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F I L E D  
PROBATE SERVICES  
MAY 17 2011  
CLERK - SUPERIOR COURT  
SAN DIEGO COUNTY, CA

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO  
9 NORTH COUNTY JUDICIAL DISTRICT

10 In the Matter of

11 SCHWICHTENBERG REVOCABLE  
12 FAMILY TRUST dated July 28, 1982

Case No. 37-2011-00150239-PR-TR-NC

13 ) PETITION REGARDING INTERNAL  
14 ) AFFAIRS OF THE TRUST (1) TO  
15 ) ALLOW EXTRINSIC EVIDENCE IN  
16 ) THE INTERPRETATION AND  
17 ) CONSTRUCTION OF TRUST  
18 ) DOCUMENTS, (2) RUNNING OF THE  
19 ) STATUTORY PERIOD OF CODE  
20 ) SECTION 16061.7, (3) ORDER  
21 ) REQUIRING THE SALE OF THE  
22 ) REAL PROPERTY IN THE TRUST, (4)  
23 ) ORDER ABATING THE BEQUESTS  
24 ) IN TRUST A, (5) ORDER TRUST  
25 ) ASSETS CANNOT BE USED TO  
26 ) DEFEND ANY CHALLENGE  
27 ) BETWEEN TRUST BENEFICIARIES  
28 ) AS TO THE VALIDITY OF ANY  
TRUST DOCUMENT AND (6) ORDER  
TRUST ASSETS CAN BE USED TO  
DETERMINE AMBIGUITY AND  
CONSTRUCTION OF TRUST

[Probate Code §§17200(b), §21402]

DATE: JUL 22 2011  
TIME: 9:30 A.M.  
DEPT: 23



1 known as Trust A. New Article VII identified the ultimate distribution of the Trust upon the  
2 death of both Settlers was to be divided equally among the Settlers' four (4) children.

3 4. Second Amendment - 1990. In February 1990 the Settlers signed an  
4 document entitled "Second Amendment", which added a new paragraph to Article VII,  
5 Paragraph 3 wherein the Settlers make a specific gift of real property to one of their  
6 children, son Paul, and cancelled any debt that child owed the Settlers. This specific gift  
7 and cancellation of debt was to be part of the child's equal share of the Trust, not in  
8 addition to it.

9 5. Third Amendment - 1993. In May 1993 the Settlers signed a document  
10 entitled "Third Amendment", which added another new paragraph to Article VII, Paragraph  
11 3 wherein the Settlers make a specific gift of real property to another one of their children,  
12 daughter Melody, and cancelled any debt that child owed the Settlers. This specific gift  
13 and cancellation of debt was to be part of the child's equal share of the Trust, not in  
14 addition to it.

15 This amendment also added another specific gift to Article VII, Paragraph 3 making  
16 a cash gift of \$100,000 to a non-child, friend Betty, the gift to be paid outright.

17 6. Fourth Amendment - 1997. In March 1997 the Settlers signed a document  
18 entitled "First Amendment", which added a new provision referencing a separate trust  
19 created by the Settlers for one of the children, daughter Melody. Again, this new bequest  
20 was to be part of the child's equal share, not in addition to it.

21 7. First Settlor dies. On July 28, 1997, Settlor Norman Schwichtenberg died.  
22 Under the terms of the Trust, Settlor Mary Schwichtenberg continued to serve, now as the  
23 sole Trustee. As a result of Norman's death, the Trust estate was divided into Trust A (the  
24 revocable trust) and Trusts B (the irrevocable trust). The Melody Underwood Property  
25 Trust was assigned the designation of Trust C - it remained a revocable trust during the  
26 surviving settlor's lifetime. The only connection between the Melody Underwood Property  
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1 Trust and the Schwichenberg Trusts A and B is the provision the sum of \$215,000 used  
2 to purchase the residence for Melody be taken into consideration when determining her  
3 "equal share" from the Schwichenberg Trusts.

4 8. Fifth Amendment - First Amendment to Trust A - 1997. On October 14,  
5 1997, Mary, the surviving Settlor signed a document entitled "First Amendment to Trust A".  
6 This amendment modified the successor trustee provisions of Trust A.

7 9. Sixth Amendment - Second Amendment to Trust A - 1998. On June 17,  
8 1998, the surviving Settlor signed a document entitled "Second Amendment to Trust A".  
9 This amendment modified the "Residue" provision of Trust A to provide that if any child  
10 failed to survive the surviving Settlor would be distributed to a separate and irrevocable  
11 trust established by the Settlor's known as the SCHWICHTENBERG FAMILY  
12 GRANDCHILDREN'S TRUST. This amendment contains very explicit language Mary still  
13 intended all of the Trust estates, Trust A, Trust B and Trust C, be divided equally among  
14 her four (4) children.

15 10. Seventh Amendment - Addendum to Second Amendment to Trust A - 2003.  
16 On October 15, 2003, Mary signed a document entitled Addendum to Second Amendment  
17 to Trust A which modifies the Residue provision of the Second Amendment to Trust A to  
18 add a provision forgiving a debt owned by one of the Settlor's children, daughter Jennifer.  
19 The document applied this cancellation of debt provision to Trusts B and C.

20 11. Eighth Amendment - entitled Fifth Amendment - On July 12, 2010, Mary, the  
21 surviving Settlor, signed a document entitled "Fifth Amendment". It is unclear whether the  
22 surviving Settlor, Mary, intended for this amendment to apply solely to the provisions of  
23 Trust A or also to Trust B at the time the document was signed.

24 This document contains a bequest to the same non-child beneficiary, friend Betty,  
25 of \$100,000 to be held in trust for her benefit. Petitioner alleges this new provision creates  
26 a question as to whether it acts as an additional gift to Betty or is a voided attempt to  
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1 modify a irrevocable gift.

2 This document also modified the successor trustee provisions to designate an  
3 attorney, the Petitioner, as a neutral successor fiduciary. The question is raised as to how  
4 this new term applies to Trust B.

5 This document also states it modifies the Trust by adding 4 new paragraphs to  
6 Article III, Paragraph 3. Two of these "new" paragraphs appear to add new estate tax  
7 terms to bequests previously made by the Settlers. The question is raised as to how these  
8 new terms apply to and effect the distribution of the various Schwichenberg Trusts.

9 The third paragraph added to Article III, Paragraph 3 in this document adds a new  
10 provision wherein Mary gives a life estate to one of the children, daughter Jennifer, in a  
11 parcel of real property, Mary's residence, and requires the Trustee to pay all costs  
12 associated with this property from the Trust. This is the first time an amendment changed  
13 the distribution of the Trust estate for being equally among the Settlers' children to showing  
14 preference to one child.

15 The fourth paragraph added to Article III, Paragraph 3 in this document adds a new  
16 provision wherein Mary makes a bequest of a specific cash gift of \$20,000 to two friends,  
17 Minda and Irma.

18 Finally, this document modified Article XIII, Miscellaneous Provisions, of the original  
19 Trust declaration, to add a no-contest provision.

20 This document was originally prepared by an attorney obtained by Jennifer, the  
21 child who received the life estate in Mary's residence. However, the document was  
22 modified slightly by person or persons unknown, and signed by Mary. A new provision in  
23 this document containing a modification to the successor trustee provisions included some  
24 contradictory language.

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1 Trust A but is instead transferred to a third Trust - Trust C.

2 17. On information and belief, upon the death of Settlor Norman Schwichenberg  
3 in 1997, the Schwichenberg Trust was divided into the three (3) subtrusts - Trust A, Trust  
4 B and Trust C. On the death of the surviving Settlor, Mary Schwichenberg, the following  
5 assets comprised the three Schwichenberg Trusts:

6 Trust C - Melody Trust. Although this Trust is referred to as Trust C, it is a  
7 totally separate trust established by the Settlers during their joint lifetimes and is  
8 controlled by the terms of that Trust, not the terms of the Schwichenberg Trust. The  
9 Trust contains a residence purchased by the Settlers for their daughter Melody and  
10 her children.

11 Trust B - contained two brokerage accounts for a total value of \$237,903.48  
12 as follows:

13 Ameriprise valued at \$148,005.86  
14 Stifel brokerage valued at \$ 89,897.62

15 Trust A - contained various assets totaling \$678,000.00 as follows:

16 Mary's residence in San Marcos - \$580,000.00 appraised value  
17 CA Bank and Trust Account - \$ 45,000.00 approximate  
18 Zurich account - \$34,000.00 approximate  
19 Stifel IRA which named Trust A as beneficiary - \$ 19,000.00 approximate

20 In addition to the above assets, there may also be debts owed by the beneficiaries to the  
21 Settlers that are required to be taken into consideration in determining the division of the  
22 Trust assets.

23 18. Although only the assets in Trust A and Trust B are subject to the terms of  
24 the Schwichenberg Trust documents, these documents do contain an equalizing provision  
25 for the value of assets contributed to the Melody Trust in the amount of \$215,000.00.  
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**COMPOSITE OF AMENDMENTS TO THE DISTRIBUTION  
PROVISIONS OF SCHWICHTENBERG TRUST**

19. The primary provisions for the distribution of the Trust assets upon the death of both Settlers is found in Article VII - "Distribution on death of both Trustors", Section 3. The following is a summary of the provisions of Section 3 constructed from a review of the 10 Trust documents. The year the amendment was signed is set forth in parentheses. Provisions made prior to the death of Norman Schwichenberg are in red and apply to both Trust B and Trust A. Provisions made or modified after the death of Norman are in blue and normally would apply solely to Trust A.

3. Equally among the children (1982 and 1989)

a. (1990) 1461 Windsor Drive, Thousand Oaks, CA to Melody Underwood; Debt owed by Melody to Trustor is forgiven; all part of Melody's share

b. (1993) 4193 McConnell Blvd, Culver City, CA 90066 to Paul Schwichtenberg; debt owed by Paul to Trustors be forgiven and cancelled; all part of Paul's share (2010) repeats McConnell to Paul and includes estate taxes prorated to Paul

b.i (2010) estate taxes of Melody's gifts deducted from her share

c. (1993) \$100,000 to Betty Huffman outright

c. (2010) \$100,000 held in Trust for Betty M. Huffman for her health care and comfort. On Betty's death distribute any remaining balance according to "Residue" hereinabove (no residue in this Article)

d. (2010) life estate to Jennifer for Lake San Marcos house, including contents not designated to others, pay taxes, HOA dues, insurance maintenance, at Jennifer's death, refusal or surrender, then sold and distributed as part of the "Residue" - with no penalty to her equal share

e. (2010) \$20,000 each to Minda and Irma outright

f. (2010) sell Mercedes - proceeds added to Residue

20. Additionally, in 1997 the Settlers established the Melody Underwood Property Trust (hereinafter "Melody Trust") and transferred real property into the Trust, allegedly with a value of \$215,000, for the benefit of their daughter Melody and her children. An amendment to the Schwichenberg Trust in 1997 provides that Melody's "equal" share



1 under the Schwichenberg Trust was to be equalized taking into consideration the  
2 \$215,000 contributed to the Melody Trust.

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4 **REQUESTS FOR RELIEF**

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6 **THE VARIOUS AMENDMENTS HAVE CAUSED AMBIGUITY**  
7 **AS TO THE SCHWICHTENBERG TRUSTS**

8 21. The various documents comprising the Schwichenberg Trust documents,  
9 which total ten, were poorly drafted and create substantial ambiguity and uncertainty of  
10 Settlers' intentions.

11 22. Amendments signed by surviving Settlor Mary after her husband's death  
12 contain provisions that may be interpreted as invalid attempts to modify the terms of the  
13 irrevocable Schwichtenberg Trust B - or may be interpreted as bequests from Trust A that  
14 are in addition to the bequests contained in Trust B.

15 23. An example of uncertainty of intent is found in provision 3.b which states the  
16 McConnell Blvd, Culver City property was to be distributed to Paul and any debt he owed  
17 the Settlers cancelled and forgiven. However the Schwichenberg Trust never owned any  
18 interest in the McConnell property, but did loan the money to Paul to purchase the  
19 property, the loan being secured by a deed of trust against the property. The provision in  
20 the 1993 amendment, and repeated in the 2010 amendment, to convey an asset the Trust  
21 does not own, raises a question of what was the Settlers' intent regarding this provision.

22 24. Given the value of the Schwichenberg Trust A and Trust B, The provisions  
23 in the 1993 and 2010 amendments regarding forgiveness and cancellation of debt to  
24 beneficiaries Paul and Melody raises the question of how the Settlor intended the Trustee  
25 should handle the likely circumstance that the share of the Trust passing to Paul and  
26 Melody is smaller than the debt being cancelled.

1           25. As shown above, there is inconsistent numeric sequence to the ten  
2 documents which purport to modify the Original 1982 Schwichtenberg Revocable Family  
3 Trust declaration. This raises ambiguity as to how this factor may affect the interpretation  
4 of Settlor's intent in making the amendments (e.g. did the Settlor or surviving Settlor  
5 remember the previous amendments, were later bequests intended to be additional gifts  
6 or modification of previous bequests) and therefore the validity or construction of any of  
7 these ten documents.

8           26. Under both California law and common law, the trustee is under a duty to  
9 administer the trust according to its terms. Prob C §16000. In general, the trustee need  
10 look only at the written trust document and properly executed amendments to determine  
11 the precise terms of the trust. The trust instruments must be interpreted according to the  
12 intention of the settlor as expressed in the instrument. Prob C §21102(a). In construing a  
13 trust document, the guiding principle must be the intention of the settlor as expressed.  
14 "Not, What did he intend to say? but, What did he intend by what he did say? must be the  
15 test." Kropp v Sterling Sav. & Loan Ass'n (1970) 9 CA3d 1033, 1044, 88 CR 878, quoting  
16 Title Ins. & Trust Co. v Duffill (1923) 191 C 629, 642, 218 P 14.

17           27. Given the ambiguity of the documents as set forth above, the intent of the  
18 Settlor and interpretation of the documents cannot be ascertained without further  
19 evidence and discovery. Extrinsic evidence of the settlor's intent may be considered only  
20 when the trust instrument is unclear or ambiguous. Kropp v Sterling Sav. & Loan Ass'n  
21 (1970) 9 CA3d 1033, 1045, 88 CR 878.

22  
23           **ABATEMENT OF BEQUESTS MADE FROM TRUST A; REQUEST OF AUTHORITY**  
24           **TO SELL THE REAL PROPERTY IN TRUST A**

25           28. In any interpretation of the provisions relating to the Schwichtenberg Trust A,  
26 assuming all amendments are valid, there is insufficient cash in Trust A to meet all of the  
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1 specific bequests which apply to Trust A. These specific gifts are as follows:

2 \$100,000 in trust for Betty Huffman,

3 \$20,000 TO MINDA

4 \$20,000 TO IRMA

5 Life estate in real property to JENNIFER plus all expenses maintaining the  
6 property, including repairs needed due to deferred maintenance.

7 29. There also are the Settlor's debts and normal costs of administration, and  
8 possible litigation costs, to be paid from the cash assets in Trust A. At the death of the  
9 surviving Settlor, there was only approximately \$100,000 in cash assets in Trust A. This  
10 \$100,000 is insufficient to pay for the costs of administration and litigation, deferred repairs  
11 on the residence, the specific cash gifts and also have the ability to maintain the real  
12 property during the beneficiary's life estate. As such, all of the bequests in Trust A are  
13 subject to abatement.

14 30. The Settlers did not specify which gifts abate, as such the abatement statutes  
15 of Probate Code §§21400-21406 are applied to identify the priority of bequests for  
16 abatement. Until the ambiguity regarding what bequests apply to Trust A and Trust B, and  
17 the expenses of administration, including trustee and legal fees, are determined, the  
18 abatement statutes cannot be applied.

19 31. Petitioner alleges no matter what, the gift to daughter Jennifer of the life  
20 estate in the Settlers' residence and full maintenance of that property during Jennifer's  
21 lifetime is a bequest that cannot be completed and must be abated. Jennifer is 56 years  
22 old and has a life expectancy of approximately another 30 years. The annual cost to  
23 maintain the real property (property taxes, insurance, HOA fees, utilities, maintenance,  
24 etc.) is estimated at a minimum amount of approximately \$12,000.00. The Trust would  
25 need approximately \$360,000 in cash assets simply to meet the costs on the real property  
26 during Jennifer's lifetime - there was only \$100,000 when the Settlor died and now there  
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1 is even less due to the payment of legal fees and expenses. . Additionally, the cost to  
2 make the necessary repairs on the residence and bring it into compliance with the HOA  
3 regulations will further reduces the cash in Trust A available to meet Jennifer's life estate.  
4 After payment of the specific cash bequests, there will be no cash left in Schwichenberg  
5 Trust A to pay for the maintenance of the residence as required In the Trust amendment.

6 32. There is insufficient cash in Trust A to fulfil the life estate bequest, let alone  
7 pay the costs of debts and administration, the specific cash gifts and fulfill the terms of the  
8 life estate gift. All of the specific gifts, including the life estate, must be abated. Petitioner  
9 requests an order for authority to sell the real property in the estate as part of the  
10 abatement of the bequests made in Trust A. The present value of Jennifer's life estate can  
11 be calculated down to a money value. From the sale of the real property, the Trustee  
12 would have sufficient cash to pay the debts and expenses of administration. All of the  
13 bequests in Trust will have been reduced to a dollar value to which the abatement rules  
14 can be easily applied.

15 33. The real property subject to the life estate is currently vacant. Petitioner  
16 requests authority to sell the real property in the estate commonly known as 1521 Via  
17 Entrada Del Lago, San Marcos, California.

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19  
20 **POTENTIAL TRUST CONTEST AND QUESTION AS TO THE TOLLING PERIOD**  
21 **OF THE STATUTORY NOTIFICATION**

22 34. Because of the bequest made in the document entitled Fifth Amendment,  
23 providing, among other bequests, a life estate in the surviving Settlor's residence to one  
24 child, was signed by the surviving Settlor approximately one month before her death and  
25 which appears for the first time in 28 years to change the distribution of the Trust estate  
26 to something other then equally among the Settlers' children. The Settlers' children  
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1 adversely affected by this Amendment immediately raised a challenge as to the validity of  
2 the Amendment.

3 35. Immediately, legal counsel for the Petitioner entered into negotiations with  
4 all Trust beneficiaries in an attempt to reach a resolution and settlement of these disputes.  
5 It is now apparent to the Petitioner a settlement could not be reached.

6 36. No person on whom the notification by trustee is served under Probate Code  
7 §16061.7(a) may bring an action to contest the trust more than 120 days from the date the  
8 notification is served on him or her, or 60 days from the day on which a copy of the terms  
9 of the trust is mailed or personally delivered to him or her during that 120-day period,  
10 whichever is later. Prob C §16061.8.

11 37. On information and belief, Petitioner alleges during the period the Trust  
12 beneficiaries engaged in settlement discussions, there was an agreement tolling the  
13 statutory notice provisions of Probate Code §16061.7. Petitioner requests an order the  
14 120 day statutory period set forth in Probate Code §16061.7 will begin to run on the date  
15 of the filing of this petition.

16  
17 **ASSETS IN THE TRUST ESTATE SHOULD NOT BE USED TO**  
18 **PROSECUTE OR DEFEND ANY TRUST CHALLENGE WHICH**  
19 **MAY BE MADE BY TRUST BENEFICIARIES**

20 38. There are limited assets in both of the Schwichtenberg Trusts. The assets  
21 which comprise the two of the Schwichtenberg Trusts are set forth in paragraph 17 above.

22 39. The Trust has already spent substantial sums in legal fees in attempting to  
23 negotiate a resolution of the disputes between the Trust beneficiaries. The disputes  
24 involve, without limitation, the validity of the last two amendments signed by the surviving  
25 Settlor, which has the effect of favoring one child to the exclusion of the Settlor's other  
26 children. As such, it is a dispute between children of the decedent as to the distribution of  
27 the Trust assets.

1           40.    The document entitled "Fifth Amendment" dated July 12, 2010 provides in  
2 the last paragraph of a No Contest provision added to Article XIII by the Amendment :

3                   "The Trustee is here by authorized to defend, at the expense of the  
4 trust estate any violation of this paragraph. Notwithstanding the foregoing,  
5 a "contest" shall include any action described in an arbitration proceeding  
6 and shall NOT include any action described above solely in a mediation not  
7 preceded by the filing of a contest with the court. If all of the beneficiaries  
8 under this Agreement so contest, the trust estate shall be distributed  
9 according to the laws of intestate succession of the State of California then  
10 in force, excluding all such contestants and their issue."

11           This provision can only apply to Trust A of the Schwichenberg Trust, not to Trust B. The  
12 documents making up the provisions of Trust B do not contain a similar provision. The  
13 Trustee interprets this provision to mean only the assets of Trust A may be used to defend  
14 any contest of Trust A. Assets contained in Trust B may not be used to defend any contest  
15 of the provisions or documents comprising Trust A.

16           41.    A trustee generally has a right to retain an attorney to defend a contest of  
17 the terms of the trust, and pay the expenses from the Trust assets. The Trustee alleges  
18 any defense of the Fifth Amendment is not litigation to protect the existence of Trust A but  
19 rather to protect a document that benefits one beneficiary to the detriment of other  
20 beneficiaries. Under these circumstances, the Trustee alleges it would be improper to  
21 incur further legal fees in defense of the Fifth Amendment if that amendment is  
22 challenged by the other Trust beneficiaries.

23           42.    Issues resolving the ambiguity of the Trust documents and the intent of the  
24 Settlers, and/or surviving Settlor, abatement and how these issues affect the construction  
25 of Trust A and Trust B are proper expenses of each respective Trust. Issues involving  
26 the validity of any amendment should be prosecuted and/or defended at the cost of the  
27 litigating parties who would directly benefit by such litigation , not the Trustee.

28           43.    The Petitioner requests an order Trust assets cannot be used to pay for  
litigation involving the validity of any Trust amendment and that the litigating parties are  
responsible for their own legal fees and costs.

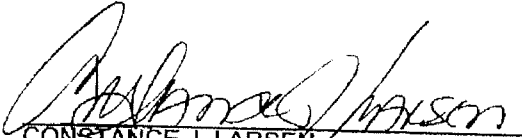


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WHEREFORE, PETITIONER prays as follows:

1. For an order allowing extrinsic evidence in the interpretation and construction of the various documents comprising the Schwichenberg Trust A and Trust B.
2. For an order the 120 day statutory period set forth in Probate Code §16061.7 starts running on the date of the filing of this petition.
3. For an order instructing the Trustee to sell the real property in the estate commonly known as 1521 Via Entrada Del Lago, San Marcos, California
4. For an order and priority of abatement of the specific cash bequests and life estate contained in the Schwichenberg Trust A as to be determined at trial.
5. For an order Trust assets cannot be used to pay for litigation involving the validity of any Trust amendment.
6. For an order Trust assets can be used to determine issues of ambiguity and construction and normal costs of Trust administration.
7. For such other and further relief as the Court deems just and proper.

Dated: May B, 2011

  
CONSTANCE J. LARSEN  
Attorney for Petitioner



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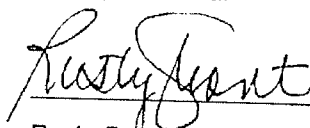
VERIFICATION

I, the undersigned, declare:

That I am the petitioner in the above-entitled matter; that I have read the foregoing PETITION REGARDING INTERNAL AFFAIRS OF THE TRUST (1) TO ALLOW EXTRINSIC EVIDENCE IN THE INTERPRETATION AND CONSTRUCTION OF TRUST DOCUMENTS, (2) RUNNING OF THE STATUTORY PERIOD OF CODE SECTION 16061.7, (3) ORDER REQUIRING THE SALE OF THE REAL PROPERTY IN THE TRUST, (4) ORDER ABATING THE BEQUESTS IN TRUST A, (5) ORDER TRUST ASSETS CANNOT BE USED TO DEFEND ANY CHALLENGE BETWEEN TRUST BENEFICIARIES AS TO THE VALIDITY OF ANY TRUST DOCUMENT AND (6) ORDER TRUST ASSETS CAN BE USED TO DETERMINE AMBIGUITY AND CONSTRUCTION OF TRUST and know the contents thereof; that the same is true of my own knowledge, except as to the matters that 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. Executed at Escondido, California.

DATE: May 13, 2011

  
\_\_\_\_\_  
Rusty Grant, Trustee