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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

Estate of JOSEPH F. SILVEIRA, Deceased.

LORRAINE F. SILVEIRA, as Trustee, etc.,
Petitioner and Appellant,

v.

KEVIN SILVEIRA, as Executor, etc.,
Respondent and Appellant.

A141310, A141421

(Marin County
Super. Ct. No. PR 032446)

In a previous appeal, this court affirmed an order reforming the terms of a “tontine,” or survivalist partnership agreement, and remanded the matter for a redetermination of the book value of the interest of the penultimate surviving partner at which his estate was compelled to sell his interest to the last surviving partner. Following that redetermination, the personal representative of the estate of the last survivor, who has since also died, appeals the trial court’s determination of the amount that must be paid to purchase the other partner’s partnership interest. Petitioner Lorraine F. Silveira, trustee of the Anthony F. Silveira and Lorraine F. Silveira 2002 trust and executor of the estate of Anthony F. Silveira (petitioner),¹ appeals the amended judgment requiring petitioner to pay \$4,056,665 to the estate of Joseph F. Silveira (the estate) in exchange for Joseph Silveira’s interest in the Silveira Ranches partnership. In a cross-appeal, the estate

¹ We refer to Lorraine F. Silveira in her representative capacity as “petitioner” because these proceedings were commenced by a petition filed in probate court by Anthony F. Silveira (Tony), the last surviving partner of the partnership agreement.

challenges the trial court's orders denying the estate's request for discovery sanctions and striking the estate's memorandum of costs. We shall affirm the amended judgment and postjudgment costs and sanction orders.

Factual and Procedural Background²

The Silveira Ranches partnership owns and operates dairy farms on several sizable acreages in Marin County. The partnership was established in 1953 by a partnership agreement signed by Mary Elizabeth Silveira (Mary) and her seven children, Joseph, Anthony, Dolores, George, Carlos, Helen, and Jean. The partnership agreement includes provisions requiring that any departing partner, or the estate of any deceased partner, sell that partner's interest back to the remaining partners for book value.³ At the time of formation, Mary held a two-thirds interest and each of the children owned a 1/21 interest in the partnership. By 1981, only Mary, Dolores, Joseph and Anthony remained as partners. In 1981, when Mary retired, her remaining interest was distributed to Dolores, Anthony and Joseph. In 1997, Dolores was bought out of the partnership in settlement of a lawsuit she filed against her brothers.

In April 2003, Joseph died. Joseph's wife, the then-executor of his estate, refused to sell Joseph's interest for less than fair market value, and Anthony filed the present petition seeking an order directing the estate to convey Joseph's interest for book value under the terms and conditions of the amended partnership agreement. In the prior appeal, we upheld the trial court's order reforming the amended partnership agreement to require the estate of the penultimate surviving partner (Joseph) to sell his interest in the partnership to the last surviving partner (Anthony) for book value. We concluded, however, that the court erred in calculating the book value of Joseph's interest and

² The estate's request for judicial notice of documents, exhibits and transcripts from prior trial court and appellate proceedings in this action is granted.

³ In 1971, Mary, Dolores, Anthony and Joseph executed a supplemental partnership agreement providing that Mary would not be obligated to participate in the buy-out of exiting partners. Consistent with this agreement, the supplemental agreement also modified the buy-out provision in the original agreement to make it a personal obligation of the remaining partners to purchase the interest of any dying or retiring partner.

remanded for recalculation. (*Estate of Joseph Silveira* (Dec. 12, 2012, A128800) [nonpub. opn.])

Although the estate challenged in numerous respects the manner in which the trial court had calculated the amount to which Joseph was entitled, this court's prior opinion identified only a single error that the trial court was directed to correct. We approved the application of generally accepted accounting principles (GAAP), specifically including accounting principles bulletin 29 (APB 29), to determine the book value of Mary's interest when she withdrew from the partnership in 1981, but we determined that in 1981 Mary held and transferred a 66.6 percent interest in the partnership, rather than the 6.61 percent urged by Anthony and accepted by the trial court. We directed the trial court to recalculate the upward adjustment to the book value of the partnership under APB 29 based on Mary's ownership and relinquishment in 1981 of a two-thirds interest in the partnership, thereby increasing the book value of Joseph's interest at the time of his death.

On remand, Donald Glenn, the estate's expert accounting witness, testified that making the upward adjustment in the book value of Mary's two-thirds interest in 1981 in accordance with APB 29 produced a book value of Joseph's partnership interest at the time of his death of \$4,056,665. Petitioner retained a new expert, Stuart Harden, who opined, contrary to the opinion expressed by petitioner's former expert, that because the buyout of Mary's interest was accomplished with a cash payment, it was a monetary transaction to which APB 29 does not apply, thus eliminating the upward adjustment of book value and substantially reducing the subsequent book value of Joseph's interest. The trial court issued an amended judgment accepting the valuation of the estate's expert and decreeing that petitioner may exercise her right to acquire Joseph's partnership interest for \$4,056,665 plus interest.

In its statement of decision, the trial court noted that it was bound by our prior opinion to apply APB 29 to Mary's 66.6 percent interest and found that Glenn's calculation properly corrected the error identified on the prior appeal. The court continued, "APB distinguishes between monetary and nonmonetary assets and, as its

‘basic principle,’ notes that, ‘A transfer of a nonmonetary asset to a stockholder or another entity in a nonreciprocal transfer should be recorded at the fair market value of the asset transferred, and a gain or loss should be recognized on the disposition of the asset.’ Although petitioner’s expert has provided testimony that the purchase of Mary’s capital account interest was a strictly cash transaction which did not involve any nonmonetary consideration and that he can ‘apply’ APB 29 but to no great effect, the court believes that APB 29 must be applied and that some recognition must be given to the fair value of Mary’s sizable interest in the partnership. The estate’s expert does that.”

Following entry of judgment and the timely filing of a notice of appeal, the estate filed a motion for discovery sanctions seeking to recover, among other costs, its attorney fees, and submitted a memorandum of costs seeking to recover other costs incurred on remand. The trial court denied the sanction motion and, on petitioner’s motion, struck the estate’s cost memorandum. The estate timely filed a notice of appeal from these orders. Pursuant to the stipulated request of the parties, the two appeals have been consolidated for the purpose of briefing, oral argument, and decision.

Discussion

I. Petitioner’s Appeal

In her appeal, petitioner contends the trial court erred in calculating the book value of Joseph’s partnership interest. She argues (1) the trial court abused its discretion in refusing to admit additional evidence concerning the percentage of Mary’s partnership interest when she retired; (2) the court misapplied APB 29; and (3) the purpose of the partnership and partnership agreement would be defeated if she is required to pay an artificially inflated price for Joseph’s partnership interest.

A. *The trial court correctly rejected additional evidence as to the percentage of Mary’s Interest in the partnership at the time of her retirement.*

In this court’s prior opinion, we concluded, based on substantial evidence received during the prior trial, that “[t]he court erred in calculating the APB 29 adjustment following Mary’s departure based on the premise that in 1981 she held only a 6.61 percent interest in the partnership rather than a 66.6 percent interest.” (*Estate of Joseph*

Silveira (Dec. 12, 2012, A128800) [nonpub. opn.] We reversed the judgment in this regard and “remanded for recalculation of the book value of the partnership consistent with [our] opinion.” (*Ibid.*) The remand did not order a new trial to re-evaluate the percentage of Mary’s interest at the time of her departure; the trial court was directed to recalculate the resulting book values in light of this court’s determination that Mary’s interest was 66.6 percent when she withdrew from the partnership. The trial court properly interpreted our opinion to preclude petitioner from introducing additional evidence reopening the issue that had been decided at the original trial and appeal. (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367 [“ ‘Where a reviewing court reverses a judgment with directions . . . the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court.’ ”].)

B. *The court did not err in calculating the book value of Joseph’s interest after applying APB 29.*

Petitioner acknowledges, “[b]ased on the trial court’s . . . interpretation of the terms of the partnership agreement, which is explicitly included in the March 22, 2010 judgment, and which has been affirmed by this court on appeal, the legal determination that GAAP and APB 29 are essential terms of the contract has become the law of the case.” As the trial court observed on remand, our direction that the court recalculate the book value based on application of APB 29 to Mary’s 66.6 percent interest was based “upon the prior findings at trial, unchallenged on appeal, that APB 29 should be applied to evaluate the interests of all partners departing after 1973”⁴ Accordingly, whether

⁴ Although petitioner’s former expert, David Baker, initially took the position that GAAP was not applicable to the valuation of the book value of Joseph’s partnership interest under the terms of the agreement, once directed to submit a supplemental opinion calculating the book value of Joseph’s interest under GAAP, including APB 29, Baker opined that APB 29 requires an upward adjustment following Mary’s departure in 1981, but that no other adjustment is necessary.

GAAP and APB 29 apply to upwardly adjust book value upon Mary's retirement was not subject to re-examination on remand and is not at issue on appeal.⁵

The court's finding as to the value of Joseph's interest, based on the expert's testimony regarding application of GAAP to the facts of this case, is subject to substantial evidence review. (See, e.g., *Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 606 [“ ‘When the assessor utilizes an approved valuation method, his factual findings and determinations of value based upon the appropriate assessment method are presumed to be correct and will be sustained if supported by substantial evidence.’ ”]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926 [substantial evidence doctrine applies where court's determination of value of property was based on conflicting expert testimony]; *In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1285-1286 [substantial evidence doctrine applies to court's valuation of spouse's separate property based on conflicting expert testimony].) As noted in the trial court's statement of decision, Glenn explained that in his professional opinion, the transaction would be classified under GAAP and APB 29 as a nonmonetary transaction because the amount of cash paid for Mary's interest was grossly disproportionate to the fair value of her interest. Glenn testified that Mary's receipt of \$76,500 in cash for a two-thirds interest in a partnership owning land worth \$10.840 million meant she received only 1.1 percent of

⁵ Petitioner argues incorrectly that because Mary received cash for her partnership interests, APB 29 does not require an adjustment as a matter of law. The accounting principles encompassed in GAAP are not rules of law. “The GAAP are an amalgam of statements issued by the AICPA through the successive groups it has established to promulgate accounting principles: the Committee on Accounting Procedure, the Accounting Principles Board, and the Financial Accounting Standards Board. Like GAAS, GAAP include broad statements of accounting principles amounting to aspirational norms as well as more specific guidelines and illustrations.” (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 382.) Expert interpretation on GAAP's application to a set of facts is common. (See, e.g., *City of Glendale v. Marcus Cable Associates, LLC* (2014) 231 Cal.App.4th 1359, 1389-1390 [trial court acted within its discretion in relying on accounting expert's testimony concerning the GAAP definition of “capital costs”]; *People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1072 [citing expert opinion on what accounting records would be required by GAAP].)

the total fair value of her partnership interest. He explained that “transfers that involve little or no monetary assets or liabilities are referred to in this section as nonmonetary transactions.” Glenn’s opinion regarding application of APB 29 in this case is entirely reasonable. His opinion provides ample evidentiary support for the court’s valuation of Joseph’s interest.

C. *The court’s decision does not lead to an inequitable result.*

Petitioner contends the court’s decision will lead to an inequitable result that is contrary to the purpose of the tontine agreement entered by the parties. She argues that she “continues to operate the Silveira Ranches dairy business, as was Tony’s lifelong passion and desire. However, there is no evidence that [she] has the ability to buy Joseph’s partnership interest for \$4 million—[she] would be forced to sell a significant portion of the Silveira Ranch property to a developer in order to acquire the necessary funds. Doing so would defeat the primary purpose of the partnership formed in 1953 and the partnership agreement executed by Mary and her seven children: to keep the land intact and use it to operate the family dairy. It would also render meaningless all of the hard work and effort put in by Tony and the family over these many years to ensure that the Ranch properties remain intact and undivided, and in the Silveira family.”

The trial court disagreed. In its statements of decision the court explained, “Establishing the book value of Joe’s share at a value in excess of \$4,000,000 does not violate the principles of equity made applicable to matters of reformation and accounting. There was ample testimony at the first book value trial, with the estate’s expert testifying to a value in excess of \$23 million for the ranch real estate alone at the time Joe died. The court takes judicial notice of a pending eminent domain proceeding in this county, in which petitioner attributes much higher current property values for its ‘highest and best use,’ admittedly a quite different standard for valuation. Although the original 1953 partnership agreement contemplated keeping the book value at a low value in order to encourage family ownership of the property, such a goal has certainly been accomplished over the past half century.” (Fn. omitted.) Moreover, we would add that the record provides no evidence that petitioner could not borrow the funds necessary to pay the

estate, using the partnership property as collateral to secure such a loan. We find no abuse of discretion in the court's ruling.

II. The Cross-Appeal

In the cross-appeal, the estate contends the trial court erred in denying its motion for sanctions under Code of Civil Procedure section 2033.420 and in striking its request for post-remand costs under Code of Civil Procedure section 998 and Probate Code section 1002.

A. Discovery Sanctions

On April 8, 2013, the estate served petitioner with a second set of requests for admissions and form interrogatories, asking her to admit that a recalculation of the APB 29 adjustment following Mary's departure, substituting two-thirds for the 6.61 percent used by petitioner's former expert, would lead to a conclusion that the book value of Joseph's partnership interest at the time of his death was not less than \$4,059,771.75, and that as a result of prejudgment interest, petitioner would, as of March 21, 2013, be obligated to pay the estate not less than \$5,277,703.27 to exercise her right to acquire Joseph's interest.

Petitioner served objection-only responses to the second set of requests for admissions, claiming they were premature because they called for expert analysis and opinion testimony. The estate filed a motion to strike petitioner's objections and require her to provide substantive responses. The court granted the motion and ordered petitioner to serve responses within 20 days. In amended responses served on August 20, petitioner claimed that having made reasonable inquiry, based on the information presently known or obtainable, she was unable to admit the matters contained in the relevant requests.

On September 6, 2013, the estate's attorney sent petitioner a letter objecting to petitioner's "evasive" responses to the requests for admissions and advising that "[r]ather than trouble the court . . . with yet another motion, I have elected to serve additional requests for admission and a supplemental interrogatory." The letter indicated that responses would be due roughly one month after petitioner was obligated to disclose her experts, so that her prior difficulty in responding would be alleviated. The third set of

requests for admissions are identical in all material respects to the relevant requests in the second set.

On October 8, petitioner served her responses, again stating that she “has no personal knowledge with which to admit or deny this request. A reasonable inquiry has been made into the subject matter of the request and, based on information presently known or obtainable, responding party is unable to admit the matter.” No further action was taken by the estate to secure additional responses to the third set of requests for admissions.

Following entry of the amended judgment, the estate filed a motion for cost-of-proof sanctions under Code of Civil Procedure section 2033.420, seeking recovery of the \$173,690.72 in fees and costs it incurred after service of its second set of requests for admissions. The court denied the motion, stating that the estate had waived its right to seek cost-of-proof sanctions based on petitioner’s responses to the requests for admissions and that alternatively, “petitioner had a reasonable ground to believe that she would prevail on the matter at the time she ‘fail[ed]’ to make the requested admission.” Finally, the court found that the estate had not properly limited its request to the costs incurred to prove the matters that petitioner failed to admit. We review the trial court’s order for an abuse of discretion. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10.)

Code of Civil Procedure section 2033.420, subdivision (a) provides, “If a party fails to admit . . . the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves . . . the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.” A court is required to make such an order “unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable

ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit.” (Code Civ. Proc., § 2033.420, subd. (b).)

We agree with the trial court that the estate waived its objections to the responses to both the second and third sets of requests for admissions. Subdivision (a) of Code of Civil Procedure section 2033.290, sauthorizes a party seeking admissions to file a motion to compel if that party deems the response received “evasive or incomplete” or that an objection lodged is “without merit or too general.” The failure to make a timely motion to compel further responses under subdivision (a) “waives any right to compel further response to the requests for admission.” (Code Civ. Proc., § 2033.290, subd. (c).) Subdivision (e) provides that “[i]f a party then fails to obey an order compelling further response to requests for admission, the court may order that the matters involved in the requests be deemed admitted. In lieu of, or in addition to, this order, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2033.010).”

Here, petitioner’s amended response to the second request that she was “unable to admit or deny the request” is “incomplete” within the meaning of Code of Civil Procedure section 2033.290, subdivision (a)(1). Counsel for the estate noted as much in his letter to opposing counsel, but opted not to seek a further order from the court. Rather, he served a third set of requests for admissions and again took no action to compel a complete and unequivocal denial following service of petitioner’s identical incomplete response. As the court noted, “[t]he third set of requests for admission was not simply an extension of the second set. In lieu of seeking to obtain further responses, respondent served a third set. He did not seek to compel further responses to the third set.”

Wimberly v. Derby Cycle Corp., *supra*, 56 Cal.App.4th 618, relied on by the trial court, is persuasive. In that case, a plaintiff asked a defendant to admit that the plaintiff’s past and future medical expenses were reasonable and necessary. In response, defendant admitted that the past medical care was necessary, but objected that the request was vague and ambiguous with regard to future medical care. The defendant responded further: “ ‘To the extent defendant can respond, defendant denies that the extent of future medical care, . . . is reasonable and necessary.’ ” (*Id.* at pp. 635-636.) At trial, defendant

presented no evidence on the medical care issue. (*Id.* at p. 636.) The Court of Appeal held that the plaintiff was not entitled to costs associated with the medical care issue because he made no motion to compel a further response after the defendant objected. (*Ibid.*)

We find no abuse of discretion in the court's conclusion that the estate waived responses to both sets of requests for admission under Code of Civil Procedure section 2033.290 and, thus, that the estate was not entitled to sanctions under Code of Civil Procedure section 2033.420.

B. *Costs*

The estate served petitioner with two offers to compromise prior to the hearing on remand. One offer for \$5.25 million, served on April 26, 2013, was not accepted. A second offer for \$4 million, served on November 1, 2013, also was not accepted. Following entry of the amended judgment, the estate filed a memorandum of costs, seeking recovery of \$51,834.39 in costs, including \$36,532.82 in expert witness fees, pursuant to Code of Civil Procedure section 998. Petitioner filed a motion to tax costs.

Initially, the trial court observed that Probate Code section 1002, not Code of Civil Procedure section 998, governs an order for costs in a probate proceeding. Probate Code section 1002 authorizes the trial court to, "in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, *as justice may require.*" (Italics added.) Code of Civil Procedure section 998, subdivision (c)(1) provides for the augmenting of costs, including expert witness fees, where a defendant has made a timely settlement offer and that offer "is not accepted and the plaintiff fails to obtain a more favorable judgment or award." As the court noted, the mandatory language of section 998 is inconsistent with the broad discretion conveyed to the trial court under of Probate Code section 1002. (See, e.g., *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 24 ["Given the broad discretion vested in the trial court under the Family Law Act to consider conduct or misconduct of a party or counsel in awarding attorney fees and costs, the Legislature could not have meant to limit this discretion by having the provisions of Code of Civil Procedure section 998 apply."].) The court also noted that no authority was provided for the proposition that the court could evaluate the results of the remand

independent from the entire proceeding. As discussed above, this court did not remand for a whole new trial. Noting that the overall results of the litigation were “mixed,” the trial court found that the interests of justice required that each side bear its own costs. We find no abuse of discretion in the court’s order.

Disposition

The amended judgment and the postjudgment orders denying the estate’s motion for sanctions and striking the estate’s memorandum of costs are affirmed. The parties shall bear their own costs on appeal.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.