

## **TENTATIVE RULINGS**

**FOR: March 8, 2019**

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

**Unlawful Detainer Cases** – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

**Court Reporting Services** – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

### **CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.**

**Francis Wang v. Peter Peletta**

**19CV000342**

PLAINTIFF’S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

**TENTATIVE RULING:** Plaintiff’s application is DENIED.

**A. Defendant’s Request for Judicial Notice**

Defendant’s Request for Judicial Notice is DENIED. The Court finds that the complaint filed by Martha Kongsgaard in a separate matter is irrelevant to the issues presented here.

**B. Plaintiff’s Request for Judicial Notice**

Plaintiff’s Request for Judicial Notice is GRANTED. The Court takes judicial notice of the Complaint filed by Plaintiff Francis Wang in this matter, but not for the truth of the matters alleged therein.

**C. Background**

This case involves a dispute between neighboring property owners over rights to a strip of land along the boundary of their respective properties. Plaintiff alleges to have lived on property commonly known as 460 Stonecrest Drive for over 30 years. Defendant recently purchased the adjacent property commonly known as 440 Stonecrest Drive. Plaintiff admits to having constructed a massive retaining wall (said to be some 295 feet in length and up to 25 feet high in places), as well as outbuildings on Defendant’s property. Plaintiff claims construction occurred over 20 years ago, and as a result of his open and notorious use of the structures in the interim, he has acquired easement rights to maintain the structures by prescription.

In July 2018, Defendant retained a surveyor to determine the exact location of the boundary line between the parties' properties. Upon completion of that survey in August 8, 2018, Defendant learned that the retaining wall and outbuildings were constructed within the legal description of his property at 440 Stonecrest. Defendant further alleges that a putting green, electrical boxes, and a port-o-potty are similarly located on his property. Plaintiff asserts that the building on Defendant's property is used to store tools and materials used by Plaintiff's employees.

Following the survey, Defendant and Plaintiff entered into discussions about the location of the boundary and the nature and location of the retaining wall, buildings, and related items.

On or about August 14, 2018, Defendant was contacted by the Napa County Planning, Building, and Environmental Services Department (NCPD) and informed that the retaining wall, storage building larger than 10ftx12ft, and electrical boxes constructed by Plaintiff on Defendants property were constructed without permits, and therefore constituted – in the words of Napa County – “apparent violations” of the California Residential Building Code and Napa County Municipal Code.

On or about February 24, 2019, Defendant constructed a post and wire fence along the boundary, effectively cutting off Plaintiff's access to the retaining wall, the outbuilding, and the port-o-potty. Defendant declares that he is concerned about his potential liability in the event that a member of the public, Plaintiff or a member of his family, and/or Plaintiff's employees were to fall off the retaining wall. Moreover, Defendant is concerned about his potential liability for injury to Plaintiff's employees coming onto his property to access the outbuilding and its tools and supplies. Defendant declares that he has repeatedly requested proof of worker's compensation insurance for such persons, and Plaintiff has failed and refused to provide any.

#### **D. Analysis**

In ruling on an application for interim injunctive relief, the Court weighs two factors: the likelihood the moving party will ultimately prevail on the underlying merits of its claims in the matter, and the relative interim harm the parties would suffer from granting or denying the application. (*Hunt v. Super. Ct.* (1999) 21 Cal.4th 984, 999.) As to the second consideration, the moving party must produce evidence of irreparable harm due to the inadequacy of legal remedies. (*Triple A Machine Shop, Inc. v. State of California* (1989) 23 Cal.App.3d 131, 138.)

In this case, both considerations weigh against the issuance of injunctive relief.

The evidence submitted fails to show that Plaintiff is likely to prevail on the merits of his claim for prescriptive easement rights. A party cannot acquire a prescriptive right to maintain a public nuisance. (*Freitas v. Atwater* (1961) 196 Cal.App.2d 289, 294.)

Defendant produces evidence that, pursuant to Napa County Planning, Building & Environmental Services, the retaining wall, storage building, and electrical boxes constitute apparent violations of Napa County Code. Such code violations constitute public nuisances. (Napa County Code section 1.20.020, subs. (A).) Because the evidence strongly suggests that the

retaining wall, building, and electrical boxes are public nuisances, and because Plaintiff cannot acquire prescriptive rights to maintain a public nuisance, Plaintiff fails to establish a likelihood of success on his claims for prescriptive easement rights.

Moreover, the Court finds that the asserted potential for harm to Defendant from granting Plaintiff's application far outweighs the asserted potential harm to Plaintiff from denial.

Plaintiff asserts that without injunctive relief his employees will be unable to access tools and equipment stored in the outbuilding and will be unable to use the port-o-potty located on Defendant's property. (Plaintiff's Memorandum at p. 2:17-24.)

Defendant asserts that if he is ordered to remove the fencing, he will be subject to significant potential liability in the event of personal injury suffered if a member of the public, Plaintiff or one of his family members, guests or employees were to fall off of the wall. Defendant further asserts that he would subject to potential liability if one Plaintiff's employees were injured on his property and were not covered by worker's compensation insurance.

The potential for Plaintiff's asserted harms can be abated simply by moving the port-o-potty and tools and supplies onto Plaintiff's property.<sup>1</sup> Any inconvenience that such solution may entail to Plaintiff is far outweighed by the potential for personal injury and resulting liability.

Finally, Plaintiff suggests that denial of his application will render "regular maintenance of the facilities" impossible. As discussed above, however, it appears that the maintenance of the facilities constitutes a public nuisance. The Court will not issue an injunction to preserve Plaintiff's ability to maintain a public nuisance.

#### **E. Conclusion**

For the foregoing reasons, Plaintiff's application for a temporary restraining order and for an order to show cause why a preliminary injunction should not issue is DENIED.

**PROBATE CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.**

**Estate of Ireneo Ochoa**

**19PR000033**

PETITION FOR LETTERS OF ADMINISTRATION AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

**TENTATIVE RULING:** The petition is DENIED WITHOUT PREJUDICE. Notice of hearing of a petition for administration of a decedent's estate must be published before the hearing. (Prob. Code, § 8120.) The first publication date of the notice shall be at least 15 days before the hearing. (*Id.*, § 8121, subd. (a).) The proof of publication here was first published on February 22, 2019, which is 14 days before the hearing. Proper notice of hearing is

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<sup>1</sup> Defendant declares that Plaintiff has already availed himself of this solution. If so, Plaintiff's asserted potential harm from denial of the present motion is negligible.

jurisdictional. Thus, proof of due publication must be on file before the hearing commencing the estate administration may proceed. Moreover, the proposed \$10,000 bond is too low. The surety bond should be in the amount of \$359,000. The proposed order (DE-140) and letters (DE-150) also are not on file.

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**In the Matter of Beverly Taser**

**19PR000039**

PETITION FOR AUTHORIZATION TO PERFORM NECESSARY TREATMENT AND FOR AUTHORIZATION TO CONSENT TO TREATMENT ON BEHALF OF AN ADULT PATIENT

**APPEARANCE REQUIRED**

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**Conservatorship of Iva Gieffels**

**26-31961**

REVIEW HEARING

**APPREANCE REQUIRED** by the conservator and attorney M. Kendall Hillman due to the failure to file the Notice of Conservatee’s Rights (Judicial Council form GC-341) despite two continuances.

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**Conservatorship of Williams, D.**

**26-43269**

REVIEW HEARING

**TENTATIVE RULING:** After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on March 9, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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**Conservatorship of Ethel Wilson II**

**26-63105**

THIRD ACCOUNT AND REPORT OF CONSERVATOR; PETITION FOR ALLOWANCE OF FEES TO CONSERVATOR OF ESTATE AND ATTORNEY FOR CONSERVATOR

**TENTATIVE RULING:** The petition is GRANTED IN PART AND DENIED IN PART. The petition is denied as to the request for \$105.75 in attorney’s fees. The request is not supported by a declaration to allow the Court to determine whether the fees are reasonable. (See Prob. Code, § 2642; Cal. Rules of Court, rules 7.702, 7.751.) The petition otherwise is granted.

After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the matter is set for a biennial review hearing and an accounting in two years on March 5, 2021, at 8:30 a.m. in Dept. B. All accounting documents must be filed at least 30 days prior to the hearing. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

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**Conservatorship of Monique Araceli Hernandez**

**26-67859**

REVIEW HEARING

**TENTATIVE RULING:** After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. The Court notes co-conservator, Armando Hernandez, passed away. The remaining conservator is Judith Armando. Thus, the case is set for a biennial review hearing in two years, on March 5, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date, and remove any reference to Armando Hernandez as currently serving as a co-conservator. The clerk is directed to send notice to the parties.

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**Conservatorship of Sarah DeNatale**

**26-67875**

REVIEW HEARING

**TENTATIVE RULING:** After a review of the matter, the Court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on March 5, 2021, at 8:30 a.m. in Dept. B. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

**CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B  
(Historic Courthouse) at 8:30 a.m.**

**Lilia Cortez Avila, et al. v. Dennis William Steele, et al.**

**18CV001225**

MOTION TO CONSOLIDATE

**TENTATIVE RULING:** Defendants County of Napa and Dennis William Steele’s motion to consolidate *Baldovino v. County of Napa*, Case No. 19CV000174, with the current case, Case No. 18CV001225, is GRANTED. The current case is designated as the lead case.

The case management conference set for March 12, 2019, is continued to July 9, 2019.

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**Diana Baldovino v. County of Napa, et al.**

**19CV000174**

MOTION TO CONSOLIDATE

**TENTATIVE RULING:** Defendants County of Napa and Dennis William Steele’s motion to consolidate the current case, Case No. 19CV000174, with *Avila v. Steele*, Case No. 18CV001225, is GRANTED. *Avila* is designated as the lead case.

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**Marc Golick, et al. v. State of California,**  
**Department of Veterans Affairs**

**19CV000271**

PETITION FOR RELIEF FROM CLAIM REQUIREMENT IN ACCORD WITH  
GOVERNMENT CODE SECTION 946.6

**TENTATIVE RULING:** Petitioner Marc Golick’s (for himself and as guardian ad litem for Makena Golick) petition for relief from the claim requirement is GRANTED due to “mistake, inadvertence, surprise, or excusable neglect.” (Gov. Code, § 946.6, subd. (c)(1).) Petitioner has been diligent in pursuing the claim. Respondent has not established that it will be prejudiced in the defense of the claim. (*Id.*) Although the code requires “suit on the cause of action to which the claim relates” to be filed within 30 calendar days, the Court notes petitioner already filed its complaint in Case No. 19CV000350. (*Id.*, § 946.6, subd. (f).) Petitioner shall file a revised proposed order.