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Statement of Decision filed.




NEW FILE

1 SUPERIOR COURT
2 COUNTY OF SAN BERNARDINO
3 Probate Division, Department S36
4 247 West Third Street
5 San Bernardino, California 92415

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

NOV 13 2018

By 
Deputy

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN BERNARDINO**

11 IN THE MATTER OF THE
12 LOREN L. KIRK,
13
14 Deceased.

Case No.: PROPS1600025
STATEMENT OF DECISION

18 This is a motion for an Order for Terminating Sanctions based upon the actions
19 of a beneficiary of a will that was presented to the Court for Probate.

20 That Petition for Probate was filed in the San Bernardino Superior Court and set
21 for hearing on March 1, 2016. An objection was filed to that petition by the Petitioners.
22 In May, 2016, a Will Contest was filed by these Petitioners.

23 This Motion for Terminating Sanctions was filed on October 19, 2017. Daniel
24 Brown stood to inherit the bulk of \$43 million as the beneficiary to the will of the
25 decedent, Loren L. Kirk. That will was dated of January 12, 2009. Mr. Brown was
26 named the executor and beneficiary in the will. The will was prepared by Regina Brode
27 and she witnessed and attested the document along with a Raymond J. Lopez. Mr. Kirk
28 executed at least two originals of the 2009 document. One was left with Ms. Brode and

1 Mr. Kirk had the other. It was later found in Mr. Kirk's home in Big Bear.

2 The contestants are intestate heirs of Mr. Kirk. They are distant cousins who had
3 never met and probably were unknown to the decedent. Mr. Brown was not related to
4 the decedent.

5 Mr. Brown had been a friend of the decedent for many years although the
6 friendship could not necessarily be called a close friendship. Mr. Kirk had lent money to
7 Mr. Brown. He gave Mr. Brown \$250,000 in order to help Mr. Brown save his
8 residence. Mr. Brown had signed a Promissory Note as evidence of that loan.

9 Mr. Kirk was somewhat of a recluse and he was a hoarder. He owned four
10 properties, two in Big Bear, and two in greater Los Angeles. The Big Bear properties
11 were extremely cluttered and dirty with extreme hoarder-like conditions inside and
12 outside the house. There was hoarding throughout the house. His remains were found
13 there. Firearms, books, boxes and food were everywhere. Rat and mice droppings
14 were everywhere. The odor was strong and offensive. The photos introduced
15 documented this cluttered condition of the house.

16 He died on December 19, 2015 but he had decomposed badly. His body was
17 discovered after death had occurred.

18 Mr. Brown found out about the 2009 will that he was the named executor and
19 beneficiary shortly after the body was discovered. Mr. Brown then acted on instructions
20 given to him by the decedent with respect to his property, his burial and his animals.

21 He began to clean and throw away trash in the home. The size of all the trash
22 required help and many dumpsters. Mr. Brown said he saved papers that appeared
23 important. If it was legal, financial or important, Mr. Brown set it aside. He kept them
24 and later turned them over to Mr. Philipson, his first lawyer (they are now in the hands of
25 the Special Administrator). The Special Administrator was appointed on May 3, 2016.

26 Mr. Brown was primarily interested in safeguarding a large cache of guns and
27 ammunition that were in the home. He enlisted the aid of a local Deputy Sheriff who
28

1 was also a local gun dealer. All of the guns and ammunition were given to the Deputy
2 to safeguard.

3 During the cleanup of the home, there were at least two vehicles found and Mr.
4 Brown took them to his home. He also found a laptop computer and took it home.

5 The decedent's computer now becomes the focal part of this motion. On
6 January 16, 2016, Mr. Brown, while at his home, turns the computer on only to find it
7 has no type of password access requirement and opens up to nothing but pornography
8 sites and pop ups and other malware. He decides to delete all that he can of the
9 pornography on the computer. It's distasteful and possibly illegal. He stated that he
10 was concerned that he was using his WiFi while he was looking at the computer.

11 He is successful in deleting thousands of the pornography and malware files. He
12 later testifies that he starts to put some of his personal information on the computer. He
13 reasons that the computer is going to be his because of the will so why not use it. He
14 testifies to this on the motion and he gives such testimony in his deposition. He
15 thought he was successful in putting his information on the computer. Later the expert
16 testimony points out that he was unsuccessful.

17 Mr. Brown continues in the cleanup process in Big Bear and he also goes to the
18 other properties in Big Bear and Los Angeles. They also are cluttered and also have
19 code enforcement notices. One of the homes is where his mother, Elaine lived and
20 later died.

21 On March 1, 2016, the Petition for Probate is called in Court and an objection
22 arises. The objector also informed the Court that a Will Contest will be filed.

23 The contestants (Petitioners in this motion) are intestate heirs of Mr. Kirk. They
24 are distant cousins that live in Kansas and Arkansas. They have never met Mr. Kirk and
25 barely knew of him, but knew of his mother, Elaine. Elaine Kirk had died in 2001 and
26 Loren Kirk inherited her wealth. Mr. Kirk was very close to his mother as Mr. Brown had
27 been very close to his own mother. That fact had made them friends over the last 15
28 years of Mr. Kirk's life.

1 One year later, on March 16, 2017, Mr. Brown told his attorney about the
2 computer he had found. They asked him to bring it to them so they could allow the
3 contestants to examine it.

4 That evening, Mr. Brown, deleted all that he could from the files. He also used
5 software known as SD Shred to destroy the hardware. This software was already on
6 the decedent's computer.

7 He told the court why he did that at (Brown Testimony 78:20-80:20, August 2,
8 2018).

9 Q (BY MR. YARBROUGH:) Let's go back to the
10 computer then. Mr. Brown, talk a little bit about the deletions
11 versus complete destructions of files. You testified – you
12 admitted a moment ago that in March of 2017, you actually
13 destroyed files so that many of them could not be recovered
14 again; is that correct?

15 A Yes, I deleted them.

16 Q What was the purpose of that?

17 A As I said about the January time, I was
18 connected to the Internet while I was going through the
19 computer, looking for things relative to the estate, deleting
20 things that were pornographic, irrelevant – I realized in
21 March, the following year, that I had been connected through
22 my IP address, my MAC address.

23 I was very concerned about the tactics employed by
24 you and your client, and I was absolutely mortified of the
25 thought that you getting – you and your client getting any
26 information about my internet activity, account passwords,
27 anything that could have been latent or remaining on the
28 computer that could gain access to my network, or for that
matter, sites that I have visited and any credentials that
might have been remnant in that computer thereafter.

I was absolutely terrified. At that time, I also believed
that I had put personal information on that computer back in
January, the prior year.

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1 Would their detective, Barry Simon, sitting
2 outside of my door – sitting outside my door with a
3 transmitter, tying into my home network, you know, doing
4 things that would be used for nefarious purposes? These
5 people had attempted to foreclose on my home, they sued
6 me for \$60 million. At first, they were hinting of a murder
7 investigation. Mr. Carter passed on the word to a deputy
8 that he would be contacting a District Attorney.

9 I'm sorry, but I wouldn't trust you as far as I could
10 throw you. And I honestly, I regret that I did this, but I did it
11 out of fear. Oh, I regret that I did that.

12 Petitioner called as an expert, Mr. Timothy Weaver. Respondent called as an
13 expert, Mr. Bradley Maryman. Their examination of this computer revealed a number of
14 things.

15 It was first used in May of 2015. Mr. Kirk died on December 19, 2015. It was
16 used by Mr. Kirk in November of 2015 – six weeks or so before he died.

17 Mr. Kirk himself deleted 1.625 million files from this computer while he used it.

18 Mr. Kirk never used the Word program in this computer. Mr. Kirk never
19 transferred any files to this computer. The experts each had a different opinion on this
20 subject.

21 It was apparent to the experts that Mr. Kirk used his computer to watch
22 pornography and surf the web.

23 The testimony of these experts could never identify any useful document or piece
24 of evidence that would assist the Petitioners in the presentation of their Will Contest.

25 The experts were examined by being asked questions like what a
26 deleted/destroyed file “could” contain. Answers like: “It could have been a will, it might
27 not have been a will”, were common. The experts employed a number of methods to
28 capture information in deleted/destroyed files and the answers were always the same.

This is the issue that is so strongly raised by both parties. Petitioners say that
since he intentionally destroyed these files, he needs to show that the documents
destroyed were not material to issues in this case. The other side stresses the

1 argument that you can't punish/default him based on pure speculation that a document
2 may have been relevant or led to relevant evidence.

3 Mr. Brown also argues that another will, or evidence of testamentary intent hurts
4 Petitioner's Will Contest. Mr. Brown is correct in that a will does not help an intestate
5 case, it destroys the intestate case. Evidence of testamentary intent hurts an intestate
6 case since intestacy occurs when there is no testamentary intent shown.

7 The law seems to be clear that imposition of evidence sanctions requires a
8 showing that the destroyed evidence had a substantial probability of damaging moving
9 party's ability to establish an essential element of his claim or defense. *Williams v. Russ*
10 167 Cal.App.4th 1215 (2008). That showing was not made by the evidence presented.

11 Petitioners remind the Court of the use of "direct and circumstantial evidence" in
12 this case.

13 Direct evidence directly proves a fact. Circumstantial evidence is an inference
14 drawn from a fact or series of facts. Both direct and circumstantial evidence are given
15 equal weight.

16 The problem with circumstantial evidence is when more than one inference can
17 be drawn from the proven fact. If more than one inference is a reasonable inference,
18 then neither inference can be used by the trier of fact. Here, the analysis should be – if
19 Mr. Brown's conduct in destroying the files infers that he did so to destroy relevant
20 evidence is the only reasonable inference to be drawn from these facts. I say there are
21 more than one reasonable interpretations of this evidence.

22 Mr. Kirk used his computer to watch porn and surf the web. He did not create
23 any documents on the computer. Mr. Brown gave credible testimony that he deleted
24 the files and the reasons why he deleted them.

25 So his testimony along with the decedent's use of his computer is a reasonable
26 inference to be drawn from Mr. Brown's actions.

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1 Petitioners in their rebuttal argument to the court cite a 4th District Court of
2 Appeal decision and suggest I'm bound by the case. The facts are completely different
3 than ours.

4 In the case of *Electronic Funds Solutions, LLC v. Murphy*, 134 Cal.App.4th 1161
5 (2005) the court in its ruling stated. The holding of this case is as follows:

6
7 "The record provides ample support for the trial court's
8 actions. Specifically, plaintiffs were forced to repeatedly file
9 motions to compel on three sets of document requests and
10 two sets of specially prepared interrogatories. With one
11 exception, the court granted each of the motions and
12 imposed monetary sanctions. Defendants' persistent failure
13 to comply with the court's discovery orders resulted in a
14 discovery stay and continuance of the trial. Significantly, in
15 one of its discovery orders imposing monetary sanctions, the
16 trial court specifically warned defendants, in capital letters no
17 less, that any further failure to comply with the court's
18 discovery orders could result in terminating *1184 sanctions.
19 Although plaintiffs based their motion for terminating
20 sanctions on a host of discovery abuses, one in particular
21 demonstrates the egregious nature of their actions.

22
23 Category No. 4 of plaintiffs' second document inspection
24 demand sought: "The computer as to which the supplement
25 to the prior Document Demand indicates that various e-mails
26 were destroyed by a virus." This category references
27 defendants' claim that they were unable to produce certain
28 e-mail messages responsive to plaintiffs' first demand
because a computer virus had, between the time of the
request and defendants' production, destroyed the e-mails.
Defendants undoubtedly understood that plaintiffs sought
production of the computer's physical hard drive to recover
whatever portion of the allegedly damaged or destroyed e-
mails still existed. Defendants failed to object to this
category, but simply requested plaintiffs image the computer
on site at defendants' offices.

 Despite defendants' tacit agreement to furnish the
documents and the court's order that defendants produce
the responsive materials in their entirety, coupled with an
express warning that the court would impose terminating
sanctions if defendants failed to comply, defendants took it
upon themselves to run a "Data Eraser" program on the disk,

1 in an apparent attempt to destroy the e-mails responsive to
2 the previous document request. Plaintiffs recovered e-mails
3 from the computer only because defendants had not run the
4 program properly.

5 Given defendants' brazen violation of a discovery order in
6 the face of an express warning that terminating sanctions
7 could be issued, the trial court could have reasonably
8 concluded a lesser sanction would not have been sufficient
9 to compel compliance and that terminating sanctions were
10 necessary to provide plaintiffs' with the due process to which
11 they were equally entitled.

12 Defendants' contention that evidence of spoliation was
13 lacking is specious. As the trial court noted, defendants'
14 actions have made it virtually impossible to determine what
15 items defendants destroyed. The mere fact plaintiffs'
16 forensic consultant recovered some of the data does not
17 mean none was lost.

18 In any event, defendants' misuse of the discovery process
19 has been pervasive and consistent. Because ample
20 evidence in the record supports the decision to grant
21 terminating sanctions, we hold the trial court did not abuse
22 its discretion."

23 That case was completely different from ours. Here, there were no discovery
24 orders by the Court. The January 16, 2016 computer deletions occur before any
25 opposition to the will was filed. The Court never made a discovery order prior to the
26 March 16, 2017 deletion.

27 Mr. Murphy (the defendant in the cited case) was under all kinds of orders and
28 was warned of terminating sanctions if he went ahead and destroyed the evidence from
his computer. Heck, he even threatened a witness.

Petitioners argue that Mr. Brown makes a similar argument that Murphy made.
That is, Mr. Brown argues that terminating sanctions were inappropriate because
Petitioners could not establish what it was that Mr. Brown destroyed from the computer.

The Court in Murphy seems to imply that such an argument is specious. They do
say that but in what context?

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1 The Murphy Court commented on the facts and evidence presented to them. Its
2 ruling points out the reasons why the terminating sanctions order was proper in their
3 case.

4 In no way did that Court conclude as a general rule that Mr. Brown's argument is
5 a specious one.

6 The Court of Appeal found enough reason to terminate Murphy's case. Murphy
7 violated numerous discovery orders, was sanctioned and even warned of terminating
8 sanctions. Yet, he continued to violate orders and even threatened a witness. The
9 terminating sanctions imposed on him were not an abuse of discretion.

10 Here, Mr. Brown did none of the things that Murphy did. He violated no
11 discovery order nor was he ever sanctioned.

12 It would be an abuse of discretion to impose terminating sanctions.

13 We know from the experts that the computer was attacked on January 16, 2016
14 and March 16, 2017. Mr. Brown also confirmed that he was the one that performed
15 these deletions/destructions on these dates.

16 Petitioner's argument relies on speculation that the destroyed files could have
17 been a will or evidence of testamentary intent. The final analysis of the facts presented
18 are that Mr. Kirk used this computer to search and surf the web. He found many, many
19 pornographic sites which he must have enjoyed watching. He never used any features
20 on the computer to draft documents. He just watched or looked what came on the
21 screen.

22 In order to conclude that he had a will or other document of testamentary intent
23 on this computer is pure speculation.

24 Mr. Brown denies that he destroyed anything but evidence of pornography and
25 associated malware. He also says he destroyed what he put on the computer in the
26 form of personal and financial information. He testified to that in open court under cross
27 examination. He gave credible evidence.

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He was asked why he did this and I find that he gave credible responses.
I will not sanction Mr. Brown.

Dated this 13 of November, 2018


JAMES MICHAEL WELCH,
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

SAN BERNARDINO DISTRICT, PROBATE DIVISION

TITLE OF CASE (ABBREVIATED): In the Matter of
LOREN KIRK, Deceased
CASE NUMBER(S): **PROPS1600025**

DECLARATION OF SERVICE BY MAIL

My business address is: San Bernardino Superior Court, 247 West Third Street, San Bernardino, California 92415.

I hereby declare that I am a citizen of the United States, over the age of 18, employed in the above-named county, and not a party to nor interested in this proceeding. On November 13, 2018, I deposited in the United States mail at San Bernardino, California, a sealed envelope (postage prepaid) which contained a true copy of the attached:

NAME OF DOCUMENT:

STATEMENT OF DECISION

which was addressed as follows:

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At the time of mailing this notice there was regular communication between the place of mailing and the place(s) to which this notice was addressed.

I declare under penalty of perjury the foregoing to be true and correct.

DATED: November 13, 2018

BY: 
Kim Perez
Administrative Assistant II