

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN  
AND FOR PALM BEACH COUNTY,  
FLORIDA

CASE NO. 50-2006-CP003580XXXXSBIY

IN RE: ESTATE OF  
WILSON LUCOM.

**RICHARD S. LEHMAN AND RICHARD S. LEHMAN, P.A.'S  
AMENDED MOTION FOR RELIEF FROM JUDGMENT  
PURSUANT TO RULE 1.540(b), FLA. R. CIV. P.<sup>1</sup>**

Pursuant to Rules 1.540(b)(2) and (5), Fla. R. Civ. P., Richard S. Lehman and Richard S. Lehman, P.A. (Lehman) move for relief from the final judgment entered on March 5, 2009, based on newly discovered evidence and the reversal of the judicial decree on which the Final Judgment is based.

**OVERVIEW OF THE GROUNDS FOR RELIEF**

On March 5, 2009, the court entered a Final Judgment surcharging Lehman, and denying his request for personal representative fees as ancillary administrator of the Estate of Wilson Lucom. Appendix 1. The court based the Final Judgment

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<sup>1</sup> The original motion was filed on February 25, 2010, but was actually a prior draft without the final revisions. This amended motion contains the final revisions.

on a determination that the order of the Panama probate court which appointed Lehman as personal representative of Lucom's domiciliary estate in Panama on July 5, 2006, was invalid (i) because it had been appealed by Lucom's widow, Hilda Lucom, on July 18, 2006, and a Panamanian attorney opined that the mere filing of her appeal had the immediate legal effect of nullifying Lehman's appointment as personal representative, and (ii) because, two years after Lehman's appointment, a Panama probate court judge ruled that his appointment was a nullity. On those two grounds, the court held that actions taken by Lehman as domiciliary and ancillary personal representative of Lucom's estate were invalid.

Subsequent to the court's entry of the Final Judgment, however, the appellate courts in Panama overturned the Panamanian probate court order which purported to nullify Lehman's appointment as personal representative, and the probate court judge himself acknowledged in a 2009 order that he lacked jurisdiction to address the appointment of Lucom's personal representative. These Panamanian decrees and order invalidate the foundation of the court's Final Judgment, by establishing the inaccuracy both of the Panamanian attorney's opinion that the filing of Hilda's appeal "automatically" invalidated Lehman's appointment as personal representative, and of the 2008 order purporting to invalidate Lehman's appointment. These 2009 orders affirmatively establish the *bona fides* of Lehman's service both as domiciliary personal representative in Panama and as ancillary personal representative in Florida. This new evidence requires the court to vacate the Final Judgment.

As an alternative ground for the Final Judgment, the court ruled that Lehman's actions as ancillary personal representative constituted a breach of fiduciary duty. Inasmuch as the court's findings on fiduciary duty were also predicated on the alleged invalidity of Lehman's actions taken as domiciliary and ancillary personal representative, this alternative ground does not provide a basis for sustaining the Final Judgment.

### GOVERNING LEGAL PRINCIPLES

Rule 1.540(b)(2) provides for relief from a judgment where material evidence which could not have been discovered before the trial is discovered after the trial, and would probably change the result. *E.g., Dade Nat'l Bank of Miami v. Kay*, 131 So. 2d 24, 26 (Fla. 3d DCA 1961), *cert. denied*, 135 So. 2d 746 (Fla. 1961); *McDonald v. Pickens*, 544 So. 2d 261, 263 (Fla. 1st DCA 1989). Rule 1.540(b)(5) provides for relief from judgment where a prior decree upon which it is based has been reversed or otherwise vacated. *And see, e.g., R.E. Ragen v. Paramount Hudson, Inc.*, 434 So. 2d 907, 908 (Fla. 3d DCA 1983); *Viets v. American Recruiters Enterprises*, 922 So. 2d 1090 1096 (Fla. 4th DCA 2006).

Section 734.102(1), Fla. Stat., provides that the personal representative of a foreign decedent is entitled to ancillary letters of administration in Florida. Section 734.102(7), Fla. Stat. (2009), accords ancillary personal representatives the same rights, powers, and authority as other personal representatives in Florida. Where a decedent's Will sets out the standard by which the personal representative's performance is to be evaluated, the personal representative's performance of

fiduciary duties is measured by that standard. *Sladek v. Lambertus*, 667 So. 2d 417 (Fla. 4th DCA 1996); *Fulton v. First Nat. Bank of Fort Myers*, 290 So. 2d 498 (Fla. 2d DCA 1949).

Article 1138(3) of the Panama Judicial Code provides, as is comparable to the law in Florida, that a trial court loses jurisdiction of an issue which is the subject of an appeal.<sup>2</sup>

### **FACTS PRECEDING ENTRY OF THE JUDGMENT**

Wilson Lucom died a resident of Panama on June 2, 2006, leaving an estate with Florida property valued at more than \$665,000, and naming Lehman as a personal representative (called an “Albacea” in Panama). On July 5, 2006, Lehman was appointed sole personal representative to administer Lucom’s estate by the Fourth Civil Court of the First Judicial Circuit of Panama (*i.e.*, probate court Judge Solange la Ferrec de Booker).

On July 14, 2006, Hilda filed an appeal of Lehman’s appointment with the First Superior Court of Panama. On May 4, 2007, the appellate court held that the will was validly admitted to probate, and that Lehman was the duly appointed personal representative of the estate along with two others named in Lucom’s will.

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<sup>2</sup> Appendix 2. Compare Rule 9.600, Fla. R. App. P., and *Pace v. State*, 919 So. 2d 545, 546 (Fla. 5th DCA 2006) (“once an appeal is filed, the trial court loses jurisdiction with regard to the matter which is the subject of the appeal.”).

On July 4, 2007, Hilda appealed that order to the Panama Supreme Court, and her appeal is currently still pending before the Supreme Court.

In Florida, Lehman was appointed ancillary personal representative on July 19, 2006. Hilda petitioned the court to remove Lehman as ancillary personal representative. In February of 2009, the court conducted a trial on Hilda's petition and other motions, and introduced into evidence an order entered by Fifth Judicial Circuit probate court Judge Juan Bosca Molina on August 28, 2008 (Order 952) which held that Lehman's appointment as personal representative in Panama was a nullity.<sup>3</sup> On March 5, the court entered the Final Judgment which is the subject of this motion.

The Final Judgment relies on Order 952, and on the testimony of Panamanian attorney Ruben Rodriguez Avilar that the Panamanian probate court's order appointing Lehman as personal representative in Panama was "automatically and immediately null and void when Hilda P. Lucom filed her appeal of that Order," and that "Lehman was not installed or properly serving as the Albacea of the Panama Estate." Appendix 1, § 1.

#### **NEW ORDERS IN PANAMA ENTERED AFTER ENTRY OF THE JUDGMENT**

The following orders were entered in Panama courts in 2009 *after* this court's entry of the Final Judgment dated March 5, 2009.

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<sup>3</sup> Judge Molina was assigned to the Lucom estate when Judge de Booker was disqualified. Judge Molina had previously entered an order appointing an administrator for the Lucom estate on November 27, 2007.

On July 15, the First Superior Court entered an order which declined to hear Lehman's appeal of Order 952. Appendix 3. On August 12, the same court validated Lehman's appointment as personal representative by setting aside Judge Molina's appointment of an administrator for the Lucom estate in light of Lucom's intent to have a personal representative, reciting as the law of Panama that Article 1138(3) of the Panama Judicial Code denies jurisdiction for the probate court to enter any order in connection with the designation of a personal representative during the pendency of an appeal on the same subject. Appendix 4.

On October 9, however, the First Superior Court granted an Lehman's appeal for constitutional relief from Order 952, and on October 12 entered an order staying Order 952. Appendix 5. On November 17, the First Superior Court reviewed the history of the orders involved with Lehman's appointment as personal representative, and vacated its October 9 "stay" order based on Lehman's failure to exhaust remedies in the lower court. Appendix 6.<sup>4</sup> In December, the First Superior Court suspended its November 17 order in response to Lehman's petition to the Panama Supreme Court, with the consequence that the November 17 order is not in effect until the Supreme Court rules pursuant to Article 2615(1) and 2625. Consequently, Order 952 is now stayed. Appendix 7.

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<sup>4</sup> The term "suspend" in the November 17 order means "stay" under Panamanian law.

Another order entered in Panama after the March 5, 2009 Final Judgment further confirms the invalidity of Order 952's nullification of Lehman's appointment as domiciliary personal representative. Early in 2009, Fifth Judicial Circuit Judge Molina was presented with a motion from Christopher Ruddy, who was also named as a personal representative in Lucom's Will, to appoint him as personal representative of the Lucom estate. On June 10, 2009, Judge Molina entered Order 587 holding that the pendency of proceedings in the Panama Supreme Court deprived him of jurisdiction to enter any order on the appointment of an executor for Lucom's Estate. Appendix 8.

#### **ARGUMENT**

On March 5, 2009, this court entered a Final Judgment finding that Lehman was not validly serving as personal representative of Lucom's domiciliary or ancillary estate. The court relied for that conclusion on the testimony of a Panamanian attorney that Hilda's 2006 appeal of Lehman's appointment order had the immediate legal effect of rendering his appointment a nullity, and on Order 952 entered by Judge Molina which purported to invalidate Lehman's 2006 appointment. The court also found that Lehman had breached his fiduciary duty as personal representative. Newly discovered evidence in the form of Panamanian court orders entered after the Final Judgment has rendered both of those grounds for the Final Judgment to be legally in error, and requires that the Final Judgment be set aside.

**I. Lehman's appointment as personal representative was not invalidated by Hilda's appeal or the subsequent probate court order in Panama.**

**A. Ruben Rodriguez Avilar incorrectly opined that Hilda's appeal immediately invalidated Lehman's appointment as personal representative.**

The Panamanian attorney who testified that Lehman's appointment as personal representative was automatically nullified by the filing of Hilda's appeal of his appointment order was misinformed with respect to the legal effect of appeals in Panama. The Panamanian appellate court with supervisory jurisdiction over the probate court has now held that Lehman's appointment remains in effect pending the conclusion of appellate proceedings in the Panama Supreme Court, with the effect that Order 952 which purported to nullify Lehman's appointment as personal representative has been stayed.

Pursuant to Rule 1.540(b)(2), these new orders change the result of the proceeding which resulted in the court's Final Judgment. *See Dade Nat'l Bank of Miami*, 131 So. 2d at 26.

**B. The 2008 Panama probate court order on which the court relied has been vacated on appeal.**

When the court entered the Final Judgment on Hilda's motion to surcharge Lehman and other pending motions, the court relied on a decree of the Panama probate court (Order 952) which has now been overturned by an appellate court in Panama. This court is obliged to give the same comity to the Panamanian appellate orders which it gave to the probate court order on which the Final



Judgment is grounded. *See, e.g., Nahar v. Nahar*, 656 So. 2d 225, 229 (Fla. 3d DCA) (*en banc*), *review denied*, 684 So. 2d 249 (Fla. 1995), holding that “any foreign decree should be recognized as a valid judgment, and thus be entitled to comity.”

A trial court order which has been overturned on appeal is a nullity. *Cf.*, “When an order is vacated, it is nullified, canceled, invalidated, or made void.” *Thomas v. Moore*, 797 So. 2d 1196, 1198 (Fla. 2001). Indeed, “it is as though no judgment had ever been entered.” *Shields v. Flinn*, 528 So. 2d 967, 968 (Fla. 3d DCA 1988). Pursuant to Rule 1.540(b)(5), Lehman has shown that decree and legal opinion on which the Final Judgment is based no longer reflect the law of this case.

#### **CONCLUSION ON LEHMAN’S STATUS AS PERSONAL REPRESENTATIVE**

There is no legal basis for the Final Judgment which was entered by the court on March 5. Both the opinion and the Panamanian order on which the court relied have been determined to be inaccurate. Appendix 9. Accordingly, the Final Judgment should be vacated.

#### **II. Lehman’s actions as personal representative did not constitute a breach of fiduciary duty.**

The court’s Final Judgment finds as a fact that Lucom had real property and a Wachovia bank account in Florida at the time of his death. Appendix 1, § 2. The bank account constitutes an intangible asset of the domiciliary estate, and was appropriately designated as such in the Panama inventory which was filed by

Lehman. If Lehman was the valid domiciliary personal representative of Lucom's estate in Panama, which the appellate court in Panama has now confirmed is the case, his expenditure of money from the bank account for the administration and protection of the estate was proper, and could not constitute a breach of fiduciary duty.<sup>5</sup>

Prior to entry of the Final Judgment, Lehman filed a final accounting for his administration of the ancillary estate which details his disbursements. By order dated January 15, 2009, this court held that the standard for determining Lehman's liability is to be determined by the exculpatory clause in Lucom's will, which exonerates him from liability unless he is guilty of bad faith, fraud, theft, crimes against estate assets, or reckless indifference to the purposes of the will or the interests of the persons. In its Final Judgment, the court expressly found that Lehman had in fact used the money in the Florida bank account for purposes appropriate for a personal representative:

1. "to fund ongoing litigation in the Panama domiciliary estate"  
(Appendix 1, § 5);
2. for "pursuing litigation in the Panama domiciliary estate and other jurisdictions" (Appendix 1, § 6);

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<sup>5</sup> There is no claim of a breach of fiduciary duty with respect to the Florida real property. The court's Final Judgment incorrectly finds that the ancillary estate is insolvent. Appendix 1 at ¶ 13. The only evidence of record with respect to the financial condition of the estate shows that the estate was solvent when Lehman resigned as Personal Representative. Appendix 10.

3. to pay to attorney's fees to himself and to "attorneys in Panama, Nevis, and British Virgin Islands, plus litigation costs" (Appendix 1, § 9);
4. for a transfer of funds to the court-appointed administrator (Appendix 1, § 8); and
5. "properly" for appraisal fees and the preparation of a U.S. estate tax return (Appendix 1, § 12).

Expenditures for litigation and attorney's fees to defend the testamentary scheme established by Lucom from repeated attempts by his widow to thwart a testamentary intent to benefit the poor children of Panama,<sup>6</sup> are proper administration expenses of an estate and do not constitute acts for which he could be found liable.<sup>7</sup> So, too, are disbursements to a court-appointed administrator and payments for appraisals and an estate tax return.

In *Estate of Pearce*, 507 So. 2d 729 (Fla. 4th DCA 1987), it was held that a personal representative cannot be held liable even under section 733.609, Fla. Stat., for conducting the affairs of the estate in a manner that

is no more than an effort to carry out one's obligations to the estate as one sees them.

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<sup>6</sup> Appendix 4 at 5.

<sup>7</sup> On December 22, 2009, Lehman obtained a judgment for \$3.8 million for abuse of process against the attorney who represented Hilda in Panama. Appendix 11.

507 So. 2d at 731. This court's Final Judgment has expressly found that, at the end of the day, estate funds *were* properly disbursed in furtherance of the personal representative's obligations to the Lucom's intent and the proper administration of estate funds. The court's findings establish that Lehman did *not* violate his responsibilities as personal representative under the standard for judgment his conduct which is specified in Lucom's will.<sup>8</sup>

Newly discovered evidence has now established that Lehman was at all times acting under the lawful authority of his Panamanian appointment as personal representative of Lucom's domiciliary estate. The validity of his status as domiciliary personal representative validates his status as ancillary personal representative in Florida. *See* subsections 734.102(1) and (7), Fla. Stat. Accordingly, Lehman's use of ancillary estate money for proper administration expenses *cannot* constitute a breach of fiduciary duty. *See* section 733.602(2), Fla. Stat., which provides that a personal representative shall not be liable for any authorized act of administration.

An executor's breach of fiduciary duty can only arise from a *misuse* of estate funds. *E.g., Kravitz v. Levy*, 973 So. 2d 1274 (Fla. 4th DCA 2008). Hilda adduced no evidence that Lehman's actions rose to the level required by the exculpatory clause in Lucom's will, and the court's factual findings in the Final Judgment

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<sup>8</sup> The comingling of ancillary estate funds with Lehman law firm funds account is legally inconsequential to a determination of whether the funds were actually used for proper administration expenses.

confirm the absence of any such conduct. Accordingly, the alternative finding in the Final Judgment that Lehman's actions constituted a breach fiduciary duty is factually unsupported, and must be vacated.

**RELIEF REQUESTED**

The court is respectfully requested to vacate its March 5 Final Judgment, to grant Lehman's motion for personal representative and legal fees, and to enter a final judgment for Lehman on all issues presented by the parties' motions.

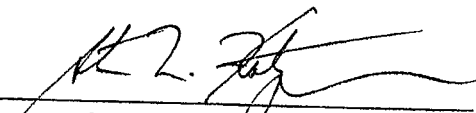
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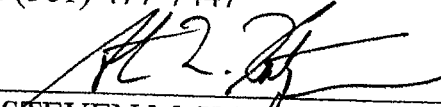
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via  Facsimile,  U.S. Mail,  Hand Delivery to all counsel on the attached list, this 1st day of March, 2010.

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