EXHIBIT E

Filing # 20143913 Electronically Filed 11/03/2014 05:10:12 PM

IN THE CIRCUIT COURT
18TH JUDICIAL CIRCUIT
BREVARD COUNTY, FLORIDA

IN RE: ESTATE OF

SEYMOUR BAUM,
Deceased.

PROBATE DIVISION

Case No.: 05-2012-CP-048323

ANNEEN NINA GLORIA BAUM,
As Daughter and heir at law,
Petitioner.

Vs.

DAVID A. BAUM, Personal Representative, et al.,
Respondent.

PETITIONER ANNEEN NINA GLORIA BAUM'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF FROM COURT ORDERS DUE TO RESPONDENT'S MISREPRESENTATION AND MISCONDUCT

Petitioner, ANNEEN NINA GLORIA BAUM (hereafter Petitioner), through her undersigned counsel files this above titled Memorandum of Law and states as follows:

1. Petitioner seeks relief pursuant to Fla R.Civ.P. 1.540(b) due to misrepresentations to counsel and misconduct actively avoiding service of process to effect formal notice.

2. In this cause Respondent's counsel repeatedly represented to the court in argument and pleadings that Petitioner was responsible for not perfecting service as a result of Petitioner's delay.

Transcript November 12, 2013 (page 4, L 25 – page 6, L 19)
(page 11, L 6-11)

Transcript November 11, 2013 (page 7, L 16-21)

Transcript March 18, 2014 (page 18, L 4-14)
(page 23, L 17 – page 24, L 24)
(page 20, L 20-22)
(page 41, L 16-18)
(page 41, L 23 – page 42, L 2)

Ex E

Pleadings

November 5, 2013 Respondent's opposition to Motion to Extend Deadline page 2

April 21, 2014 Respondent's to request for hearing, pages 2, 8, 9, and 13

October 15, 2014 Respondent's response to Petitioner's Amended Motion, page 2

3. At the hearing of this cause on October 28, 2014, Petitioner's counsel testified the only act by Petitioner that caused delay in this cause was Petitioner terminating her attorneys of record.

Cases controlling on the issue of the validity of even an order agreed upon by parties counsel being different from the court oral pronouncement of the ruling at hearing are as follows:

Glick v. Glick, 874 So2d 1238 (Fla. 4th DCA 2004);

B.C. Father of S.C. and D.C. v. Department of Children and Families, 864 So2d 486 (Fla. 5th DCA 2004);

R.W. Father v. Department of Children and Families, 214 WL 4495187 (Fla. App. 3d 2014);

Reber v. State, 611 So2d 91 (Fla. 3rd DCA 1992);

Brewer v. State, 99 So3d 519 (Fla. 3d DCA 2011);

Smith v. State, 100 3d 253 (Fla. 3d. DCA 2012);

Simpson v. Estate of Norton, 949 So2d 262 (Fla. 3d DCA 2007)

The appellate court by order relinquished jurisdiction to the trial court to hold an evidentiary hearing on Petitioner's *Motion for Relief* from court orders due to Respondent's misrepresentation and misconduct in the entry of the Order dated November 15, 2013. In *Glick* the 4th DCA reversed an Order holding the appellant (husband) in contempt as the subject contempt order even though it was agreed upon by all counsel then representing the parties was not consistent with the court's oral pronouncement where the court ordered the husband to comply with certain financial obligations, yet did not hold the husband in contempt and set aside any jail time previously ordered. The appellate court also ruled the subject Order was VOID as it did not reflect the court's oral pronouncement. In *B.C. Father of S.C. and D.C.* (hereafter *B.C.*), the 5th DCA where there is a difference between the court's oral pronouncement and the written Order, the oral pronouncement controls. In *B.C.*, the 5th DCA further remanded the trial court for correction of the written Order to comply with the oral

pronouncement. The rule of law in *Glick* and *B.C.* is followed in the other cases cited *R.W. v. DCF*; *Rebar*; *Brewer*; and *Smith*.

In *Simpson*, the 3rd DCA held a two year delay in memoralizing an oral ruling did not prejudice nieces right of first refusal as it did not grant her a right of first refusal, and ruling was binding when made even without being memoralized, the court went on to further hold that comments by the court that were omitted were not part of court's ruling, but rather were mere dicta properly excluded from the written Order.

In this cause the oral pronouncement of the court at the Pre-Trial Conferenee hearing of November 12, 2013, is set forth on pages 14 and 15 with the dispositive pronouncement being on page 15 lines 5 through 21. The court gave Petitioner's counsel a target date of Friday, December 13, 2013 to shoot at and if service could not be effected to address it on December 17, 2013 at the next scheduling hearing. The court questions to attorney Guralnick on page 14 lines 5 and 6 was dicta and pursuant to *Simpson* should not be in the Order. Further, the Order of November 15, 2013, even though allegedly agreed upon by both parties' counsel Hennessey and Guralnick, is void *ab initio* due to its paragraph 1, which requires Petitioner to serve process on Respondent pursuant to Fla.R.Civ.P. 1.070(j), which was not part of any oral pronouncement of the court and paragraph 2 which states "any Respondents not served on or before December 13, 2013 shall be dropped as a party." Paragraph 2 was not part of the court's oral pronouncement at the November 12, 2013 hearing and it is not reflected in the transcript.

Properly, the court should determine that the November 15, 2013 Order in compliance with *Glick*, *B.C.*, and other authority cited is again VOID from its inception.

As set forth in Petitioner's subject Amended Motion for Relief the misrepresentation to the court by Respondent's counsel of the court's actual ruling via oral pronouncement by submission of the Order dated November 15, 2013 in its proposed yet improper form must cause the court to rule said Order as void *ab initio*, irrespective of whether it was agreed upon by all parties' counsel, particularly under the unique attendant circumstances of this cause.

Consequently, the Orders entered by the court on April 2, 2014, which are predicated on the November 15, 2013 Order being viable also fall and should be vacated.

The court in *Paxton v. Scotsman*, 924 So2d 37 (Fla. 5th DCA 2006) and *Kozel v. Ostendorf* (Fla. 1994) set forth 6 factors that the court must consider before dismissing a cause of action. The trial court at the December 17, 2013 hearing page 137 line 7 stated is a party

need relief they can file a motion for relief from that order. Attorney Guralnick argued he was having problems serving Respondents with Petitioner's action due to the summons expiring. The Petitioner through her counsel in fact filed the subject *Motion for Relief* which the court is now ruling upon. Respondent argues all issues presented in the Petitioner's *Motion for Relief* have been ruled upon and litigated. The appellate court upon review of Petitioner's motion relinquished jurisdiction to this court, to rule upon the misrepresentation to the court by Respondent's counsel that Petitioner individually is responsible for the delay in effecting formal notice on Respondent. *Kozel* requires that the court consider 6 factors in determining whether acts of a party properly should result in dismissal of this cause or other remedies as available. Here Respondent's counsel repeatedly asserted Petitioner was through her acts solely responsible for the delay in effecting formal notice by service of process. The Respondent's counsel clearly misrepresented to the court in pleadings and argument that Petitioner caused delay in effecting formal notice as at hearing on the subject motion the only evidence or testimony was that Petitioner only delayed service by terminating her counsel. Using the *Kozel* factors 1 through 6 a brief analysis is as follows:

Factor 1:

Attorney Manney, utilized efforts to effect service and his failure to do so was not willfull or deliberate.

Attorney Guralnick and his inability to effect service was hampered by the summons issued being expired when he filed his notice of appearance which was authorized by Petitioner, attorney Guralnick's withdrawal and not pursuing service was combined with a request to extend deadlines. This was not willfull or deliberate disobediance of the November 15, 2013 Order.

Factor 2:

Petitioner's attorneys were not previously sanctioned.

Factor 3:

Petitioner individually was not involved in any fashion or manner with any of her counsel's method of effecting or failure to effect formal notice.

Factor 4:

The Respondent's cannot demonstrate any prejudice in pursuing the administration of this estate from the death of Seymour Baum in June 2012, publication in February 2013,

Formal Notice to Petitioner on April 24, 2013, and the date attorney Hoffman effected Formal Notice in February 2014.

Factor 5:

Petitioner's counsel acted in good faith in attempting to effect formal notice on David Baum through a certified process server, who testified in September through November 2013. 15 attempts were made to serve Respondent.

In *Roberts v. Stidham*, 19 So3d 1155 (Fla. 5th DCA 2009), the appellate court held 10 attempts to serve a tortfeasor was good cause and the trial courts dismissed of the Complaint for violation of the 120 day rule in effecting service was reversed with instruction to extend time to effect service.

Respondent's counsel additionally misrepresented to the court that the 120 day service rule contrary to *Aguilar v. Aguilar*, 15 So3d 803 (Fla. 2d DCA 2009) did not apply. The Respondent's acts of being a registered agent for the Respondent's corporation including and not being present at the office to actually be served, contacting Petitioner's process server Ron Kustin, realizing a conflict existed as to Mr. Kustin amount to misconduct to thwart Petitioner's reasonable and prudent attempts to effect formal notice. The 5th DCA in *Ford v. Stimpson*, 115 So 3d 401 (Fla. 5th DCA 2013), Respondent's fraud on the court included misrepresentation of Petitioner's alleged acts which caused her counsel to be unable to serve formal notice on Respondent, David Baum, and David Baum further acts of avoiding formal notice being served by process through not being at home, at the place of his designated registered agent office and David Baum further testimony that he had no idea that service was being attempted by Ron Kustin on behalf of Petitioner which testimony respectfully lack credibility when taken into account regarding the nature of this cause, the pleading therein, and the amount in controversey.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail to William T. Hennessey, Esquire, Attorney for David A. Baum, at whennessey@gunster.com, dcarr@gunster.com, and eservice@gunster.com; Bruce M. Baum, biological son of decedent, at 05-2012-ep-048323@gmx.fr; William E. Boyes, Esquire, Attorney for The Women's Zionist Organization of America, Inc. a/k/a Hadassah, at bboyes@boyesandfarina.com, asaboclk@boyesandfarina.com, and ezill@boyesandfarina.com; David H. Jocoby, Esquire, Attorney for Chabad Trustees under the Chabad Trust, at j.sanchez@davidhjacobypa.com; Jonathan Bernstein, Friends of Israel Defense Forces, Inc., at jonathan.bernstein@fidf.org; and Mark S. Guralnick, Esquire, at msg@guralnicklegal.com and msglegal@comcast.net; this 3 day of November, 2014.

TINO GONZALEZ, ESQ.
Attorney for Petitioner
Florida Bar No. 378089
1600 Sarno Road, Suite 1
Melbourne, Florida 32935
(321) 751-9675
(321) 751-1293 Facsimile
Tino@TinoLegal.com