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F I L E D
PROBATE SERVICES

AUG 23 2011

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5 Attorney for BRADD SCHWICHTENBERG

CLERK OF SUPERIOR COURT
SAN DIEGO COUNTY, CA

*ROA
#23*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO

10
11 In re the Matter of:) CASE NO. 37-2011-00150239-
12 THE SCHWICHTENBERG REVOCABLE) PR-TR-NC
13 FAMILY TRUST, dated) PETITION CONCERNING THE
14 July 28, 1982) INTERNAL AFFAIRS OF THE TRUST
15) AND FOR (1) FORENSIC ACCOUNTING
16) AND RESTORE TRUST "B" AND TRUST
17) "C"; (2) CHARGE GIFTS TO
18) CHILDREN AGAINST DISTRIBUTIVE
19) SHARE; AND (3) INVALIDATE GIFT
TO CARE CUSTODIAN
[PROBATE CODE §§17200, 21350]
DATE: 10/07/2011
TIME: 9:30 am
DEPT: 23

20 Petitioner, BRADD SCHWICHTENBERG, is the Trustors' son and
21 beneficiary of the SCHWICHTENBERG FAMILY REVOCABLE TRUST
22 ("Trust"). Petitioner's Petition concerns the internal affairs of
23 the trust and is a request for the Trustee, RUSTY GRANT ("RUSTY")
24 to prepare a forensic accounting of the actions taken by the
25 previous trustee, MARY SCHWICHTENBERG ("MARY"); for an Order that
26 Trust "B" and Trust "C" be restored; for an Order that lifetime
27 gifts to children be charged against their beneficial interest in
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1 the trust; and for an order that the gift to MINDA MCCONNELL is an

2 invalid gift to a care custodian.

3 The Trustors (NORMAN H. SCHWICHTENBERG and MARY R.

4 SCHWICHTENBERG) resided in San Diego County, North County, and the

5 Trust is being administered by the successor Trustee in said

6 County.

7 STATEMENT OF FACTS

8 Original Trust Declaration

9 Petitioner's parents were the Trustors of the SCHWICHTENBERG

10 REVOCABLE FAMILY TRUST, dated July 28, 1982. The Trust provided

11 that upon the death of the first Trustor, the trust assets were to

12 be divided into a Survivor's Trust (Trust "A") and a Decedent's

13 Trust (Trust "B"). Trust "B" becomes irrevocable on the death of

14 the first Trustor. The surviving Trustor was to act as Trustee of

15 both trusts.

16 Upon the death of the surviving Trustor, the trust was to be

17 distributed equally among the Trustors' four (4) children.

18 The Trustors executed a number of amendments to the trust,

19 but the trust was never restated.

20 First Amendment - August 18, 1989

21 The Trustors executed the First Amendment to Trust on August

22 18, 1989. The First Amendment modified the Trust from an AB

23 Trust to an ABC Trust. Trust "A" was the revocable Survivor's

24 Trust; Trust "B" was the irrevocable Decedent's Trust; and Trust

25 "C" was a Qualified Terminable Interest Property Trust (QTIP

26 Trust), also irrevocable.

27 The surviving Trustor (in this case, MARY), was to have

28 access to the entire income and principal of Trust "A", and the

1 entire income of Trusts "B" and "C". However, MARY could only
2 invade the principal of Trust "B" subject to an ascertainable
3 standard:

4 1. If the income payments were insufficient, then
5 sums of Trust "B"'s principal may be withdrawn "after
6 Trust "A" has been exhausted, as are reasonably required
7 for the surviving Trustor's proper support, maintenance,
8 health and education in the surviving Trustor's
9 accustomed manner of living at the time of the death of
10 the Trustor first to die."; and,

11 2. The Trustee, with the consent of the surviving
12 Trustor, may use the principal of Trust "B" for the
13 benefit of one or more of the Trustor's children, for
14 the purpose of their "proper support, health,
15 maintenance and education in their accustomed manner of
16 living existing at the time of death of the Trustor
17 first to die...." The Trust further provided that such
18 payments of principal to or for the child is to be
19 offset against that child's ultimate distribution.

20 Additionally, the surviving Trustor was allowed to invade the
21 principal of Trust "B" for "all maintenance costs, insurance,
22 assessments, property taxes, mortgage or trust deed payments,
23 utility bills, and expenses necessary for the proper upkeep of the
24 real property which Trustors' occupied as their principal place of
25 residence at the date of the death of the first Trustor to die."
26 (V(A)(2)).

27 The surviving Trustor was allowed to invade the principal of
28 Trust "C" "only after Trust A and Trust B have been totally

1 exhausted, as was reasonably required for the proper support,
2 maintenance and health of the surviving Trustor, in his or her
3 accustomed manner of living existing at the time of the death of
4 the Trustor first to die." (VI(C)(2)).
5 The beneficiaries remained the Trustors' four (4) children,
6 share and share alike.

7 Second Amendment - February 20, 1990

8 The Trustors executed a Second Amendment to the Trust on
9 February 20, 1990. The Trustors made a specific gift of real
10 property to their daughter, MELODY, and also cancelled any of her
11 debt that may have been outstanding to them. The gift of real
12 property and debt forgiveness was to be considered part of
13 MELODY's ultimate share of the assets, not in addition to it.

14 Third Amendment - May 10, 1993

15 The Trustors executed a Third Amendment to Trust on May 10,
16 1993. This Amendment created a specific gift of real property to
17 the Trustors' son, PAUL, and cancelled any debt of his that may
18 have been outstanding to the Trustors. The gift of real property
19 and debt forgiveness was to be considered part of PAUL's ultimate
20 share of the assets, not in addition to it.

21 The Third Amendment created a gift of \$100,000.00 to MARY's
22 sister, BETTY M. HURFMAN ("BETTY"), from Trust "B". This gift was
23 to be given to BETTY free of trust.

24 This amendment also modified the provisions for successor
25 trustee. The Trustors' daughter, Merrily Sue Schwichtenberg, (aka
26 JENNIFER GRANT) ("JENNIFER") was nominated as successor trustee.
27 This was the last amendment to mention the successor trustee
28 before the death of the first Trustor.

1 Fourth Amendment and Melody Underwood Property Trust - March 28,
2 1997

3 The Trustors executed the Fourth Amendment on March 28, 1997.
4 This amendment referred to a new trust created by the Trustors,
5 The Melody Underwood Property Trust, executed on the same day.
6 MELODY received a specific piece of real property, valued at
7 \$215,000.00, for the purpose of providing a residence for MELODY
8 and her minor children. MELODY's equal share of the trust estate
9 was to include this gift and not to be in addition thereto.

10 First Trustor Dies - July 28, 1997

11 NORMAN died on July 28, 1997. Upon his death, Trusts "B" and
12 "C" became irrevocable. All amendments made to the trust document
13 after this date only affect Trust "A".

14 Specific assets were distributed into Trust "A", Trust "B"
15 and Trust "C". Trust "A" was funded with \$913,491.53. Trust "B"
16 was funded with \$600,000.00 and Trust "C" was funded with
17 \$370,789.69. Petitioner is attaching **Exhibit A**, which is the
18 Allocation of the Trust Assets, completed on October 30, 1997.

19 Fifth Amendment- First Amendment to Trust "A" - October 14, 1997

20 This amendment modified the successor trustee of Trust "A",
21 naming JENNIFER as the successor trustee.

22 Sixth Amendment - Second Amendment to Trust "A" - June 17, 1998

23 The Sixth Amendment modified the distribution of Trust "A",
24 and stated that it is "the intention of the surviving trustor that
25 all of the trustors' children be treated equally." ((IV) (E) (2)).
26 Any loans received by any of the Trustor's children from the
27 Trustor were to be included in that child's share of the trust

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1 estate as well as the child's distribution from Trust "B" and

2 Trust "C".

3 Seventh Amendment - Addendum to Second Amendment to Trust "A" -

4 October 15, 2003

5 This Amendment modified the distribution provisions of Trust

6 "A". This Amendment also purports to cancel \$125,000.00 of a loan

7 made to JENNIFER, and further purports to apply the forgiveness to

8 Trusts "B" and "C" which were irrevocable and non-amendable.

9 Eight Amendment (titled Fifth Amendment) - July 12, 2010

10 On July 12, 2010 MARY executed the Eight Amendment (though

11 titled Fifth Amendment). This amendment purports to modify the

12 gift to BETTY from Trust "B" created in the Third Amendment. MARY

13 purported to restrict the \$100,000.00 (originally to be given to

14 BETTY free of trust) be held in trust, although Trust "B" had

15 become irrevocable and non-amendable.

16 The amendment reiterates that the gifts to PAUL and MELODY

17 are to be considered part of their final distribution, not in

18 addition to it.

19 said amendment gives JENNIFER a life estate in MARY'S

20 residence, located at 1521 Via Entrada Del Lago, Lake San Marcos,

21 California. The trust was to pay for all expenses incurred during

22 the life estate, including property taxes, homeowners dues,

23 insurance and maintenance.

24 said amendment gives \$20,000.00 each to MINDA MCCONNELL, who

25 was a paid care giver in the last year of MARY'S life, and IRMA

26 ARROYO, who was a longtime housekeeper of the trustors.

27 The Eighth Amendment nominated RUSTY as trustee of the Trust.

28 This amendment also included a very robust no-contest clause.

1 Ninth Amendment (titled Sixth Amendment) - July 22, 2010

2 This amendment clarified the nomination of RUSTY as successor
3 trustee.

4 MARY died on August 28, 2010.

5 RUSTY had been serving, and continues to serve, as trustee of
6 all Trusts.

7 AUDIT OF FORMER TRUSTEE'S ADMINISTRATION

8 Trustors created an "ABC" Trust. By the explicit terms of
9 the Trust, the surviving Trustor could invade the principal of
10 Trust "B" in limited circumstances and could only access the
11 principal of Trust "C" when there were no assets remaining in
12 either Trust "A" or Trust "B".

13 Reasons for the Division of Assets Into Separate Trusts Upon the
14 Death of the First Trustor

15 Trustors create "ABC" trusts for a variety of reasons, one of
16 which is federal estate tax planning. However, another compelling
17 reason to create separate trusts upon the death of the first
18 Trustor is to provide certainty for the first to die that his or
19 her assets will ultimately be distributed as he or she intended.

20 NORMAN was the first to die. NORMAN provided MARY access to
21 the income of his Trusts (Trust "B" and Trust "C"). NORMAN
22 allowed MARY access to the principal of Trust "B", however only
23 for certain purposes, and only if the assets in Trust "A" were
24 insufficient. MARY was not allowed to draw on the principal of
25 Trust "C" unless the assets in Trusts "A" and "B" were exhausted.
26 NORMAN ultimately wanted his assets to be divided among his
27 children, equally.

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1 Mary Violated Her Duties as Trustee of Trusts "B" and "C"

2 Despite the clarity of the Trust document, MARY invaded the
3 entire principal of Trust "C" and almost all of the principal of
4 Trust "B", while still leaving substantial assets in Trust "A".
5 Trust "A" contained approximately \$678,000.00, comprised of MARY's
6 San Marcos residence appraised at \$580,00.00; a California Bank
7 and Trust account worth approximately \$45,000.00; a Zurich account
8 worth approximately \$34,000.00; and a Stifel IRA, with Trust "A"
9 named as beneficiary, worth approximately \$19,000.00.

10 Forensic Audit Required

11 As set forth above, upon NORMAN's death on July 28, 1997, the
12 SCHWICHTENBERG Trust was divided into three (3) sub-trusts, "A",
13 "B" and "C". The value of each trust as of July 28, 1997 was as
14 follows:

15 A. Trust A: \$913,491.53

16 B. Trust B: \$600,000.00

17 C. Trust C: \$370,789.69

18 Petitioner is informed and believes that the approximate

19 value of each trust today is as follows:

20 A. Trust A: \$678,000.00

21 B. Trust B: \$237,903.48

22 C. Trust C: \$0

23 MARY was to receive the income from all three (3) sub-trusts;

24 however, MARY was to distribute principal, if needed, first from

25 Trust "A" before any distributions of principal were made from

26 Trust "C". Trust "B"'s principal was only subject to invasion

27 based on an ascertainable standard which took into consideration

28 assets she owned in Trust "A". Yet, the value of Trust "B" from

1 July 28, 1997 to August 28, 2010 (MARY's D.O.D.) declined from
2 \$600,000.00 to approximately \$237,903.48. The value of Trust "C"
3 declined from \$370,789.69 to \$0. Petitioner is informed and
4 believes the former Trustee, MARY, made improper distributions
5 from the principal of Trusts "B" and "C" prior to exhausting the
6 principal of Trust "A". The remedy for this breach of trust is to
7 return assets from Trust "A" to Trusts "B" and "C". In order to
8 determine the extent of the assets which should be returned to
9 Trusts "B" and "C" it is necessary for Trustee RUSTY to conduct a
10 forensic audit of the administration of the three (3) sub-trusts
11 from July 28, 1997 to August 28, 2010. Petitioner requests an
12 Order that Trustee RUSTY conduct such an audit and report the
13 results to this Court.

14 CHARGE LIFETIME GIFTS AGAINST INHERITANCE

15 The SCHWICHTENBERG Trust consists of ten (10) documents, the
16 original Trust and nine (9) amendments. With one exception (the
17 Seventh Amendment), the Trust documents are consistent that any
18 gifts given to Trustors' children are to be charged against that
19 child's share of the Trust estate. The Seventh Amendment was
20 executed after Trusts "B" and "C" became irrevocable. Therefore,
21 that amendment which purports to forgive \$125,000.00 of the amount
22 given to JENNIFER is applicable, if at all, only to Trust "A". In
23 order for this Trust to be distributed the Trustee must know the
24 amount of loans and gifts made by the Trustors to all of their
25 children. Petitioner requests an Order instructing Trustee RUSTY
26 to ascertain the amount of loans made to and gifts to each of
27 Trustors' children as of MARY's D.O.D., August 28, 2010.

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GIFTS TO CARE CUSTODIANS NOT ALLOWED PER PROBATE CODE §21350

1 The Eighth Amendment to Trust purports to make a gift of
2 \$20,000.00 to MINDA MCCONNELL. This gift is invalid. MINDA was
3 a paid care custodian of MARY during the time leading up to MARY's
4 death. Probate Code Section 21350 provides that a transfer to an
5 individual(s) who is "A care custodian of a dependent adult" is
6 invalid unless a Certificate of Independent Review was obtained.
7 Petitioner is informed and believes no Certificate of Independent
8 Review was obtained.
9 WHEREFORE, petitioner prays as follows:

10 1. For an order that RUSTY GRANT (or other independent
11 private fiduciary as appointed by the Court) complete a
12 forensic accounting from the date of death of the first
13 Trustor, July 28, 1997 through August 28, 2010;
14 2. For an order that, and subject to the results of a
15 forensic accounting, the assets from Trust "A" be returned to
16 sub-trusts "B" and "C";


17 3. For an order that gifts to any of the four beneficiaries,
18 MELODY, PAUL, JENNIFER and BRAD, (including loan
19 forgiveness), during the lifetime of MARY or NORMAN or both,
20 be charged against that child's respective share of the
21 trust assets;

22 4. For an order that the gift to MINDA be held invalid, under
23 Probate Code Section 21350;
24 5. For an order directing the distribution of the trust
25 estate to its beneficiaries;

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1 6. For such other and further relief as the Court deems just
2 and proper.

3 Dated: 8/15/11 LAW OFFICES OF RICHARD B. MACGURN

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5 
6 BRADD SCHWICHTENBERG By: Richard B. Macgurn, Attorney
 for BRADD SCHWICHTENBERG

7 VERIFICATION

8 I, BRADD SCHWICHTENBERG, am the Petitioner. I have read the
9 foregoing PETITION CONCERNING INTERNAL AFFAIRS OF THE TRUST AND
10 FOR (1) FORENSIC ACCOUNTING AND RESTORE TRUST "B" AND TRUST "C";
11 (2) CHARGE GIFTS TO CHILDREN AGAINST DISTRIBUTIVE SHARE; AND (3)
12 INVALIDATE GIFT TO CARE CUSTODIAN and know the contents thereof.
13 The same is true of my own knowledge, except as to those matters
14 which are therein represented on information and belief and, as to
15 those matters, I believe it to be true.

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

18 Dated this 15th day of August, 2011 at Washington, D.C.

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21 
22 BRADD SCHWICHTENBERG

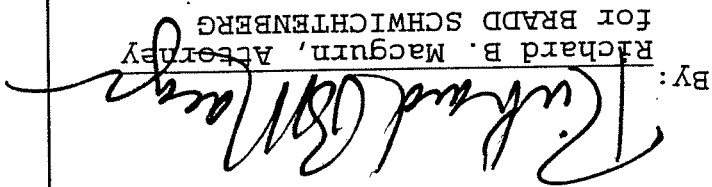
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6. For such other and further relief as the Court deems just

and proper.

Dated: 8.15.11

LAW OFFICES OF RICHARD B. MACGURN

By:  Richard B. Macgurn, Attorney
for BRADD SCHWICHTENBERG

BRADD SCHWICHTENBERG
Signature via facsimile

VERIFICATION

I, BRADD SCHWICHTENBERG, am the petitioner. I have read the

foregoing PETITION CONCERNING INTERNAL AFFAIRS OF THE TRUST AND

FOR (1) FORENSIC ACCOUNTING AND RESTORE TRUST "B" AND TRUST "C";

(2) CHARGE GIFTS TO CHILDREN AGAINST DISTRIBUTIVE SHARE; AND (3)

INVALIDATE GIFT TO CARE CUSTODIAN and know the contents thereof.

The same is true of my own knowledge, except as to those matters

which are therein represented on information and belief and, as to

those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the

State of California that the foregoing is true and correct.

Dated this 15th day of August, 2011 at Washington, D.C.

BRADD SCHWICHTENBERG
Signature via facsimile

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Chart #2
Revised 10/30/97 - Final

THE SCHWICHTENBERG FAMILY TRUST
ALLOCATION OF TRUST ASSETS

Trust Assets at date of death:	DOD Value	50% to Trust A	Allocated Value	81.8% to Trust B	Allocated Value	38.2% to Trust C	Allocated Value
Real Property: Residential real property located at 1521 Via Entrada Del Lago, San Marcos, CA 92069	235,000.00	100%	\$235,000.00				
Brokerage Accounts: A. G. Edwards account #557. 021590-013							
200 shares Baimco	1,800.00					200 shares	1,800.00
200 shares Bonavisia Petroleum Ltd.	189.10	200 shares	189.10				
143 shares Centex Corp.	7,395.78	143 shares	7,395.78				
18 shares El Paso Natural Gas Co New	1,037.81	18 shares	1,037.81				
100 shares Fluor Corp.	5,928.13					100 shares	5,928.13
240 shares Fortune Brands Inc	8,407.50	240 shares	8,407.50				
240 shares Gallaher Group PLC							
Sponsored ADR							
624 shares Kimberly Clark Corp	4,350.00	240 shares	4,350.00				
600 shares Loews Corp.	31,375.50					600 shares	31,375.50
600 shares Mesa Inc.	62,212.50	600 shares	62,212.50				
200 shares Mitchell Energy & Dev Corp., Class A	3,412.50					600 shares	3,412.50
40 shares Newport News Shipbuilding Inc	4,768.75					200 shares	4,768.75
200 shares Tainoco Inc. New	811.25	40 shares	811.25				
3,987,241 shares Franklin Calif Tax Free Trust Insured Tax Free Income Fund - Class I	9,400.00					200 shares	9,400.00
IDS Account #57303190 3 021	49,681.02			3,987,241 shares	49,681.02		
572,931 shares IDS High Yield Tax- Exempt Fund							
Exempt Fund	2,652.67	572,931 shares	2,652.67				
\$162,000 United States Treasury Bond, 13.1250%, due 5/15/2001							
\$216,000 United States Treasury Bond, 13.2500%, due 5/15/2014	200,728.12	\$162,000	200,728.12				
124,230,901 shares IDS High Yield Tax-Exempt Fund	338,107.50	\$164,000	256,711.25			\$62,000.00	81,396.25
Cash:	574,830.02						
Annuitties:	48,932.38						
IDS Immediate Annuity Policy #9300 3106633-3	263,260.69						
Miscellaneous Assets: 1995 Dodge Van, with medical transport upgrades	25,000.00	100%	25,000.00				
Clothing, furniture and furnishings, and personal effects	5,000.00	100%	5,000.00				
	1,884,281.22		\$913,491.53		\$600,000.00		\$370,789.69

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