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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ALFRED C. CAVAGNARO, as Trustee, etc.,

Plaintiff and Respondent,

v.

LUCILLA SAPONE,

Defendant and Appellant.

A139250, A139990

(City & County of San Francisco
Super. Ct. No. PTR-05-287470)

Lucilla Sapone appeals an order of the probate court authorizing Alfred C. Cavagnaro, as trustee of the John Sapone and Ebe F. Sapone Trust (the trust), to sell the home held by the trust in which Lucilla now lives. Lucilla contends that the order is contrary to both the terms and purpose of the trust. In a consolidated appeal, Lucilla challenges the probate court's order requiring the posting of an undertaking to stay enforcement of the sale pending appeal. Although the trustors of the trust undoubtedly were concerned with the welfare of their daughter, a contingent remainder beneficiary of the trust, the evidence confirms that the sale is necessitated by current financial conditions and transgresses neither the terms nor purpose of the trust. We shall therefore affirm the order directing the sale and dismiss the consolidated appeal.

Factual and Procedural Background

Ebe Sapone and her husband, John Sapone, created the trust in 1978 and in 1988 amended the trust in its entirety. The trust was established to provide for the support and maintenance of John and Ebe during their lives and to provide for the support and maintenance of other beneficiaries "if some calamity should befall" John or Ebe.

John Sapone died in 1991. On his death, the trust estate was divided among four separate subtrusts: (1) the survivor's trust; (2) the exempt marital trust; (3) the non-exempt marital trust; and (4) the residual trust. Ebe became the sole income beneficiary of the four subtrusts. Lucilla, and Lucilla's three children Jeffrey Dullea, John Dullea, and Angela Dullea are remainder beneficiaries under the trusts.

In 1998, Ebe married Alfred Cavagnaro. In 2007, Alfred was appointed the general conservator of Ebe's estate and cotrustee with Ebe of the four subtrusts. The order appointing Alfred cotrustee provides that real property may not be sold without court order. In 2013, Ebe resigned as cotrustee and Alfred became the sole trustee.

The principal assets of the subtrusts include four parcels of real property: a commercial property at 150-156 West Portal in San Francisco, and three residential properties, located at 170 Palo Alto Avenue in San Francisco, 30 Partridge Court in San Rafael, and 172 Galewood Circle in San Francisco. The trust assets are divided between the subtrusts as follows:

- 170 Palo Alto and 1/6 of the West Portal property are held by the survivor's trust.
- 30 Partridge Court and 1/6 of the West Portal property are held by the non-exempt marital trust.
- 172 Galewood Circle and 1/3 of the West Portal property are held by the residual trust.
- One-third of the West Portal property is held by the exempt marital trust.

In April 2013, Ebe and Alfred lived at 170 Palo Alto, Lucilla lived at 30 Partridge Court, and Jeffrey Dullea lived at 172 Galewood. At that time Alfred petitioned the trial court for an order authorizing him to, among other things, sell 30 Partridge Court and, if necessary, evict Lucilla from that property. The petition alleges that all of the trust's residential properties are heavily encumbered and that the financial situation of the trust "has become more precarious over the past several months." At the hearing he explained, "The subtrust in which the Partridge property is funded receives approximately \$1,800 in income from the commercial property. As total monthly expenses for this subtrust are approximately \$3,000, the non-exempt marital subtrust runs a deficit of over \$1,300 per

month. This is not sustainable. The trustee needs to sell the Partridge Property in order to make this subtrust financially productive and self-sustaining.”¹

On June 5, the court granted the petition, finding that “[t]he financial condition of the trusts is unsustainable and the property should be sold.” Lucilla timely filed a notice of appeal.

On August 5, 2013, Alfred petitioned the trial court for an order directing him to exercise his powers under the June 5 order as if no appeal were pending or, alternatively, requiring Lucilla to post a \$530,000 undertaking pending the outcome of that appeal. The trial court granted the petition over Lucilla’s objection. Lucilla timely filed a second notice of appeal. On Lucilla’s motion, this court consolidated the two appeals for all purposes.

Discussion

I. A139250 – Challenging the order that 30 Partridge Court be sold

A. *The order directing the sale of 30 Partridge Court does not contravene the terms of the trust.*

Under the terms of the trust, Ebe, as the surviving spouse, is entitled to the net income generated by the assets held by each of the subtrusts.² In addition, the trustee has authority to distribute to Ebe as much of the principal of the subtrusts as the trustee “deems necessary . . . for . . . her health, education, support and maintenance.” The trust

¹ Lucilla does not dispute the accuracy of these numbers or the current negative cash flow. The record contains indications of the reasons for a downturn in the financial condition of the trust, including the incurring of a significant liability arising out of an investment made by one of Lucilla’s sons when Ebe was the sole trustee, and a reduction in the amount of rent received from the West Portal property.

² Article II, section 7 of the trust provides: “From and after the death of the deceased spouse and during the lifetime of the surviving spouse, the trustee shall distribute to or apply for the benefit of the surviving spouse the entire net income of the marital trusts in convenient installments, but in no event less often than annually.” Article II, section 8 similarly provides, “On the death of the deceased spouse, the trustee shall pay to or apply for the benefit of the surviving spouse all of the net income of the residual trust in quarter annual or more frequent installments but in no event less often than annually.”

provides that “[p]ayments out of the principal to the surviving spouse shall be made first out of the survivor’s trust until it is exhausted then from the marital trusts until they are exhausted and thereafter out of the residual trust.”

Lucilla argues that Alfred’s petition improperly seeks to invade the principal of the non-exempt marital trust without first exhausting the principal of the Survivor’s trust. She explains, “The 30 Partridge Court property that the superior court authorized the trustee to sell is funded entirely into the non-exempt marital trust. . . . Selling it to support Ebe is a payment out of the marital trust’s principal to the surviving spouse. This is something the trustee is forbidden to do until the survivor’s trust is exhausted. But the survivor’s trust is not exhausted; it still holds, at a minimum, the 170 Palo Alto property and one-sixth of the West Portal property.”

Sale of the property, however, is not an invasion of the trust principal. As Alfred notes, “By selling 30 Partridge Court and investing the proceeds of sale prudently, the trustee will not be invading principal at all. He will simply be changing the form of the principal by converting a wasting asset of the trust to an income producing asset.” He asserts that his “purpose in selling 30 Partridge Court is not to spend the proceeds to care for Ebe, but to stop the financial hemorrhage caused by maintaining a parcel of real property that costs the non-exempt marital trust \$1,350 more each month than that subtrust receives in income. By selling 30 Partridge Court and investing the net sale proceeds in a safe, income-producing asset (e.g., a savings or money market account), the non-exempt marital trust will realize a *gain* of more than \$1,658 each month (the net income from its 1/6 share of the West Portal property, plus the income generated by the cash investment).” In other words, “It will preserve 100% of the principal and make the subtrust income-producing and self-sustaining.”

Lucilla insists that Alfred intends to use the equity from the sale to pay for Ebe’s ongoing maintenance and support. Lucilla relies on allegations in the petition that “the net equity from the sale would be available to Ebe for her own on-going expenses” and that “[a]lthough this is not a complete resolution of the conservatee’s financial crisis, the proposed sale would provide petitioner with the needed liquidity to pay the existing

liabilities and any emergency expenses that may arise.” While there may be some ambiguity in these allegations, they do not necessarily evidence an intent to invade principal. As explained above, selling the property will eliminate the approximate \$1,300 monthly deficit for which Ebe is currently responsible. Under the terms of the trust any income generated from the investment of the proceeds of the sale of the Partridge Court home may properly be distributed to Ebe. The allegations in the petition thus can be understood to mean only that the reduced expenses and increased income will tend to alleviate Ebe’s financial difficulties.

Alfred has argued throughout the proceedings that he “needs to sell the Partridge property in order to make this subtrust financially productive and self-sustaining,” which is what the court ordered him to do. According to the settled statement, Alfred’s counsel argued, “The trust is in dire financial straits and it is difficult to pay minimal bills. . . . [¶] . . . [¶] The trustee is taking the appropriate action by selling the Partridge Court property as he is under a duty, imposed on him by the probate court and this court, to make trust property productive. In fact, this court has reminded trustee in earlier proceedings that he has a duty to ensure that trust property is generating income for the benefit of Ebe.”

In short, we find no inconsistency between the court’s direction that the property be sold and the express terms of the trust.

B. *The order directing the sale of 30 Partridge Court is not contrary to a purpose of the trust.*

Lucilla contends that the trustee’s decision to sell 30 Partridge Court when other alternatives are available is an abuse of the trustee’s discretion. She argues, “Although the trustee is certainly empowered to take the actions necessary to provide for Ebe’s needs, he is not empowered to take actions to that end that will defeat other purposes of the trust when alternative avenues are available.” Lucilla specifies a number of alternatives she contends the trustee should have exhausted before seeking to sell her home. “One [alternative] was to recover the property at 172 Galewood, which Ebe’s grandson and his girlfriend have been occupying rent-free for many years, despite the

terms of a lease under which they live there. . . . Another possibility could be to sell the income property at 150-56 West Portal.” In her reply brief, Lucilla asserts: “The terms of the trust could be satisfied by, for example, selling the survivor’s trust’s interest in the West Portal income property and/or realizing the equity in the 170 Palo Alto residence while leaving Ebe in place through a reverse mortgage.”³

While we are sympathetic to Lucilla’s situation, nothing in the record supports the assertion that maintaining her living arrangement indefinitely was an essential objective in creating the trust. Court filings made while Ebe was trustee, which reflect Ebe’s concern for Lucilla’s welfare, do not go so far as Lucilla contends. In 2006, Ebe submitted a budget for court approval that included the following statement about her daughter: “Petitioner has only one daughter (Lucilla), who is an honest and an honorable person (though seemingly, perhaps, suffering from the same tendency as petitioner, namely the favoring of her own three children, who are petitioner’s grandchildren.) Lucilla has engaged in productive and reasonably well compensated work during her entire adult lifetime, until the beginning of the year 2005, when a substantial part of her income was interrupted. Since then, petitioner has supported her said daughter, who has

³ Although not necessary to the disposition of the appeal, we note that the record casts considerable doubt on the efficacy or sufficiency of these alternatives. As respondent points out, the West Portal commercial property is the trust’s only income producing asset and, he argues, “[s]elling it would be suicidal for the trust.” Obtaining a reverse mortgage on the 170 Palo Alto home in which Ebe resides might not jeopardize retention of the residence but a continuing negative cash flow caused by Lucilla’s rent-free occupancy of the Partridge Court home apparently would threaten to deprive the trust of funds necessary to meet Ebe’s medical and other living expenses. As to the suggestion that Alfred should have evicted Jeffery from the Galewood property and rented the home at market value, the record reflects that at the time of the hearing, Alfred had retained an attorney and was attempting to do just that. It does not appear, however, that the potential rental income on the Galewood property would be sufficient to make the subtrust in which that property is held self-sufficient, let alone produce sufficient additional income to overcome the negative cash flow of the Partridge Court property.

Alfred’s request that this court to take judicial notice of his April 2014 petition for authorization to sell the Galewood property and the May 2014 court order granting that petition is denied. This evidence was not before the court when the order on appeal was issued and thus is not relevant to the propriety of the court’s order.

no significant savings, and who has been precluded from replacing her lost income stream, though she has earnestly sought new earning opportunities, by her age and the condition of her health. Petitioner considers Lucilla to be the principal and most important object of her bounty, and requests approval of all budgetary provisions in Lucilla's behalf based on the following: petitioner is the life income beneficiary of all trusts, and there is sufficient income to both support petitioner and provide for the support of her daughter, if petitioner and said daughter exercise a reasonable amount of frugality. It is to be further noted that Lucilla has been taking courses to expand on her ability to earn an income for herself in the future, when and as her health may allow." In 2007, Ebe filed an accounting of the trust estate in which she noted her continued pleasure with Lucilla's living arrangement at 30 Partridge Court. While this evidence indicates that Ebe was supportive of Lucilla living rent-free in the property when that was financially feasible, the record also shows that the trust's financial circumstances have changed. Moreover, at the hearing on the petition Ebe's attorney indicated that she wanted the property sold and supported the rental of a small apartment for Lucilla.

The terms of the trust evidence an intent that the assets of the marital and residual subtrusts be preserved so that they can ultimately be distributed to the contingent remainder beneficiaries, Lucilla and her children. As set forth above, it is no longer financially possible to maintain 30 Partridge Court without placing an unsustainable burden on Ebe's income and assets. By selling the 30 Partridge Court property, the trustee fulfills the purpose of the trust by ensuring that Ebe's income is protected, the subtrust is self-sustaining and the equity in the property is preserved for the contingent beneficiaries. There is no merit to Lucilla's suggestion that the trustee is obligated to leverage the assets of the survivor's trust to continue subsidizing the non-exempt marital trust so that Lucilla can permanently live rent-free at 30 Partridge Court.

C. *The court's order does not contravene the terms of the Survivor's trust.*

Lucilla argues that the petition Ebe filed in 2006 seeking court approval of a six-month budget, in which Ebe expressed her thoughts about her daughter quoted above,

amended the survivor's trust to make Lucilla a current beneficiary. Nothing in the record supports this interpretation.

The 2006 petition says nothing about amending the survivor's trust. To the contrary, Ebe's petition clearly indicates that provisions in the budget that were intended to benefit Lucilla were premised on the assumption that the West Portal property was generating sufficient income to cover the expenses on the 30 Partridge Court property and that total trust income was sufficient to cover the expenses of both Ebe and Lucilla ("there is sufficient income to both support petitioner and provide for the support of her daughter"). These assumptions negate any intention to continue subsidizing Lucilla's housing if doing so jeopardized a continuing source of support for Ebe.

II A139990 - Challenging the order requiring an undertaking pending appeal

Lucilla contends that the order requiring her to post an undertaking was invalid but acknowledges that "with the consolidation of these two appeals, appeal No. A139990 will become moot at the same time it is decided. Since the two appeals will be decided simultaneously, when the court issues its decision and remittitur issues, appeal No. 139250 will no longer be pending and there will no longer be any reason to post an undertaking."

" 'An appellate court will not review questions which are moot and which are only of academic importance.' " (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 566, quoting *Keefe v. Keefe* (1939) 31 Cal.App.2d 335, 337.) A question becomes moot when the appellate court is unable to grant any effectual relief or render an opinion that affects the matter at issue. (*Ibid.*) Such is the case here. Because consideration of the trial court's ruling on the undertaking would serve no purpose following our determination in the consolidated appeal, the propriety of the order requiring an undertaking is moot. Accordingly we shall dismiss appeal No. A139990 as moot.

Disposition

The order directing the sale of 30 Partridge Court is affirmed. Appeal No. A139990 is dismissed. Respondent Alfred Cavagnaro shall recover his costs on appeal.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.