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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LINSEY FRELO,

Plaintiff and Appellant,

v.

JEFFREY R. OPFER, as Trustee, etc.,

Defendant and Respondent.

A134665

(San Mateo County
Super. Ct. No. PRO-118161)

In this inter-sibling dispute over parental property, Linsey Frelo appeals the trial court’s judgment entered after a bench trial, denying in part her petition to determine her interest in certain trust property. We shall affirm the judgment.

BACKGROUND

Roy and Margaret Opfer were married in July 1955. Plaintiff Linsey Frelo is Margaret’s daughter and was 13 years old when Margaret and Roy married. Respondent Jeffrey Opfer was born in 1959 and is Roy and Margaret’s only child.¹

In September 1983, Roy and Margaret created “The Opfer 1983 Family Trust” (1983 Trust). Roy and Margaret were named cotrustees of the trust estate. The 1983 Trust provided that in the event of the death of Roy or Margaret, the survivor shall act as sole trustee unless he or she elects to serve as cotrustee with the successor trustee. Linsey and Jeffrey were named as joint successor trustees. Also, the 1983 Trust provided that upon the deaths of both Roy and Margaret, the remainder of the trust was to be

¹ For the ease of the reader, we shall refer to all family members by first name throughout the remainder of our opinion. No disrespect is intended.

distributed in equal shares to the children, Linsey and Jeffrey. The property transferred to and made part of the 1983 Trust was listed in Schedule A, and included the following, denominated as “Community Property”; the residence located at 422 2nd Avenue in Redwood City (2nd Avenue property), real property located at 2233 Middlefield Road in Redwood City (Middlefield property), a rental property located at 2840 Huntington Avenue, Redwood City (Huntington property), and two bank accounts at a Wells Fargo Bank branch in Redwood City.

In August 2010, Linsey filed a “Petition for Determining Interest in Property, Instructions and for Account by Trustee Jeffrey R. Opfer” (petition).² The petition stated as follows: Linsey is a named cotrustee and beneficiary of the 1983 Trust. Margaret was diagnosed with Alzheimer’s disease and was confirmed to be incapacitated by a licensed medical practitioner in February 2007. Roy died on June 30, 2008, and Margaret died on November 29, 2009. After Roy’s death, Jeffrey, as successor cotrustee of the 1983 Trust, filed a petition requesting the court to cure a defect in the title of the Huntington property caused by the fact Margaret mistakenly failed to sign the deed transferring the Huntington property into the 1983 Trust. On November 25, 2008, the court issued an order regarding Jeffrey’s petition, finding Roy and Margaret intended to transfer the Huntington property into the 1983 Trust, Margaret was currently incapacitated, and ordering the Huntington property be transferred into the 1983 Trust.

The petition further alleged that after Margaret’s death, Linsey contacted Jeffrey concerning the 1983 Trust and he refused to cooperate with her in an orderly settlement of the trust. After Linsey retained counsel, her counsel contacted attorney Stuart Bronstein. Attorney Bronstein informed Linsey’s counsel that on October 23, 2006, Roy

² The petition was filed pursuant to sections 850, subdivision (a)(3)(B) and 17200, subdivision (b)(6) of the Probate Code. Section 17200, subdivision (b)(6) of the Probate Code governs petitions by a trustee or beneficiary concerning the internal affairs of a trust with respect to “[i]nstructing the trustee,” and section 850, subdivision (a)(3)(B) of the Probate Code governs petitions for court orders by a trustee or any interested person having a claim to real or personal property held by another.

had established another trust known as the Roy E. Opfer Revocable Trust (2006 Trust). In establishing the 2006 Trust, Roy, as trustee of the 1983 Trust, signed grant deeds on October 23, 2006, transferring the 2nd Avenue, Middlefield and Huntington properties to the 2006 Trust. The 2006 Trust named Jeffrey as the successor trustee and sole beneficiary of the trust property.

In her petition, Linsey alleged Roy's transfer of title of the three properties to the 2006 Trust are void and without force or effect because (1) Margaret was incapacitated with Alzheimer's disease at the time of the transfers; (2) there is no evidence Margaret consented to the transfer; and (3) the purported transfers did not constitute an effective revocation under Paragraph 7 of the 1983 Trust.³ The petition also alleged in the alternative that if the transfer was valid, the transfer applied only to Roy's one-half community property interest and not to Margaret's one-half community property interest.

The matter was tried before the court over several hearings held in October and November 2011. The court received evidence and heard testimony from Jeffrey, Linsey, Attorney Bernstein, and Barbara Abrams, Roy's friend of over 20 years. The trial court issued its amended statement of decision and judgment on December 27, 2011, (SOD). The SOD included the following factual findings: At some point after Roy and Margaret created the 1983 Trust, they agreed Jeffrey should have the Huntington property, Jeffrey paid the then-existing fair market value for the property and the property was Jeffrey's but remained in the 1983 Trust for tax purposes upon the advice of an accountant. Roy and Margaret also intended to compensate Jeffrey for his caregiving services, which began sometime around 1994 and continued until their deaths. There was no evidence of undue influence by Jeffrey and Roy intended the 2006 Trust to benefit Jeffrey. There was no evidence as to Margaret's capacity with respect to, or that she objected to, the

³ Paragraph 7 of the 1983 Trust provides: "During our joint lifetimes, this trust agreement may be revoked in whole or in part with respect to the community property in the trust estate by an instrument in writing signed by either of us and delivered to the Trustee and the other of us In the event of such revocation, any community property in the revoked portion shall revert to both of us as our community property"

2002 gift of money to Jeffrey (the monies placed in a joint account held by Roy and Jeffrey). There was evidence Margaret did lack capacity as of 2004.

Additionally, the SOD included the following legal findings: The 1983 Trust held the Huntington property constructively for Jeffrey's benefit and that asset is not a part of the 1983 Trust. Roy's transfer of the 2nd Avenue property and the Middlefield property to the 2006 Trust are set aside as to Margaret's community interest, i.e., the 1983 Trust owns a 50 percent interest in these two properties. Regarding the transfers of money from the 1983 Trust to a joint account for the benefit of Roy and Jeffrey, the court concluded the 2002 transfer of \$61,500 is a valid gift and thus not part of the 1983 Trust estate. On the other hand, the court set aside the 2004 transfer of \$99,161.54 made after Margaret was incapacitated, and included Margaret's 50 percent interest in that amount (\$49,580.77) in the 1983 Trust estate. Linsey filed a timely notice of appeal on February 23, 2012.

DISCUSSION

A. *Roy Transferred His Community Property Interest in the Subject Properties from the 1983 Trust to the 2006 Trust*

In its SOD, the trial court set aside Roy's transfer of the Middlefield and 2nd Avenue properties from the 1983 Trust to the 2006 Trust as to Margaret's community property interest in those properties. Here, Linsey contends the entire transfer should be set aside, reasoning that for Roy to transfer his half of the community property from the 1983 Trust to the 2006 Trust, he first had to revoke the 1983 Trust, and his attempted revocation was ineffective because he failed to follow the method of revocation specified in the 1983 Trust.⁴

⁴ Linsey also argues Roy, as trustee of the 1983 Trust, lacked authority to transfer trust property to a new revocable trust of which he was the sole settlor and trustee. Linsey bases this contention on language in the 1983 Trust under paragraph 3.A., which provides "community property in the trust estate shall retain its character as community property during our joint lifetimes" and limits the Trustee's power over trust community property to that provided under California community property law, including "California Civil Code Sections 5125 and 5127 or other California Code Sections then in effect."

Developing her argument on this point, Linsey notes the issue of revocability under the 1983 Trust is governed by former Civil Code Section 2280 (repealed by Stats. 1986, ch. 820, § 7, operative July 1, 1987) and not by current Probate Code section 15401 (governing revocable trusts; methods; multiple settlers; granting of power to revoke). (See Prob. Code, § 15401, subd. (e) [“The manner of revocation of a trust revocable by the settlor or any other person that was created by an instrument executed before *July 1, 1987*, is governed by prior law and not by this section.”], italics added.) In essence, Linsey contends under former Civil Code section 2280, to revoke the 1983 Trust with respect to trust community property, Roy had to follow the revocation procedures under paragraph 7 of 1983 Trust, which required “an instrument in writing signed by either of us and delivered to the Trustee and the other of us.” According to Linsey, Roy’s attempted revocation of the 1983 Trust was ineffective because he failed to deliver “an instrument in writing” signed by him to Margaret. We are not persuaded.

Contrary to common law, California law carries a presumption that a voluntary trust is revocable unless language in the trust expressly provides it is irrevocable. (See Anderson et al., Cal. Trust Administration (Cont.Ed.Bar 2d ed. 2013) Modification, Revocation, and Termination of Trust, § 16.22, pp. 1370–1371.) “If the settlors of a trust are a married couple . . . and the trust holds community property, either settlor acting alone can revoke the trust as to community property, unless the trust *expressly provides otherwise*.” (*Id.* at § 16.23, p. 1371, italics added.)

Linsey notes California Civil Code Sections 5125 and 5127 were repealed in 1992 and 1993, respectively, and replaced without substantive change by various provisions in the Family and Probate Codes. Relying on these various provisions, Linsey asserts because Margaret was incapacitated at the time Roy transferred community property out of the 1983 Trust, Roy was required to comply with joinder and consent requirements specified under Probate Code sections 3051 and 3071. However, we need not address this contention because the SOD did not allow the entire transfer to stand, returning Margaret’s share of community property to the 1983 Trust, and Linsey acknowledges Roy’s transfer of his share of community property to the 2006 Trust may stand if he revoked the 1983 Trust.

This principle applies to trusts governed under former Civil Code section 2280, as explained in *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956 (*Huscher*). In *Huscher*, the appellate court, in order to resolve a modification issue related to a trust created prior to July 1, 1987, examined Civil Code former section 2280 (section 2280) “as it originally existed and as amended in 1931” as well as decisions applying both versions. (*Huscher, supra*, at p. 961.) As amended in 1931, and until its repeal in 1986, section 2280 “read, in relevant part: ‘Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee.’ ” (*Huscher, supra*, at p. 963.) The *Huscher* court distilled the following principle from its examination of the statutes and cases: “[I]f a trust contains a revocation . . . procedure that is either explicitly or implicitly exclusive [i.e., specific and detailed enough to imply exclusivity], that procedure must be followed and section 2280 will not apply.” (*Id.* at p. 970.)

However, as the court noted, “Left unanswered by this formulation is what happens when a trust’s revocation or amendment procedure is not explicitly exclusive and is not sufficiently detailed or specific to be considered implicitly exclusive. We see two possible interpretations: (1) that section 2280 preempts the nonexclusive procedure; or (2) either method may be used.” (*Huscher, supra*, 121 Cal.App.4th 956, 970, fn. omitted.) The court endorsed the latter approach, stating: “[S]ection 2280 was [not] intended to preempt a trustor’s designated method of revocation simply because it is not implicitly or explicitly the exclusive means of doing so. As amended in 1931, section 2280 said that unless a trust were expressly made irrevocable in writing, ‘every voluntary trust shall be revocable by the trustor by writing filed with the trustee.’ Because the amendment was designed to reverse the presumption of irrevocability that existed under the previous version of section 2280, we believe that the term ‘shall’ in the amended version of section 2280 was intended to highlight that change in the law. In short, ‘shall’ was used to make clear that trusts shall be revocable unless otherwise stated, but was not designed to make mandatory the method of revocation which followed. Our

conclusion is bolstered by Civil Code former section 2282, which governed the means for discharging a trustee. In that section, the Legislature stated that a trustee could be discharged ‘only as follows,’ then set forth six specific methods. [Citation.] As that section makes clear, when the Legislature wanted to make trust-related procedures exclusive, it knew how to say so. We also believe that where a trust’s modification method does not suggest exclusivity, the section 2280 procedure should remain available to the trustor as an alternative. To hold otherwise would render that portion of section 2280 meaningless. More important, it could well frustrate the intentions of a competent trustor who did not intend to create an exclusive modification procedure and who sought to modify his trust pursuant to section 2280.” (*Id.* at p. 971, fn. omitted.)

The *Huscher* court applied these principles to the modification provision before it. The provision stated the trustor “ ‘may at any time amend any of the terms of this trust by an instrument in writing signed by the Trustor and the Trustee.’ ” (*Huscher, supra*, 121 Cal.App.4th at p. 972.) The court held the provision was “not explicitly exclusive” and that it did not “meet the criterion for implicit exclusivity” because it lacked “clear and specific language detailing” the methods by which revocation could be affected, for example, by providing “revocation ‘shall not be effective *until and unless*’ several specified events took place,” or specifying that “no modification ‘shall be effective’ *until 30 days after* it was served upon and accepted by the trustee.” (*Ibid.*, citations omitted, italics added.) Rather, the provision simply stated that “the trustor ‘may at any time amend . . . by an instrument in writing signed by the Trustor and the Trustee.’ ” (*Ibid.*) The absence of more detailed “language tips the scale away from an interpretation of implicit exclusivity.” (*Ibid.*)

Like the provision at issue in *Huscher*, the revocation provision in the 1983 Trust is not explicitly exclusive and it fails the *Huscher* test for implied exclusivity. The provision simply states the “agreement *may be revoked* . . . with respect to the community property . . . by an instrument in writing signed by either of us and delivered to the Trustee and the other of us” and as in *Huscher*, it lacks any “clear and specific language”

marking this as the exclusive method of revocation, such as providing “revocation ‘shall not be effective *until and unless*’ several specified events took place,” or specifying that “no modification ‘shall be effective’ *until 30 days after* it was served upon and accepted by the trustee.” (*Huscher, supra*, 121 Cal.App.4th at p. 972, citations omitted, italics added.) Moreover, to hold to the contrary would “frustrate the intentions of a competent trustor [Roy] . . . to [revoke] his trust pursuant to section 2280” (*id.* at p. 971), because the record demonstrates Roy’s transfer of his community property interests from the 1983 Trust to the 2006 Trust reflected his “true intentions” to benefit Jeffrey over Linsey in return for the many years Jeffrey cared for Margaret. (*Id.* at p. 972.) Furthermore, Margaret, the other trustor of the 1983 Trust, suffered no prejudice thereby. The 1983 Trust states “[i]n the event of such revocation, any community property in the revoked portion shall revert to both of us as our community property,” and pursuant to the SOD Margaret’s community property reverted to the 1983 Trust and will be distributed equally between Linsey and Jeffrey as she desired according to the terms of that trust.

In sum, we conclude Roy was entitled to the benefit of section 2280 and that he revoked his community property interest in the 1983 Trust by transferring his community property interests in the subject real property to the 2006 Trust via grant deeds he signed in October 2006. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738, 742–743 [where husband and wife were both trustees, husband’s “notice to himself is sufficient as notice to ‘the trustee.’ ”]; *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 886–887 [will qualified as a writing by which trustor gave notice to herself as trustee].)

B. *Linsey Fails to Show the Judgment Must Be Reversed for Violation of the Duty of Loyalty*

At the parties’ request, the trial court set forth the following “additional specific findings” in its SOD: Jeffrey did not breach the duty to avoid conflict of interest; he did not breach the duty not to undertake an adverse trust; he did not breach the duty of loyalty; and, he did not breach the duty of impartiality.

Linsey now contends the trial court committed legal error by finding Jeffrey did not breach the duty of loyalty. She argues Jeffrey had an “irreconcilable conflict of interest” and breached the duty of loyalty because he was both a successor cotrustee of the 1983 Trust and a successor Trustee of the 2006 Trust. Linsey asserts the court’s finding on this point “must be reversed and [Jeffrey] must be removed as trustee.”

The issue of whether a party has breached a duty of loyalty is a question of fact. (See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) We review express and implied findings of fact made by the court in its statement of decision for substantial evidence. (See *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501.) Under this standard, “ “ ‘any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]’ [Citation.] In a substantial evidence challenge to a judgment, the appellate court will ‘consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]’ [Citation.] We may not reweigh the evidence and are bound by the trial court’s credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]” ’ [Citations.]” (*Axis Surplus Ins. Co. v. Reinoso* (2012) 208 Cal.App.4th 181, 189.) Indeed, we “start[] with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant’s affirmative burden to demonstrate otherwise.” (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.)

Here, attorney Stuart Bronstein testified at trial that he met with Roy Opfer on several occasions at Roy’s house. According to Bronstein, Roy was “really angry at his stepdaughter” Linsey. Roy told Bronstein Linsey “hadn’t paid any attention to her mother for years and Jeff had basically given up his life. He was spending full-time, seven days a week taking care of his mother who had Alzheimer’s for years” Roy

explained to Bronstein that in return for Jeffrey's dedication to his mother's care, Roy wanted to leave as much as he could of their combined estate to Jeffrey. Bronstein advised Roy that he could not leave everything to Jeffrey because "Margaret's part of the [1983] trust would become irrevocable and he could amend his part of the trust, but not hers." Bronstein advised he could leave "three quarters [to Jeffrey], but he couldn't leave the whole thing." Roy's response was the three properties in the 1983 Trust were his separate property because he owned all three outright prior to his marriage to Margaret. Bronstein further advised that a court could disagree with that assessment and conclude his transfer of the properties to the 1983 Trust was a gift to the community. At the time, Bronstein thought "there was a good chance there might be litigation about [this issue]."

Bronstein also testified that in his consultations with Roy regarding setting up the 2006 Trust, Jeffrey was merely the "go-between." Jeffrey arranged for Bronstein to come to the house and meet Roy because Roy did not like to communicate by telephone due to hearing difficulties. When Bronstein met with Roy at the house, he discussed matters directly with Roy. Although Jeffrey was present in the house at those times, he was otherwise engaged taking care of Margaret. Jeff told Bronstein that Margaret suffered from severe Alzheimer's disease. Bronstein never saw Roy seek the advice or approval of Jeffrey on any of the matters they discussed, stating, "These were Roy's ideas. I didn't have any impression that they came from Jeff."

Furthermore, in regard to Roy's capacity at that time, Bronstein testified Roy "seemed to be fully engaged and knew exactly what he was doing; knew what was going on. I didn't have any doubt that he was really on the ball." Bronstein's testimony on this point was corroborated by Barbara Abrams, who knew Roy for over 20 years as they attended the same church. Abrams stated Roy served as financial secretary for the church until just prior to his death in 2008; in that capacity he collected money, made bank deposits, and prepared monthly financial reports. Abrams opined Roy "was fully capable."

Jeffrey testified he had been living in the Huntington property until around 1998, when he began the transition to living in his parents' home as their need for his assistance increased; however, he continued to store his furniture at the Huntington property after he moved in with his parents. Around 1985, his parents gifted him the Huntington property but he insisted on making payments to his parents of \$200 per month that over the years amounted to the fair market value for the property. He explained the reason for that was he wanted "to be fair with everybody . . . and I asked them [his parents] if I could do that just to make a show of good faith so Linsey wouldn't be upset at the end when I ended up getting the [Huntington] house." He understood that "somewhere down the line, [he was] going to get the house and then there would be the split of everything else between [him] and Linsey." And in regard to the Huntington property, attorney Bronstein testified that when he spoke with Linsey in December 2008, she acknowledged Jeffrey paid for the Huntington property and it belonged to him.

This evidence shows that Roy, the cotrustor and cotrustee of the 1983 Trust, while of sound mind and after consultations with counsel, made the decision to revoke the 1983 Trust and set up a new and different trust in 2006. There is no evidence Jeffrey instigated the matter, suggested that course of action to his father, or that Jeffrey influenced or directed his father's decision in any way whatsoever. However, as attorney Bronstein predicted, because the real property Roy attempted to transfer from the 1983 Trust to the 2006 Trust was community property, Roy was empowered to transfer only his 50 percent interest in the real property to the 2006 Trust; moreover, Jeffrey acknowledged Margaret's 50 percent community property interest belongs to the 1983 Trust and never asserted it belonged in the 2006 Trust. In sum, the evidence provides ample support for the trial court's factual finding that Jeffrey did not breach a duty of loyalty to the 1983 Trust. On the other hand, Linsey fails to identify affirmative actions taken by Jeffrey in violation of his duty of loyalty to the 1983 Trust. Thus, we conclude she has failed to carry her burden of demonstrating the trial court's finding amounts to reversible error. (See *Garlock Sealing Technologies*, *supra*, 148 Cal.App.4th at p. 951.)

DISPOSITION

The judgment is affirmed. Appellant shall bear costs on appeal.

Dondero, J.

We concur:

Margulies, Acting P.J.

Banke, J.