

**ORIGINAL**

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA  
GENERAL CIVIL DIVISION

ESTATE OF LISA McPHERSON, by and  
through the Personal Representative,  
DELL LIEBREICH

Plaintiff,

vs.

Case No. 00-5682-C1  
Section 11

CHURCH OF SCIENTOLOGY FLAG  
SERVICE ORGANIZATION, INC.;  
JANIS JOHNSON; ALAIN KARTUZINSKI;  
and DAVID HOUGHTON,

Defendants.

FILED  
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CLERK OF DISTRICT COURT  
PINELLAS COUNTY, FLORIDA

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO CONTINUE TRIAL  
PENDING RESOLUTION OF ITS MOTION TO REMOVE  
THE PERSONAL REPRESENTATIVE IN PROBATE COURT**

COMES NOW the Plaintiff, ESTATE OF LISA McPHERSON and hereby replies to yet another Motion to Continue the Trial in this matter filed by the Defendant, CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION, INC. (COSFSO) This latest motion to continue the trial is premised on COSFSO's position that the trial cannot go forward as long as there is pending in Probate Court its fourth attempt to Remove the Personal Representative of the Estate of Lisa McPherson, Dell Liebreich. The ESTATE strenuously objects to this continuous stratagem to delay the trial. Any alleged irregularity of the appointment of the Personal Representative disappears with the court's issuance of Letters of Administration. Just because COSFSO now has been declared to have standing does not change its lack of evidence to remove Liebreich. The law of the case

doctrine forbids re-litigation of this issue and the same evidence. The multiple motions are strategically timed to delay the multiple trial start dates.

**FACTS.**

1. COSFSO lost the three day trial of December 16-17, 1999, and January 13, 2000 on its first Petition for Removal of Personal Representative by order of the Probate Court, Judge George Greer, dated February 3, 2000. Final Judgment was affirmed on appeal. COSFSO fully briefed the issues of fraud to the appellate court, including its allegation of forgery by Liebreich. See COSFSO'S brief attached as an exhibit to the Estate's Amended Motion to Dismiss COSFSO's Renewed Petition for Removal filed in Probate with a copy delivered to this court on January 7, 2003.

2. After obtaining an order granting summary judgment in the Clearwater case, case #OO-002750-CI-20, on breach of the litigation stipulation entered in this wrongful death case, COSFSO, claiming it now had standing as a creditor of the Estate, again filed another attempt for removal by filing its "Motion" for Removal of Personal Representative and Appointment Administrator Ad Litem, which was heard on May 2, 2002.<sup>1</sup> By order of May 30, 2002, this motion was denied without prejudice since it was not the proper pleading to file. In order to file a proper pleading, leave was granted to file a "petition" for removal per Probate Rule 5.025.

3. Knowing that a motion was not a proper pleading to attempt removal of the Personal Representative prior to the May 2 hearing, COSFSO had already filed on April

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<sup>1</sup>The Estate had filed an Offer of Judgment in the Clearwater case. If the offer becomes operative, the Estate will be the ultimate prevailing party. Also, the order of summary judgment is moot since COSFSO filed several amended complaints subsequent to this order.

30, 2002 its Renewed Petition to Remove Personal Representative. COSFSO only noticed the improper motion to be heard on May 2, 2002. The Estate filed a motion to dismiss this petition on May 1, 2002.

4. All three pleadings from 1999 to 2002 argued as its main point that Liebreich forged the signature of Fannie McPherson in order to be appointed personal representative. Without question, pursuant to the beneficiaries' trial testimony of 1999 and 2000, if Fannie McPherson had never signed the Consent and Waiver, Liebreich would still have been appointed through unanimous consent of the ultimate beneficiaries, her sisters and brother.

5. Since the order of May 30, 2002, stated that "the Church" was a creditor of the Estate, the Estate filed an appeal on June 27, 2002 by writ of certiorari, converted to a direct appeal under Case #2D-02-2568.

6. Since COSFSO, the slayer, having filed multiple actions in probate court to take over the wrongful death case, was interfering with the Estate's attempt to ready for trial, and was wasting the resources of the Estate, the Estate filed its motion for Emergency Stay on September 26, 2002, which was granted by the Second District Court of Appeal on October 1, 2002, staying the May 30, 2002 order which found that COSFSO had standing.

7. Then in December 2002, COSFSO filed yet another Renewed Petition to Remove the Personal Representative, asserting the same grounds for the fourth time.

8. Whether or not the allegations of forgery are true, which they are not, that issue has been decided in favor of Liebreich by the order of the Probate Court of February 3,

2000. Further, regardless of who is standing in the shoes of Lisa McPherson, there is a valid estate established under Florida law.

### ARGUMENT

COSFSO intentionally delayed filing its fourth attempt for removal in December, 2002. The same grounds supporting its current petition for removal of the Personal Representative was argued by COSFSO in 1999 resulting in the order of February 3, 2000 from the Probate Court, which was then followed by Final Judgment (see attached Exhibits 1 and 2).

In the order of February 3, 2000, the Probate Court specifically held:

The court finds that pursuant to *Retzel (Estate of Retzel v. CSX Transport, Inc., 586 So.2d 1247 (Fla. 1<sup>st</sup> DCA 1991))*, the letters of administration in the case at bar are, at most, voidable. However, there is no evidence that the personal representative in the matter pending before the court is acting adverse to the interest of the Estate and additionally there is no objection by the beneficiaries to the actions of the personal representative. As such, the church as a potential debtor of the Estate does not have standing to raise that issue. The court, in determining that the church does not have standing at this time to suspend the powers of the personal representative, finds that the church can act in reliance on the Letters of Administration issued by the court on February 4, 1997. (Emphasis added.)

All the cases cited by COSFSO have nothing to do with an estate in litigation. However, a case cited by COSFSO in the Probate action and relied upon by the Probate Court, *Estate of Retzel v. CSX Transport, Inc.*, would not only permit but encourage the wrongful death action to go forward even if the personal representative was removed during or after the trial due to improperly obtaining or not obtaining at all legal Letters of Administration. In *Retzel*, the stepmother of the deceased intentionally misrepresented

her status to the probate court by stating that she was the mother of the deceased minor child. As here in the McPherson case, the only one objecting to the appointment of the personal representative in *Retzel* was the defendant in the wrongful death case.

The court held that only in the event that there was **fraud which was adverse to the interest of the Estate**, would the Letters of Administration be void *ab initio*.

Even though the stepmother misrepresented her status as the mother in *Retzel*, the court held that

**We find no rational basis in the case law for holding that actions in behalf of and beneficial to an estate by an administrator appointed through some procedural irregularity must be declared void where such a result is adverse to the estate.** It is noted that there is no statutory provision mandating such action by the court. Indeed, the only provision addressing revocation is found in section 733.301(5), which provides that if a person who was entitled to, and has not waived, preference over the person appointed at the time of his appointment, and upon whom formal notice was not served seeks the appointment, the letters granted "may be revoked" and the person entitled to preference may have letters granted to him after formal notice and hearing. Furthermore, our view is strengthened by the 1977 amendment to then section 733.401(3), Florida Statutes (1977) providing that mistaken noncompliance with any of the requirements of subsection (1) of the statute "shall not be jurisdictional." Section 733.401(1)(b) provides that "after the petition for administration is filed, the court shall appoint the person entitled and qualified to be personal representative." We are of the view that this language substantially erodes appellee's argument that the court below was required to void appellant's appointment *ab initio*.

**We also disagree with appellee's contention that appellant's actions in securing appointment as personal representative in order to maintain the wrongful death action amounted to "fraud," justifying the court's action in declaring her appointment void *ab initio*.** Although appellant was misguided in the means employed by her,

**we find nothing so improper in appellant's attempt to preserve a cause of action for the benefit of the estate as to warrant the voiding of her actions.**

*Retzel*, at 1250-1251. (emphasis added).

The decision in *Retzel* shows without question, that if any improper actions taken by the personal representative are not adverse to the estate, then the personal representative shall not be removed.

Although there are at least three eyewitnesses to the signing by Fannie McPherson to Waiver and Consent to appoint Dell Liebreich as the personal representative of the Estate of Lisa McPherson, COSFSO continues to argue that the signature of Fannie McPherson is a forgery.

A full-blown trial was conducted on this matter of forgery. COSFSO called its handwriting expert and so did the Estate. The Probate Court announced in its order of February 3, 2000, that "there is no evidence" that Dell Liebreich acted adverse to the Estate. This is a binding final conclusion entitled to *res judicata*. It is the law of the case, since this decision finding no fraud was affirmed on appeal after being fully briefed to the Second District Court of Appeal by COSFSO. See its brief previously filed with this court on January 7, 2003.

The *Retzel* court further relied upon the Florida Supreme Court decision in *Griffin v. Workman*, 73 So.2d 844 (Fla. 1954), where suit was instituted by the father for the deceased minor, but the father had not yet in fact been appointed administrator of the estate. Before the Letters of Administration could be issued, one of the defendants filed a motion for dismissal in the wrongful death case. Subsequently, the daughter, sister of the decedent, was appointed administrator and moved to amend the complaint,

substituting her name in place of the father. Before ruling on that motion, the court dismissed the case. Subsequently, the father did become administrator of the estate and moved for substitution of parties and filed a Motion for Rehearing. All motions were denied by the trial court. The Supreme Court reversed and held that once Letters of Administration had been properly entered in the probate proceedings, the court committed reversible error in not allowing the cause to proceed forward. The court found that since there was no fraud or inequity involved, and no new cause of action would have been presented by allowing the father to prosecute the action to a conclusion, reversible error had been committed.

Even if the personal representative is improperly appointed, subsequent appointment of a substituted personal representative relates back to the filing of the original wrongful death complaint. *Cunningham v. Florida Dept. of Children & Families*, 782 So.2d 913 (Fla. 1<sup>st</sup> DCA 2001). Therefore, there is no prejudice to the defendant in the wrongful death case and as the Probate Court held on May 30, 2000, COSFSO can rely upon the Letters of Administration issued in 1997 to Dell Liebreich.

In the Estate of Lisa McPherson, there is no issue and no evidence that Dell Liebreich has ever acted adversely to the interest of the Estate or the beneficiaries.

Finally, in *Retzel*, the court cited the case of *Talan v. Murphy*, 443 So.2d 207 (Fla. 3d DCA 1983) where the father filed a wrongful death suit without first being appointed personal representative. When he finally moved to amend the complaint to show himself as personal representative, after obtaining Letters of Administration, upon motion of the defendant in the wrongful death case, the trial court dismissed with prejudice stating that the suit was barred now by the statute of limitations.

The Third District reversed, finding that amendments to the complaint relate back to the original filing. So even if under the strangest of circumstances, COSFSO was permitted to have a second bite of the apple and re-litigate the issues that it had already lost and which were affirmed on appeal, thus becoming the law of the case, and if the Probate Court decided to remove Dell Liebreich and appoint another family member or even a stranger as personal representative, the appointment would relate back to the original Letters of Administration. Nothing would change, there is no prejudice to COSFSO, and therefore, the trial should not be delayed one more day.

The most distinguishing factor concerning an estate bringing a wrongful death suit rather than a liquidator bringing a collection action<sup>2</sup>, where standing is contested, is that here in McPherson, the real party in interest is the estate, not the personal representative. The personal representative is only a conduit for the death claim.

The personal representative, as a statutorially-appointed (sic) party plaintiff in the wrongful death case, is merely a conduit for the settlement proceeds, and he is duty-bound to apportion the proceeds equitably among the estate and the survivors. ...the personal representative is not actively administering an estate. Instead, the personal representative has been appointed and the estate opened, solely to provide a vehicle for the wrongful death action.

*Thompson v. Hodson*, 825 So.2d 941 (Fla. 1<sup>st</sup> DCA 2002)

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<sup>2</sup>*Weisser v. FDIC*, 365 So.2d 1034 (Fla 3<sup>rd</sup> DCA 1979), cited by COSFSO, where a new trial is ordered because of no evidence of standing at trial. Here we have Letters of Administration. COSFSO fails to cite the subsequent decision that held that evidence attached to the new complaint was sufficient for standing. *FDIC v. Weisser*, 391 So.2d 733 (Fla 3<sup>rd</sup> DCA 1980).



The new Motion to Continue Trial filed by COSFSO is just another attempt among many to stop the case from proceeding to trial in violation of Florida law. §57.105(3), *Fla. Stat.* (2002).<sup>3</sup> The fact that a Final Judgment has been entered against COSFSO in its attempt to remove the personal representative shows that the Motion to Continue is not supported by fact or law in violation of Florida law. §57.105(1), *Fla. Stat.* (2002)<sup>4</sup>.

WHEREFORE, the Plaintiff, ESTATE OF LISA McPHERSON respectfully requests that the court deny the Defendant's Motion to Continue Trial since it has absolutely no effect and no prejudice on the Defendant, CHURCH OF SCIENTOLOGY COSFSO SERVICE ORGANIZATION, INC. Even if by some wild stretch of the imagination, COSFSO prevailed in removing Dell Liebreich as the personal representative, the ESTATE, and its beneficiary, the Estate of Fannie McPherson, mother of Lisa McPherson, are the true parties in interest and all of the beneficiaries of Fannie McPherson's estate

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<sup>3</sup> §57.105(3), *Fla. Stat.* states: At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the **court shall award damages** to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

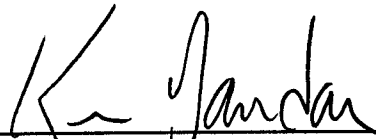
<sup>4</sup> §57.105(1), *Fla. Stat.* states: Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

had never objected to Dell Liebreich's appointment as personal representative of the ESTATE OF LISA McPHERSON. In fact, Dell Liebreich was properly appointed the personal representative of the Estate of Fannie McPherson, thus showing continuing approval by the ultimate beneficiaries and the probate court.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 9<sup>th</sup> day of January, 2003, to the attached service list.

  
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