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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR
THE THIRD APPELLATE DISTRICT

WILLIAM J. ZISK AND JOHN W. ZISK
Objectors/Appellants

No. 3 Civil CO39478
Placer Sup. No. SPR0567

vs.

DONALD R. ZISK
Personal Representative/Respondent
_____ /

APPELLANTS' OPENING BRIEF

Appeal from the order of the Superior Court of the State of California,
in and for the County of Placer

THE HONORABLE JAMES D. GARBOLINO, JUDGE

WILLIAM J. ZISK
205 Thomas Street
Roseville, California 95678
Telephone: (916) 782-2233
In Pro Per

JOHN W. ZISK
2 Tomahawk Court
Novato, California 94949
Telephone: (415) 883-2580
In Pro Per

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STATEMENT OF APPEALABILITY

(Cal Rules of Court, Rule 13)

This is a joint appeal of William J. Zisk and John W. Zisk from an order of the Superior Court of Placer County in settling the account and discharging the personal representative in the probate of the Estate of Mary A. Zisk, entered on August 3, 2001 (CT 183). Notice of appeal was filed on October 1, 2001 pursuant to Cal Rules of Court, Rule 1(a) (CT 190-194). The order is appealable pursuant to Code of Civil Procedure, section 904.1(a)(10); Probate Code sections 1300 (a)(b)(c)(f)(g); Probate Code sections 1303 (a)(b)

I. FACTUAL SUMMARY

The action below was heard without a jury and culminated with an order approving the first and final account and report of the purported Executor and discharge of the personal representative, entered on August 3, 2001 (CT 183)

William J. Zisk is the eldest of four children born during the marriage of William W. Zisk (predeceased) and Mary A. Zisk (deceased) and is the objector and appellant in this appeal. Joint appellant John W. Zisk, who adopts the entire Opening Brief as his own, is the son of William J. Zisk and grandchild of the deceased Mary A. Zisk. Marion A. Krivanec is an objector and daughter of the deceased and Edward J. Zisk is a son of the deceased. Donald R. Zisk is the youngest child of the deceased and is the personal representative in this matter (CT 17-18, 106-107).

Appellants appearing without counsel, appeal from the Probate Order approving the personal representatives' final account, in that the court below, while accepting the representation of the personal representatives'

attorney, that the estate is without assets, the Probate Judge's order completely ignored the reason the estate is without assets.

The decedent was the holder of a one third interest in a \$183,333.32 promissory, the payment of which was secured by a first deed of trust on a parcel of valuable real property in the State of Connecticut (CT 98-101). The personal representative, Donald R. Zisk and Edward J. Zisk held the other two thirds of the \$183,333.32 promissory (CT 160-164) . The personal representative, acting under *limited authority* (CT 47) *which precludes dealing in real property interests without first obtaining court approval*, consented to the *subordination* (CT 159-164) of said first trust deed to a construction loan of approximately \$1,025,000.00 and a \$355,000.00 commercial open end mortgage deed & note, #13-10-201 & 13-10-202 (CT 120-127). It is because of a default in the construction loans that the \$183,333.32 note is deemed without value by the personal representative and his attorney (CT 98). In consenting to the subordination of the \$183,333.32 trust deed, *the personal representative knowingly and intentionally dealt with an interest in real property without court approval*. Surely some consideration was given by the construction loan borrower for the *subordinations*, otherwise, why were they given? Who got the consideration? How much was it? What was the inducement to put a free and clear estate asset to risk? A risk that has proven to make the note valueless. If the estate is without assets, how does the personal representative and his attorney get paid? Not that they should, given the circumstances. Would the court below be indifferent if the note had been \$3,000,000.00 or \$30,000,000.00 instead of a mere \$183,333.32. Why wasn't the court interested in the misconduct of the personal representative and require an explanation rather than ignore the objections of the appellants, and the court going to the extent of signing a corrective order to get a better record after this appeal was filed.

Appellants are admittedly laymen, unschooled in the law and therefore have the simplistic notion that legal requirements, both as to substance and procedure, should be followed. Non-lawyers have the belief that legal proceedings, once concluded ought to answer reasonable questions about the rights and obligations of the parties. If that were true in this matter, this appeal would not have been filed. But there are questions, both procedural and substantive, which remain unanswered. Among those exist in the minds of the appellants and raised by this appeal are the following:

1. Why wasn't the inventory and appraisal timely filed as required by the probate court? What is the penalty, if any, for not having done so?
2. Why was the original estimated value of the estate to be \$140,000.00 and now is valueless?
3. Why is the only known Will of the decedent not admitted to probate and a Lost Will which completely changes the appellants' share of the estate admitted to probate?
4. Why isn't the probate court concerned with the loss of value to the estate's interest in the promissory note when it is admittedly due to unauthorized *subordination* to construction loans. Why isn't the probate court concerned with the how and whys of the *subordinations*? Who was the construction loan borrower? What was the consideration for granting them? Who received the consideration? The Executor?

Given these and other unanswered questions which these appellants tried to find out but were denied by the probate court, how else but by remanding the proceedings with instructions which the court below cannot ignore, can answers to legitimate questions be found.

Simple justice requires that the matter be remanded for further

hearings about the revocation of letters and removal of the personal representative and surcharged for wrongful taking, concealment, and the extrinsic fraud in the disposition of estate property, and the conduct of the personal representative without court approval, and the loss to the estate he caused. But to remand it to the very court, which by ignoring the appellants objections to the personal representatives' conduct, demonstrated his bias and prejudice and abuse of discretion towards these appellants would be unproductive and a travesty of justice. A reading of the short transcript of the July 17, 2001 hearing below (RT 11-13) supports the conclusion of bias and prejudice and abuse of discretion.

"MR. W. ZISK: William Zisk, objector, your Honor

THE COURT: Unfortunately, Mr. Zisk, you don't have standing to object to anything, not being a beneficiary under the will by having contested the will, and so I acknowledge that you're here. Thank you and nice to see. Your not going to say anything, sir." (RT 11 lines 18-23)

It is suggested that even a hearing by his peer group Judges in Placer County would be futile. It is requested that sanctions and a reprimand be directed toward respondents attorney, Tosh G. Yamamoto and the matter be remanded for further proceedings on revocation of letters and admittance of the later June 24, 1974 Will, with removal of and surcharging the personal representative, due to his conduct, acting with *limited authority*, and *without court supervision*, to be held before an independent Judge, appointed by the Judicial Council, and from a county other than from the County of Placer.

II. STATEMENT OF THE CASE

Appellants appeal from an order of the Superior Court of Placer County approving the first and final account and report of the purported Executor and discharge of the personal representative. Pursuant to Probate Code section 10452 on November 17, 1994, William J. Zisk and Marion A. Krivanec objected to the appointment of respondent Donald R. Zisk as Executor with full authority under the Independent Administration of Estates Act and the purported offering of a Lost Will of Mary A. Zisk to probate, due to respondents conflict of interest and undue influence on the decedent and her estate. (CT 39-42, 48-49) Appellants allege that, pursuant to Probate Code section 859, former Probate Code section 9869, by the respondents wrongful taking, concealment, extrinsic fraud and misrepresentation of disposition of estate property, William J. Zisk was prevented from contesting *the admission* of the purported Lost Will within the statutory period, and the failure of respondent to file an inventory and appraisal within the statutory period deprived appellants of the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present all of its case to the court. Appellants contend that respondent had a duty to maintain a confidential and fiduciary relationship with them which placed upon him a duty to disclose all material facts concerning the estate. Respondent breached his duty by concealing and misrepresenting the facts, and that such breach is fraudulent as a matter of law. Appellants also claim that respondents' conduct constitutes extrinsic fraud since by his silence and deception he kept appellants from discovering the true nature of the purported Lost Will offered for probate and the failure to timely submit an appraisal and inventory thereby prevented a timely contest to the admittance of the purported Lost Will. *Estate of Sanders*, 40 Cal.3d 613 (1985)

III. FACTUAL BACKGROUND HISTORY

On December 3, 1943, William W. Zisk and Mary A. Zisk, father and mother, purchased the real property, hereinafter *subject property*, located at 106 High Street, in the Village of Higganum, Town of Haddam, County of Middlesex, in the State of Connecticut, consisting of 32 acres, more or less. The *subject property* was purchased from Beda L. Brainard, by Manuscript Warrantee Deed, and found at Volume 67, page 469 and 470 of the land records of the Town of Haddam, Connecticut. (CT 106, 107, 112, 128, 129)

On July 20, 1952, William W. Zisk and Mary A. Zisk, as a wedding gift, granted to their eldest son, William J. Zisk, a four acre portion of the above described *subject property*, described as follows:

"All that certain real property situated in Middlesex County, Connecticut, fronting on the East side of Killingworth Road, being a portion of the Zisk Property and having a frontage of approximately 300 feet on Killingworth Road and adjacent on the North side to the south boundary line of Professor West Property; running East along said boundary line to the east end of West property and thence in a Southerly direction along the extension of the East boundary line of West property to the South boundary line of Zisk property; thence West along the South boundary line of Zisk Property to the West boundary line of Zisk Property fronting on Killingworth Road, containing approximately four (4) acres, more or less, excepting and reserving a right of way for ingress and egress to the main real property along the North side of Professor West property, said right of way to be fifty (50) feet in width extending from the Killingworth Road to the main real property." (CT 107)

At all times since the gifted transfer, William J. Zisk has exercised dominion and control over said four acre parcel and has been seized of and

possessed said parcel to the exclusion of all other rights, interests and claims of any other person or party. William J. Zisk materially relying upon the promise of his mother and father to convey the 4 acre parcel described above, expended large sums of money improving the premises in question, clearing trees, built a driveway, staked out a house site and further expended monies in rebuilding the household on the 32 acre parcel belonging to William W. Zisk and Mary A. Zisk and paid taxes on the entire parcel, all in reliance in obtaining title to the 4 acre parcel described above. (CT 107, 135)

On February 3, 1969, while alone at a temporary residence at 115 Linda Drive in Roseville, California, William W. Zisk was stricken with a fatal heart attack and died at the hospital in Roseville, California. Mary A. Zisk was in the State of Connecticut on the date of death of William W. Zisk. William W. Zisk died intestate, without a Will, and was a domiciliary of the State of Connecticut. By existing Connecticut laws of intestate succession, William J. Zisk inherited an additional undivided legal title ownership interest in the remaining 28 acre portion of the intestate estate of William W. Zisk at 106 High Street, Higganum, Connecticut, through the Connecticut laws of intestate succession, which were in effect on February 3, 1969. (CT 107, 108)

Upon the death of William W. Zisk, Mary A. Zisk was appointed administratrix to his intestate estate at 106 High Street, Higganum, Connecticut. Without providing any knowledge or notice to the legal children heirs to the intestate estate, Mary A. Zisk secretly filed probate proceedings in Placer County Superior Court in Auburn, California, Placer County Superior Court No. 12063. In the California Probate proceedings, Mary A. Zisk alleged to be the sole heir to the entire intestate estate of William W. Zisk, wherever situated. Mary A. Zisk later filed ancillary probate proceedings in Haddam, Connecticut, Middlesex County Probate

file No. SA-95875, thereby submitting only half of the intestate estate to be administered by the probate court in Connecticut. (CT 41, 48)

On January 17, 1970, ancillary administration of the intestate estate of William W. Zisk was granted to Mary A. Zisk, by the Haddam Probate Court in the County of Middlesex, State of Connecticut. On March 11, 1971 a certification that the heirs-at-law and distributees of said intestate estate were ascertained by that Court to be:

Mary A. Zisk	Wife	One-third
William J. Zisk	Son)
Edward J. Zisk	Son)
Marion A. Krivanec	Daughter) Two-thirds
Donald R. Zisk	Son)

On March 11, 1971, a certificate of distribution was recorded in Volume 109, page 206 of the land records of the Town of Haddam, Connecticut, but no deeds were ever issued to the children heirs of the intestate estate of William W. Zisk. (CT 113, 169, 170)

On June 24, 1974, Mary A. Zisk, a resident of Sacramento County, executed her Last Will and Testament to wit:

" Last Will and Testament
Of
Mary A. Zisk

I, Mary A. Zisk, a resident of Sacramento County, California, hereby make and declare this to be my last Will and Testament and revoke all other Wills and Codicils to Wills previously made by me.

FIRST: I direct my Executor hereinafter named to pay my just debts and funeral expenses as soon after my demise as can lawfully and conveniently be done.

SECOND: I declare that I am a Widow; that I have four (4) children, namely, WILLIAM J. ZISK, Roseville, California; EDWARD J. ZISK, Pearl River, Louisiana;

MARION A. KRIVANEC, Idaho Falls, Idaho; and DONALD R. ZISK, Roseville, California.

THIRD: It is my intention hereby to dispose of all real and personal property of which I have the right to dispose of by Will, including any and all property as to which I may have a power of appointment by Will.

FOURTH: I hereby declare that certain real property located in Middlesex County, Connecticut, hereinafter described, was given by oral gift by my deceased husband and myself to my child, WILLIAM J. ZISK. No deed to the property was ever signed and delivered to said child. Therefore, in conformity with the oral gift, I hereby give, devise and bequeath the said real property hereinafter described to my Son, WILLIAM J. ZISK, Roseville, California that said property is described as follows:

"All that certain real property situated in Middlesex County, Connecticut, fronting on the East side of Killingworth Road, being a portion of the Zisk property and having a frontage of approximately 300 feet on Killingworth Road and adjacent on the North side to the south boundary line of Professor West property; running East along the said boundary line to the east end of West property and thence in a Southerly direction along the extension of the East boundary line of West property to the South boundary line of Zisk property; thence West along the South boundary line of Zisk property to the West boundary line of Zisk property fronting on Killingworth Road, containing approximately four (4) acres, more or less, excepting and reserving a right of way for ingress and egress to the main real property along the North side of Professor West property, said right of way to be fifty (50) feet in width extending from the Killingworth Road to the main real property."

FIFTH: I hereby give, devise and bequeath all of the rest, residue and remainder of my property whether the same be real, personal or mixed and of whatsoever kind or character and wheresoever situated, or in which I may have any interest or right of testamentary disposition or power of appointment at the time of my death, to my four (4) children, WILLIAM J. ZISK, EDWARD J. ZISK, MARION A. KRIVANEC and DONALD R. ZISK, in equal shares, or to their issue by right of representation.

SIXTH: I hereby nominate and appoint my Son, EDWARD J. ZISK, as Executor of this Will to serve without

bond. In the event he is unable or refuses to serve, then I nominate and appoint my Daughter, MARION A. KRIVANEC, as alternate Executor of this Will to serve without bond.

SEVENTH: I have purposely made no provisions for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this Will or not mentioned herein, shall contest this Will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of One (\$1.00) Dollar and no more, in lieu of the provision which I have made or which I might have made herein for such persons so contesting or objecting.

IN WITNESS WHEREOF, I have hereunto set my hand at Roseville, California, this 24 day of June, 1974.

s/ Mary A. Zisk
MARY A. ZISK

The foregoing instrument, consisting of three pages, including this page, was signed on the above date in Placer County, California, by the Testatrix, MARY A. ZISK, in our presence, we being present at the same time, and she then declared to us that such instrument was her last Will, and we, at Testatrix's request and in her presence, and in the presence of each other, have signed such instrument as witnesses.

s/ Al B. Broyer Residing at Roseville
California

s/ Jean K. Rose Residing at Roseville
California "

(CT 136, 144)

During 1989, a scheme was commenced by a developer in the State of Connecticut and four members of the Zisk family, respondent Donald R. Zisk, Edward J. Zisk, Marion A. Krivanec and the decedent, Mary A. Zisk, to acquire the entire 32 acre Zisk family intestate estate at 106 High Street, Higganum, Connecticut. A local developer, Steven A. Rocco, alleging to

be a 5/6 co-owner in the 32 acre intestate estate, acting as attorney-in-fact for the four members of the Zisk family, initiated a partition action in the State of Connecticut, Middlesex Superior Court No. CV-89-0056040S, Steven A. Rocco, attorney in fact v. William J. Zisk, naming William J. Zisk as the sole defendant. Subsequently, Summary Judgment was granted in behalf of William J. Zisk by Judge Richard T. O'Connel on March 7, 1991, thereby terminating the first partition action, due to the fact that Steven A. Rocco was not the legal owner of any part of the *subject property* in Connecticut. (CT 117, 118, 145)

On March 23, 1991, Marion A. Krivanec conveyed her entire interest in the 106 High Street, Higganum, Connecticut intestate estate of William W. Zisk over to William J. Zisk, by Quit Claim Deed, recorded in Book 179, page 441 of the land records of the Town of Haddam, State of Connecticut. (CT 108, 114)

On May 8, 1991, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk purportedly conveyed a 10/12 interest in the 106 High Street Intestate Estate, by Warrantee Deed and Quit Claim Deed, purportedly to the fictitious name of High Street Associates, purporting to be a Connecticut general partnership, and found in Book 180, pages 230 and page 235 of the land records of the Town of Haddam, Connecticut. In fact, the land records of the Town of Haddam do not support a 10/12 record deed title ownership by the three members of the Zisk family on May, 8, 1991 and the purported fictitious partnership of High Street Associates was non-existent, and was not a Connecticut general partnership on May 8, 1991. In addition, the legal description to the purported Quit Claim Deed did not coincide with the original Warrantee Deed to the 106 High Street intestate estate. (CT 114, 115, 172-177) This matter is the subject of a pending Quiet Title action currently being litigated in the State of Connecticut, Middlesex County Superior Court No. CV 98 0086079S, William J. Zisk v. Walkley

Heights Associates. (CT 130-140)

On May 23, 1991, the purported High Street Associates purportedly conveyed a Mortgage Deed and Note in the amount of \$183,333.32 over to three members of the Zisk family, Mary A. Zisk, Edward J. Zisk and Donald R. Zisk and found in Book 180 page 238 of the land records of the Town of Haddam, State of Connecticut. The purported Mortgage Deed and Note purports to encumber the entire 32 acre Zisk family intestate estate at 106 High Street, Higganum, Connecticut, including the entire interest of owner William J. Zisk, purportedly by a non-existent purported Connecticut general partnership of High Street Associates, interest free, with no payments due for 5 years, or until May 23, 1996. (CT 115, 179-181)

On June 4, 1991, three months after the first partition action was terminated in Connecticut, developer Steven A. Rocco filed a second identical partition action against William J. Zisk under the guise of the fictitious name of High Street Associates, purporting to be a Connecticut general partnership and again alleging to be a 5/6 or 10/12 co-owner in the 106 High Street, Higganum, Connecticut intestate estate of William W. Zisk. The second partition action, Middlesex County Superior Court No. CV 91-0062496S, High Street Associates v. William J. Zisk was also filed at Middletown, Connecticut. The land records in the Town of Haddam, Connecticut verify that Donald R. Zisk, Edward J. Zisk and Mary A. Zisk were not record deed owners of a 5/6 or 10/12 interest in the *subject property* in Connecticut on May 8, 1991 when the alleged transfer to the fictitious name of High Street Associates was purported to have occurred. Reference is made to the certificate of distribution, dated March 11, 1971 (CT 170) and the Quit Claim Deed of Marion A. Krivanec to William J. Zisk, dated April 1, 1991. (CT 114) The records in the Town of Haddam Connecticut also verify that the fictitious name of High Street Associates

was non-existent on May 23, 1991, when the purported \$183,333.32 Mortgage Deed and Note (CT 115) was alleged to have been conveyed to the three members of the Zisk family and on June 4, 1991 when the second partition action was filed in the State of Connecticut. (CT 117)

IV. FACTUAL PROCEDURAL HISTORY

On September 8, 1994, Mary A. Zisk died testate in Roseville, California at the age of 82. On October 28, 1994, Donald R. Zisk petitioned the probate court in Auburn, California, Placer Superior Court No. SPR-0567, for probate of Lost Will or Probate of Will and for Letters Testamentary and to be appointed Executor with full authority to administer under the Independent Administration of Estates Act. Respondent estimated the character and estimated value of estate property to be personal property at approximately \$140,000.00. (CT 1-15) Notice of hearing on respondents petition was set to be heard on November 22, 1994 at 8:30 a.m. in Department 3 of Placer County Superior Court in Auburn, California. (CT 23-34)

On November 17, 1994, pursuant to Probate Code, section 10452, appellant William J. Zisk filed written objections requesting denial to respondent Donald R. Zisks' requested full authority to administer the estate of Mary A. Zisk under the Independent Administration of Estates Act. (CT 39-42) Appellant further objected to respondents request that a copy of the decedents alleged Lost Will and codicils, if any, be admitted to probate, including the alleged proof of holographic instrument. Appellant claims the signature of Mary A. Zisk bears little resemblance to the signature on the purported copy of the Lost Will, dated August 3, 1989, presented for probate by respondent. Appellant directed his objections to respondents conflict of interest in ongoing litigation involving the 106 High Street.

Higganum, Connecticut intestate estate of William W. Zisk, in which respondent Donald R. Zisk, Mary A. Zisk, Edward J. Zisk, Marion A. Krivanec and appellant William J. Zisk are all named parties to the pending and ongoing litigation in the State of Connecticut, which has not reached a dispositive conclusion as of February 1, 2002. Appellant also objected to respondents estimated value of the estate to be personal property valued at \$140,000.00, with no indication as to the contents of the inventory or its whereabouts. Appellant further requested, pursuant to Evidence Code section 452 et. seq., the court take judicial notice of the records of the California probate file of William W. Zisk, Placer County Superior Court No. 12063, secretly filed by Mary A. Zisk during 1969 without notice or participation to any of the legal heirs to the intestate estate of William W. Zisk, alleging to be the sole heir to the entire intestate estate, wherever situated. (CT 39-42)

On November 17, 1994, appellant William J. Zisk filed a Request for Special Notice on all matters listed in Probate Code section 1250(c) in the matter of the Estate of Mary A. Zisk, Placer Superior Court No. SPR-0567. (CT 36-38)

On November 17, 1994, objector, Marion A. Krivanec filed a Request for Special Notice on all matters listed in Probate Code section 1250(c) in the matter of the Estate of Mary A. Zisk, Placer Superior Court No. SPR-0567. (CT43-45)

On November 17, 1994, Marion A. Krivanec filed written objections, pursuant to Probate Code section, 10452, to respondents request to administer the Estate of Mary A. Zisk under the Independent Administration of Estates Act. The objections were very similar to the objections of William J. Zisk, noting respondents conflict of interest in the failure of Mary A. Zisk to distribute the Intestate Estate of William W. Zisk to the legal children heirs to the *subject property* located at 106 High Street,

Higganum, Connecticut, and the erroneous secret processing of probate proceedings in California courts instead of Connecticut courts of proper jurisdiction, and including the ability of respondent to take many actions without obtaining court approval and unilateral authority to execute terms as he sees fit, and the disbelief of the purported copy of a Lost Will, and that the purported witnesses to Mary A. Zisk's signing the purported August 3, 1989 Lost Will and the contents of that Will should be questioned under oath, and the purported signature of Mary A. Zisk on the copy of the Lost Will does not appear as the one that Marion A. Krivanec is familiar with. (CT 48-49)

On November 22, 1994 at 8:30 a.m. in Department 3, of Placer County Superior Court a hearing was held before the Honorable J. Richard Cousens in the matter of the Estate of Mary A. Zisk, case Number SPR-0567 (RT 1-3). During the hearing, respondents attorney, Tosh Yamamoto, acknowledged objectors William J. Zisk and Marion A. Krivanec objections on the record and agreed to *"serve under very limited authority if he will give prior notice and etcetera"*. (RT p. 2 L. 2-4)

Mr. Yamamoto:

"And if that's the case what I'm asking this time, if they have again no objection I'd like to have my client appointed as a *special administrator*, you know, pending trial of the matter. Again, *it would be without any type of independent authority*" (RT 2 L. 23-26)

The Court stated:

"At this time I'm going to grant the petition and appoint the petitioner *special administrator* with Will annexed with *limited authority* so that the estate can proceed" (RT 2, 3 - L. 27, 28, 1)

Judge J. Richard Cousens signed the order for probate, dated

November 22, 1994, appointing personal representative Donald R. Zisk as *Special Administrator with general powers. Limited authority* is granted to administer the estate under the Independent Administration of Estates Act "*(there is no authority, without court supervision, to (1) sell or exchange real property or (2) grant an option to purchase real property or (3) borrow money with the loan secured by an encumbrance upon real property)*". Bond is not required. (CT 47)

On December 6, 1994, Judge J. Richard Couzens signed the order for probate, appointing Donald R. Zisk as *Special Administrator with general powers* and with *Limited Authority*. The Petition for Probate of Lost Will or Probate of Will and for Letters Testamentary and Authorization to Administer Under the Independent Administration of Estates Act is continued to January 24, 1995 at 8:30 a.m. in Department 3 of the Placer County Superior Court. (CT 50, 51)

On December 14, 1994, *Letters of Special Administration* were issued to respondent Donald R. Zisk appointing him *Special Administrator of decedent's estate with the powers of a general administrator with limited authority (no authority, without court supervision, to (1) sell or exchange real property or (2) grant an option to purchase real property or (3) borrow money with the loan secured by an encumbrance upon real property)*. The affirmation was executed on November 22, 1994 in Sacramento, CA by respondent Donald R. Zisk as an individual stating:

"I solemnly affirm that I will perform the duties of personal representative according to law". (CT 52)

On December 15, 1994, on the Court's own motion and good cause appearing, Judge James L. Roeder issued notice in the matter of the Estate of Mary A. Zisk, action No. SPR 0567, that the above entitled matter set for hearing on January 24, 1995 is hereby reset for hearing on February 7, 1995

at 8:30 a.m. in Department No. 2. (CT 53)

On December 21, 1994, respondents' attorney, Tosh G. Yamamoto, appears to have filed a proof of subscribing witness in the matter of the Estate of Mary A. Zisk, Placer Superior No. SPR-0567, without providing any notice or proof of service to any of the named parties to this action, or persons requiring Special Notice. The instrument declares under penalty of perjury that the signature of V. Eldora Ford appears as one of the attesting witnesses to the instrument of which attachment 1 is a photographic copy and stating:

"I have examined attachment 1 and my signature is on it".

Appellants are unable to locate the purported signature of V. Eldora Ford as a purported attesting witness to the purported Lost Will of Mary A. Zisk purportedly executed on August 3, 1989 at Sacramento, California. (CT 57-59)

On January 17, 1995, Appellant William J. Zisk filed Notice of Motion and Motion for Continuance and for Full Disclosure of Decedent's Alleged Estate; Declaration of William J. Zisk in Support, with hearing set for February 7, 1995 at 8:30 a.m. in Department 2 of Placer County Superior Court. The grounds for the motion are based upon the inclusion of documents creeping into the Court file by surprise, without proof of service or Special Notice to anyone, and that a complete disclosure of the alleged Estate of Mary A. Zisk is a prerequisite of due process. Appellant made it unequivocally clear to all interested parties and the court, that there was no objection to administering the estate, per se, unless the alleged estate included the Connecticut property. (CT 60-65)

On February 7, 1995 in Placer County Superior Court, the following proceedings were had, to wit:

AUBURN, CALIFORNIA
FEBRUARY 7, 1995

--oOo--

In the matter of MARY A. ZISK, Decedent, Case Number SPR-0567, came on regularly this day before the Honorable JAMES D. GARBOLINO, Judge of the Superior Court of the State of California, County of Placer, Department Number Two thereof.

The DECEDENT was represented by TOSH YAMAMOTO, Attorney at Law acting as counsel.

An OBJECTOR, MARION A. KRIVANEC, was in personal attendance upon the Court.

An OBJECTOR, WILLIAM J. ZISK, was in personal attendance upon the Court.

The following proceedings were had, to wit:

--oOo--

" THE COURT: The matter of Mary Zisk. This is a petition for probate of Will and Issuance of Letters?

MR. YAMAMOTO: Yes your Honor.

Tosh Yamamoto appearing in this matter, your Honor.

And also, two of the children are present, who have previously filed Objections. William J. Zisk and Marion A Krivanec are both present, your Honor.

In their Prayer they had objected to my client serving them with full authority under the Independent Estate Act.

I spoke with my client, and he's agreeable to dropping that request, and serving them with *limited authority*.

And, I believe, they're agreeable to that.

THE COURT: Agreeable?

You have an Order?

MR. YAMAMOTO: No.

I'll submit one.

THE COURT: Submit an Order and submit a copy to the Objectors.

MR. YAMAMOTO: Correct, your Honor.

THE COURT: Yes, Mr. Zisk?

MR. ZISK: Your Honor, I would also like to present a copy of the Petition on Judicial Notice in my motion. If I could give it to the Clerk?

THE COURT: You want to file something?

MR. ZISK: Yes. I would like to have her file this, and keep it in the file.

THE COURT: What is it?

MR. ZISK: It's a copy of the Petition for the -- for the property back on the East Coast. That's involved in this, and has a definite, direct bearing on the circumstances of my mother's estates.

THE COURT: Mr. Yamamoto?

MR. YAMAMOTO: Your Honor, I know something about it.

Basically, we would have no objections to the gentleman lodging it with the Court.

THE COURT: Fine. Go ahead.

Why don't you give it to the Bailiff.

MR. YAMAMOTO: We have no objection to lodging it with the Court.

Basically, Mr. Zisk here had filed a lawsuit back East in regards to the sale of a piece of real property, which his father and mother both had an interest in it. And there was a part -- somewhat of a partition action is my understanding.

He had lost at the trial level, and he lost at the appellate level. And he's -- now, he's brought a Writ of Certiorari Application in Pro Per before the Supreme Court of the United States. And this is the Application for Writ of Certiorari.

So, I've no objection to it being lodged with the Court.

We have no objection to the Court taking Judicial Notice; and no objection to it being lodged.

MR. ZISK: Your Honor, it's in regards to my Motion to Compel the Full Disclosure of the Estate of my Mother. I would like to have that matter clarified, also.

MR. YAMAMOTO: Your Honor, in that regard the only thing we can disclose at this time is what I filed with the Court. He indicated that I did not file certain things, the proof of the witnesses; and I did forward that to him.

But as far as the inventory of things, we will now inventory. Now that the client has been appointed, we can go ahead and file our inventory within 90 days. And they'll be supplied with a copy within 90 days. And they'll be supplied with a copy of that.

Other than an accounting -- an accounting is not due. We just started the Administration of the Estate.

MR. ZISK: It's not a matter of accounting. I want

full disclosure. I want to have a full understanding of what part of the Connecticut property is involved in the estate. I have no way of knowing what constitutes the estate. And this is my concern I don't have any problem --

THE COURT: He's got 90 days to file an Inventory and Appraisal. And at that point in time -- if you don't think that it's complete, then at that point you make your objections.

MR. ZISK: Well, nothing will proceed before that time then, your Honor?

THE COURT: No.
You'll get notice.

Have you made a request for Special Notice?

MR. YAMAMOTO: They have, your Honor;
and we acknowledged that.

MR. ZISK: Thank you very much.

MR. YAMAMOTO: Thank you, your Honor.

THE COURT: Thank you
(Proceedings adjourned.) (RT 4-7)

Appellant, William J. Zisk relied on the oral proceedings had during the February 7, 1995 hearing before Judge Garbolino, to wit:

" THE COURT: He's got 90 days to file an inventory and appraisal. And at that point in time - - if you don't think that it's complete, then at that point you make your objections.

MR. ZISK: Well, nothing will proceed before that time then, your Honor?

THE COURT: No. You'll get notice. Have you a request for special notice?

MR. YAMAMOTO: They have, your honor;
and we acknowledged that.

MR. YAMAMOTO: Thank you, your honor.

THE COURT: Thank you. (proceedings adjourned.) " (RT 7 L. 13-27)

From this point in time, *appellant did not receive any contact, special notice or correspondence from respondent or his attorney, Tosh G. Yamamoto during the course of the following five years.* In fact, a cursory review of the Reporters Transcript of the February 7, 1995 hearing before

Judge Garbolino, verifies that the word, *Executor*, was not mentioned during the entire course of the oral proceedings held on that date. (RT 4-7) The Probate Minutes in reference to the February 7, 1995 hearing before Judge Garbolino are not supported by and are in direct conflict with the *Reporters Transcript of the same hearing date*. (CT 66) (RT 4-7)

On March 23, 1995, a Probate Order was filed, referring to the February 7, 1995 hearing before Judge Garbolino, *under signature of David L. Allen, which had crept into the court file without proof of service to anyone or approval of objectors Marion A. Krivanec or William J. Zisk as ordered by Judge Garbolino during the February 7, 1995 hearing*. (RT 5 L. 8-9) The purported Order for Probate purports to appoint respondent Donald R. Zisk *Executor*, with *limited authority*, of the decedents purported 8/3/89 Lost Will, as set forth in attachment "1". Appellants have no idea who David L. Allen is or how an order for probate under his signature, dated March 22, 1995, had crept into the court files of the Matter of the Estate of Mary A. Zisk. (CT 67-69)

On March 30, 1995, *without providing any knowledge or Special Notice to objectors Marion A. Krivanec or William J. Zisk, and without court supervision from the Placer County Superior Court in Auburn, California*, respondent Donald R. Zisk, individually and purportedly as Executor of the Estate of Mary A. Zisk and Edward J. Zisk purportedly executed a *Mortgage Extension Agreement* relating to the purported Mortgage Deed and promissory Note for \$183,333.32, which was purportedly executed between purported mortgagor High Street Associates, of 1783 Saybrook Road, Haddam, Connecticut 06438 and purported mortgagees Donald R. Zisk, Edward J. Zisk and the deceased, Mary A. Zisk on May 23, 1991 and found in Volume 180, page 238 of the land records of the Town of Haddam, Connecticut. The purported *Mortgage Extension Agreement* purportedly extends the payment of the principal sum

of \$183,333.32 from the due date of May 23, 1996 to May 23, 2001. The purported agreement was executed by respondent Donald R. Zisk, individually and purportedly as Executor of the Estate of Mary A. Zisk on March 10, 1995 at Roseville, County of Placer, State of California, and Edward J. Zisk on March 14, 1995 at Pearl River, Parish of Saint Tammany, State of Louisiana, and Steven A Rocco on March 30, 1995, at Middletown, County of Middlesex, State of Connecticut, and Recorded on June 28, 1995 in Volume 202, pages 679-681 of the land records of the Town of Haddam, County of Middlesex, State of Connecticut. (CT 149-152)

While appellant William J. Zisk continued to wait for respondent to file an inventory and appraisal, with the clear understanding from Judge Garbolino at the February 7, 1995 hearing that *nothing would proceed before that time*, it appears that on April 5, 1995, two additional orders for probate had crept into the court file without the knowledge or prior approval or prior special notice to objectors Marion A. Krivanec and William J. Zisk. (CT 72-77) The April 5, 1995 order for probate was signed by Judge Garbolino and was identical to the one signed by David L. Allen and filed on March 23, 1995. All three orders for probate appear to appoint respondent Donald R. Zisk as *Executor*, with *limited authority*, of the decedent's 8/3/89 purported Lost Will, as set forth in attachment "1". (CT 67-69) (CT 72-77) All three orders for probate are contrary to and contradictive of the Reporters' Transcript of the proceedings held before Judge Garbolino on February 7, 1995 (RT 4-7) (CT 81-88)

During the February 7, 1995 hearing there was no discussion on a petition for probate of Lost Will or granting of issuance of letters. Respondent attorney, Tosh G. Yamamoto acknowledged the presence of objectors Marion A. Krivanec and William J. Zisk in the courtroom and in their prayer to continue, expressing their objections to respondent serving

them with full authority under the Independent Estate Act. Mr. Yamamoto stated:

" I spoke with my client, and he's agreeable to dropping that request, and serving them with limited authority.

And, I believe, they're agreeable to that.

THE COURT: *Agreeable?*

You have an Order?

MR. YAMAMOTO: *No.*

I'll submit one.

THE COURT: *Submit an Order and submit a copy to the Objectors.*

MR. YAMAMOTO: *Correct, your Honor."*

(RT 4-5 L. 28, 1-10) (CT 83. 84)

Appellant has stated above, from the conclusion of the proceedings had before Judge Garbolino on February 7, 1995, appellant *William J. Zisk* did not receive any contact, special notice or correspondence of any kind, including proof of service, from respondent or his attorney, *Tosh G. Yamamoto* during the course of the following five years.

On June 16, 1995, *without providing any knowledge or special notice to objectors Marion A. Krivanec or William J. Zisk and without the court supervision of the Placer County Superior Court in Auburn, California*, respondent Donald R. Zisk, Individually and purportedly as Executor of the Estate of Mary A. Zisk and Edward J. Zisk executed a *partial release* of the purported Mortgage Deed and \$183,333.32 Promissory Note purportedly executed between purported mortgagor High Street Associates and purported mortgagees Donald R. Zisk, Edward J. Zisk and the deceased, Mary A. Zisk, on May 23, 1991 and found in Volume 180, page 238 of the land records of the Town of Haddam, County of Middlesex, State of Connecticut. The purpose of the *partial release* was to enable developer Steven A. Rocco and Jonathan Gottlieb to acquire an additional \$106,600.00 mortgage and loan on a two acre portion of the 32

acre *subject property*, on which includes the original Zisk family home and found in Volume 202 page 651 of the land records of the Town of Haddam, in the State of Connecticut. (CT 133)

On October 17, 1996, while acting under limited authority, and without providing any knowledge or special notice to objectors MARION A. KRIVANEC, or WILLIAM J. ZISK, and without the required court supervision of the Placer County Superior Court in Auburn, California, respondent DONALD R. ZISK, individually and purportedly as Executor of the ESTATE OF MARY A. ZISK and with EDWARD J. ZISK executed a SUBORDINATION AGREEMENT on the 32 acre Zisk family estate in Connecticut, in favor of WALKLEY HEIGHTS ASSOCIATES of 1783 Saybrook Road, Haddam, Connecticut, to wit:

" SUBORDINATION AGREEMENT

WHEREAS, WALKLEY HEIGHTS ASSOCIATES, a Connecticut general partnership having its principal place of business at 1783 Saybrook Road, Haddam, Connecticut 06438, is desirous of obtaining from FARMERS & MECHANICS BANK, a Connecticut corporation having its principal office located at 237 Main Street, Middletown, Connecticut a loan of ONE MILLION TWENTY FIVE THOUSAND and 00/100 (\$1,025,000.00) DOLLARS upon a note secured by a mortgage of premises owned by WALKLEY HEIGHTS ASSOCIATES situated at High Street, Haddam, Connecticut; and

WHEREAS, said premises are presently encumbered by a mortgage from HIGH ST. ASSOCIATES in favor of MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK dated May 23, 1991 and recorded June 3, 1991 in the Haddam Land Records in Volume 180 at Page 238 and which mortgage was modified by Mortgage Extension Agreement dated March 30, 1995 and recorded June 28, 1995 at Volume 202 Page 679 of the Haddam Land Records; and

WHEREAS, said premises will be or have been conveyed from HIGH ST. ASSOCIATES to WALKLEY HEIGHTS ASSOCIATES, subject to said mortgage; and

WHEREAS, FARMERS & MECHANICS BANK will only make said loan if said loan is secured by a first mortgage

on said premises; and

WHEREAS, in order to induce FARMERS & MECHANICS BANK to make said loan EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK are willing to waive priority of said mortgage from said HIGH ST. ASSOCIATES to MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK.

NOW THEREFORE, in order that said loan may be made and may be secured by a first mortgage on said premises, EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK do hereby agree for themselves and their heirs, successors and assigns to and with FARMERS & MECHANICS BANK to waive and surrender to said FARMERS & MECHANICS BANK, its successors and assigns, such right or priority as they the said EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK, have or ought to have by virtue of the above described mortgage and do hereby covenant and agree that said new mortgage from WALKLEY HEIGHTS ASSOCIATES shall take precedence over said mortgage and shall be entitled to the same rights and privileges, both in law and in equity, as it would have had if it had been executed, delivered and recorded prior to said mortgage. "

Said *subordination agreement*, dated October 17, 1996 is found in Volume 209, page 605 of the land records of the Town of Haddam, County of Middlesex, in the State of Connecticut. (CT 133)

On October 17, 1996, *while acting under limited authority, and without providing any knowledge or special notice to objectors Marion A. Krivanec, or William J. Zisk, and without the required court supervision of the Placer County Superior Court in Auburn, California*, respondent Donald R. Zisk, individually and purportedly as executor of the Estate of Mary A. Zisk, and with Edward J. Zisk executed an additional *SUBORDINATION AGREEMENT* pertaining to the 32 acre Zisk family intestate estate located at 106 High Street, Higganum, Connecticut, to wit:

" SUBORDINATION AGREEMENT

WHEREAS, WALKLEY HEIGHTS ASSOCIATES, a Connecticut general partnership having its principal place of business at 1783 Saybrook Road, Haddam Connecticut 06438, is desirous of obtaining from FARMERS & MECHANICS BANK, a Connecticut corporation having its principal office located at 237 Main Street, Middletown, Connecticut a loan of THREE HUNDRED FIFTY FIVE THOUSAND and 00/100 (\$355,000.00) DOLLARS upon a note (s) secured by a mortgage of premises owned by WALKLEY HEIGHTS ASSOCIATES situated at High Street Haddam, Connecticut; and

WHEREAS, said premises are presently encumbered by a mortgage from HIGH ST. ASSOCIATES in favor of MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK dated May 23, 1991 and recorded June 3, 1991 in the Haddam Land Records in Volume 180 at Page 238 and which mortgage was modified by Mortgage Extension Agreement dated March 30, 1995 and recorded June 28, 1995 at Volume 202 Page 679 of the Haddam Land Records; and

WHEREAS, said premises will be or have been conveyed from HIGH ST. ASSOCIATES to WALKLEY HEIGHTS ASSOCIATES, subject to said mortgage; and

WHEREAS, FARMERS & MECHANICS BANK will only make said loan if said loan is secured by a second mortgage on said premises; and

WHEREAS, in order to induce FARMERS & MECHANICS BANK to make said loan EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK are willing to waive priority of said mortgage from said HIGH ST. ASSOCIATES to MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK.

NOW THEREFORE, in order that said loan may be made and may be secured by a second mortgage on said premises, EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK do hereby agree for themselves and there heirs, successors and assigns to and with FARMERS & MECHANICS BANK to waive and surrender to said FARMERS & MECHANICS BANK, its successors and assigns, such right or priority as they the said EDWARD J.

ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK, have or ought to have by virtue of the above described mortgage and do hereby covenant and agree that said new mortgage from WALKLEY HEIGHTS ASSOCIATES shall take precedence over said mortgage and shall be entitled to the same rights and privileges, both in law and in equity, as it would have had if it had been executed, delivered and recorded prior to said mortgage. "

Said *subordination agreement*, dated October 17, 1996 is found in Volume 209, page 674 of the land records of the Town of Haddam, County of Middlesex, in the State of Connecticut. (CT 133)

On June 9, 1998, appellant, William J. Zisk, through his attorney, Charles W. Snow Jr. in the State of Connecticut, filed a Quiet Title action complaint, Middlesex County Superior Court Case No. CV 98 0086079S, William J. Zisk v. Walkley Heights Associates. (CT 131-138) The purpose of this action is to quiet the title to the *subject property* located at 106 High Street, Higganum, Connecticut, alleged owned by the parties. On July 8, 1998, a notice of LIS PENDENS was recorded at the Town Clerk's Office in Haddam, Connecticut and found in Volume 218, page 375 of the land records of the Town of Haddam, Connecticut. (CT 139, 140) The case title as set forth above is returnable on July 14, 1998 in the Judicial District of Middlesex at Middletown, Connecticut, in which William J. Zisk of 205 Thomas Street, Roseville, California is the plaintiff and Walkley Heights Associates of 1783 Saybrook Road, Haddam, Connecticut is the defendant.

The allegations of the complaint claims that William J. Zisk has an interest in the *subject property* that comes about by being an heir of the intestate estate of William W. Zisk and Mary A. Zisk who acquired the *subject property* on December 3, 1943 and found in Volume 67, page 469 of the Haddam Land Records. The complaint further alleges that Mary A.

Zisk died on September 8, 1994, a resident of Roseville, California and that no executor had been appointed for her estate as shown in a probate order signed by Judge J. Richard Couzens on December 6, 1994 in the probate of the Estate of Mary A. Zisk in Placer County Superior Court, Case No. SPR-0567 at Auburn, California. (CT 137-138). Even though no executor had been appointed to her estate Donald R. Zisk signed the following documents as her purported Executor:

- " a. Mortgage extension agreement as found in Volume 202, page 679 of the Haddam Land Records.
- b. Subordination agreement subordinating the mortgage held by Mary A. Zisk, et al to a mortgage given by the Farmers & Mechanics Savings Bank, dated October 17, 1996 and recorded in Volume 209, page 605 of the Haddam Land Records.
- c. A partial release of mortgage dated June 16, 1995 and recorded in Volume 202, page 651 of the Haddam Land Records.
- d. A subordination agreement dated October 17, 1996 and found in Volume 209, page 674 of the Haddam Land Records." (CT 133)

The complaint further alleges that on June 24, 1974, Mary A. Zisk, who on this date now held title to the subject property, executed her Last Will and Testament and in the fourth paragraph of said Will specifically described the 4 acre portion of the subject property to be given by herself and her now deceased husband, William W. Zisk, over to William J. Zisk and further describes said premises in her Will. (CT 136)

The complaint further alleges in paragraphs 10, 11 and 12 as follows, to wit:

- " 10. The Defendant, Steven A. Rocco, purports to have an interest in said property as a result of a Warrantee Deed from Mary A. Zisk, Donald R. Zisk and Edward J. Zisk, over to High Street Associates, a 10/12 interest dated May 8, 1991 and recorded in Volume 180, Page 230 of the Haddam Land Records.

11. The Defendant, High Street Associates, also purports to have a further added interest in said premises as a result of a Committee Deed, dated September 20, 1994 and recorded in Volume 199, Page 885 of the Haddam Land Records.

12. *The entity known as High Street Associates, which purported to have an interest in said property as a result of a Warrantee Deed as referred to above, did not exist at the time of said transfer, dated May 8th, 1991 and therefore all subsequent transfers from the alleged High Street Associates are null and void. " (CT 136)*

Currently, the trial in the Quiet Title action, Middlesex Superior Court Case No. CV 98 0086079S, William J. Zisk v. Walkley Heights Associates is set to commence in Middletown, Connecticut on April 9, 2002 at 10:00 a.m..

On June 5, 2001, in the Matter of the Estate of Mary A. Zisk, Placer County Superior Court Case No. S-PR-567, on the court's own motion, the Honorable James D. Garbolino issued an ORDER TO SHOW CAUSE AND NOTICE OF HEARING, setting the hearing for June 26, 2001 at 8:30 a.m. in Department 2. The order stated as follows:

" YOU ARE ORDERED to personally appear at the time and place set forth above and to show cause to this court then and there, why the Inventory and Appraisal, has not or should not be filed. This was to have been filed within 90 days from the court hearing of February 7, 1995 " (CT 89, 90)

On June 20, 2001, respondent Donald R. Zisk, through his attorney, Tosh G. Yamamoto, filed a FIRST AND FINAL ACCOUNT AND REPORT OF EXECUTOR AND PETITIONS FOR APPROVAL OF ACCOUNT AND REPORT; AND FOR DISCHARGE OF PERSONAL REPRESENTATIVE and setting hearing for July 17, 2001 at 8:30 a.m. in Department 2. (CT 91-105)

Respondents first and final account and report was made six (6) years, four (4) months and thirteen (13) days "after" Judge Garbolino had

ordered respondent to file an inventory and appraisal within ninety (90) days of the February 7, 1995 hearing. (RT 7 L. 1-26)

On October 28, 1994, respondent had estimated the character and value of the estate to be \$140,000.00 (CT 1). On June 20, 2001 respondent submitted a first and final account and report of the inventory and appraisal of the Estate of Mary A. Zisk. *The respondent determined the total assets of the estate are now valued at zero (\$0.00).* (CT 97)

V. ARGUMENT

Summary Of The Argument

- A. THE PERSONAL REPRESENTATIVE, ACTING UNDER *LIMITED AUTHORITY WHICH PRECLUDES DEALING IN REAL PROPERTY INTERESTS WITHOUT FIRST OBTAINING COURT APPROVAL*, CONSENTED TO THE SUBORDINATION OF A FIRST TRUST DEED TO A CONSTRUCTION LOAN OF APPROXIMATELY \$1,025,000.00 AND A \$355,000.00 COMMERCIAL OPEN END MORTGAGE DEED & NOTE.

The personal representative is an officer of the court and occupies a fiduciary relationship towards all parties having an interest in the estate. Appellants contend that respondent had an obligation to maintain a confidential and fiduciary relationship with them which placed upon him a duty to disclose all material facts concerning the estate. On November 22, 1994, Judge J. Richard Couzens appointed respondent Donald R. Zisk *special administrator* with Will annexed, with *limited authority*. The decedent was the holder of a one third interest in a \$183,333.32 promissory, the payment of which was secured by a first deed of trust on a parcel of valuable real property in the State of Connecticut. The personal representative, Donald R. Zisk and Edward J. Zisk held the other two thirds

of the \$183,333.32 promissory. The personal representative, acting under *limited authority*, which precludes dealing in real property interests, *without first obtaining court approval*, and *without giving special notice to objectors William J. Zisk and Marion A. Krivanec*, consented to the *subordination* of said first trust deed to a construction loan of approximately \$1,025,000.00 and a \$355,000.00 commercial open end mortgage deed and note. It is because of default in the construction loans that the \$183,333.32 note is deemed without value by the personal representative and his attorney. In consenting to the *subordination* of the \$183,333.32 trust deed, the personal representative knowingly and intentionally dealt with an interest in real property *without court approval*. Surely some consideration was given by the construction loan borrower for the *subordinations*, otherwise, why were they given? Who got the consideration? How much was it? What was the inducement to put a free and clear estate asset to risk? A risk that has proven to make the note valueless. If the estate is without assets, how does the personal representative and his attorney get paid? Not that they should, given the circumstances. Why wasn't the court interested in the misconduct of the personal representative and require an explanation rather than ignore the objections of the appellants, the court going to the extent of signing a corrective order to get a better record after this appeal was filed?

**B. RESPONDENT BREACHED HIS FIDUCIARY DUTY BY
WRONGFULLY TAKING, CONCEALING AND
MISREPRESENTING THE FACTS IN DISPOSITION OF
ESTATE PROPERTY CONSTITUTING EXTRINSIC
FRAUD**

Appellants allege that, pursuant to Probate Code section 859, former Probate Code section 9869, by the respondents wrongful taking,

concealment, extrinsic fraud and misrepresentation of disposition of estate property, appellants were prevented from contesting the admission of the purported Lost Will within the statutory period, and the failure of respondent to file an inventory and appraisal within the statutory period deprived appellants of the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present all of its case to the court. Appellants contend that respondent had a duty to maintain a confidential and fiduciary relationship with them which placed upon him a duty to disclose all material facts concerning the estate. Respondent breached his duty by concealing and misrepresenting the facts, and that such breach is fraudulent as a matter of law. Appellants also claim that respondents' conduct constitutes extrinsic fraud since by his silence and deception he kept appellants from discovering the true nature of the purported Lost Will offered for probate and the failure to timely submit an appraisal and inventory thereby prevented a timely contest to the admittance of the purported Lost Will. *Estate of Sanders*, 40 Cal.3d 613 (1985)

C. FAILURE OF RESPONDENT TO TIMELY FILE THE
INVENTORY AND APPRAISAL OF THE ESTATE IS
UNCONTROVERTED AND A MATTER OF CONTEMPT

Probate Code, section 8800, subdivision (b), provides the inventory and appraisal "shall" be filed within four months of issuance of letters. On February 7, 1995, the Honorable James D. Garbolino ordered respondent to file an inventory and appraisal within 90 days. Respondent failed to comply. On June 5 2001, the Honorable James D. Garbolino ordered respondent to show cause why the inventory and appraisal, has not or should not be filed. Respondent filed a first and Final Account and Report on June 20, 2001, six (6) years, four (4) months and thirteen (13) days

"after" being ordered to do so. Pursuant to Probate Code, section 11050, if the personal representative does not file a required account, the court shall compel the account by punishment for contempt. Probate Code, section 12200, subdivision (a), provides, the personal representative "shall" petition for an order for final distribution within one year after the date of issuance of letters. The unreasonable delay by the personal representative in submitting the inventory and appraisal fraudulently deprived appellants of the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present its case. *Estate of Justesen* 77 Cal. App. 4th 352 (1999)

D. THE RECORD AMPLY SUPPORTS GROUNDS FOR
REMOVAL OF THE PERSONAL REPRESENTATIVE
AND REVOCATION OF LETTERS

Appellants assert the record in this proceeding falls within the grounds for removal of the personal representative, pursuant to Probate Code, section 8502 (a)(b)(c)(d), and the revocation of letters pursuant to Probate Code, section 8501, with the admittance of the decedents later Will executed on June 24, 1974, pursuant to Probate Code, section 8504 (b).

VI. CONCLUSION

A personal representative is supposed to conserve and protect estate assets. It cannot be controverted that when the personal representative was appointed the estate's interest in the promissory note had value. It is now valueless due solely to the personal representative's abuse of *limited authority*. He should be answerable for that loss. This Probate Court excused him without so much as a question. Appellants submit that is reversible error. The matter should be remanded with instructions to

require inquiry of the facts which resulted in the loss and hold the personal representative personally accountable. There are questions, both procedural and substantive, which remain unanswered. Among those, exist in the minds of appellants and raised by this appeal are the following:

1. Why wasn't the inventory and appraisal timely filed as required by the probate court? What is the penalty, if any, for not having done so?
2. Why was the original estimated value of the estate to be \$140,000.00 and now is valueless?
3. Why is the only known Will of the decedent not admitted to probate and a Lost Will which completely changes the appellants' share of the estate admitted to probate?
4. Why isn't the probate court concerned with the loss of value to the estate's interest in the promissory note when it is admittedly due to unauthorized subordination to construction loans. Why isn't the probate court concerned with the how and whys of the subordinations? Who was the construction loan borrower? What was the consideration for granting them? Who received the consideration? The Executor?
5. Who is to benefit from the personal representative signing the subordination agreement?
6. Who is to benefit from the personal representative extending the maturity date of said \$183,333.32 note from May 23, 1996 to May 23, 2001, five (5) years, interest free with no payments?

Given these and other unanswered questions which these appellants tried to find out but were denied by the probate court, how else but by remanding the proceedings with instructions which the court below cannot ignore, can answers to legitimate questions be found.

Simple justice requires that the matter be remanded for further hearings about the revocation of letters and removal of the personal representative and surcharged for wrongful taking, concealment, and the extrinsic fraud in the disposition of estate property and the conduct of the personal representative without court approval and the loss to the estate he caused. But to remand it to the very court which by ignoring the appellants objections to the personal representatives' conduct, demonstrated his bias and prejudice and abuse of discretion towards these appellants would be unproductive and a travesty of justice. A reading of the short transcript of the July 17, 2001 hearing below (RT 11-13) supports the conclusion of bias and prejudice and abuse of discretion.

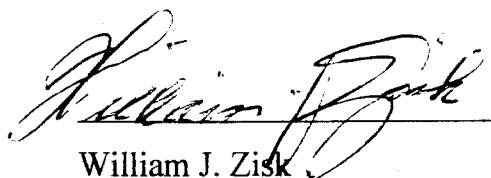
"MR. W. ZISK: William Zisk, objector, your Honor

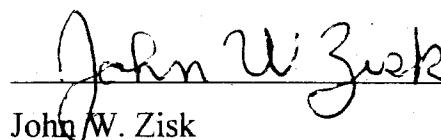
THE COURT: Unfortunately, Mr. Zisk, you don't have standing to object to anything, not being a beneficiary under the will by having contested the will, and so I acknowledge that you're here. Thank you and nice to see. Your not going to say anything, sir." (RT 11 lines 18-23)

It is suggested that even a hearing by his peer group Judges in Placer County would be futile. It is requested that sanctions and a reprimand be directed toward respondents attorney, Tosh G. Yamamoto and the matter be reversed and remanded for further proceedings on revocation of letters and admittance of decedents later June 24, 1974 Will, with removal of and surcharging the personal representative, due to his conduct, acting with *limited authority, and without court supervision*, to be held before an independent Judge, appointed by the Judicial Council, and from a county other than from the County of Placer.

WHEREFORE. Appellants pray that this Honorable Court grant the relief requested, to award costs, and for such other and further relief as the court deems just and proper.

DATED: February 20, 2002


William J. Zisk


John W. Zisk

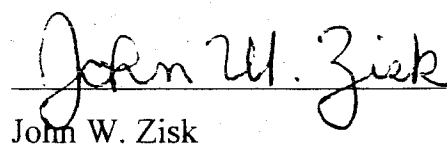
DECLARATION OF LENGTH OF BRIEF

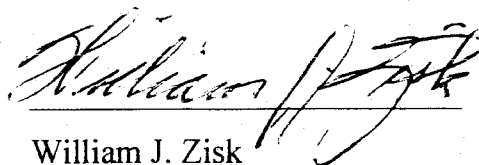
Appellants William J. Zisk and John W. Zisk hereby certify that Appellants

Opening Brief contains:

Pages	36
Words	10768
Characters (no spaces)	53498
Characters (with spaces)	64589
Paragraphs	220
Lines	1161

I/We declare under penalty of perjury that the foregoing is true and correct and this declaration is executed on February 20, 2002 at Roseville, California.


John W. Zisk


William J. Zisk

Court: THIRD APPELLATE DISTRICT OF THE
STATE OF CALIFORNIA

Case Number: 3 Civil No. C039478
Placer Superior Court No. SPR0567

Case Name: Zisk v. Zisk et al

PROOF OF SERVICE

I am a resident in the County of Marin; my address is 2 Tomahawk Court, Novato, California 94949. I am over the age of 18 years and not a party to the foregoing action.

On February 21, 2002, I served the following document(s):

APPELLANTS' OPENING BRIEF

XXX (by mail) on the following party(ies) in said action, in accordance with Code of Civil Procedure Section 1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, given the correct amount of postage and deposited that same day in a United States mailbox in the City of Roseville, California addressed as set forth below.

— (by personally delivering) true copies thereof, in accordance with Code of Civil Procedure Section 1011, to the person(s) and at the address(es) set forth below.

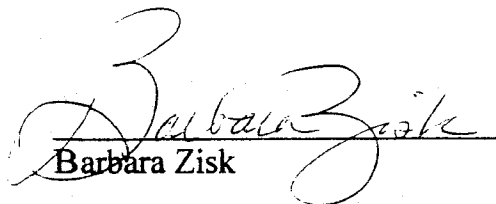
The Law Office of
Tosh M. Yamamoto
7201 S. Land Park Drive
Sacramento, CA 95831

John W. Zisk
2 Tomahawk Court
Novato, CA 94949

William J. Zisk
205 Thomas Street
Roseville, CA 95678

Placer County Superior Court
101 Maple Street, Room 401
Auburn, California 95603

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on February 21, 2002, at Novato, California.


Barbara Zisk

Court: THIRD APPELLATE DISTRICT OF THE
STATE OF CALIFORNIA

Case Number: 3 Civil No. C039478
Placer Superior Court No. SPR0567

Case Name: Zisk v. Zisk et al

PROOF OF SERVICE

I am a employed in the County of Placer; my business address is 205 Thomas Street, Roseville, California 95678. I am over the age of 18 years and a party to the foregoing action.

On February 21, 2002, I served the following document(s):

APPELLANTS' OPENING BRIEF

_____ (by mail) on the following party(ies) in said action, in accordance with Code of Civil Procedure Section 1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, given the correct amount of postage and deposited that same day in a United States mailbox in the City of Roseville, California addressed as set forth below.

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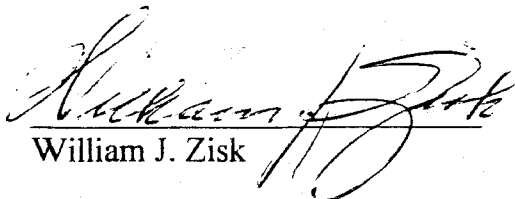
Court of Appeal
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814

(Original and 4 Copies)

Supreme Court
900 N Street, Room 400
Sacramento, CA 95814

(5 Copies)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on February 21, 2002, at Roseville, California.


William J. Zisk