As a result, neither Jozlyn nor her Grandparents/Guardians had actual notice or legal notice of the existence of the Trust, and it was not until 2009 (1 CT 132, 133, 10, 15, 18) when the wife of the Trustee, Deena Blevins, telephoned the Grandparents/Guardians did they learn that the Trust, but not Dawn Morin's case, existed and Jozlyn was a beneficiary entitled to distribution of a portion of its assets. (1 CT 9, 14)

III. PROCEDURAL FACTS

April 3, 2003: Charles Giles' died.

Dec. 31, 2004: Bobette Giles, died.

July 24, 2007: Dawn Morin, a 40% beneficiary of the Family and Marital Trusts, filed a Petition for Declaratory Relief in the Federal Court which was later dismissed for lack of subject matter jurisdiction.

April 8, 2008: Dawn Morin filed the initial (“safe harbor”) Petition for Declaratory Relief with the Stanislaus County Superior Court.

April 10, 2008: Trustee Blevins filed a PETITION TO APPROVE AND CONFIRM ACCOUNT AND REPORT OF TRUSTEE; APPROVAL OF PROPOSED DISTRIBUTION AND PAYMENT OF TRUSTEE'S FEES; CONSENT OF TRUSTEE OF BENEFICIARIES' TRUST

May 13, 2008: Pursuant to a stipulation between Blevins and Morin, the Court ordered Dawn Morin's case consolidated with Trustee Blevin's case.

June 11, 2008: Dawn Morin filed the PETITION TO COMPEL PERFORMANCE OF RESPONDENT'S DUTIES AS TRUSTEE OR IN THE ALTERNATIVE REMOVE THE TRUSTEE PURSUANT TO PROBATE CODE § 17200 AND 16420

March 2, 2009: At the Trial Settlement Conference of the consolidated cases, the parties entered into a settlement agreement and the Court issued its Minute Order incorporating the

settlement agreement pursuant thereto.

March 25, 2009: James Scott Blevins as Trustee to The Administrative Trust, The Survivor's Trust, The Family Trust and The Marital Trust filed the Trustee's Amended Petition.

April 29, 2009: Petitioner Dawn Morin filed a Request for Dismissal with prejudice of her case.

May 5, 2009: The Court issued an Order pursuant to the settlement agreement which was entered on May 6, 2009.

May 6, 2009: Petitioner Dawn Morin filed a Notice of Entry of Dismissal and Proof of Service.

March 26, 2018: Appellant filed her Petition to Vacate and Set Aside the May 5, 2009, Order.

May 4, 2018: Opposition to Appellant's Petition to Vacate and Set Aside filed.

November 1, 2018: Appellant filed Notice of Appeal.

IV. LEGAL FINDINGS OF THE TRIAL COURT

It is difficult to excise the legal findings of the trial court due to ambiguity as to whether the Opposition to Appellant's Petition is, in actuality, the legal findings of the Trial Court.

In her final ruling on Appellant's Petition to Vacate and Set Aside, stated in a sub-heading entitled, "**Opposition to Motion by Successor Trustee**" (1 CT 136) The first three (3) paragraphs under this sub-heading makes clear that these paragraphs are truly the arguments of the Respondent Blevins.

However the sub-headings to the sub-heading including “Guardian of the Estate’s Objection:” (1 CT 136), “Waiver and Signed Release:” (1 CT 136), “Two-Year “Statute of Limitations” Applies” (1 CT 137), and “Trackman Applies But Extrinsic Fraud Exists” (1 CT 139) notwithstanding they appear to be sub-headings to the subheading “**Opposition to Motion by Successor Trustee**” (1 CT 136), they, in fact are legal “findings” of the court (1 CT 136 - 139) which act foundationally to support the court’s ruling as the trial court concludes: “**Conclusion:** For all of the above-stated reasons, the motion/petition to reopen distribution of the trust assets is denied.”

V. STATEMENT OF APPEALABILITY

This appeal is from a Ruling of the Stanislaus Superior Court which denied Appellant’s petition to vacate and set aside a previous Order of this court made on May 5, 2009, pursuant to a settlement agreement. The ruling denied Appellant’s petition and was final. This appeal is authorized by the Code of Civil Procedure, § 904.1, subdivision (a)(2) and California Rules of Court, Rule 8204(a)(2)(B).

VI. THE STANDARD OF REVIEW

The standard of review is *de novo*.

If the trial court’s decision did not turn on few, if any disputed facts, the trial court’s decision is subject to *de novo* review. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1032 [56 Cal.Rptr.3d 814, 155 P.3d 226].)

Though Appellant disputes a few, but not many, of the facts stated in

the trial court ruling, such facts are not disputed or described here.

The issues in this appeal do not involve any disputed questions of fact. The issue of whether a judgment is void due to improper service is a question of law that should be reviewed *de novo*. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175 [114 Cal.Rptr.3d 619]; *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 858 [92 Cal.Rptr.3d 717].)

When reviewing questions of law, an appellate court is not bound by the trial court's reasons supporting its ruling. Instead, the Court of Appeal reviews the ruling, but not the trial court's rationale, independently. (*Stratton v. First Nat'l Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.)

As a matter of law, only, Appellant appeals the October 1, 2018, ruling of the trial court as follows and claims that the trial court abused its discretion when it denied Appellant's Petition to Vacate and Set Aside.

VIII. ARGUMENT

A. THE SETTLEMENT ORDER OF THE TRIAL COURT IS VOID AND SHOULD BE VACATED AND SET ASIDE BECAUSE:

1. The Judgment in the Trial Court Proceedings is Void Because the Trial Court Failed to Obtain Personal Fundamental Jurisdiction Over the Appellant Caused by Respondent's Failure to Serve Notice of the Trial Court Proceedings on the Appellant.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the

pendency of the action and afford them the opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). Failure to give notice violates "the most rudimentary demands of due process of law." (*Armstrong v. Manzo*, 380 U. S. 545, 550 (1965). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 291 (1980); *Mathews v. Eldridge*, 424 U. S. 319, 333 (1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969); *Pennoyer v. Neff*, 95 U. S. 714, 733 (1878).)

Appellant alleges that the final underlying settlement order and the subsequent final ruling on Appellant's Petition to Vacate and Set Aside by the trial court were void because she was never served process and had no actual notice of the proceedings. Cases have distinguished between "void" and "voidable" judgments as being whether the trial court acted in excess of its jurisdictional authority, making the judgment voidable, versus issuing a judgment without jurisdictional authority, making the judgment void. (*Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115 [233 Cal.Rptr.3d 814]; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215 [113 Cal.Rptr.3d 147].) Therefore, because the trial court did not obtain jurisdiction over Appellant, the settlement order issued by the trial court was void.

In its final ruling on Appellant's Motion to Vacate and Set Aside, the trial court discusses Appellant's argument that California Code of Civil Procedure ("CCP") §473(d) applies to allow the court

the authority to vacate and set aside a void judgment. (1 CT 137-140). It adopts, when possible, the application § 473.5 as a time limitation to § 473 challenge to the judgment as being void for two years post entry of judgment. With exceptions, CCP § 473.5 sets a “reasonable” time limitation, not to exceed two (2) years from the date of entry of the judgment. As the facts show, Appellant has exceeded this limitation.

However, lack of service of process on an interested party who has property interests in the outcome, violates that person’s fundamental rights established under the 5th and 14th Amendments to the U.S. Constitution which states that a person cannot be deprived of “life, liberty, and property” without due process of law.

As a fundamental right, due process requires that an indispensable interested party be given adequate notice of the suit and be subject to the personal jurisdiction of the Court. (*World-Wide Volkswagen Corp. v. Woodson* (1980), *supra*.)

Such notice must be reasonably calculated, under all the circumstances, to apprise an interested party of the pendency of the action and afford that person an opportunity to present his or her objections. (*Mullane v. Cent. Hanover Bank & Trust Co.*, *supra*; *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260; *Dusenberry v. United States*, 534 U.S. 161; see also *Duran v. Obesity Research Institute, LLC*, 1 Cal. App. 5th 635 (2016); *Estate of Reed*, *supra*; *Estate of Lacy* (1975) 54 Cal. App. 3d 172.)

Appellant was a named beneficiary of the Trust and thus an interested and indispensable party to the proceedings. In the trial court, the underlying consolidated proceeding negatively affected her rights as a beneficiary and, therefore, she was entitled to reasonable due process notice to allow her to present objections. The failure of Dawn Morin, the Petitioner in the trial court proceedings, and the Trustee, James Scott Blevins, to give Jozlyn constitutionally adequate notice rendered the subsequent final settlement judgment void. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal. App. 5th 1318; *Strathvale Holdings v. E.B.H.; People v. American Contractors Indemnity Co.*, (2004) 33 Cal. 4th 653; *Estate of Lacy* *supra*; *Estate of Reed* (1968) 259 Cal. App. 2d 14.)

In the recent case of *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) [24 Cal.App.5th 115 [233 Cal.Rptr.3d 814]], where a Chinese company was not properly served with process as required by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, the court found that because the company was not properly served with the summons and petition pursuant to the Hague Convention, the trial court did not acquire jurisdiction over it, and the resulting judgment was void. (*Id.* at p. 134.) The court further stated that “California is a jurisdiction where the original service of process, which confers jurisdiction, must

conform to statutory requirements or all that follows is void.” (*Id.*)

The *Rockefeller* court further stated:

“Where the defendant establishes that he or she has not been served as mandated by the statutory scheme, “**no personal jurisdiction by the court will have been obtained and the resulting judgment will be void as violating fundamental due process.** (*See Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. [80,] 84 [99 L.Ed.2d 75, 108 S.Ct. 896].)” (*Gorham, supra*, 186 Cal.App.4th 1215, 1227, . . . [reversing order denying motion to set aside a default judgment because plaintiff had not been properly served with the summons and complaint]; see also *Renoir*, *supra*, 123 Cal.App.4th at p. 1154 [“Because no summons was served on any of the defendants and the defendants did not generally appear in the proceeding, the trial court had no jurisdiction over them. Therefore, the California judgment was void, as is the order denying the motion to vacate the California judgment.”]; *Lee v. An* (2008) 168 Cal.App.4th 558, 564 [85 Cal. Rptr. 3d 620] [“[I]f a defendant is not validly served with a summons and complaint, the court lacks personal jurisdiction and a . . . judgment in such action is subject to being set aside as void.”].) *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018), *supra*, at pp. 134-135. (Emphasis added..)

In its final ruling on Appellant’s Petition to Vacate and Set Aside, the trial court herein argues that the Petition to Vacate and Set Aside whether the two (2) year time limitations of Probate Code § 473.5 are applied, the Petition to Vacate and Set Aside was unreasonably late. (1 CT 138) It is arguable whether Dan and Mary Thomas knew or should have known of the original

proceedings before 2017. This issue is irrelevant.

In the case *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215 [113 Cal.Rptr.3d 147]], (“Gorham”) in this family law matter, the father knew a default judgment was entered against him in 2002, but did not challenge the judgment as being void for lack of service until 2008. (*Id.* at pp, 1223-1225) The trial court found that the motion to set aside the default judgment was untimely and denied the motion, (*Id.* at p. 1225)

On appeal from this judgment, the appellant alleged that the trial court abused its discretion when it denied his motion to set aside default judgment based on lack of service. In agreeing with the appellant, the appellate court reasoned that the trial court never obtained jurisdiction and the trial court’s order violated the appellant’s fundamental rights. (*Id.* at 1225-1226). It further reasoned that where it is shown that there has been a complete failure of service of process upon a person, he generally has no duty to take affirmative action to preserve his right to challenge the judgment or order even if he later obtains actual knowledge of it because “[w]hat is initially void is ever void and life may not be breathed into it by lapse of time.” (citing *Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 731).

The *Gorham* court in reversing the trial court’s order denying the Appellant’s Motion to Vacate and Set Aside the default judgment entered against him stated:

“. . .because Gorham established through extrinsic evidence that the default judgment was void for want of personal jurisdiction over him, it had the same effect as if it had been void on its face and the court had the inherent

power to set it aside even though any statutory periods had run." Citing *Thompson v. Cook* (1942) 20 Cal.2d 564, 569; *Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 182-183; *Morgan*, *supra*, 105 Cal.App.2d at p.732.

The argument is the Appellant herein was never served with process of the underlying litigation. This lack of service violated Appellant's fundamental rights under the 5th and 14th Amendments to the U.S. Constitution and the trial court failed to obtain jurisdiction over the Appellant. Therefore, it lacked authority to issue the judgment in the underlying litigation and the power to issue the final ruling denying the Appellant's Petition to Vacate and Set Aside the judgment in the underlying case.

2. The Settlement Order Is Void Because the Respondent Trustee Admitted He Sent Notices to the Wrong Address And Failed to Act Diligently to Discover Petitioner's True Address

In his declaration in opposition to Appellants, Trustee James Scott Blevins declared as follows:

"3. I was first alerted to Movants' involvement as guardians for Jozlyn Thomas in 2009 by my then wife Deena Blevins. My wife Deena had a phone call with Mary Thomas on May 18, 2009 wherein Mary Thomas explained to Deena that her and Daniel Thomas were the guardians for Jozlyn Thomas and that all mailings should be sent to 10 Belem Street, in Punta Gorda Florida. Prior to learning of Movants' involvement, all correspondence and court filings for Jozlyn Thomas were sent to addresses that based on information and belief, were provided to me from either Jozlyn Thomas' father, Joseph Giles, and/or Bobbette Giles

prior to her death. These include the addresses Movants claim that Jozlyn Thomas never resided at. Once I learned, on or about May 18, 2009, that Jozlyn Thomas lived with Movants I caused all communications and filings to be sent to Movants at their address.” (1 CT 60 at ¶ 3, lines 9-19)

In this declaration made under oath and dated and entered on May 4, 2018, trustee Blevins admits that the process required to be served on Appellant as a beneficiary of the Trust, were sent to the wrong address during the litigation of the underlying lawsuit, and that he did not know the Appellant’s true address until the May 18, 2009, telephone call which occurred almost two weeks after the entry of the Settlement Order on May 8, 2009.

Case law has established that if a party admits facts showing that a judgment is void, or allows such facts to be established without opposition, then, as a question of law, a court must treat the judgment as void upon its face. (*Hill v. City Cab & Transfer Co.* (1889) 79 Cal. 188, 191 [21 P. 728]; *OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1328-1329 [213 Cal.Rptr.3d 395].)

In this case the Respondent has admitted he sent required pleadings to the wrong address (*see above; see also* California Rules of Court, Rule 7.51(d) and California Probate Code § 14601.1). Thus, the settlement order is void, and it is the duty of the court to so declare as a matter of law. (*Id.; Fidelity Creditor Service, Inc. v. Browne* (2001) 89 Cal.App.4th 195, 205 [106 Cal.Rptr.2d 854].)

Further, Respondent did not act diligently to find the correct address. On information, he claims that the address(es) were given to him either by

trustor Bobette Giles before she died in 2004, which is highly unlikely, and Appellant lived at one of the addresses on the proofs of service for only two months, June and July, 2003. Further, had the Respondent asked, which he failed to do, Appellant's father, Joseph, incarcerated in the Florida Penal System could have told Respondent the Appellant's correct address. (1 CT 117 at ¶¶ 3, 4 lines 12-24.)

2. The Settlement Order Issued by the Trial Court Is Void Because Extrinsic Fraud Existed to Prevent Appellant from Protecting Her Interests as a Beneficiary of the Trust.

Extrinsic fraud is a concept that tends to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. *Estate of Beard* (1999) 71 Cal.4th 753, 772-773; *In re Marriage of Modnick* (1983) 33 Cal.3d 897, 904-905 [191 Cal.Rptr. 629, 663 P.2d 187]; *In re Marriage of Park* (1980) 27 Cal.3d 337, 342 [165 Cal.Rptr. 792, 612 P.2d 882]. Generally, it arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. (*In re Marriage of Modnick*, *supra*, 33 Cal.3d at p. 905; *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 470-471 [82 Cal.Rptr. 489, 462 P.2d 17, 39 A.L.R.3d 1368].)

It is well settled law that the probate court is mandated to set aside court orders procured or based on any order(s) procured by extrinsic fraud. *Estate of Sanders*, (1985) 40 Cal.3d. 607, 614; *Estate of Charters* (1956) 46 Cal.2d 227, 234. An appellate court has inherent equitable power to set aside a decree for extrinsic fraud. (*Cross v. Tustin* (1951) 37 Cal.2d 821, 825 [236 P.2d 142].)

A final ruling, order, or judgment may be set aside based on extrinsic

fraud.

As in the instant case an example of extrinsic fraud are misrepresentations that cause a party to be unaware of a court date in a case in which they are an interested party, to miss that date and to thereby not have his or her day in court.

The appellate court in its final ruling on Appellant's Petition to Vacate and Set Aside apparently states that extrinsic fraud exists in this case (1 CT 10) when the courts writes "at sub-heading:

"Trackman Applies But Extrinsic Fraud Exists:"

The court's ruling seems to agree with Appellant that extrinsic fraud existed, e.g., (1) Appellant was not served with process; (2) that process was served at two separate addresses which neither were the residential address of Appellant; (3) that Respondent could have discovered Appellant's correct address by asking Appellant's father; (4) that but for Respondent's lies and misrepresentations in its verified pleadings that Appellant was an adult who already received \$25,000.00 and did not object to the settlement agreement, it is likely that the trial court would not have accepted settlement agreement and made it the central part of its final order.

A motion to vacate and set aside a final court order, ruling, or judgment based on extrinsic fraud can be brought at any time and is not restricted by the time limitations of CCP § 473.5 if the motion is brought diligently and within a reasonable time from the date of discovery of the judgment. (*Trackman v. Kenney* (2010), *supra*, at p. 181.)

**a. Appellant Through Her Grandparents/Guardians
Had No Actual Knowledge of the State Court
Litigation.**

Appellant was a minor and was the ward of the guardian/grandparents and Appellant's legal and personal interests at all times were protected by them.

Respondent in his response to Appellant's Petition to Vacate and Set Aside, argues that two 2011 letters, one dated February 15, 2011 and September 8, 2011, along with an attached waiver and release form provided adequate notice to Petitioner of Dawn Morin's lawsuit herein. (1 CT 89-90)

Certainly, there is general reference to Dawn Morin's case as alleged in the Response. However, Respondents have not shown that the relevance of the references alluded to in the letters offered sufficient notice or were understood by the Appellant. There are no references to or descriptions of the court or the county in which it presides or to any case number. Appellant's guardian/ grandparents, who were elderly and retired and were not versed in the intricacies, nuances, or complexities of the law. They cannot be expected to understand and comprehend the legal and factual impact of what they were reading. They certainly understood their granddaughter was receiving an inheritance from her paternal grandfather but had no idea that there was a contested lawsuit in which the Appellant was an interested indispensable party. Had they known and understood this fact, they would have objected to the settlement as being against the interest of the Appellant and the intent of the settlors.

Further, the Grandparents/Guardians have declared under penalty

of perjury that they did not know that the case existed until on or about October 25-27, 2017. (Coming from these credible people, this should carry much weight.) (1 CT 9-10; 1 CT 6)

B. THE WAIVER AND RELEASE SIGNED BY APPELLANT'S GUARDIAN/GRANDPARENTS IS A NULLITY WITHOUT EFFECT.

In the court's final ruling on Appellant's Motion to Set Aside and Vacate, the court states:

In addition, parties may waive the protection of *Civil Code section 1542* if they understand and consciously agree to such waiver, and there is no ambiguity or evidence of fraud, undue influence or mistake. *Jefferson v. California Dept. of Youth Authority* (2002) 28 Cal.4th 299, 307 (1 CT 3, lines 8-11)

Attached to the September 8, 2011, letter is a form entitled "Release of Liability of Trustee and Waiver of Accounting". ("Release and Waiver") (Please see September 8, 2011, letter attached as Exhibit C to Notice of Lodgment. [1 CT 121, lines 15-17.] This Release and Waiver was signed by the Grandparents/Guardians of Appellant, Daniel and Mary Thomas.

However, a close reading of the letter the onto which the Release and Waiver is attached, at the end of the letter, is the following:

"With regard to distribution of your respective shares of the Reserve Account, I am also enclosing a Waiver of Accounting and Release of Liability of Trustee. Please review the waiver and release, and sign where indicated. Please return the original document to me in the envelope provided. **Once all signed waivers are received, original checks will be immediately forwarded directly to each of you.**"

(Emphasis added.) (Please see September 8, 2011, letter attached hereto as Exhibit B.)

A reasonable and compelling interpretation of that paragraph would be that disbursement of the funds in the reserve account would be sent to the addressed beneficiaries only if all addressed beneficiaries signed the Release and Waiver form and returned using the envelope provided.

Appellant herein alleges that this is the correct interpretation of this paragraph and that Appellant's understood its coerciveness and signed the release.

Probate Code § 16004.5 applies. It states:

§ 16004.5. Relief of trustee from liability as condition for making distribution or payment prohibited

- (a) **A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument.**
- (b) . . . (Emphasis added.)

Since the Trust requires the disbursement of the Trust assets, and since the funds reposing in the Reserve Account are Trust assets, § 16004.5 is on point and applies here. The September 8, 2011, makes clear that release of funds of the Trust to the beneficiaries, including Appellant, was conditioned upon the signing of the Release and Waiver. This is prohibited by § 16004.5, and the legal impact of the signed Release and Waiver is nullified. *Bellows v. Bellows* (2011) 196 Cal.App.4th 505 [125 Cal.Rptr.3d 401]; *Lawson v. Lawson* (D.Nev. Nov. 13, 2014, No. 3:14-cv-00345-LRH-WGC) 2014 U.S.Dist.LEXIS 160354.

VII. CONCLUSION

For the reasons stated above, Appellant respectfully requests this court to remand the case back to the Stanislaus County Superior Court with directions to vacate and set aside the final Order entered May 5, 2009, in which the settlement agreement was affirmed. Further, Appellant requests this court remand this case back to the trial court with further directions that the Trial Judge conduct further proceedings consistent with this court's ruling.

Appellant requests that attorney's fees and costs be assessed against Respondent.

Respectfully submitted,

Dated: June 1, 2019.

/s/ _____
Jozlyn Thomas
Appellant

CERTIFICATE OF WORD COUNT

I certify that according to the computer program used to prepare this brief, the Appellant's Opening Brief contains 6,321 words, not including the cover, the Tables of Contents and Authorities, the Certificate of Interested Entities or Persons, this certificate and the signature block.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 1, 2019.

/s/ _____
Jozlyn Thomas
Appellant

PROOF OF SERVICE

I Do Hereby Declare As Follows:

That I am a citizen, over the legal age of 18 years and not a party to the
within litigation

That my residence address is 2838 The Esplanade, #15, Chico, California 95973

That on the date entered below, I served the attached **Appellant's Opening Brief** by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing that envelope in the United States Mail at Chico, California, with fully prepaid postage. There is delivery service by the United States Postal Service to each of the places so addressed.

This Appellant's Opening Brief was served on the interested parties at the addresses as listed below:

California Supreme Court
350 McAllister Street Second Floor
San Francisco, CA 94102

Michael Gianelli
Gianelli & Associates
1014 16th Street
Modesto, CA 95354

Anthony Giles
5613 Lowell Street
Everett, Washington 98203-3910

Boys & Girls Club of Manteca
Beneficiary
545 W. Alameda Street
Manteca, CA 95336

Stanislaus County Superior Court
800 11th St.
Modesto, CA 95354

Christopher Ramey
Ramey Litigation Group APC
3838 Camino Del Rio N, Suite 120
San Diego, CA 92108-1762

William Blevins
337 Ruess Road
Ripon, CA 95366

Brent Blevins
7887 Koftinow Ct.
Manteca, CA 95336

Bryan Blevins
2091 Willow Lane
Lakewood, Colorado 80215

Charles W. Giles, Jr.
P.O. Box 13282
Everett, Washington 98206

Dawn Morin
Beneficiary
P.O. Box 8198
Surprise, Arizona 85374

James Scott Blevins
901 Opal Lane
Ripon, CA 95366

Joseph Giles
20683 Waalew Road, Space 123-B
Apple Valley, CA 92307

Kelly Bergman
172 Joseph Court
Ripon, CA 95366

Michael Giles
5613 Lowell Street
Everett, Washington 98203-3910

St. Vincent de Pauls Society
525 East North Street
Manteca, CA 95336

Stoney Dahlberg
P.O. Box 578217
Modesto, CA 95357

Dated: June 28, 2019.

/s/ _____
Larry Dick

PROOF OF SERVICE

I Do Hereby Declare As Follows:

That I am a citizen, over the legal age of 18 years and not a party to the within litigation.

That my residence address is 2838 The Esplanade, #15, Chico, California 95973

That on the date entered below, I served a true copy of:

APPELLANT'S OPENING BRIEF

by placing in an envelope addressed to the court named below at the address shown, and by sealing and depositing that envelope in the United States Mail at Chico, California, with fully prepaid postage. There is delivery service by the United States Postal Service to the place so addressed.

This Appellant's Opening Brief was served on the interested parties at the address as listed below:

**Stanislaus County Superior Court
800 11th St,**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

June 3, 2019.

/s/

Larry Dick

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOZLYN THOMAS,

Court of Appeal
No. F078333

Appellant/Petitioner,

vs.

(Superior Court Case No. 428536)

JAMES SCOTT BLEVINS,

Respondent.

Appeal from a final order denying Appellant's Motion to vacate and set aside Final Ruling the superior court of California, County of Stanislaus

The Honorable Stacy P. Speiller, Judge

APPELLANT'S REPLY BRIEF

Jozlyn Thomas
10 Belem Street
Punta Gorda, Florida 33983

Tel: (941) 456-4000

63a
TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL	FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: F078333
ATTORNEY OR PARTY WITHOUT ATTORNEY: NAME: JOZLYN THOMAS FIRM NAME: IN PRO PER STREET ADDRESS: 10 BELEM STREET CITY: PUNTA GORDA TELEPHONE NO.: E-MAIL ADDRESS: ATTORNEY FOR (name): APPELLANT/ JOZLYN THOMAS PETITIONER: RESPONDENT/ JAMES SCOTT BLEVINS REAL PARTY IN INTEREST:		STATE BAR NUMBER: SUPERIOR COURT CASE NUMBER: 428536
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS		
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE		
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.		

1. This form is being submitted on behalf of the following party (name): JOZLYN THOMAS
2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
- b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1) ANTHONY GILES	BENEFICIARY - GILES REVOCABLE TRUST
(2) WILLIAM BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(3) BOYS & GIRLS CLUB OF MANTECA	BENEFICIARY - GILES REVOCABLE TRUST
(4) BRENT BLEVINS	BENEFICIARY - GILES REVOCABLE TRUST
(5) CHARLES W. GILES	BENEFICIARY - GILES REVOCABLE TRUST

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: JUNE 1, 2019

JOZLYN THOMAS
(TYPE OR PRINT NAME)

/s/

(SIGNATURE OF APPELLANT OR ATTORNEY)

ATTACHMENT 2
TO CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

<u>NAMES OF INTERESTED PERSONS</u>	<u>NATURE OF INTEREST:</u>
Bryan Blevins	BENEFICIARY - GILES REVOCABLE TRUST
Dawn Morin	BENEFICIARY - GILES REVOCABLE TRUST
James Scott Blevins	BENEFICIARY AND TRUSTEE OF GILES REVOCABLE TRUST
Joseph Giles	BENEFICIARY - GILES REVOCABLE TRUST
Kelly Bergman	BENEFICIARY - GILES REVOCABLE TRUST
Michael Giles	BENEFICIARY - GILES REVOCABLE TRUST
St. Vincent de Pauls Society	BENEFICIARY - GILES REVOCABLE TRUST
Stoney Dahlberg	BENEFICIARY - GILES REVOCABLE TRUST

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Appellant respectfully replies to Respondent's Brief as follows:

I. INTRODUCTION

A careful and thoughtful review discloses that Respondent's Brief (hereinafter "Response") fails to overcome Appellant's arguments in the Opening Brief. Respondent avoids the overriding fact that Jozlyn Thomas ("Appellant"), a minor until June 2019, and her guardians, Mary Thomas and Daniel Thomas had no actual or legal notice that in June 2008 Dawn Morin, a beneficiary, had filed a "Petition to Compel Performance of Respondent's Duties as Trustee or in the Alternative Remove the Trustee Pursuant to Probate Code §§17200 and 16420", that partial litigation had occurred in the case, and that on May 6, 2009, settlement had been agreed upon by the parties and the judge.

II. ARGUMENT

Respondent, in his brief has failed to overcome the facts and legal conclusions that Appellant poses in her Opening Brief that:

1. The Settlement Order should be vacated as void because:
 - A. Appellant was never served with any legal process thereby causing the trial court's failure to obtain fundamental personal jurisdiction over Appellant;
 - B. Respondent admitted he mailed process to the wrong address;
 - C. Extrinsic fraud existed to prevent Appellant from advocating and protecting her interests in the trust property as a beneficiary.

D. The waiver and release of liability signed by Appellant's guardians was void.

Appellant responds to Respondent's arguments as follows.

a. **Response to Respondent's "III. STATEMENT OF FACTS"**

(Respondent's Brief ("RB") at p. 7.)

Respondent has stated facts that are not true or leads to untrue conclusions:

Untrue Statement No. 1:

"Notably, none of the fourteen beneficiaries objected to this petition." (RB at p. 8.)

Reply: Since Appellant was a beneficiary, this supports the fact that she was not served.

Untrue Statement No. 2:

"Prior to learning of the Thomas' involvement, all correspondence and court filings for Appellant were sent to addresses that Respondent reasonably understood where (sic) accurate as they were provided to Respondent from Appellant's father, Joseph Giles, and Respondent's mother, Bobette Giles, prior to her death. *Id.* However, once Respondent learned that Appellant was living and being cared for by Mr. and Mrs. Thomas, Respondent immediately caused all communications, all court filings, and all Trust distributions to be sent to Appellant at the address provided to him by Mr. and Mrs. Thomas." (RB at p. 8.)

Reply: This is highly unlikely. First, settlor Charles Giles died on April 3, 2003, and Bobette his wife and first surviving trustee of the Trust, died on December 31,

2004. This left Respondent James Scott Blevins as the trustee of the Trust.

From the date of Bobette's death until beneficiary Dawn Morin's first filing with the federal court, later dismissed, the beneficiaries were ignored by the trustee, James Scott Blevins. No contact was made with Appellant or Appellant's guardians/grandparent until a few weeks after the settlement order had been issued and entered. It is important to note that alleged attempted contact involved two different addresses. This meant that one of them had to be wrong. Yet, the trustee failed to contact Joseph Giles, Appellant's father, who has declared that no one contacted him, that he knew of the guardianship proceedings and Appellant's correct address, and had the trustee inquired, he could have and would have given them the correct address. (CT 116) No one put in the effort to correctly notice Appellant.

Untrue Statement No. 3:

"The relief sought by Appellant will effectively create an unprecedented mechanism to reopen a completed trust administration and unwind the past seven years of spending, investing, selling, devising, donating, etc. the distributed Trust corpus from ten years ago. (CT 87.)"

Reply: It does not create an "unprecedented mechanism" to set aside a void judgment after 9 years (not 10 years). In the case of *County of San Diego v. Gorham* (2010) [186 Cal.App.4th 1215 [113 Cal.Rptr.3d 147]], the appellant filed a motion to vacate and set aside a default judgment entered approximately ten (10) years before the date of filing his motion to vacate and set aside judgment. The appellate court found that

because Appellant had not been served, that the attempted service was an address where he had live for only two months, the judgment should be set aside. *Id.*

Untrue Statement No. 4:

“Distribution of all Trust assets was completed in 2011 and the final Trust tax return was filed that year as well.”

Reply: Appellant is informed and believes that distribution is ongoing in view of the fact that Appellant continues to receive funds from trust assets.

b. Response to Respondent’s “IV. ARGUMENT”

Respondent’s Argument Number 1:

“THIS COURT HAS NO JURISDICTION OVER THE TRUST”: (RB at p.9.)

Reply: Though this argument is very interesting, it has no legal validity. Respondent seems to argue (1) that because Appellant in her motion did not name the trustee as the ‘trustee of the Trust’, and (2) that because the Trust has no assets and, for that reason ceases to exist (citing Probate Code § 15202¹), the trial court has no jurisdiction to vacate and set aside the final Ruling of the trial court and that the only avenue left open to the Appellant is to file a civil suit. (RB pp. 9-10)

Respondent has not shown that Appellant, in her motion to vacate and set aside the trial court’s ruling failed to name Respondent as ‘trustee to the Trust’. He simply makes

¹ Probate Code § 15202 does not stand for the proposition that a trust does not exist without trust property. It states, “A trust is created only if there is trust property.”

the bald statement without foundational facts. Appellant denies this, and Respondent fails to sufficiently prove this fact whether it matters or not.

It appears that the motivation underlying this argument is to divert attention away from the true issue, that is: Whether or not the trial court maintains jurisdiction to hear and rule on Appellant's motion to vacate and set aside the trial court's **final ruling** even if the final ruling has been made and entered, and the trust property has been disbursed.

Code of Civil Procedure § 473(d) grants the trial court statutory authority to hear and rule on motions to vacate and set aside a ruling. It states:

- (d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, **and may, on motion of either party after notice to the other party, set aside any void judgment or order.** (Code of Civil Procedure § 473(d).) (Emphasis added.)

This authority is limited to void judgments. (*Vitatech Internat., Inc. v. Sporn* (2017) 16 Cal.App.5th 796 [224 Cal.Rptr.3d 691]; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495–496 [52 Cal. Rptr. 3d 862]), and, clearly, the judgment was void.

Further, the appellate court in *Diaz v. Professional Community Management, Inc.*, (2017) (16 Cal. App. 5th 1190 [225 Cal. Rptr. 3d 39]) quoted with approval at fn.4: “[W]here the law allows an appeal from a judgment or order, it is appealable even though void.” (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366 [217 P.2d 951].) Instead, the “proper

procedure is to reverse the void order rather than dismiss the appeal from it." (*Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 379, fn. 5 [163 Cal. Rptr. 708].) *Id.*

And further, cases have held that though a final judgment has been entered and an appeal filed, the trial court under limited circumstance still maintains some jurisdiction concurrently with the appellate court over matters not concerned with in the appeal. (See *Franklin & Franklin v. 7-Eleven Owners For Fail Franchising*, (2000) 85 Cal. App.4th 1168.)

In summary, by way of statutory as well as case law, the trial court maintains jurisdiction to entertain a motion to vacate an entered void judgment even, in limited circumstances, if the judgment has been appealed. Such jurisdiction is not subject to whether or not the Appellant has named the Respondent properly or whether the trust has ended. This appeals is to the judgment of the trial court only.

Respondent's Argument Number 2.:

"THE SIGNED RELEASE AND WAIVER PRECLUDES THE INSTANT ACTION" (RB at p.10.)

Allegation No. 1:

The Respondent cites multiple authority for the proposition that parties can agree to waive "any and all claims" even if not listed on the waiver form and may also waive the provisions of CCP § 1542. (RB p. 10.)

Reply: Appellant does not oppose.

Allegation No. 2:

The Respondent goes on to allege that Appellant's guardians/grandparents signed such a release of claim and such release was not boiler plate but included various aspects of the administration of the Trust, including the 2009 Order Appellant claims to have only just discovered in 2017, and Respondent quotes from the waiver and release. (RB at pp. 10-11.)

Reply: Appellant does not oppose.

Allegation No. 3:

Respondent states:

"Appellant contends that language in a cover letter sent with the Release on September 8, 2011 (described in Section IV.3 below) somehow negates the effectiveness of the Release they signed. (Appellant's Opening Brief "AOB" at 32-33). Specifically, Appellant cites Probate Code Section 16004.5 for the rule that a trustee may not condition a trust distribution required by the trust instrument on receipt of a signed release of liability as against the trustee. **However, Appellant ignores the plain language of the Release which makes clear that distribution of the Trust assets is not contingent upon anything whatsoever.**" (CT 72-73)." (Emphasis added.)

Reply: Appellant opposes Respondent's characterization that the contingency condition **must be shown within the "release"** before Probate Code section 16004.5(a) applies.

Probate Code section 16004.5(a) states:

"A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument."

A simple reading of this section of the statute would require that the trustee cannot place conditions for making distributions as required by the trust. **There is nothing in the code that states that before Probate Code section 16004.5(a) becomes effective, such restriction must be stated in the Release.** Respondent's "interpretation" of this code section as presented in his brief is wrong. Probate Code section 16004.5(a) restricts a trustee from placing conditions for disbursement in any way and without limitations. (See *Bellows v. Bellows* (2011) 196 Cal.App.4th 505, [125 Cal.Rptr.3d 401]; *Lawson v. Lawson* (D.Nev. Nov. 13, 2014, No.3:14-cv-00345-LRH-WGC) 2014 U.S. Dist.LEXIS 160354.)

Appellant will not belabor the argument further, and, instead, refers the reader to Appellant's Opening Brief at p. 23, which quotes from the September 8, 2011, letter stating:

"With regard to distribution of your respective shares of the Reserve Account, I am also enclosing a Waiver of Accounting and Release of Liability of Trustee. Please review the waiver and release, and sign where indicated. Please return the original document to me in the envelope provided. **Once all signed waivers are received, original checks will be immediately forwarded directly to each of you.**" (Emphasis added.)
(CT p. 80)

In other words, forwarding the disbursement checks was conditioned on the receipt of signed waivers. (See Probate Code section 16004.5(a).)

Respondent's Argument Number 3:

"APPELLANT'S MOTION TO SET ASIDE THE 2009 ORDER WAS NOT

TIMELY FILED.” (RB at p.12.)

The arguments presented by Appellant in the Opening Brief is that:

The settlement order of the trial court is void and should be vacated and set aside because:

1. The judgment in the trial court proceedings is void because the trial court failed to obtain personal fundamental jurisdiction over the appellant caused by respondent's failure to serve notice of the trial court proceedings on the appellant;
2. The settlement order is void because the respondent Trustee admitted he sent notices to the wrong address and failed to act diligently to discover petitioner's true address; and
3. The settlement order issued by the trial court is void because extrinsic fraud existed to prevent appellant from protecting her interests as a beneficiary of the trust.

The Respondent failed to respond to Petitioner's arguments 1 and 2 restricting his discussion to 3, only, as discussed below.

Note that Respondent in his Respondent's Brief at the bottom of page 12 references (AOB 32) and then on page 13 he references (AOB 31). Neither of these references exist as the Opening Brief consists of 26 pages only.

The arguments presented by Respondent is that the two-year time limitation period imposed by CCP § 473.5 applies and that the Appellant makes two arguments to get around § 473.5.

They are:

1. “... Appellant contends that she did not have knowledge of the 2009 Order because Respondent *“failed to take reasonable*

steps to determine Jozlyn and her Grandparents/Guardians' residential address, and notices on the petitions failed and were not given." (CT 38)." Further, that the trial court could not find any evidence alleged of the Respondent's intent to commit fraud for the purposes of establishing extrinsic fraud other than Appellant's allegation that the pleadings that were required to be sent to Respondent were sent to the wrong addresses;" (RB p. 13) and

2. That it was unreasonable to believe that the Appellant's guardians/grandparents did not know of the case at issue herein or understand the nuances of the law. Further, Respondent argues that whether or not they understood, they should have understood and a presumption exists to the effect that a signatory is presumed to know and understand what is being signed. The Respondent cites the case in support of this contention, *Randas v. YMCA of Metropolitan Los Angeles* (1993) [17 Cal.App.4th 158, 160]. (RB pp 13-14) Additionally, Respondent argues that two letters were sent to Appellant in which reference was made to Dawn Morin's case.

First, Appellant makes no contention that the guardians/grandparent did not understand the waiver and release signed. Instead, the guardian/grandparents did not understand how the court case reference applied to the minor Jozlyn at that time. The letters quoted in Respondent's Brief reference the case as "Dawn's" case. No case number or description of the litigation of rights of the beneficiaries was mentioned. The guardian/grandparents did not know or understand that their ward, Jozlyn, had an interest in or otherwise had any right participate in the Dawn's case. It was not until 2017 that the guardians/grandparents discovered that Jozlyn had a right to participate in Dawn's case as

a beneficiary but was not served with any court papers disclosing that right.

Further, in his discussion of the alleged extrinsic fraud Respondent in his brief alleges that, other than sending to Jozlyn notices and pleadings required by law to the wrong address, Appellant has not shown intent on the part of Respondent to support "extrinsic" fraud.

This is untrue. At page 6. of Appellant's Opening Brief, Appellant states that in Respondent's Verified Petition on p. 4, ¶ 4, at lines 14-15 (Exhibit C to Notice of Lodgment) and again in Respondent's Amended Verified Petition on p. 4 ¶ 4 at lines 6-7 (Exhibit G to the Notice of Lodgment) Respondent represented and declared to the trial court that:

"At all times herein relevant, the above beneficiaries are adults. Below is a list of all beneficiaries and interested persons who are at all times herein mentioned adults . . ."
(Emphasis added.)

This representation was untrue and fraudulent. At all times the Respondent absolutely knew that the Appellant was a minor, but in order for the trial court to accept the settlement agreement, it had to know that all beneficiaries were adults competent to accept the settlement agreement.

This fraud perpetrated upon the court was extrinsic in nature and the trial court had the power to set aside the ruling without further evidence of intent. (*McKeever v. Superior Court*, 85 Cal. App. 381.)

III. CONCLUSION

For the foregoing reasons and for the reasons argued in Appellant's Opening Brief, Appellant respectfully requests this Court to remand the case back to the Stanislaus County Superior Court with direction to vacate and set aside the final Order entered May 5, 2009, in which the settlement agreement was affirmed, and further direct the trial court to conduct further proceedings consistent with this Court's ruling.

Appellant requests that attorney's fees and costs be assessed against Respondent.

Dated: September 11, 2019.

Respectfully submitted,

/s/ _____

Jozlyn Thomas
Appellant

CERTIFICATE OF WORD COUNT

I certify that according to the computer program used to prepare this brief, the Appellant's Opening Brief contains 2,730 words, not including the cover, the Tables of Contents and Authorities, the Certificate of Interested Entities or Persons, this certificate and the signature block.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 11, 2019.

/s/

 Jozlyn Thomas
Appellant

PROOF OF SERVICE

I Do Hereby Declare As Follows:

That I am a citizen, over the legal age of 18 years and not a party to the within litigation;

That my residence address is 2838 The Esplanade, #15, Chico, California 95973;

That on the date entered below, I served the attached **Appellant's Reply Brief** by placing a true copy thereof in envelopes addressed to the persons named below at the addresses shown, and by sealing and depositing that envelope in the United States Mail at Chico, California, with fully prepaid postage. There is delivery service by the United States Postal Service to each of the places so addressed.

This Appellant's Reply Brief was served on the interested parties at the addresses as listed below:

California Supreme Court
350 McAllister Street Second Floor
San Francisco, CA 94102

Michael Gianelli
Gianelli & Associates
1014 16th Street
Modesto, CA 95354

Anthony Giles
5613 Lowell Street
Everett, Washington 98203-3910

Boys & Girls Club of Manteca
545 W. Alameda Street
Manteca, CA 95336

Bryan Blevins
2091 Willow Lane
Lakewood, Colorado 80215

Dawn Morin
P.O. Box 8198
Surprise, Arizona 85374

Stanislaus County Superior Court
800 11th St.
Modesto, CA 95354

Christopher Ramey
Ramey Litigation Group APC
3838 Camino Del Rio N, Suite 120
San Diego, CA 92108-1762

William Blevins
337 Ruess Road
Ripon, CA 95366

Brent Blevins
7887 Koftinow Ct.
Manteca, CA 95336

Charles W. Giles, Jr.
P.O. Box 13282
Everett, Washington 98206

James Scott Blevins
901 Opal Lane
Ripon, CA 95366

Joseph Giles
20683 Waalew Road, Space 123-B
Apple Valley, CA

Michael Giles
5613 Lowell Street
Everett, Washington 98203-3910

Stoney Dahlberg
P.O. Box 578217
Modesto, CA 95357

Kelly Bergman
172 Joseph Court
92307 Rilon, CA 95366

St. Vincent de Pauls Society
525 East North Street
Manteca, CA 95336

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 11, 2019.

/s/ _____
Larry Dick

APPENDIX E

1 **KEVIN PERKINS, ESQ. SBN 195279**
2 Perkins Law Firm,
3 2618 San Miguel Dr. #103
4 Newport Beach, CA 92660
5 Tel: (949) 251-8877
6 Fax: (949) 644-6022

7 Attorney for Petitioner Daniel Thomas as Guardian of the Estate and Person of Jozlyn Thomas

8 **SUPERIOR COURT OF THE STATE CALIFORNIA**

9 **IN AND FOR THE COUNTY OF STANISLAUS**

10
11
12 In re Matter of) Case No.: 428536
13 GILES REVOCABLE TRUST)
14 Dated: January 18, 2002)
15 TRUSTEE: James Scott Blevins)
16)
17)
18 DANIEL THOMAS, as Guardian of the Estate)
19 and Person of Jozlyn Thomas, a minor.)
20 Petitioner.)
21 v.) Date: May 17, 2018
22 JAMES SCOTT BLEVINS.) Time: 8:30 a.m.
23 Respondent.) Dept: 22
24) Trial Date:
25
26 I, Joseph Giles, declare:
27 1. I am the son of Charles Giles, a co-settlor, now deceased, of the Giles Revocable Trust
28

1
SUPPLEMENTAL DECLARATION OF JOSEPH GILES IN SUPPORT OF MOTION TO SET ASIDE VOID ORDER

1 dated January 18, 2002. I am a named beneficiary of that trust.

2 2. I have a daughter, Jozlyn Thomas, who was born on June 20, 2000, and is now 17 years
3 old.

4 2. Jozlyn's grandparents on her mother's side, Daniel and Mary Thomas, became
5 Jozlyn's guardians of her estate and person when the Racine County (Wisconsin) Court issued
6 Letters of Guardianship on February 6, 2008. At the time the Letters were issued Jozlyn was 8
7 years old. I am informed and believe that Jozlyn has lived with her grandparents/guardians
8 continuously at 10 Belem Street, Punta Gorda Florida 33983 since the date the Racine County
9 Human Services placed Jozlyn with her grandparents/guardians.

10 3. At all times during the guardianship proceedings, I was incarcerated in prison
11 administered by the Florida Department of Corrections. Though I was incarcerated, I was in
12 monthly contact with Racine County Human Services concerning the guardianship proceedings,
13 and I had actual knowledge that my daughter, Jozlyn Thomas, lived with her grandparents/
14 guardians at 10 Belem Street, Punta Gorda, Florida 33983.

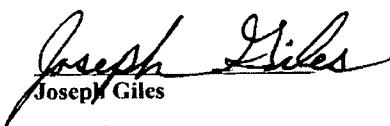
15 4. On April 8, 2008, the initial filing date of this case, I was again incarcerated in prison
16 administered with the Florida Department of Corrections. Though incarcerated, I had actual
17 knowledge that my daughter, Jozlyn, lived with her grandparents/guardians at 10 Belem Street,
18 Punta Gorda, Florida 33983, and had anyone requested her present address during the litigation of
19 this case, I could have and would have informed them of the Wisconsin guardianship and given
20 them Jozlyn's address in Punta Gorda, Florida. No one contacted me to request Jozlyn's address.

21 5. I am informed and believe that my daughter Jozlyn has never lived at 25030 Sandhill
22 Blvd., #4b2, Punta Gorda, Florida 33983, and though when Jozlyn was 3 years old, in June and
23 July 2003, only, Jozlyn's mother, Lisa, Jozlyn and I lived at 25050 Sandhill Blvd., #4b2, Punta

1 Gorda, Florida 33983.

2 I declare under penalty of perjury under the laws of the State of California that the foregoing
3 is true and correct.

4 Dated: 4/21/18, 2018.
5

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8 Joseph Giles

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3
SUPPLEMENTAL DECLARATION OF JOSEPH GILES IN SUPPORT OF MOTION TO SET ASIDE VOID ORDER

1 L. GIANELLI, SBN 070950
 2 NINI T. LEE, SBN 199109
 3 GIANELLI & ASSOCIATES
 A Professional Law Corporation
 1014 - 16th Street
 4 P. O. Box 3212
 Modesto, CA 95353
 5 Tel.: (209) 521-6260
 Fax: (209) 521-5971

6 Attorneys for Petitioner, JAMES SCOTT BLEVINS,
 7 Trustee of the Giles Revocable Living Trust

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

FILED

2008 APR 10 PM 12:40

CLERK'S OFFICE, SUPERIOR COURT
 COUNTY OF STANISLAUS

Lynne Kern

10 IN RE: Case No.

428549

11 THE ADMINISTRATIVE TRUST, THE
 12 SURVIVOR'S TRUST, THE FAMILY
 13 TRUST AND THE MARITAL TRUST
 14 CREATED IN THE GILES REVOCABLE
 15 LIVING TRUST w/i/d January 18, 2002.

PETITION TO APPROVE AND CONFIRM
 ACCOUNT AND REPORT OF TRUSTEE,
 APPROVAL OF PROPOSED
 DISTRIBUTION AND PAYMENT OF
 TRUSTEE'S FEES; CONSENT OF
 TRUSTEE OF BENEFICIARIES' TRUST

[Probate Code § 17200]

\$320.00 QD

Hearing Date: JUN 02 2008

Time: 8:30 a.m.

Dept.: 22

Judge:

20 Junes Scott Blevins, Trustee of the Administrative Trust ("Administrative Trust"), the
 21 Survivor's Trust, the Family Trust and the Marital Trust (collectively referred to as the "Sub
 22 Trusts") created in the Giles Revocable Living Trust w/i/d January 18, 2002 (the "Trust"),
 23 presents the following Account and Report of trust administration and seeks the court's
 24 approval and confirmation of Account and Report of the Trustee and approval of proposed
 25 distribution and payment of attorney's fees:

26 1. Creation of Trust

27 Charles L. Giles and Bobette Giles ("Trustors"), husband and wife, executed the
 28 Trust on January 18, 2002. Attached as Exhibit "A" and incorporated herein by reference is a
 true and correct copy of the Trust. The Trust provides that at the death of one of the Trustors, an

1 Administrative Trust would be formed for the purpose of administering the trust and ultimately
2 dividing it into the Sub Trusts defined below, which were to be administered until the death of
3 the surviving Trustor. Trustee has, in fact, formed and has been operating the Administrative
4 Trust since the death of Bobette Giles. The Survivor's Trust was to consist of the surviving
5 spouse's half of the community property and the surviving spouse's separate property. The
6 Family Trust and the Marital Trust were to consist of the first spouse to die's separate property
7 and half interest in the community property to be divided between the two trusts according to a
8 Marital pecuniary share formula. The Survivors' Trust, the Family Trust and the Martial Trust
9 are hereinafter referred to as the "Sub Trusts".

10 2. Date and Place of Death

11 Charles L. Giles died on April 2, 2003 in Stanislaus County, California. Upon
12 the death of Charles L. Giles, an Administrative Trust was created for the administration of his
13 trust estate. Before the Trust could be distributed into the Sub Trusts, the surviving Trustor,
14 Bobette Giles died on December 31, 2004 in Stanislaus County, California. Therefore, the
15 division of the Trusts into Sub Trusts did not actually take place.

16 3. Appointment of Trustee and Jurisdiction and Venue

17 Petitioner, James Scott Blevins, was nominated as successor Trustee under
18 Article VIII subsection (A) on page 11 of the Trusts. On December 1, 2003, Bobette Giles
19 resigned as successor Trustee of the Trusts and James Scott Blevins consented to act as
20 successor Trustee and has been serving as successor trustee of the trusts since that date.

21 The principal place of administration is located in Stanislaus County, California.
22 The settlors, Charles L. Giles and Bobette Giles, were residents of Stanislaus County,
23 California. Stanislaus County, California is the usual place where the day-to-day activity of the
24 Trust is carried by the Trustee, James Scott Blevins. The Trustee resides in Stanislaus County,
25 California. Further, the Trust consists of real and personal properties located in Stanislaus
26 County, California. Therefore, jurisdiction and venue are proper under Probate Code Section
27 17000 et. seq.

1
2 4. Beneficiaries of Trust Estate

3 a. After the death of Charles L. Giles, his share of the Trust estate was to go
4 to the following beneficiaries:
5 i. \$1,000.00 to Stoney Dahlberg;
6 ii. \$25,000.00 to Dawn Morin; and
7 iii. \$25,000.00 to each grandchild of Charles L. Giles who is then living;
8 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L. Giles,
9 and Michael Giles.

10 All of the above distributions have been made.

11 b. In addition, after the death of Charles L. Giles, the Trust is to be split into
12 the Marital Trust, Family Trust and Survivor's Trust.

13 i. Upon the death of the surviving spouse, Bobette Giles, the Marital
14 Trust is to be distributed to the following beneficiaries:
15 1. \$50,000 to the Trustee of the Joseph L. Giles Trust.
16 2. 10% to Boys & Girls Club of Manteca;
17 3. 10% to St. Vincent De Pauls Society;
18 4. 10% to each grandchild of Charles L. Giles who is then living
19 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L.
20 Giles, and Michael Giles; and
21 5. The balance (40%) to Dawn Morin.

22 ii. Upon the death of the surviving spouse, Bobette Giles, the Family
23 Trust is to be distributed as follows:

24 1. \$50,000.00 to the Trustee of the "Joseph L. Giles Trust". To
25 date \$6,500 has been distributed to Joseph L. Giles from the
26 Joseph L. Giles Trust.
27 2. 10% to each grandchild of Charles L. Giles who is then living
28 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L.

Giles, and Michael Giles; and

3. The balance (40%) to Dawn Morin.

Distribution to any beneficiary named herein shall not be made outright to any beneficiary under the age of 25 years; rather distribution shall be made pursuant to the terms and provisions of the Beneficiaries' Trust as set forth on Exhibit "G" attached hereto and made a part hereof. By his signature hereto, James Scott Blevins consents to serve as the Trustee of said Beneficiaries' Trust.

c. Upon the death of the surviving spouse, the Survivor's Trust is to be distributed equally among Bobette Giles' children, William Blevins, Kelly Berginan, James Scott Blevins, Bryan Blevins, and Brent Blevins (hereinafter called "Bobette's Children").

At all times herein relevant, the above beneficiaries are adults. Below is a list of all beneficiaries and interested persons who are at all times herein mentioned adults, and their addresses:

William Blevins
337 Ruess Road
Ripon, CA 95366

Kelly Bergman
1172 Joseph Court
Ripon, CA 95366

James Scott Blevins
11277 Cleveland Avenue
Oakdale, CA 95361

Bryan Blevins
2091 Willow Lane
Lakewood, CO 80205

Brent Blevins
7887 Kostinow Court
Manteca, CA 95366

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© 2008, The Law Office of Michael J. Giles, PLLC
A Professional Law Corporation
101416 - Street, P.O. Box 3212
Modesto, CA 95333
Telephone: (209) 521-6260

Dawn Morin
15113 West Tasha Drive
Surprise AZ 85374

Joseph L. Giles
25050 Sandhill Blvd., #4b2
Punta Gorda, FL 33983

Jozilyn N. Thomas
25030 Sandhill Blvd., #4b2
Punta Gorda, FL 33983

Charles W. Giles, Jr.
5613 Lowell Street
Everett, WA 98203

Anthony L. Giles
5613 Lowell Street
Everett, WA 98203

Michael Giles
5613 Lowell Street
Everett, WA 98203

Stoney Dahlberg
5747 Roseburg Court
Riverbank, CA 95367

5. Summary of Account. The Trustee should be charged and credited as shown in the summary of account, along with supporting schedules, as set forth in the Summary of Account attached hereto as Exhibit "B" covering the period April 3, 2003 and ending December 31, 2007, and incorporated herein by reference. All cash has been invested and maintained in interest bearing accounts or in investments authorized by law or by the Trust, except such cash as is reasonably necessary for the orderly administration of the Trust estate.

6. Sales of Property. All sales of real property and personal property have been properly reported in the Summary of Account as set forth in Exhibit "B".

7. Reappraisal. All of the real property and partnership interests of the estate have been reappraised by Ben Whitmer as of March 1, 2008. A copy of the informal letter appraisal is attached to Exhibit "C" and made a part of this Petition. Formal appraisals have just been

1 8. Debts and Expenses. The Trustee has collected all assets belonging to the trust,
2 has filed all income tax returns, for the trust which have become due, and has paid all debts,
3 taxes, and current expense of trust administration, more specifically identified in the Trustee's
4 Account and Report, attached as Exhibit "B".

5 9. Affiliation with Agents

6 The Trustee did not use any agents that had any family or affiliate relationship
7 with Trustee.

8 10. Trustee's Compensation

9 The Trustee has not paid himself any compensation. Article VII, subsection (L),
10 on page 14 of the Trust authorizes the Trustee to pay himself reasonable compensation for
11 services rendered to the trust estate as Trustee. The Trustee has served in his capacity as
12 Trustee of the Trust since the resignation of Bobette Giles on December 1, 2003. Since that
13 period, Trustee has gathered up the trust assets, reviewed and compiled bank records and other
14 financial records of the trust, managed the trust estate, caused to be prepared and filed trust
15 estate and income tax returns, defended claims against the trust and gathered information for the
16 preparation of almost five years of extremely involved and complicated accountings due to the
17 fact that there were so many adjustments that had to be made (see Section 13). The Trustee has
18 spent hundreds of hours of his time working with and assisting Dan Gatto, CPA and the trust
19 attorney to reconcile the gifts and other adjustments made by the Trustees which have impacted
20 the distribution of the trust.

21 The fee requested by the Trustee is the sum of \$180,000 payable one half from
22 the Survivor's Trust and one-half from the Marital Trust. The fee is based on one percent per
23 annum of the lesser of the assets on hand as reported on the federal estate tax return of Bobette
24 Giles in the amount of \$4,912,228, and the assets on hand at the present time, in the
25 approximate amount of \$4,909,444.00. The fee computation is set forth as follows:

26

27

28

1	January 1, 2004 to December 31 2004—1% x \$4,900,000=	\$49,000
2	January 1, 2005 to December 31, 2005—1% x \$4,900,000=	\$49,000
3	January 1, 2006 to December 31, 2006—1% x \$4,900,000=	\$49,000
4	January 1, 2007 to December 31, 2007—1% x \$4,900,000=	\$49,000
5	January 1, 2008 to June 30, 2007 (projected distribution)—1% x \$4,800,000/2	\$24,500
6		
7	Total:	\$220,500
8		

9 The Trustee is willing to reduce the fee to \$180,000.

10 **11. Agent's Compensation**

11 **Accountants.** The Trustee retained Dan Gatto, CPA for accounting work on the
 12 trust estate, including the preparation of income tax returns, the 706 estate tax return, and the
 13 trustee account and report on Exhibit "B". The total amount paid to Dan Gatto, CPA through
 14 December 31, 2007 was approximately \$31,923.00.

15 **Appraisers.** The Trustee retained Ben Whitmer as appraiser to appraise the real
 16 property and the partnership interests of the Trust. To date, fees in the approximate amount of
 17 \$33,500.00 have been paid to Mr. Whitmer. An additional \$8,000 is anticipated to be paid to
 18 said appraiser pursuant to the contract presented to the Trust. Further, fees in the approximate
 19 amount of \$1,300 have been paid to Robert Erreca, Probate Referee as indicated herein.

20 **Attorneys.** The Trustee retained Gianelli & Associates as attorneys for
 21 representation on the administration of the trust estate and defense of a complaint filed in
 22 federal court by Dawn Morin, a beneficiary of the trust estate, as explained below. The total
 23 amount paid to Gianelli & Associates through March 30, 2008 is approximately \$75,074.65.
 24 Fees are itemized in Exhibit "F" attached hereto and made a part hereof.

25 **12. Filing of Federal Case**

26 On or about July 24, 2007, Dawn Morin filed a petition for declaratory relief
 27 regarding the no-contest clause of the Trust in the United States District Court, Eastern District
 28 of California, Fresno Branch, Case number 1:07-CV-01061-AWI-NEW. Counsel for Petitioner

1 attempted to informally request counsel for Dawn Morin to transfer the petition to state court.
 2 Counsel for Dawn Morin did not voluntarily dismiss the petition. Thus, counsel for Petitioner
 3 was required to file a motion to dismiss the case in federal court. On December 21, 2007, the
 4 Federal Court granted Petitioner's motion to dismiss the federal complaint. Petitioner incurred
 5 attorney's fees and costs in defending Dawn Morin's federal complaint.

6 13. Adjustments for Gifts and other Expenses: Except as otherwise set forth in this
 7 Section 13., all of the assets of Bobette Giles and Charles Giles were community property.
 8 Since the Trustors died within 18 months of each other, the Survivor's, Marital and Family
 9 Trust were never actually funded. Petitioner proposes therefore an equal division of the assets of
 10 the Trust estate, without regard to any changes in value between the first and second death, with
 11 half of the assets being allocated to the Survivor's Trust, the exemption equivalent amount
 12 being allocated to the Family Trust and the balance of the assets being allocated to the Marital
 13 Trust, all subject to the adjustments set forth in this Section.

14 Attached hereto as **Exhibit "D"** and made part hereof is a Schedule of Adjustments that
 15 the Trustee proposes will need to be made prior to distribution. The adjustments proposed to be
 16 made and the explanation for each adjustment is as follows:

- 17 a. Cash gifts to Bobette's donees: Subsequent to Charles' death, Bobette
 18 made certain gifts to her children and grandchildren, which gifts are set
 19 forth in **Schedule D1 of Exhibit "D"**. These gifts are being deducted
 20 from the Survivor's Trust to determine assets on hand for distribution.
- 21 b. MVE Stock Gift to Scott: Subsequent to Charles' death, Bobette gave
 22 her son, James Scott Blevins, 570.16 shares of stock in Mountain Valley
 23 Express, a California Corporation valued at \$1,000,000. This gift is being
 24 deducted from the Survivor's Trust to determine assets on hand for
 25 distribution.
- 26 c. Disbursements '03 and '04: The disbursements made by Bobette for '03
 27 and '04 except those chargeable to principal are being deducted from the
 28 Survivor's Trust to determine assets on hand for distribution. Said

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 Modesto, CA 95353
 Telephone: (209) 527-4260

1 Disbursements are more fully described and set forth on Schedule D2 of
2 Exhibit "D" as attached hereto.

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d. IRAs/Annuities. Certain IRAs and Annuities as set forth in Exhibit D are being deducted from the Survivor's Trust to determine assets on hand for distribution since these assets either named the trust as beneficiary or were changed by Bobette Giles to name her children as beneficiary after Charles Giles' death.

e. Income Tax Adjustment for '03 and '04. Income taxes paid for 2003 and 2004 up to the date of death have been computed by Dan Gatto, the trust estate CPA, and should be deducted from the Survivor's Trust as an offset against income earned subsequent to Charles Giles death and up to the date of death of Bobette Giles.

f. Charitable Bequests. Charitable bequests to be made from the Marital and Family Trust are being deducted from the Marital and Family Trust for purposes of determining assets on hand for distribution.

g. Specific bequests. Specific bequests of \$125,000 were made following Charles Giles' death from his share of the community property have been made and should be deducted from the Marital Trust and Family Trust to determine assets on hand for distribution.

h. Income Earned to 12/31/04. Exhibit D shows income earned by Bobette Giles subsequent to Charles Giles' death through December 31, 2004, the date of Bobette Giles' death. This income is being added to the Survivor's Trust to determine assets on hand for distribution.

i. Credit for amounts Paid by Beneficiaries to Trust. Bobette Giles' children repaid the Trust the amounts set forth in Exhibit "D" and should be added to the Survivor's Trust to determine assets on hand for distribution.

j. Gifts by Charles to Bobette. At Charles Giles' death, certain assets were left to Bobette by Charles outside the Trust estate. These assets are listed

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Modesto, CA 95353
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on Exhibit "D". These transfers to Bobette are being added to the Survivor's Trust to determine assets on hand for distribution.

k. Distribution to Joseph Giles. The sum of \$6,500 has been made as an advance distribution to Joseph Giles

l. Estate tax allocations. Estate taxes are being allocated among the beneficiaries as per **Exhibit "D"**, which allocation is based on each beneficiaries' pro-rata share of estate taxes. No estate taxes have been allocated to the charitable bequests, however the Marital Trust will receive the income tax benefits of the charitable gift deduction. See Section 13. m. below.

m. Credit for income taxes. Charitable deductions were inadvertently not taken on the estate tax return. A decision was made by the Trustee and his accountant that rather than amend the estate tax return and open it back up to audit and further delay distribution, distributions of \$495,633 were made to the charities and taken as a deduction from income taxes in 2005. Allocation of the credit for the tax deduction is computed by calculating the income tax in year 2005 without the charitable deduction of \$495,633. This results in federal tax of \$129,408 versus \$5,497 for a savings of \$123,911 and California tax of \$59,085 versus \$13,015 for a savings of \$46,070. The combined savings in income taxes to the Trust was \$169,981. This should be added to the Survivor's Trust to determine assets on hand for distribution.

Proposed Additional Sales. The Trustee proposes to sell the Trust's interest in the Stable Rd. property, the Messing Rd. property and the Sunnyview property and the Trustee has taken steps to accomplish these sales. Pursuant to the Property On Hand (Schedule G to Exhibit "B"), the Sunnyview property has been shown as being outside of the Keyway Partnership. It is anticipated that the Partners intend to distribute said property out of the partnership and eventually

1 sell said Sunnyview property.

2 The Trustee intends to comply with the procedures of Probate Code
3 Section 16500 et. seq. (Notice of Proposed Action) in accomplishing these sales.
4 Further, the Trustee requests authority to sell the Golden Valley Enterprises
5 Partnership interest to the five beneficiaries of the Bobette Giles Survivor's Trust
6 and to Dawn Morin for the sum of \$456,000, with each such beneficiary being
7 offered the right to purchase a one-sixth interest therein and each beneficiary
8 who elects to purchase such interest being responsible for paying the sum of
9 \$76,000, i.e., one sixth the purchase price, payable in cash at the Closing Date.

10 The sale would be subject to the following procedure:

- 11 i. Upon authorization by the Court by this Trustee giving each such
12 beneficiary written notice of their right to purchase immediately upon
13 authorization of this process by the Court.
- 14 ii. Each beneficiary will have 30 days from such written notice to either
15 accept or reject the offer to so purchase. Should any beneficiary fail
16 to so elect, notice will be sent by the Trustee to the beneficiaries who
17 have elected to purchase ("First Round Beneficiaries") of the name of
18 each beneficiary that fails to so elect in to purchase and the First
19 Round Beneficiaries will then have an additional 15 days to elect in
20 writing delivered to the Trustee to equally purchase the un-purchased
21 interest. Should any of the First Round Beneficiaries be unable or
22 unwilling to purchase the un-purchased interest within said 15 days,
23 then the beneficiaries who do elect to purchase the un-purchased
24 interest ("Second Round Beneficiaries") shall have an additional 15
25 days to elect in writing delivered to the Trustee to purchase the
26 additional un-purchased interest or not. The process will continue for
27 as many rounds as is necessary to determine if all of the un-purchased
28 interest can be purchased. Once it is determined that the entire un-

1 purchased interest can be purchased, the Trustee shall so notice the
2 Purchasing Beneficiaries in writing of the amount each of them owes
3 and each Purchasing Beneficiary shall have 30 days thereafter to pay
4 such amount to the Trustee. If the remaining un-purchased interest in
5 its entirety cannot be purchased in this manner then the Golden
6 Valley Partnership interest will be sold by the Trustee to a third party.
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10 15. Proposed Distribution: With the sale of the above properties, the Trust will
11 finally be in a position to be distributed. Distribution has been delayed due to several factors,
12 including the Trustee's desire not to make distribution until he received a tax clearance from the
13 Internal Revenue Service on the Estate Tax return; the disputes with beneficiary Dawn Motin,
14 including paternity issues raised by her concerning one of the grandchildren, and the
15 considerable time it has taken to sort out the above-mentioned adjustments and prepare a full
16 accounting going back five years to the death of Charles Giles. Trustee attempted numerous
17 times to meet with Dawn Motin and her attorney to attempt to work out a plan of distribution
18 but Dawn Motin and her attorney refused any such meetings and filed an action in federal court
19 which Trustee had to defend. Immediately prior to filing this Petition, Trustee was served with a
20 Petition by Dawn Motin demanding, among other things, an accounting.

21 Upon sale of the properties described in Section 14 above, and after taking into
22 consideration expenses and taxes attributable to such sales, the Trustee proposes distribution
23 pursuant to the Schedule of Distribution attached hereto as Exhibit "E" and made a part hereof.
24 Distribution shall be adjusted in the event the properties sell for more or less than set forth in
25 Section 14. Trustee also proposes that he retain in trust the sum of \$75,000 for a period of up to
26 one year as a reserve for administrative expenses ("Reserve"), including unknown or
27 unanticipated expenses.
28

CHURCHILL, PROUDFOOT, LTD.
A Professional Law Corporation
1014 16th Street, P.O. Box 3212
Modesto, 95352
Telephone: (209) 521-4260

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2 A summary of the proposed distributions, subject to any adjustments that may occur as a result
3 of the sale of the above mentioned properties for more or less than their appraised values, are as
4 follows:

5
6 a. The Keyway partnership will be divided and distributed equally among
7 William Blevins, Kelly Bergman, James Scott Blevins, Bryan Blevins,
8 Brent Blevins ("Bobette's children") and Dawn Morin.
9 b. Bobette Giles' children shall further be distributed the sum of \$176.72
10 cash each.
11 c. The Koftinow Rd. property and the sum of \$349,825.40 cash shall be
12 distributed to Dawn Morin.
13 d. The Joseph L. Giles Trust shall be distributed the amount of \$43,500.
14 e. The grandchildren of Trustor Charles Giles, namely Jozilyn N. Thomas,
15 Charles W. Giles, Jr., Anthony L. Giles, and Michael Giles, shall each be
16 distributed the amount of \$76,591.43 cash and a one fourth interest in the
17 Mountain Valley Express Note.
18 f. The amount of \$174,576.40 shall be distributed to Boys & Girls Club of
19 Manteca.
20 g. The amount of \$174,576.40 shall be distributed to St. Vincent DePauls
21 Society.
22 h. The Petitioner shall hold the Reserve for a period not to exceed one year
23 and at that time shall provide the beneficiaries with an accounting of the
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1 reserve and shall distribute the remaining funds in the same ratios as
2 distribution herein.

3 WHEREFORE, James Scott Blevins, Trustee of the Giles Revocable Living Trust
4 respectfully requests that the following orders be made:

5 1. The account and report of Trustee, James Scott Blevins, be approved and
6 confirmed;

7 2. That Trustee, James Scott Blevins, be authorized to pay himself \$180,000.00,
8 one half from the Survivor's Trust and one half from the Marital Trust as trustee fees;

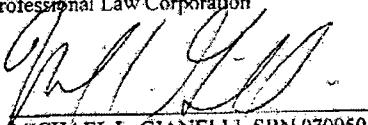
9 3. That the Trustee, James Scott Blevins, be authorized and directed to make the
10 proposed distributions as set forth in Section 15 of this Petition.

11 4. For such other relief as the Court deems just and appropriate.

12

13 DATED: April 8, 2008.

14 GIANELLI & ASSOCIATES
15 A Professional Law Corporation

16 By: 

17 MICHAEL L. GIANELLI, SBN 070950
18 Attorneys for Petitioner, James Scott Blevins,
19 Trustee of the Giles Revocable Trust

20 A Professional Law Corporation
21 1014 16th Street, P.O. Box 3212
22 Austin, Texas 78701-3212
23 Telephone: (512) 522-5260

VERIFICATION

I, James Scott Blevins, am a party to this action. I have read the foregoing document and know its contents. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct:

Executed on April 8, 2008 at Modesto, California.



JAMES SCOTT BLEVINS

James Scott Blevins
A Professional Law Corporation
1014 16th Street P.O. Box 3212
Modesto, CA 95355
Telephone (209) 521-6260

- 15 -

Petition to Approve and Confirm Account and Report, etc.

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PROOF OF SERVICE

I, LYNETTE G. MILLER, declare:

I am a citizen of the United States and a resident of the County of Stanislaus, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1014 – 16th Street, Modesto, California 95354.

I am readily familiar with the business practice for collection and processing of correspondence, and on April 10, 2008, I served:

PETITION TO APPROVE AND CONFIRM ACCOUNT AND REPORT OF TRUSTEE, APPROVAL OF PROPOSED DISTRIBUTION AND PAYMENT OF TRUSTEE'S FEES; CONSENT OF TRUSTEE OF BENEFICIARIES' TRUST

in the following manner and addressed as set forth below;

Via United States Postal Service: Such correspondence was enclosed in a sealed envelope with postage thereon fully prepaid, addressed as stated below. I caused such envelope to be deposited in the U.S. Mail at Modesto, California through the firm's ordinary course of business.

Via Telecopier. No. (209) 521-5971 during normal business hours on the date set forth below. The document(s) was transmitted via facsimile to the address and telecopier number set forth below. The document(s) was transmitted completely and without error.

William Blevins
337 Ruess Road
Ripon, CA 95366

Kelly Bergman
1172 Joseph Court
Ripon, CA 95366

James Scott Blevins
11277 Cleveland Avenue
Oakdale, CA 95361

Bryan Blevins
2091 Willow Lane
Lakewood, CO 80205

Brent Blevins
7887 Kofkinow Court
Manteca CA 95366

Dawn Morin
15113 West Tasha Drive
Surprise AZ 85374

Richard W. Morris
Attorney at Law
13951 West Grand Avenue, Ste. 203
Surprise, Arizona 85374

Joseph L. Giles
25050 Sandhill Blvd., #4b2
Punta Gorda, FL 33983

Joseph L. Giles#Y25969
Wakulla Correctional Institution
110 Melaleuca Drive
Crawfordville, FL 32327

Joseph Giles DCY25969
Brevard Work Camp
855 Camp Road
Cocoa, FL 32927 3700

- 16 -

Petition to Approve and Confirm Account and Report, etc.

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A Professional Law Corporation
1014 16th Street P.O. Box 9212
Modesto, CA 95354
Telephone: (209) 521-5260

1 Jozilyn N. Thomas
 2 25030 Sandhill Blvd., #4b2
 3 Punta Gorda, FL 33983

Charles W. Giles, Jr.
 5613 Lowell Street
 Everett, WA 98203

4 Anthony L. Giles
 5613 Lowell Street
 5 Everett, WA 98203

Michael Giles
 5613 Lowell Street
 Everett, WA 98203

6 Stoney Dahlberg
 7 5747 Roseburg Court
 8 Riverbank, CA 95367

Ramey Stairs APC
 Christopher L. Ramey
 8880 Rio San Diego, 8th Floor
 San Diego CA 92108

9 I declare under penalty of perjury under the laws of the State of California that the
 10 foregoing is true and correct and if called could truthfully testify thereto.

11 Dated: April 10, 2008 at Modesto, California.

12 lynnette g miller
 13 LYNNETTE G. MILLER

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 20 APPROVAL.GIGI.S.ROBETTE.MILLEN17200.Petition/Petition to Approve Account and Report.doc
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APPENDIX G

1 MICHAEL L. GIANELLI, SBN 070950
 2 NINI T. LEE, SBN 199109
 3 GIANELLI & ASSOCIATES
 A Professional Law Corporation
 1014 - 16th Street
 4 P. O. Box 3212
 Modesto, CA 95353
 5 Tel.: (209) 521-6260
 Fax: (209) 521-5971

6 Attorneys for Petitioner, JAMES SCOTT BLEVINS,
 7 Trustee of the Giles Revocable Living Trust

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

25
 FILED

2009 MAR 25 PM 1:02

CLERK OF THE SUPERIOR COURT
 COUNTY OF STANISLAUS

by *Lynne* *LESA* DEPUTY

Case No. 428549 428534 *4/28/09*

10 IN RE:

11 THE ADMINISTRATIVE TRUST, THE
 12 SURVIVOR'S TRUST, THE FAMILY
 13 TRUST AND THE MARITAL TRUST
 14 CREATED IN THE GILES REVOCABLE
 15 LIVING TRUST *w/i/d* January 18, 2002.

AMENDED PETITION TO APPROVE AND
 CONFIRM ACCOUNT AND REPORT OF
 TRUSTEE; PETITION TO APPROVE
 AGREEMENT BETWEEN TRUSTEE AND
 DAWN MORIN; APPROVAL OF
 DISTRIBUTION PLAN AND PAYMENT OF
 TRUSTEE'S FEES;

[Probate Code § 17200].

17 Hearing Date: MAY - 6 2009
 18 Time: 8:30 a.m.
 19 Dept.: 22

20 James Scott Blevins, Trustee of the Administrative Trust ("Administrative Trust"), the
 21 Survivor's Trust, the Family Trust and the Marital Trust (collectively referred to as the "Sub
 22 Trusts") created in the Giles Revocable Living Trust *w/i/d* January 18, 2002 (the "Trust"),
 23 presents the following Account and Report of trust administration and seeks the court's
 24 approval and confirmation of Account and Report of the Trustee and approval of proposed
 25 distribution and payment of attorney's fees:

26 I. Creation of Trust

27 Charles L. Giles and Bobette Giles ("Trustors"), husband and wife, executed the
 28

Amended Petition to Approve and Confirm Account and Report, etc.

1 Trust on January 18, 2002. A true and correct copy of the Trust is attached here to as Exhibit
 2 "A" and made a part hereof. The Trust provides that at the death of one of the Trustees, an
 3 Administrative Trust would be formed for the purpose of administering the trust and ultimately
 4 dividing it into the Sub Trusts defined below, which were to be administered until the death of
 5 the surviving Trustor. Trustee has, in fact, formed and has been operating the Administrative
 6 Trust since the death of Bobette Giles. The Survivor's Trust was to consist of the surviving
 7 spouse's half of the community property and the surviving spouse's separate property. The
 8 Family Trust and the Marital Trust were to consist of the first spouse to die's separate property
 9 and half interest in the community property to be divided between the two trusts according to a
 10 Marital pecuniary share formula.

11 2. Date and Place of Death

12 Charles L. Giles died on April 2, 2003 in Stanislaus County, California. Upon
 13 the death of Charles L. Giles, an Administrative Trust was created for the administration of his
 14 trust estate. Before the Trust could be distributed into the Sub Trusts, the surviving Trustor,
 15 Bobette Giles died on December 31, 2004 in Stanislaus County, California. Therefore, the
 16 division of the Trusts into Sub Trusts did not actually take place.

17 3. Appointment of Trustee and Jurisdiction and Venue

18 Petitioner, James Scott Blevins, was nominated as successor Trustee under
 19 Article VIII subsection (A) on page 11 of the Trusts. On December 1, 2003, Bobette Giles
 20 resigned as successor Trustee of the Trusts and James Scott Blevins consented to act as
 21 successor Trustee and has been serving as successor trustee of the trusts since that date.

22 The principal place of administration is located in Stanislaus County, California.
 23 The settlors, Charles L. Giles and Bobette Giles, were residents of Stanislaus County,
 24 California. Stanislaus County, California is the usual place where the day-to-day activity of the
 25 Trust is carried by the Trustee, James Scott Blevins. The Trustee resides in Stanislaus County,
 26 California. Further, the Trust consists of real and personal properties located in Stanislaus
 27 County, California. Therefore, jurisdiction and venue are proper under Probate Code Section
 28 17000 et. seq.

Amended Petition to Approve and Confirm Account and Report, etc.

1 4. Beneficiaries of Trust Estate

2 a. After the death of Charles L. Giles, his share of the Trust estate was to go
 3 to the following beneficiaries:

4 i. \$1,000.00 to Stoney Dahlberg;
 5 ii. \$25,000.00 to Dawn Morin; and
 6 iii. \$25,000.00 to each grandchild of Charles L. Giles who is then living:
 7 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L. Giles,
 8 and Michael Giles.

9 All of the above distributions have been made.

10 b. In addition, after the death of Charles L. Giles, the Trust is to be split into
 11 the Marital Trust, Family Trust and Survivor's Trust.

12 i. Upon the death of the surviving spouse, Bobette Giles, the Marital
 13 Trust is to be distributed to the following beneficiaries:

14 1. \$50,000 to the Trustee of the Joseph L. Giles Trust.
 15 2. 10% to Boys & Girls Club of Manteca;
 16 3. 10% to St. Vincent De Pauls Society;
 17 4. 10% to each grandchild of Charles L. Giles who is then living
 18 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L.
 19 Giles, and Michael Giles; and
 20 5. The balance (40%) to Dawn Morin.

21 ii. Upon the death of the surviving spouse, Bobette Giles, the Family
 22 Trust is to be distributed as follows:

23 1. \$50,000.00 to the Trustee of the "Joseph L. Giles Trust". To
 24 date \$6,500 has been distributed to Joseph L. Giles from the
 25 Joseph L. Giles Trust.
 26 2. 10% to each grandchild of Charles L. Giles who is then living
 27 namely Jozilyn N. Thomas, Charles W. Giles, Jr., Anthony L.
 28 Giles, and Michael Giles; and

3

3. The balance (40%) to Dawn Morin.

iii. Upon the death of the surviving spouse, the Survivor's Trust is to be distributed equally among Bobette Giles' children, William Blevins, Kelly Bergman, James Scott Blevins, Bryan Blevins, and Brent Blevins (hereinafter called "Bobette's Children").

At all times herein relevant, the above beneficiaries are adults. Below is a list of all beneficiaries and interested persons who are at all times herein mentioned adults, and their addresses:

William Blevins
337 Ruess Road
Ripon, CA 95366

Kelly Bergman
1172 Joseph Court
Ripon, CA 95366

James Scott Blevins
11277 Cleveland Avenue
Oakdale, CA 95361

Bryan Blevins
2091 Willow Lane
Lakewood, CO 80205

Brent Blevins
7887 Kossinow Court
Manteca, CA 95366

Dawn Morin
15113 West Tasha Dr
Surprise AZ 85374

Joseph L. Giles
2391 Burns Avenue
Melbourne, FL 32935

William N. Thompson

Jozilyn R. Thomas
28030 Sonchill Blvd

25030 Sanchill Blvd
Punta Gorda, FL 33983

Amended Petition to Approve and Confirm Account and Report, etc.

Charles W. Giles, Jr.
5613 Lowell Street
Everett, WA 98203

Anthony L. Giles
5613 Lowell Street
Everett, WA 98203

Michael Giles
5613 Lowell Street
Everett, WA 98203

Stoney Dahlberg
5747 Roseburg Court
Riverbank, CA 95367

Boys & Girls Club of Manteca
545 W. Alameda St.
Manteca, Ca. 95336

St. Vincent De Pauls Society
525 E. North St.
Manicca, Ca. 95336

5. Agreement with Beneficiary Dawn Morin. In January of 2007 Petitioner submitted an informal accounting and proposed distribution plan to all beneficiaries. Beneficiary Dawn Morin rejected at that time the proposed distribution plan and ultimately brought a Petition in the Stanislaus County Superior Court, Action Number 428336. Petitioner herein responded to said petition and filed for the court's approval a formal accounting and petition for distribution pursuant to Probate Code Section 17200.

Said proceeding resulted in an Agreement executed by Dawn Morin and the Petitioner which was signed by Dawn Morin and Petitioner on or about March 2, 2009 and recited on the Court record in the above entitled proceeding on that date. A true and correct copy of said Settlement Agreement is attached hereto as Exhibit "B" and made a part hereof.

6. Accountings. The Trustee has previously filed and submitted to the beneficiaries a full and complete accounting from the period commencing on the date of death of Charles Giles, April 2, 2003, and continuing until December 31, 2007. The accounting has been

Amended Petition to Approve and Confirm Account and Report, etc.

1 supplemented for the period ending December 31, 2008. A full and complete accounting for the
 2 period April 2, 2003, and ending December 31, 2008 is attached hereto as Exhibit "C" and
 3 made a part hereof.

4 7. Reappraisal. All of the real property and partnership interests of the estate were
 5 reappraised by Ben Whitmer as of January 9, 2009. A copy of the informal letter appraisal is
 6 attached to **Exhibit "D"** and made a part of this Petition.

7 8. Debts and Expenses. The Trustee has collected all assets belonging to the trust,
 8 has filed all income tax returns, for the trust which have become due, and has paid all debts,
 9 taxes, and current expense of trust administration and is now in a position to distribute the Trust
 10 Estates.

11 9. Affiliation with Agents

12 The Trustee did not use any agents that had any family or affiliate relationship
 13 with Trustee.

14 10. Trustee's Compensation

15 The Trustee has not paid himself any compensation. Article VII, subsection (I.),
 16 on page 14 of the Trust authorizes the Trustee to pay himself reasonable compensation for
 17 services rendered to the trust estate as Trustee. The Trustee has served in his capacity as
 18 Trustee of the Trust since the resignation of Bobette Giles on December 1, 2003. Since that
 19 period, Trustee has gathered up the trust assets, reviewed and compiled bank records and other
 20 financial records of the trust, managed the trust estate, caused to be prepared and filed trust
 21 estate and income tax returns, defended claims against the trust and gathered information for the
 22 preparation of almost five years of extremely involved and complicated accountings due to the
 23 fact that there were so many adjustments that had to be made (see Section 13). The Trustee has
 24 spent hundreds of hours of his time working with and assisting Dan Gatto, CPA and the trust
 25 attorney to reconcile the gifts and other adjustments made by the Trustors which have impacted
 26 the distribution of the trust, as well as time spent in defending the claims of Dawn Morin.

27 The fee requested by the Trustee is the sum of \$180,000 payable one half from
 28 the Survivor's Trust and one-half from the Marital Trust. The fee is based on one percent per ⁶

1 amount of the lesser of the assets on hand as reported on the federal estate tax return of Bobette
2 Giles in the amount of \$4,912,228, and the assets on hand each year thereafter. The fee
3 computation is set forth as follows:

4	January 1, 2004 to December 31, 2004—1% x \$4,900,000=	\$49,000
5	January 1, 2005 to December 31, 2005—1% x \$4,900,000=	\$49,000
6	January 1, 2006 to December 31, 2006—1% x \$4,900,000=	\$49,000
7	January 1, 2007 to December 31, 2007—1% x \$4,900,000=	\$49,000
8	January 1, 2008 to December 1, 2009—1% x \$4,500,000	\$45,000
9	January 1, 2009 to May 1, 2009 (proposed distribution date)	
10		
11	—1/3 x 1% \$4,500,000	\$15,000
12	Total:	\$256,000

Total: \$256,000

The Trustee is willing to reduce the fee to \$180,000.

11. Assets on Hand and Adjustments for Gifts and other Expenses: Attached hereto as Exhibit "E" and made part hereof is a Schedule of Assets on Hand Property, including Adjustments to the accounting of Bobbie and Charles estates which are explained as follows:

a. Cash Gifts to Bobette's donees: Subsequent to Charles' death, Bobette made certain gifts to her children and grandchildren, which gifts are set totaled \$455,351. These gifts are being deducted from the Survivor's Trust to determine assets on hand for distribution.

b. MVE Stock Gift to Scott: Subsequent to Charles' death, Bobette gave her son, James Scott Blevins, 570.16 shares of stock in Mountain Valley Express, a California Corporation valued at \$1,000,000. This gift is being deducted from the Survivor's Trust to determine assets on hand for

c. Disbursements '03 and '04. The disbursements made by Bobette for '03 and '04 except those chargeable to principal are being deducted from the 7

Accepted Pursuant to Approve and Confirm Account and Report, etc.

4 Survivor's Trust to determine assets on hand for distribution.

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d. IRAs/Annuities. Certain IRAs and Annuities as set forth in **Exhibit "E"** are being deducted from the Survivor's Trust to determine assets on hand for distribution since these assets either named the trust as beneficiary or were changed by Bobette Giles to name her children as beneficiary after Charles Giles' death.

e. Income Tax Adjustment for '03 and '04. Income taxes paid for 2003 and 2004 up to the date of death have been computed by Dan Gatto, the trust estate CPA, and should be deducted from the Survivor's Trust as an offset against income earned subsequent to Charles Giles death and up to the date of death of Bobette Giles.

f. Charitable Bequests. Charitable bequests which were made from the Marital and Family Trust are being deducted from the Marital and Family Trust for purposes of determining assets on hand for distribution.

g. Specific bequests. Specific bequests of \$125,000 were made following Charles Giles' death from his share of the community property have been made and should be deducted from the Marital Trust and Family Trust to determine assets on hand for distribution.

h. Income Earned to 12/31/04. Income earned by Bobette Giles subsequent to Charles Giles' death through December 31, 2004, the date of Bobette Giles' death is being added to the Survivor's Trust to determine assets on hand for distribution.

i. Credit for amounts Paid by Beneficiaries to Trust. Bobette Giles' children repaid the Trust the amounts set forth in **Exhibit "E"** and are being added to the Survivor's Trust to determine assets on hand for distribution.

j. Gifts by Charles to Bobette. At Charles Giles' death, certain assets were left to Bobette by Charles outside the Trust estate. These transfers to Bobette are being added to the Survivor's Trust to determine assets on. ⁸

1 hand for distribution.

2 k. Distribution to Joseph Giles. The sum of \$6,500 was made as an advance
3 distribution to Joseph Giles.

4 l. Estate tax allocations. Estate taxes are being allocated among the
5 beneficiaries as per Exhibit "E", which allocation is based on each
6 beneficiaries' pro-rata share of estate taxes. No estate taxes have been
7 allocated to the charitable bequests, however the Marital Trust will
8 receive the income tax benefits of the charitable gift deduction.

9 m. Credit for income taxes. Charitable deductions were inadvertently not
10 taken on the estate tax return. A decision was made by the Trustee and
11 his accountant that rather than amend the estate tax return and open it
12 back up to audit and further delay distribution, distributions of \$495,633
13 were made to the charities and taken as a deduction from income taxes in
14 2005. Allocation of the credit for the tax deduction is computed by
15 calculating the income tax in year 2005 without the charitable deduction
16 of \$495,633. This results in federal tax of \$129,408 versus \$5,497 for a
17 savings of \$123,911 and California tax of \$59,085 versus \$13,015 for a
18 savings of \$46,070. The combined savings in income taxes to the Trust
19 was \$169,981. This should be added to the Survivor's Trust to determine
20 assets on hand for distribution.

21 12. Proposed Plan of Distribution. The Trustee proposes a plan of distribution that
22 will result in each of the Beneficiaries receiving their proportionate share of the trust estate set
23 forth in Exhibit "F", and consistent with the Settlement Agreement reached between the
24 Trustee/Petitioner and Dawn Morin attached hereto as Exhibit "B". Said plan of distribution is
25 as follows:

26 A summary of the proposed distribution by Petitioner, subject to any accounting
27 adjustments that may occur between January 12, 2009 and the date of distribution is attached
28 hereto as Exhibit "F" and made a part hereof. Said Exhibit F provides for a proportionate

1 distribution of all assets from the combined Trust estates with the following exceptions in order
2 to comply with the Settlement Agreement of the Petitioner/ Trustee and Dawn Morin which
3 requires Dawn Morin to receive \$252,950.53 cash:

4 ---Petitioner/Trustee proposes to purchase from Dawn all of her proportionate interest in
5 Golden Valley Enterprises and \$35,506.48 of her interest in Keyway Enterprises.

6 ---Dawn Morin will receive a 100% interest in 7699 Kostinow Court, Manteca.

7 ---Dawn Morin will receive no interest in the Stable Rd. and Messing Road, Valley
8 Springs Properties and the Mountain Valley Express Note, and her interest in those
9 assets will be divided proportionately among the other beneficiaries.

10 ---The Boys & Girls Club and St. Vincent DePaul's Society will receive a greater
11 allocation of the Mountain Valley Express Note (combined 13.021169%) and none of
12 the cash, since they have already received combined \$495,168.00 cash, which is
13 disproportionate to cash received by other beneficiaries.

14 ---Dawn will have received \$1,865.88 more than her proportionate share of distribution.
15 This excess amount will be debited against her share of any funds remaining in the
16 Reserve.

17 WHEREFORE, James Scott Blevins, Trustee of the Giles Revocable Living Trust
18 respectfully requests that the following orders be made:

19 1. That Trustee, James Scott Blevins, be authorized to pay himself \$180,000.00,
20 one half from the Survivor's Trust and one half from the Marital Trust as trustee fees.

21 2. That the Trustee pay out of the combined trust the sum of \$10,000 to Dawn
22 Morin for reimbursement of a portion of attorneys fees she has incurred in connection with this
23 proceeding.

24 3. That Trustee's accounting on file here in be approved and settled and all actions
25 of the Trustee, all sales or transfers of assets set forth in the accounting, all accounting and
26 distribution adjustments set forth in Exhibit "F" to this Petition and all expenses and
27 disbursements incurred by Trustee be approved:

28 4. That the Settlement Agreement between the Trustee and Dawn Morin dated 10

1 March 2, 2009 be approved and its terms ratified by the above-entitled Court except as modified
2 herein;

3 5. That the Trustee be authorized and directed to make the proposed distributions as
4 set forth in Section 12 of this Petition, and in accordance with Exhibit "F" retaining a reserve of
5 \$100,000.

6 6. That the Trustee be directed to prepare a final accounting and disbursement of
7 any portion of the reserve that is left over at time of distribution, no later than December 31,
8 2009.

9 7. For such other relief as the Court deems just and appropriate.

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11 DATED: March 25, 2009.

12 GIANELLI & ASSOCIATES
13 A Professional Law Corporation

14 By:

15 MICHAEL L. GIANELLI, SBN 070950
16 Attorneys for Petitioner, James Scott Blevins,
Trustee of the Giles Revocable Trust

Gianelli & Associates, LLP
A Professional Law Corporation
1014 16th Street P.O. Box 3212
Modesto, CA 95353
Telephone: (209) 521-8260

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Amended Petition to Approve and Confirm Account and Report, etc.

VERIFICATION

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3 I, James Scott Blevins, am a party to this action. I have read the foregoing document
4 and know its contents. The same is true of my own knowledge, except as to those matters
5 which are therein stated on information and belief, and as to those matters, I believe them to be
6 true.

7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct.

9 Executed on March 9, 2009 at Modesto, California.

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12 JAMES SCOTT BLEVINS
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Petition to Approve and Confirm Account and Report, etc.