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PROBATE SERVICES
JUL 22 2011
CLERK OF SUPERIOR COURT
SAN DIEGO COUNTY, CA

5 Attorneys for JENNIFER GRANT
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION**

RCA
#14

10 In the Matter of:) Case No. 37-2011-00150239-PR-TR-NC
11)
12 SCHWICHTENBERG REVOCABLE) **PETITION FOR ORDERS (1) REMOVING**
FAMILY TRUST dated July 28, 1982) **RUSTY GRANT AS TRUSTEE OF TRUST A;**
13) **(2) APPOINTING TEMPORARY TRUSTEE**
14) **OF TRUST A AND DIRECTING DELIVERY**
15) **OF ASSETS TO TEMPORARY TRUSTEE;**
16) **(3) CONFIRMING JENNIFER GRANT AS**
17) **TRUSTEE OF TRUST B AND TRUST C AND**
18) **DIRECTING DELIVERY OF ASSETS TO**
19) **HER; (4) PRECLUDING RUSTY GRANT**
20) **FROM USING TRUST A ASSETS FOR**
21) **TRUSTEE AND ATTORNEY'S FEES AND**
22) **COSTS WITHOUT COURT ORDER; (5)**
23) **PRECLUDING RUSTY GRANT FROM**
24) **USING TRUST ASSETS TO PAY ANY**
25) **EXPENSES, TRUSTEE'S FEES OR**
26) **ATTORNEY'S FEES ASSOCIATED WITH**
27) **TRUST B OR TRUST C WITHOUT COURT**
28) **ORDER; (6) SURCHARGING RUSTY**
GRANT FOR PENALTIES, LATE FEES,
INTEREST AND OTHER COSTS AND
EXPENSES ATTRIBUTABLE TO HER
NEGLIGENT FAILURE TO MAINTAIN
TRUST PROPERTY AND FAILURE TO
FOLLOW TERMS OF TRUST; AND (6)
GRANTING PETITIONER COSTS
INCLUDING REASONABLE ATTORNEY'S
FEES [Prob. Code §§ 15642, 17200(b)(10)]
)
)
) Date: **OCT 07 2011**
) Time: **9:30 A.M.**
) Dept.: N-23
) Judge: Hon. Harry L. Powazek
)

1 Petitioner JENNIFER GRANT, individually and in her capacity as successor trustee of Trust
2 B and of Trust C of the SCHWICHTENBERG REVOCABLE FAMILY TRUST dated July 28,
3 1982, as amended (“Jennifer” or “Petitioner”), respectfully submits her *“Petition For Orders (1)*
4 *Removing Rusty Grant As Trustee Of Trust A; (2) Appointing Temporary Trustee Of Trust A And*
5 *Directing Delivery Of Assets To Temporary Trustee; (3) Confirming Jennifer Grant As Trustee Of*
6 *Trust B And Trust C And Directing Delivery Of Assets To Her; (4) Precluding Rusty Grant From*
7 *Using Trust A Assets For Trustee and Attorney’s Fees And Costs Without Court Order; (5)*
8 *Precluding Rusty Grant From Using Trust Assets To Pay Any Expenses, Trustee’s Fees Or*
9 *Attorney’s Fees From Trust B Or Trust C Without Court Order; And (6) Granting Petitioner Costs*
10 *Including Reasonable Attorney’s Fees”* as follows:

11 I

12 **BACKGROUND**

13 **A. The Parties**

14 1. Settlers Norman and Mary Schwichtenberg, husband and wife, established the
15 Schwichtenberg Revocable Family Trust on July 28, 1982, naming themselves as co-trustees. The
16 settlors’ four children, Jennifer Grant, Melody Underwood, Paul Schwichtenberg, and Bradd
17 Schwichtenberg, are the remainder beneficiaries, and Jennifer, Melody and Paul are also legatees of
18 pre-residuary bequests. Norman Schwichtenberg died on July 28, 1997. The surviving settlor,
19 Mary Schwichtenberg, died on August 28, 2010.

20 2. Respondent, Rusty Grant (“Rusty”), is an attorney, and the named successor trustee
21 of Trust A pursuant to amendments to the Trust executed by Mary Schwichtenberg after the death
22 of Norman Schwichtenberg. Rusty Grant is not related to Jennifer Grant or to any members of the
23 Schwichtenberg family and, but for the amendments naming her as successor trustee of Trust A
24 upon the death of Mary Schwichtenberg, Rusty Grant is a complete stranger to the Trust. Rusty has
25 also assumed to act – without legal authority – as trustee of the entire Trust, not just Trust A.

26 3. Petitioner, Jennifer Grant (aka Merrily Sue Schwichtenberg), one of the settlors’
27 daughters, was named in the May 10, 1993 Amendment to the Trust as successor trustee of all
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1 subtrusts of the Trust upon the death of Mary Schwichtenberg. Notwithstanding the later Trust
2 amendment naming Rusty Grant successor trustee of Trust A, Jennifer remained the duly named
3 successor trustee of both Trust B and Trust C pursuant to the May 10, 1993 Amendment, although
4 as set forth below, she did not become aware of this until April 2011, at which time she
5 immediately informed Rusty's counsel and Rusty, who is also an attorney and who should have
6 known and told Jennifer of this at the beginning.

7 **B. Jurisdiction and Venue**

8 4. The principal place of administration of Trust A of the Schwichtenberg Revocable
9 Family Trust is currently in the city of Escondido in San Diego County, California, and Trust A
10 holds title to real property located in Lake San Marcos, also in San Diego County. Therefore, venue
11 is appropriate in the Superior Court for the County of San Diego, North County Division.

12 **C. The Schwichtenberg Trust and Its Amendments**

13 5. The original declaration of trust, signed by both trustors, is dated July 28, 1982. A
14 true and correct copy of the original declaration of trust is attached as Exhibit A to the Notice of
15 Lodgment ("N/L") filed herewith and is incorporated herein by this reference. While both trustors
16 were living, they jointly amended the Trust several times. Those joint amendments are: (1) an
17 August 18, 1989 Amendment, signed by both trustors and entitled "Amendment to the
18 Schwichtenberg Revocable Family Trust dated July 28, 1982"; (2) a February 20, 1990
19 Amendment, signed by both trustors and entitled "Second Amendment to the Schwichtenberg
20 Revocable Family Trust dated July 28, 1982"; (3) a May 10, 1993 Amendment, signed by both
21 trustors and entitled "Third Amendment to Schwichtenberg Revocable Family Trust dated July 28,
22 1982"; (4) a March 28, 1997 Amendment, signed by both trustors and entitled "First Amendment
23 to Schwichtenberg Revocable Family Trust." True and correct copies of the August 18, 1989
24 Amendment, the February 20, 1990 Amendment, the May 10, 1993 Amendment, and the March 28,
25 1997 Amendment are attached as Exhibits B through E to the N/L and incorporated herein by this
26 reference.

1 6. Following the death of Norman Schwichtenberg, Mary Schwichtenberg executed
2 several more amendments, as follows: (5) an October 14, 1997 Amendment, signed by Mary R.
3 Schwichtenberg and entitled "First Amendment to Trust A of the Schwichtenberg Revocable
4 Family Trust;" (6) a June 17, 1998 Amendment, signed by Mary R. Schwichtenberg and entitled
5 "Second Amendment to Trust A of the Schwichtenberg Revocable Family Trust;" (7) an October
6 15, 2003 Amendment, signed by Mary R. Schwichtenberg and entitled "Addendum to the Second
7 Amendment to Trust A Section 1:2 of the Schwichtenberg Revocable Family Trust Dated July 17,
8 1998 to the Schwichtenberg Revocable Family Trust Dated July 28, 1982;" (8) a July 12, 2010
9 Amendment, signed by Mary R. Schwichtenberg and entitled "Fifth Amendment to the
10 Schwichtenberg Revocable Family Trust Dated July 28, 1982;" and (9) a July 22, 2010
11 Amendment, signed by Mary R. Schwichtenberg and entitled "Sixth Amendment to the
12 Schwichtenberg Revocable Family Trust Dated July 28, 1982." True and correct copies of the
13 October 14, 1997 Amendment, the June 17, 1998 Amendment, the October 15, 2003 Amendment,
14 the July 12, 2010 Amendment, and the July 22, 2010 Amendment are attached as Exhibits F
15 through J to the N/L and incorporated herein by this reference.

16 7. Detailed descriptions of the various Trust amendments are set forth in Jennifer's
17 Response and Objections to the Petition as *supplemented* "Regarding Internal Affairs Of Trust (1)
18 To Allow Extrinsic Evidence In The Interpretation And Construction Of Trust Documents, (2)
19 Running Of The Statutory Period Of Code Section 16061.7, (3) Order Requiring The Sale Of The
20 Real Property In The Trust, (4) Order Abating The Bequests In Trust A, (5) Order Trust Assets
21 Cannot Be Used To Defend Any Challenge Between Trust Beneficiaries As To The Validity Of
22 Any Trust Document And (6) Order Trust Assets Can Be Used To Determine Ambiguity And
23 Construction Of Trust" filed in this Court on behalf of Rusty Grant on or about May 17, 2011 and
24 supplemented on or about June 14, 2011. A true and correct copy of Jennifer's aforementioned
25 Response and Objections is attached as Exhibit K to the N/L and incorporated herein by this
26 reference.

1 8. **Revocation and Amendment:** The original declaration of trust, dated July 28, 1982
2 and signed by both trustors, clearly provides that after the death of the first trustor to die, Trust B
3 may not be amended or revoked:

4 B. After Death of First Trustor to Die.

5 *From and after the death of the first Trustor to die, the surviving*
6 *Trustor shall have the power to amend or revoke Trust A (as*
7 *hereinafter described), in whole or in part by an instrument in writing*
8 *delivered to the Trustee; the Trust B (as hereinafter described), may*
 not be amended or revoked by any person. Upon the written election
 of both Trustors, this Trust shall become irrevocable and not be
 subject to amendment.

9 (N/L, Exhibit A, Article I, ¶ B [Emphasis added.]) No amendment modified this provision, so it
10 remained the operative provision governing amendment and revocation of the Trust. Since Norman
11 Schwichtenberg died on July 28, 1997, none of the amendments signed after that date by Mary
12 Schwichtenberg alone could apply to Trust B.

13 9. **Successor Trustee Provisions of the May 10, 1993 Amendment:** The May 10, 1993
14 Amendment replaced Section A of Article X with the following provisions:

15 A. NORMAN H. SCHWICHTENBERG and MARY R. SCHWICTENBERG shall serve as
16 cotrustees.

17 1. If NORMAN H. SCHWICHTENBERG shall become
18 unwilling or unable for any reason to serve as cotrustee, then MARY
19 R. SCHWICHTENBERG shall serve as sole trustee. If MARY R.
20 SCHWICHTENBERG shall become unwilling or unable for any
 reason to serve as sole trustee, MERRILY SUE
 SCHWICHTENBERG, also known as JENNIFER GRANT, shall
 serve as successor trustee.

21 2. If MARY R. SCHWICHTENBERG shall become unable
22 or unwilling to serve as cotrustee with NORMAN H.
23 SCHWICHTENBERG, MERRILY SUE SCHWICHTENBERG, also
24 known as JENNIFER GRANT, shall serve as cotrustee with him. If
 NORMAN H. SCHWICHTENBERG is unable or unwilling for any
 reason to serve as cotrustee, then MERRILY SUE
 SCHWICHTENBERG, also known as JENNIFER GRANT, shall
 serve as successor sole trustee.

25 3. At all times while MERRILY SUE SCHWICHTENBERG,
26 also known as JENNIFER GRANT, is serving as trustee or cotrustee,
27 she shall be empowered to nominate an institutional or corporate
28 cotrustee to serve with her or as successor to her. She shall also retain
 the right to remove and replace that corporate or institutional trustee
 with another corporate or institutional trustee. At such time as she is
 unwilling to act as trustee or cotrustee, a majority of the adult income

1 beneficiaries of this trust shall be empowered to nominate a corporate
2 or institutional trustee over this trust and all trusts created hereunder,
3 and to remove and replace any corporate or institutional trustee or
4 cotrustee with another corporate or institutional trustee or cotrustee.

(N/L, Exhibit D, ¶ 4)

5 10. ***The July 12, 2010 Amendment of Trust A (N/L, Exhibit I):*** The July 12, 2010
6 Amendment expressly recites that it is made pursuant to the surviving trustor's power to amend the
7 Trust under the provision governing "Revocation and Amendment: After Death of First Trustor to
8 Die," set forth in Article 1, paragraph B, of the original Trust instrument. As set forth above, this
9 provision reserved to the surviving trustor the power to amend or revoke Trust A, but not Trust B,
10 which was made irrevocable (and therefore unchangeable [*see Prob. Code § 15402*]) upon the death
11 of Norman Schwichtenberg, the first trustor to die.

12 11. ***The July 12, 2010 Amendment Added a Provision Granting a Life Estate in the***
13 ***Trustor's Home to Jennifer Grant:*** The new provision, paragraph 3-(d), states:

14 3-(d) MERRILY SUE SCHWICHTENBERG, better known as
15 JENNIFER GRANT, shall be given a life estate in the real property
16 located at 1521 Via Entrada Del Lago, Lake San Marcos, California
17 ("Trustor's Home") including all contents not designated to other
18 beneficiaries. The trustee shall hold sufficient funds in trust any
19 amounts necessary to maintain Trustor's Home, and any property
20 taxes, homeowner's dues, insurance, and maintenance expenses
21 thereon for the benefit of JENNIFER GRANT. Upon the death of
22 JENNIFER GRANT, or upon her refusal or surrender of the property,
23 the Trustor's Home shall be sold by VIRGINIA BOYER, if
24 VIRGINIA BOYER is willing and able, and the balance then
25 remaining, if any shall be distributed as part of the residue
26 hereinabove with no penalty to the equal share of JENNIFER
27 GRANT should she still be living.

(N/L, Exhibit I, p. 2, ¶ 3-(d))

28 12. ***The July 12, 2010 Amendment's Modification of the Successor Trustee Provision***
for Trust A: The July 12, 2010 Amendment also contained an amendment to the trustee succession
provision found in Article X, Section A, of the Trust, as follows:

If MARY R. SCHWICHTENBERG shall become unwilling or unable
to serve as Trustee, RUSTY GRANT is hereby appointed as trustee.
At all times, MERRILY SUE SCHWICHTENBERG, better known as
JENNIFER GRANT, shall be empowered to nominate an individual,

1 institutional, or corporate cotrustee to serve as successor trustee
2 should RUSTY GRANT be unable or unwilling to serve as trustee.
3 She shall also retain the right to remove and replace that trustee or any
4 other successor trustees throughout the life of the trust. Should
5 JENNIFER GRANT become unable or unwilling to act, a majority of
6 the adult beneficiaries of the trust shall act.

7 (N/L, Exhibit I, pp. 1-2) Notwithstanding the seemingly unrestricted scope of this provision, the
8 surviving trustor had no power to change the trustee succession provision as to Trust B and Trust C,
9 so this provision could only modify the trustee succession provision as to Trust A.

10 13. *The July 12, 2010 Amendment Also Added a No-Contest Clause to the Trust: See*
11 N/L, Exhibit I, pp. 3-4.

12 14. *The July 22, 2010 Amendment Further Modified the Successor Trustee Provision*
13 *for Trust A:* The final Trust amendment, signed by the surviving trustor on July 22, 2010, amended
14 the successor trustee provision contained in the July 12, 2010 Amendment, as follows:

15 If MARY R. SCHWICHTENBERG shall become unwilling or unable
16 to serve as Trustee, RUSTY GRANT is hereby appointed as trustee.
17 At all times, MERRILY SUE SCHWICHTENBERG, better known as
18 JENNIFER GRANT, shall be empowered to nominate an individual,
19 institutional, or corporate trustee to serve as successor trustee should
20 RUSTY GRANT be unable or unwilling to serve as trustee. She shall
21 also retain the right to remove and/or replace that trustee or any other
22 successor trustees throughout the life of the trust. Should JENNIFER
23 GRANT become unable or unwilling to replace a trustee who has
24 become unable or unwilling (sic) to serve, a majority of the adult
25 beneficiaries of the trust shall replace the trustee.

26 (N/L, Exhibit J, pp. 1-2)

27 III

28 LEGAL GROUNDS FOR ORDERS REQUESTED

A. Removal of Rusty Grant Is Warranted in Light of Her Determined Refusal to Follow the Terms of the Trust.

1. *Rusty Refuses to Follow the Trustee Succession Provisions of the Trust.*

15 15. Probate Code § 15642(b)(1) authorizes removal of a trustee who has committed a
16 breach of the trust. Probate Code § 16400 provides that a violation of any duty the trustee owes a
17 beneficiary is a breach of the trust. Probate Code § 16000 imposes a duty on the trustee to

1 administer the trust according to the trust instrument. As demonstrated herein, Rusty Grant has
2 failed and refused to fulfill her duty to administer the Trust according to the Trust instrument, both
3 in illegally assuming to act as trustee of Trust B and Trust C to begin with, and otherwise acting
4 contrary to the terms of the Trust and to the great detriment of Petitioner. Rusty Grant has breached
5 the trust and she should be removed as trustee of Trust A and required to turn over the assets of
6 Trust B and Trust C to Petitioner, the duly named successor trustee of those subtrusts.

7 16. Rusty Grant's authority to act as trustee of *Trust A* derives from the July 12, 2010
8 Amendment of the Trust, which provides as follows:

9 If MARY R. SCHWICHTENBERG shall become unwilling or unable
10 to serve as Trustee, RUSTY GRANT is hereby appointed as trustee.
11 At all times, MERRILY SUE SCHWICHTENBERG, better known as
12 JENNIFER GRANT, shall be empowered to nominate an individual,
13 institutional, or corporate cotrustee to serve as successor trustee
14 should RUSTY GRANT be unable or unwilling to serve as trustee.
15 She shall also retain the right to remove and replace that trustee or any
16 other successor trustees throughout the life of the trust. Should
17 JENNIFER GRANT become unable or unwilling to act, a majority of
18 the adult beneficiaries of the trust shall act.

19 (N/L, Exhibit I, pp. 1-2) (The July 22, 2010 Amendment slightly modified and clarified this
20 provision, but the naming of Rusty Grant as successor trustee remained the same.) Notwithstanding
21 the seemingly unrestricted scope of this provision, the surviving trustor had no power to change the
22 trustee succession provision as to Trust B and Trust C, so this provision could only modify the
23 trustee succession provision as to Trust A.

24 17. As set forth above, the last Trust amendment signed by both trustors modifying the
25 trustee succession provisions of the Trust was the May 10, 1993 Amendment, which provides in
26 pertinent part:

27 A. NORMAN H. SCHWICHTENBERG and MARY R.
28 SCHWICHTENBERG shall serve as cotrustees.

1. If NORMAN H. SCHWICHTENBERG shall become
unwilling or unable for any reason to serve as cotrustee,
then MARY R. SCHWICHTENBERG shall serve as sole
trustee. If MARY R. SCHWICHTENBERG shall become
unwilling or unable for any reason to serve as sole trustee,
MERRILY SUE SCHWICHTENBERG, also known as
JENNIFER GRANT, shall serve as successor trustee.

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2. If MARY R. SCHWICHTENBERG shall become unable or unwilling to serve as cotrustee with NORMAN H. SCHWICHTENBERG, MERRILY SUE SCHWICHTENBERG, also known as JENNIFER GRANT, shall serve as cotrustee with him. If NORMAN H. SCHWICHTENBERG is unable or unwilling for any reason to serve as cotrustee, then MERRILY SUE SCHWICHTENBERG, also known as JENNIFER GRANT, shall serve as successor sole trustee.

3. At all times while MERRILY SUE SCHWICHTENBERG, also known as JENNIFER GRANT, is serving as trustee or cotrustee, she shall be empowered to nominate an institutional or corporate cotrustee to serve with her or as successor to her. She shall also retain the right to remove and replace that corporate or institutional trustee with another corporate or institutional trustee. At such time as she is unwilling to act as trustee or cotrustee, a majority of the adult income beneficiaries of this trust shall be empowered to nominate a corporate or institutional trustee over this trust and all trusts created hereunder, and to remove and replace any corporate or institutional trustee or cotrustee with another corporate or institutional trustee or cotrustee.

(N/L, Exhibit D, ¶ 4)

18. Rather than respect and follow the trustee succession provisions of the Trust, Rusty Grant – who is an attorney – merely assumed to act as trustee of the entire Trust, not just Trust A, and she simply took over the whole Trust, without ever informing Petitioner that Petitioner was still the legitimate, duly-named successor trustee of Trust B and Trust C. Petitioner – who, unlike Rusty Grant, is not an attorney – did not understand she still had a role as successor trustee of Trust B and Trust C following Mary’s death, and she accepted Rusty Grant’s representation that Rusty Grant was now trustee of the entire trust.

19. To compound her egregious usurpation of power, Rusty Grant initially ignored Petitioner’s complaint and notice that Petitioner had discovered that Rusty was acting illegally. Petitioner did not discover that she was the rightful trustee of Trust B and Trust C until April 2011, and immediately upon learning this, Petitioner e-mailed Rusty’s current counsel informing her she had just received notice that Rusty is not the trustee of Trust B and Trust C, demanding that Rusty transition administration of Trust B and Trust C to her, and informing them that Rusty has no

1 authority to petition the court concerning Trust B and Trust C. Petitioner copied Rusty Grant on
2 this e-mail. A true and correct copy of Petitioner's April 20, 2011 e-mail to Rusty's counsel and
3 Rusty is attached as Exhibit L to the N/L and is incorporated herein by this reference. Petitioner
4 also informed Rusty's counsel by telephone that Petitioner was the legitimate successor trustee of
5 Trust B and Trust C, demanding that Rusty turn over the assets to her. Both Rusty Grant and her
6 counsel ignored Petitioner's April 20, 2011 demand. Almost a month later, on May 17, 2011, Rusty
7 filed her Petition Regarding Internal Affairs of Trust, etc. ("Rusty's Petition"), in which she
8 represented to the Court that she is Trustee of "Trust A, Trust B and Trust C" of the Schwichtenberg
9 Revocable Family Trust without ever mentioning Petitioner's assertion to the contrary. (See Rusty's
10 Petition, p. 2, line 2) A true and correct copy of Rusty's Petition is attached as Exhibit M to the N/L
11 and incorporated herein by this reference. In late May, Petitioner retained her current counsel, who
12 proceeded to demand that Rusty Grant resign as trustee, in a letter dated June 9, 2011, to Rusty's
13 counsel. See N/L, Exhibit N. In a response dated June 14, 2011 to the demand made by Petitioner's
14 counsel, Rusty's counsel continued to ignore Petitioner's April 20 e-mail, feigning surprise that
15 "Jennifer is just now raising an objection [to Rusty being trustee of Trust B and Trust C]." See N/L,
16 Exhibit O. Subsequently, Rusty Grant proceeded to file a supplement to Rusty's Petition, seeking
17 confirmation as trustee of Trust B and alleging that Petitioner demanded Rusty's resignation "on or
18 about June 10th," thus neglecting to inform this Court of Petitioner's April 20 demand, an obvious
19 attempt to mislead the Court into believing Petitioner was tardy in waiting until June to raise the
20 issue. See ¶ 2 on page 2 of Supplement to Rusty's Petition, filed by Rusty Grant on or about June
21 14, 2011, a true and correct copy of which is attached as Exhibit P to the N/L and incorporated
22 herein by this reference.

23 20. Rusty should not be heard to assert that she did not realize the July 12, 2010
24 Amendment and the July 22, 2010 Amendment only applied to Trust A. In Rusty's Petition, she
25 quoted a portion of the no-contest provision contained in the July 12, 2010 Amendment, which
26 authorized the trustee to defend any violation of the no-contest clause, and noted that "[t]his
27 provision can only apply to Trust A of the Schwichtenberg Trust, not to Trust B. The documents
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1 making up the provisions of Trust B do not contain a similar provision.” (See Rusty’s Petition, ¶ 40
2 at p. 14) Although Rusty is completely wrong in asserting that “the documents making up the
3 provisions of Trust B do not contain a similar provision,”¹ the point remains that there is no
4 question Rusty Grant clearly understood that these amendments – executed after the death of
5 Norman Schwichtenberg – could not alter the terms of Trust B and Trust C.

6 **2. Rusty Grant Continues Her Efforts to Overturn a Bequest to Petitioner of a Life**
7 **Estate in the Trustors’ Residence.**

8 21. Rusty has also engaged in a concerted effort to negate the bequest in the July 12,
9 2010 Amendment of a life estate to Petitioner in the trustors’ residence. To begin with, Rusty
10 attempted to coerce Petitioner into waiving her life estate as part of a so-called settlement with
11 Bradd, who apparently was threatening a contest of the July 12, 2010 Amendment. When Petitioner
12 balked at doing so, Rusty informed Petitioner that the 120-day period in which to bring a trust
13 contest – which was then nearing expiration – “had been extended.” In her Petition Regarding
14 Internal Affairs of Trust, Rusty falsely claims that Petitioner agreed to toll the statutory period, but
15 Petitioner never agreed to do so, and Petitioner’s consent to a tolling agreement was never
16 requested. Moreover, upon questioning the legality of extending the statutory period, Petitioner was
17 informed by Rusty that it was completely legal. And now, in Rusty’s Petition, she asserts the
18 outlandish position that upon expiration of the purported tolling, a brand new 120-day period should
19 commence, a position that is both unsupported by citation to authority and unsupportable in law.
20 As pointed out in Petitioner’s Response and Objections to Rusty’s Petition, any actual tolling
21 agreement – even if it had existed – would not have resulted in commencement of a brand new 120-
22 day period but, instead, would merely have suspended the running of the period during the time the
23 tolling period was in effect. Whatever portion of the 120-day period that had already elapsed prior
24 to the alleged tolling would be forever gone. The California Supreme Court has analogized the

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26 ¹ Article VIII of the original Trust instrument, which confers powers “with respect to the
27 original Trust and Trusts ‘A’ and ‘B’,” authorizes the trustee, among other things, “to commence or
28 defend such litigation with respect to the Trust or any property of the Trust Estate as the Trustee
may deem advisable, at the expense of the Trust.” (N/L, Exhibit A, Art. VIII, ¶ 6, at p. 19)

1 tolling of a statutory limitations period “to a clock that is stopped and then restarted. Whatever
2 period of time that remained when the clock is stopped is available when the clock is restarted, that
3 is, when the tolling period has ended.” *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48
4 Cal.4th 665, 674 (quoting *Woods v. Young* (1991) 53 Cal.3d 315, 326, n.3).

5 22. Next, Rusty Grant has taken the position that the bequest to Petitioner of a life estate
6 in the trustors’ residence is subject to abatement and that, therefore, it is necessary to sell the
7 trustors’ residence. In taking this position, Rusty has ignored the applicable law concerning
8 abatement, and she has also ignored Petitioner’s offer to assume the burden of maintaining the life
9 estate to the extent Trust A funds become legitimately depleted and can no longer maintain the
10 property.

11 23. The bequest of a life estate to Jennifer is a *specific* bequest to the transferor’s relative
12 because it is a transfer of specifically identifiable property to the trustor’s daughter. *See* Prob. Code
13 § 21117(a); *In re DeSanti’s Estate* (1942) 53 Cal.App.2d 716, 719. Under California’s abatement
14 statute, specific gifts to the transferor’s relatives are the very last category of beneficial interests to
15 abate should abatement be required. *See* Prob. Code § 21402(a). Therefore, *if* abatement were
16 necessary, beneficial interests in the Trust residue, and general gifts such as cash bequests would
17 abate first, prior to any abatement of the life estate.

18 24. Furthermore, there does not appear to be any actual need for abatement here. Rusty
19 has asserted that abatement is necessary, in part, to enable the trustee to distribute a \$100,000
20 bequest to Betty Huffman. But that bequest is made from Trust B, not from Trust A. The gift to
21 Betty Huffman is contained in the May 10, 1993 Amendment, which added the following provision
22 to paragraph 3 of Section A of Article VII of the Trust:

23 3-(c) Notwithstanding the above, and prior to the allocation of the
24 shares of Trust B (as augmented by Trust C and as may be further
25 augmented by Trust A) being divided into equal shares as set forth in
26 paragraph 3 above, the trustee shall distribute the sum of \$100,000 to
27 BETTY M. HUFFMAN, outright and free of trust. If she is not living
28 at the time of the death of the surviving trustor, this gift shall lapse
and be disposed of as part of the residue hereinabove.

1 (N/L, Exhibit D, ¶ 3) According to Rusty's Petition, there is sufficient cash in Trust B to fund
2 Betty's gift, and it is not necessary to sell the residence – which is an asset of Trust A – to fund the
3 gift to Betty.² Further, upon information and belief, Trust A includes not only the assets disclosed
4 in Rusty's Petition, but also a percentage interest in the Melody Underwood Property Trust (of
5 which Melody's home is the primary asset), contrary to Rusty's misleading allegation that Melody's
6 home is held entirely in Trust C (*see Rusty's Petition*, N/L, Exhibit M, ¶ 17 at p. 7)..

7 25. Nor does the need to maintain the life estate require sale of the trustors' residence.
8 To the extent there actually are insufficient funds in the Trust to maintain the residence over the
9 remaining years of Jennifer's life, Jennifer is willing to assume the burden of doing so herself,
10 except to the extent repairs have become necessary as the result of Rusty's failure to properly
11 maintain the residence and except for penalties, interest, and unnecessary or improper expenditures
12 and waste that have been incurred as a result of Rusty's negligence and breach of duties. Jennifer
13 has also offered to maintain the life estate herself, rather than have Melody subject to potential loss
14 of her trust, so that Melody's trust would only come under question should abatement occur for
15 reasons other than the need to maintain the residence during Jennifer's life estate, a generous offer
16 made by Jennifer to protect and promote her sister's welfare. Based on the allegations of Rusty's
17 Petition and in view of Jennifer's generous willingness to maintain the residence herself with her
18 own personal funds should it become necessary, there appear to be sufficient assets in Trust A to
19 fund the gifts to Minda and Irma and still honor the life estate in the residence.

20 26. In derogation of the terms of the Trust granting Petitioner a life estate in the
21 residence, Rusty has refused to distribute possession of the residence to Petitioner.³

22 **B. Removal of Rusty Grant Is Warranted Because Her Demonstrated Hostility Towards**
23 **Petitioner and Bias in Favor of Bradd Is in Breach of Her Duty of Impartiality.**

24 ² Indeed, as set forth above, if there indeed were insufficient assets, the cash gift to Betty
25 would abate prior to the life estate to Jennifer.

26 ³ Rusty Grant has also refused to follow the terms of the Trust by deliberately retaining the
27 surviving trustor's Mercedes Benz automobile contrary to the terms of the Trust, which expressly
28 directed that it be sold forthwith. (N/L, Exhibit I, ¶ 3-(i) on p. 3) In doing so, Rusty has incurred
unnecessary license fees and automobile insurance premiums.

1 27. Probate Code § 16003 imposes a duty upon a trustee “to deal impartially” with
2 multiple trust beneficiaries. Rusty Grant has violated her duty of impartiality by demonstrating her
3 hostility towards Petitioner and her favoritism towards Bradd in a number of ways. As noted above,
4 Rusty attempted to pressure Petitioner into giving up her life estate as part of a “settlement” to
5 appease Bradd. *See* December 4, 2010 e-mail from Bradd Schwichtenberg to Sonja Panajotovic
6 (N/L, Exhibit Q) Rusty also purported to unilaterally extend the statutory period in which Bradd
7 could bring a contest of the July 12, 2010 Amendment conferring the life estate. Rusty’s Petition,
8 among other things, sought both to obfuscate the running of the statutory period for bringing a
9 contest and to obtain court approval of her refusal to defend the July 12, 2010 Amendment, even
10 from an unmeritorious contest brought after expiration of the statutory period.

11 28. In the process, Rusty, herself, attempted to cast doubt on the validity of the July 12,
12 2010 Amendment (even though it named Rusty as successor trustee). For example, Rusty falsely
13 implied that Petitioner was responsible for preparation of the July 12, 2010 Amendment. This is
14 untrue. The July 12, 2010 Amendment was originally prepared by Mary Schwichtenberg’s
15 independent estate planning counsel, whom Mary retained for purposes unrelated to that
16 amendment on November 8, 2009, *eight months before* execution of the July 12, 2010 Amendment.
17 Rusty further falsely asserted that Petitioner was “favored” over the trustors’ other children by the
18 grant of the life estate (ignoring substantial gifts and debt forgiveness to two of Petitioner’s siblings
19 *well beyond the designated amounts to be deducted from their shares of the residue*). Rusty also
20 falsely asserted that the life estate represented the only deviation from an otherwise equal
21 distribution of the trustors’ estate among the trustors’ children. In fact, the Trust provisions
22 requiring equal distribution among the trustors’ children apply only to the Trust residue and only in
23 the event the surviving trustor failed to exercise her general power of appointment. Surely an
24 overriding intent of equality of treatment cannot be ascertained from the granting of a mere life
25 estate to Petitioner compared with inter vivos gifts of full ownership in homes to Melody and Paul,
26 as well as payment of their taxes and insurance, coupled with Trust provisions forgiving all debts
27 owed by Melody and Paul to the trustors, far beyond the amounts to be deducted from their shares.

1 Petitioner submits that the actual facts are distinctly different from the distortions presented in
2 Rusty's Petition.

3 29. As described above, Rusty's Petition also argued, erroneously, that the life estate
4 must be abated. Upon information and belief, these actions were undertaken by Rusty to promote
5 Bradd's goal of eliminating Petitioner's life estate and forcing the sale of the trustors' residence,
6 and they are evidence of Rusty's hostility towards Petitioner and her bias in favor of Bradd. Rusty
7 Grant's violation of her duty to deal impartially with beneficiaries is a breach of the trust that
8 provides further grounds for her removal as trustee.

9 **C. Removal of Rusty Grant Is Warranted Because She Has Failed to Act to Protect Trust**
10 **Property.**

11 30. Probate Code § 16006 imposes a duty on trustees "to take reasonable steps under the
12 circumstances to take and keep control of and to preserve the trust property." During the more than
13 10 months that have elapsed since the death of the surviving trustor, Mary Schwichtenberg, Rusty
14 has neglected to maintain the trustors' residence, exposing it to damage and diminution in value, all
15 the while refusing to distribute the life estate to Petitioner, which would have allowed Petitioner to
16 take action to prevent further damage. Upon information and belief, Rusty's failures to perform
17 necessary repairs and maintenance in a timely manner, if at all, have resulted in or contributed to
18 extensive water damage to the interior and exterior of the residence and destruction of landscaping,
19 among other things.

20 **D. Rusty Grant Should Be Compelled to Surrender the Trust Real Property to a**
21 **Temporary Trustee to Prevent Further Injury and Loss.**

22 31. Probate Code § 15642(e) provides, as follows:

23 If it appears to the court that trust property or the
24 interests of a beneficiary may suffer loss or injury pending a
25 decision on a petition for removal of a trustee and any appellate
26 review, the court may, on its own motion or on petition of a
27 cotrustee or beneficiary, compel the trustee whose removal is sought
28 to surrender trust property to a cotrustee or to a receiver or
temporary trustee. The court may also suspend the powers of the
trustee to the extent the court deems necessary.

1 32. Rusty Grant refuses to distribute the life estate to Petitioner and she also refuses to
2 maintain and repair the residence, the condition of which is continuing to deteriorate as a result.
3 Rusty Grant has also incurred penalties and jeopardized the status of Trust real property by failing
4 to pay property taxes in a timely manner. Rusty should be compelled to surrender the residence to a
5 temporary trustee who can take the necessary steps to halt further deterioration and diminution in
6 value of the residence and Petitioner's life estate therein.

7 33. Under the terms of the July 12, 2010 Amendment and the July 22, 2010 Amendment,
8 Petitioner is empowered to nominate an individual or corporate trustee to serve in the event Rusty is
9 unable or unwilling to do so.

10 34. The surviving trustor's long time certified public accountant, Donald R. Mess, has
11 agreed to serve as temporary trustee. Mr. Mess was named by both trustors as trustee of a trust for
12 their daughter Melody, as well as trustee of another trust, the Schwichtenberg Family Life Insurance
13 Trust, also created by both original trustors. Mr. Mess obviously enjoyed the confidence of the
14 trustors, and he is knowledgeable about the surviving trustors' finances. A true and correct copy of
15 the professional resume of Donald R. Mess is attached as Exhibit R to the N/L and is incorporated
16 herein by this reference. For efficient administration of Trust A, protection of the condition and
17 value of the trustors' residence, and considering the best interests of the beneficiaries, Petitioner
18 requests that Donald R. Mess be appointed as temporary trustee of Trust A pursuant to Probate
19 Code § 15642(e).

20 35. Further, Petitioner requests, consistent with Probate Code § 15642(e), that Rusty
21 Grant be instructed to deliver all Trust A assets, books, and records to the court-appointed
22 temporary trustee within ten days of such appointment.

23 36. Petitioner also requests that Rusty Grant be precluded from using any assets of Trust
24 A for her trustee's fees, attorney's fees and costs without a court order. This will preserve the
25 corpus of Trust A while the litigation to remove Rusty Grant as trustee is pending.

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1 **E. Petitioner Should Be Confirmed as Successor Trustee of Trust B and Trust C**

2 37. Pursuant to Article X, Section A of the Trust, as set forth in the May 10, 1993
3 Amendment, Petitioner Jennifer Grant is the duly named, legitimate successor trustee of Trust B
4 and Trust C of the Schwichtenberg Revocable Family Trust. Petitioner did not fail to assume her
5 duties as successor trustee. Instead, she was led to believe that on the death of the surviving trustor
6 there was only one entire Trust and that Rusty Grant was successor trustee of that entire Trust.

7 38. As set forth above, Petitioner did not discover that she was the rightful trustee of
8 Trust B and Trust C until April 2011, and immediately upon learning this, Petitioner telephoned and
9 e-mailed Rusty Grant's current counsel informing her she had just received notice that Rusty is not
10 the trustee of Trust B and Trust C and demanding Rusty transition administration of Trust B and
11 Trust C to her. Petitioner copied Rusty Grant on the e-mail to Rusty's counsel. (N/L, Exhibit L)

12 39. Petitioner requests an order confirming that she is the duly named, legitimate
13 successor trustee of Trust B and Trust C. Petitioner further requests orders precluding Rusty Grant
14 from charging Trust A, Trust B or Trust C with any expenses, trustee's fees or attorney's fees in
15 connection with her illegal administration of Trust B and Trust C without further court order.
16 Finally, Petitioner requests an order instructing Rusty Grant to deliver the assets, books and records
17 of Trust B and Trust C to Petitioner within ten days of the issuance of the order confirming her as
18 trustee of those trusts.

19 40. Persons Entitled to Notice. The names and last known addresses of all persons who
20 have or had an interest in the Trust that is the subject of this proceeding are as follows:

<u>Name/Relationship</u>	<u>Age</u>	<u>Address</u>
Rusty Grant/Trustee of Trust A	Adult	Law Office of Rusty Grant 345 W. Ninth Street, Suite 102 Escondido, CA 92025
Betty M. Huffman/General Legatee/Sister of Trustor	Adult	1625 La Verde Lake San Marcos, CA 92078
Minda McConnell/General Legatee/Friend of Trustor	Adult	624 Parker Street Oceanside, CA 92057

<u>Name/Relationship</u>	<u>Age</u>	<u>Address</u>
Irma Arroyo/General Legatee/Friend of Trustor	Adult	1755 Boyle Place Escondido, CA 92025
Melody Underwood/Beneficiary/Daughter of Trustors	Adult	P.O. Box 2611 Crestline, CA 92335
Paul N. Schwichtenberg/Beneficiary/Son of Trustors	Adult	4193 McConnell Avenue Los Angeles, CA 90066
Bradd Schwichtenberg/Beneficiary/Son of Trustors	Adult	5702 Maiden Lane Bethesda, MD 20817
Jennifer Grant (aka Merrily Sue Schwichtenberg)/Petitioner/Trustee of Trust B and Trust C/Beneficiary/Daughter of Trustors	Adult	840 Haverford #2 Pacific Palisades, CA 90272
Constance J. Larson, Esq./counsel for Rusty Grant	Adult	345 W. Ninth Street, Suite 102 Escondido, CA 92025

41. Request for Special Notice. No requests for special notice have been served or filed.

WHEREFORE, Petitioner, JENNIFER GRANT, prays that this Court issue an order as follows:

1. Removing Rusty Grant as Successor Trustee of Trust A of the Schwichtenberg Revocable Family Trust;
2. Appointing Donald R. Mess as temporary trustee of Trust A under Probate Code § 15642(e);
3. Directing Rusty Grant to deliver the assets, books and records of Trust A to Donald R. Mess within ten days of his appointment as temporary trustee;
4. Confirming Petitioner, Jennifer Grant, as successor trustee of Trust B and Trust C of the Schwichtenberg Revocable Family Trust;
5. Instructing Rusty Grant to deliver the assets, books and records of Trust B and Trust C to Petitioner Jennifer Grant within ten days of the issuance of the order confirming Jennifer Grant as trustee of Trust B and Trust C.

1 6. Precluding Rusty Grant from using any assets of Trust A for her trustee's and
2 attorney's fees and costs without a court order;

3 7. Precluding Rusty Grant from charging Trust A with any expenses, trustee's fees or
4 attorney's fees in connection with Trust B and Trust C;

5 8. Charging Rusty Grant personally for all Trust A penalties, late fees, interest and
6 other costs and expenses attributable to her negligent failure to adequately maintain Trust property
7 and her failure and refusal to follow the terms of the Trust;

8 9. Precluding Petitioner from charging Trust B and Trust C with any expenses, trustee's
9 fees or attorney's fees without further court order since she acted improperly in usurping authority
10 as to those subtrusts;

11 10. Granting Petitioner Jennifer Grant her costs of suit incurred herein, including
12 reasonable attorney's fees to the extent permitted; and

13 11. Granting such other and further relief as this Court deems just and proper.

14
15 DATED: July 21, 2011

HICKSON KIPNIS & BARNES, LLP

16
17 By: 

18 Howard A. Kipnis

19 Steven J. Barnes

20 Attorneys for JENNIFER GRANT,
21 individually and as successor trustee
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VERIFICATION

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I, JENNIFER GRANT, individually and as successor trustee of Trust B of the Schwichtenberg Revocable Family Trust dated July 28, 1982, declare that I have read the foregoing PETITION FOR ORDERS (1) REMOVING RUSTY GRANT AS TRUSTEE OF TRUST A; (2) APPOINTING TEMPORARY TRUSTEE OF TRUST A AND DIRECTING DELIVERY OF ASSETS TO TEMPORARY TRUSTEE; (3) CONFIRMING JENNIFER GRANT AS TRUSTEE OF TRUST B AND TRUST C AND DIRECTING DELIVERY OF ASSETS TO HER; (4) PRECLUDING RUSTY GRANT FROM USING TRUST A ASSETS FOR ATTORNEY'S FEES AND COSTS WITHOUT COURT ORDER; (5) PRECLUDING RUSTY GRANT FROM USING TRUST ASSETS TO PAY ANY EXPENSES, TRUSTEE'S FEES OR ATTORNEY'S FEES ASSOCIATED WITH TRUST B OR TRUST C; (6) SURCHARGING RUSTY GRANT FOR PENALTIES, LATE FEES, INTEREST AND OTHER COSTS AND EXPENSES ATTRIBUTABLE TO HER NEGLIGENT FAILURE TO MAINTAIN TRUST PROPERTY AND FAILURE TO FOLLOW TERMS OF TRUST; AND (6) GRANTING PETITIONER COSTS INCLUDING REASONABLE ATTORNEY'S FEES. The matters stated in it are true of my own knowledge, except as to those matters which are 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 above is true and correct and that this verification was executed this 21st day of July, 2011, at Pacific Palisades, California.

Jennifer Grant

JENNIFER GRANT

VIA FACSIMILE