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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LISA M. DESBIENS et al.,
Plaintiffs and Respondents,
v.
TIMOTHY DELGMAN,
Defendant and Appellant.

A143931

(Contra Costa County
Super. Ct. No. MSP-1400404)

I.

INTRODUCTION

Appellant Timothy Delgman (Delgman) appeals the probate court's orders removing him as the trustee for the estate of his deceased mother and appointing a professional trustee to perform an accounting. The probate court did not abuse its discretion in removing Delgman as trustee because he failed to provide a proper accounting after being granted continuances to do so, and he allowed his counsel to represent a party with interests adverse to the trust.

Delgman also purports to appeal the court's order denying his request for recusal of the trial judge pursuant to Code of Civil Procedure section 170.1, but he failed to file a motion or to seek appellate review by filing a writ of mandate, the exclusive means for seeking review. We, therefore, affirm the probate court's orders.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Delgman's mother, Eileen Chase, died on December 1, 2011. Upon her death, Delgman became the successor trustee to her trust, the Delgman Family Trust (the trust). The trust provides that upon Chase's death her assets should be distributed to her three children: Delgman, Lisa Desbiens, and Suzanne Mendoza. The trust includes two properties: 285 Paris Street in San Francisco, California, and 141 Camelia Court in San Bruno, California, several bank accounts and personal property.

On April 2, 2014, respondents Mendoza and Desbiens filed a petition to compel an accounting of the trust pursuant to section 17200. Their petition stated they never received Probate Code section 16061.7¹ notice upon Chase's death and, despite "countless requests" for information, they have received no information from the trustee. Respondents sent a letter to Delgman's counsel on December 20, 2013, demanding an accounting of the trust assets, but they received no response. In their letter, respondents requested advances on the trust because the assets had not been distributed for years. Also, Delgman had listed the Paris Street property for sale. After respondents received a "Notice of Proposed Action," they objected to the sale without additional work being done on the property. In addition, respondents requested an accounting with a complete list of assets, the amount of attorney fees incurred, and any notices regarding sale of the properties.

The court set the matter for a hearing on May 15, 2014. Three days prior to the hearing date, on May 12, 2014, Delgman's counsel, Jonathan Gordon, filed a motion to continue the hearing to allow him time to file an objection to the petition. The motion stated that Gordon had been ill and his input was "particularly valuable" in preparing any sort of accounting. The court held an unreported hearing on May 15, 2014, at which it suspended Delgman as trustee and appointed Elizabeth Soloway of Soloway Fiduciaries

¹ All further references are to the Probate Code unless otherwise identified.

as temporary trustee. It also ordered Delgman to provide an accounting by June 26, 2014.

On June 2, 2014, Delgman filed a motion for reconsideration of the court's ruling on the petition to compel an accounting, and sought a restraining order against respondents. The petition further stated that Delgman had no objection to providing an accounting, but objected to the "deliberately false and utterly contrived claims" made by his sisters Desbiens and Mendoza. It also stated that attorney Gordon had been sleep-deprived, ill, and was working on an accounting in the related estate of Richard Chase (Eileen Chase's husband), so he could not file a pleading disputing the claims in the petition. Delgman was unable to present his arguments earlier due to his counsel's illness and work schedule. Delgman further argued the court improperly suspended him as trustee because the parties had not requested this relief.

Delgman also requested a restraining order against his sisters and his nephew, Francisco "Paco" Mendoza, to stay away from the Paris Street property and from the realtor for the property, Emmy Greene. Francisco Mendoza was living at the Paris Street property and had damaged it, including by repeatedly changing the locks to prevent realtors from showing the property to potential buyers. In support of the restraining order, Delgman attached Greene's declaration. Delgman further requested an extension of the listing agreement for the Paris Street property with Greene. Delgman requested he be restored as trustee so he could move forward with the sale of the property with Greene as the listing agent. Finally, because of their delays, Delgman requested that the court "surcharge" respondents the amount of the difference between the appraisal value of the Paris Street property and the sale price, if it were lower.

On June 10, 2014, the court reaffirmed its earlier order suspending Delgman's powers as trustee and appointing Soloway as trustee. It ordered Delgman to file an accounting of the trust before a scheduled hearing date of June 26, 2014.

On June 24, 2014, Delgman's counsel, Gordon, filed a joinder on behalf of realtor Emmy Greene in Delgman's petition for a restraining order.

On June 26, 2014, Delgman filed an accounting pursuant to section 16063. It included a statement of assets, liabilities, disbursements, receipts and trustee compensation. It also included all of Delgman's counsel's billing for his services related to the trust (916.15 hours at \$350 per hour, for a total of more than \$320,000). The hearing was continued to August 28, 2014.

On August 25, 2014, attorney Gordon filed his own declaration apologizing to the court for his delay in providing the ordered accounting of the trust. The declaration stated that he filed a section 16063 accounting on June 26, 2014, and Soloway's counsel informed him the court generally requires a section 1060 accounting. He planned to file the section 1060 accounting before the August 28, 2014 hearing date. The declaration again detailed Gordon and his family's health problems.

Respondents filed objections to Delgman's accounting. They alleged that Gordon had submitted identical fee requests both for this trust and the related Chase trust. Respondents asserted they were "wary" of Gordon's allegations of ill health because he had recently filed a 350-page accounting and 40-page brief in the related Chase action during the period he claimed to be too ill and exhausted to work. Delgman's accounting also failed to comply with section 1060. Respondents asserted neither Delgman nor Gordon were "capable of fixing the mess they have created," and requested a qualified neutral party to provide an accurate accounting. They requested Soloway be appointed the permanent trustee.

On August 28, 2014, Soloway filed the "Report and Recommendation of Temporary Trustee."

The court held an unreported hearing on August 28, 2014. The minute order issued after the hearing stated that respondents requested the court to remove Delgman as trustee and to appoint Soloway in his place. The minute order further stated that it was improper for Delgman to allow Gordon to represent Greene. On October 24, 2014, the court issued an order stating that it had reviewed Delgman's accounting, respondents' opposition, and the Report and Recommendation of Temporary Trustee, and it ordered Delgman removed as trustee and replaced by Soloway.

On November 3, 2014, Delgman filed a petition for reconsideration of the court's October 24, 2014 order, requesting the court reinstate him as trustee. He argued that the court improperly removed him even though none of the parties requested such relief at the May 15, 2014 hearing. Delgman argued that the court was required to find he committed a "moral wrong" in order to remove him. He further argued there was no "actual" conflict of interest by his counsel in representing Greene. Finally, Delgman argued the trial judge should be disqualified pursuant to Code of Civil Procedure section 170.1. He claimed in an unreported hearing the court improperly said to respondents' counsel: "If I remove the trustee, will you protect me?"

The court held a hearing on December 11, 2014. The court stated it was troubled that Delgman allowed his attorney to take on what it perceived to be a "disabling disqualification." Gordon was attempting to represent the interests of another party who could be adverse to the trust. Greene's real estate firm, which was hired by the trust to list the property, stated it would sue the trust if any effort was made to rescind the listing agreement. The court found the conflict likely necessitated removing Gordon from the case entirely. Gordon argued his representation of Greene was only in a limited capacity, but the court advised him he could not "pick and choose." Gordon argued that it was not Greene who threatened to sue, but her employer. The court replied that was precisely the reason to "stay away from those possible situations"; Delgman, as trustee, should not have allowed this to happen. Gordon argued there was not "actual conflict of interest" and after the court raised the issue at the prior hearing, he terminated his representation of Greene.²

Respondents' counsel argued that in addition to the conflict, the other ground supporting removal of Delgman was the failure to provide an accounting in compliance with section 1060 despite being provided continuances to do so. Gordon argued he was extremely ill, he did not often practice probate law, and he filed a section 16063

² On August 28, 2014, Greene filed a substitution of attorney replacing herself in propria persona for Gordon.

accounting. Gordon admitted it was his mistake in failing to file the section 1060 accounting. The court stated that it was the trustee's responsibility to provide the accounting.

Gordon argued that the court should recuse itself because the court had stated that it would remove the trustee if respondents' counsel would "protect" the court's interest. Gordon stated that the request was pursuant to Code of Civil Procedure section 170.1 for cause. The court advised him that he would need to serve a proper motion under section 170.1. The court denied the motion for reconsideration. No such written motion to disqualify the judge under section 170.1 was subsequently filed.

The court issued an order on December 11, 2014, finding Delgman failed to produce and file an accounting pursuant to section 1060 et. seq. despite being provided with continuances and ample opportunity to do so. Delgman's failure to produce an accounting required the appointment of Soloway. Delgman's counsel, Gordon, entered into "an agreement to represent realtor Emmy Greene regarding the sale of Trust real property, constituting a fatal conflict of interest." (Original capitalization omitted.) The court reaffirmed its order removing Delgman as trustee and appointing Soloway in his place.

III.

DISCUSSION

Delgman appeals two orders filed by the court: (1) the October 24, 2014 order removing him as trustee and appointing Soloway in his place; and (2) the December 11, 2014 order reaffirming the earlier order removing Delgman based upon his failure to file an accounting as ordered, and because of Gordon's conflict of interest.

A. *The Probate Court Properly Suspended and Later Removed Delgman as Trustee*

Delgman's briefs on appeal focus on the many alleged inaccuracies in respondents' original petition to compel an accounting and his original suspension as trustee. Delgman, however, did not appeal from the court's May 15, 2014 order suspending him as trustee and appointing Soloway as temporary trustee. Respondents contend any argument about Delgman's initial suspension as trustee is moot both because

it was superseded by a permanent removal order and a suspension order is not appealable. We agree that the suspension of a trustee is not an appealable order under section 1300, subdivision (g). (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417 (*Schwartz*) [§ 1300, subd. (g) provides for an appeal from orders surcharging, removing, or discharging a fiduciary, but not suspending one].) However, under *Schwartz*, we may consider the order suspending Delgman as trustee, even though it was not an appealable order, and he did not appeal from it, as it relates to the later orders removing him as trustee. (*Schwartz, supra*, at p. 425, fn. 4.)

Delgman argues that the court's October 24, 2014 order violated his due process rights by removing him as trustee without respondents' seeking his removal. He claims the issue "came out of the blue" and was raised sua sponte by the court. However, in respondents' objections to Delgman's accounting filed two days before the hearing on August 26, 2014, they argued neither Delgman nor Gordon were "capable of fixing the mess they have created," and requested a qualified neutral party provide an accurate accounting. They also requested Soloway be appointed the permanent trustee.

Moreover, the probate court has the power and duty to supervise the administration of trusts. (*Schwartz, supra*, 164 Cal.App.4th at p. 427.) The probate court has the authority to remove a trustee entirely in the exercise of its general equity jurisdiction (*Getty v. Getty* (1988) 205 Cal.App.3d 134, 141-142; §§ 15642, 17000.) The removal of a trustee is within the discretion of the trial court (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633), and is " "dependent upon the circumstances of each particular case." ' [Citation.]" (*Estate of Keyston* (1951) 102 Cal.App.2d 223, 228.)

Additionally, respondents filed a petition pursuant to section 17200 to compel an accounting. When presented with a section 17200 petition, " "the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's administration.' . . ." (*Schwartz, supra*, 164 Cal.App.4th at p. 427, quoting *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 594 & fn. 10, original italics.) "To preserve the trust and to respond to perceived breaches of trust, the probate court has wide, express powers to 'make any orders and take any other action necessary or proper to dispose of the matters

presented' by the section 17200 petition. (§ 17206.) Among the remedies in the probate court's arsenal is the express power to remove a trustee on its own motion, *without a petition* (§ 15642, subd. (a); see 3 Gillick et al., Cal. Civil Practice: Probate & Trust Proceedings (1992) Remedies (2005 supp.), §§ 24:96, pp. 24–102 to 24–105 & 24:47, p. 24–60), along with the express authority to suspend a trustee pending a hearing on a petition for the trustee's removal. (§ 15642, subd. (e).)" (*Schwartz, supra*, 164 Cal.App.4th at p. 427.)

Therefore, even if respondents had not sought Delgman's removal, the court has the express power to remove a trustee on its own without a petition. (*Schwartz, supra*, 164 Cal.App.4th at p. 427.) "We reject appellant's implication that a trustee may be removed or suspended only in response to petitions under section 17200, subdivision (b)(10) or section 15642, subdivision (e)." (*Schwartz, at p. 428.*)

The heart of Delgman's merits argument on appeal is that the court did not have a proper basis to remove him a trustee. Delgman's legal analysis, however, is premised on sections of the Probate Code that are not applicable to a trustee. (§§ 8500, 9614.) Delgman relies on section 8500 relating to petitions to remove personal representatives (§ 8500), whereas section 15642 governs the removal of a trustee (§ 15642, subds. (a), (b)).

Similarly, the cases cited in Delgman's appellate brief do not involve trustees. (See *Estate of Feeney* (1983) 139 Cal.App.3d 812, 816 [petition to remove an executrix of a will under § 521]; *In re Chadbourne* (1911) 15 Cal.App. 363 [an action under Code Civ. Proc., § 1511 against an executor for failing to publish notice to creditors]; *Estate of Wemyss* (1975) 49 Cal.App.3d 53, 56 [petition for removal of a bank as the executor of a will].)

Delgman is not a personal representative. He was made the successor trustee in the "Declaration of Trust," and there is no mention of him acting as a personal representative. The Probate Code specifies the grounds for removal by the court of a trustee including where: (1) the trustee has committed a breach of the trust; (2) the trustee is insolvent or "otherwise unfit to administer the trust"; (3) there is hostility or lack of

cooperation among co-trustees impairing the administration of the trust; and (4) the trustee fails or declines to act. (§ 15642, subds. (a), (b).) A trustee may also be removed for “other good cause.” (§ 15642, subd. (b)(9).) “ ‘[T]he violation by a trustee of any duty owed to the beneficiaries of the trust constitutes a breach of trust.’ (Rest.2d Trusts, § 201, pp. 442–444.) Such duties include the duty of loyalty, the duty to avoid conflicts of interest, the duty to preserve trust property, the duty to make trust property productive, the duty to dispose of improper investments, and the duty to report and account.’ . . .” (*In re Estate of Cairns* (2010) 188 Cal.App.4th 937, 949 (*Cairns*), quoting *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 462.)

First as to his temporary suspension, he argues that the court incorrectly found that he had failed to produce a proper accounting. “Determining the need for an accounting is a matter within the trial court’s sound discretion. [Citation.]” (*Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413.) Respondents filed a section 17200 petition to compel an accounting in April 2014. The court set a hearing for May 15, 2014. Three days before the hearing date, Delgman requested a continuance that was denied. The court suspended Delgman as trustee and appointed Soloway as temporary trustee, ordering Delgman to produce an accounting by June 26, 2014. On June 26, 2014, Delgman filed an accounting that did not properly comply with the court’s order. The court provided Delgman an additional two months to August 28, 2014, to submit a proper accounting. Two days before the accounting was due, Gordon filed a declaration apologizing to the court for the improper accounting and stating a section 1060 accounting would be filed by the August 28, 2014 due date. The section 1060 accounting was never filed.

After Delgman failed to provide an accounting as ordered, the court then provided a continuance to allow Delgman to file the section 1060 accounting, and Delgman did not comply with the order. If Delgman had filed the accounting at any point between June and the end of August 2014, the court could have lifted the suspension and he could have remained the trustee. Delgman’s failure to comply with the court’s order to produce an

accounting provided a basis for the court first to suspend him and later to remove him as trustee under section 15642, subdivisions (b)(4) and (9).

Furthermore, Delgman's actions subjected the trust to unnecessary fees and costs because the court had to request an accounting from Soloway. This failure to provide an accounting constitutes a breach of duty to preserve trust assets and justifies removal under section 15642, subdivision (b)(1).

Contrary to Delgman's arguments, there is no requirement the trustee commit a "moral wrong" to be suspended or removed. The probate court's supervisory power includes the authority to remove a trustee, based either on a party's motion or on its own motion (§ 17200, subs. (a), (b)(10)), on the grounds for removing a trustee set forth in section 15642. These include the failure to report and account for trust assets and to preserve trust property. (*Cairns, supra*, 188 Cal.App.4th at p. 949.)

Next, Delgman argues the court incorrectly found Gordon had a conflict of interest. He contends the potential conflict of interest presented by Gordon's representation of Greene is not an adequate basis to suspend or remove him as trustee.

"The bare potential for a conflict of interest does not categorically bar a fiduciary from functioning as a trustee. . . ." (*Cairns, supra*, 188 Cal.App.4th at p. 950, quoting *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 676–677.) In *Cairns*, the court found there was no conflict of interest because the trustee had not engaged in any "actual dishonesty" or taken an action antithetical to the trust. (*Cairns*, at p. 950.) The conflict consisted of relationships known to the settlor and sanctioned by her in the trust. (*Ibid.*)

The conflict presented here was not an issue anticipated or sanctioned by the settlor. If the only conflict here had been the acrimonious relationship between Delgman and his sisters, Delgman would be correct that the conflict would not require his removal. But, the court found Delgman's counsel's representation of Greene to be an actual conflict of interest based upon the fact that Greene's firm threatened to sue the trust if Greene were removed as the listing agent.

A trustee has a duty of loyalty to beneficiaries to administer trust in their best interest (§ 16002, subd. (a)), and to avoid any transaction adverse to the trust (§ 16004,

subd. (a)). Delgman violated this duty by allowing his counsel to represent the real estate agent he hired to sell trust property in an action related to the trust. Gordon represented Greene in filing a restraining order against respondents, the beneficiaries of the trust, while Greene's firm was threatening to sue the trust if Greene was removed as the listing agent.

Generally a trustee has a duty not to delegate his functions as trustee to another person. (§ 16012.) Where a trustee can properly delegate tasks to an agent, "the trustee has a duty to exercise general supervision over the person performing the delegated matter." (§ 16012, subd. (b).) As trustee, Delgman is responsible for Gordon's actions as his attorney and agent on behalf of the trust. A trustee is personally responsible when he "confide[s] the application of a trust fund to the care of another, whether a stranger or his own attorney or solicitor." (*Estate of Spirtos* (1973) 34 Cal.App.3d 479, 489 (*Spirtos*), quoting *Gaver v. Early* (1923) 191 Cal. 123, 127.)

While the record is not clear to what extent Gordon was acting as Delgman's agent, Delgman, as trustee, had a duty to review the actions and performance of his agent. (§ 16052, subd. (a).) From the pleadings and declarations filed by Delgman, it appears the missed court appearances, failure to file pleadings, and the representation of Emmy Greene were Gordon's actions, but Delgman had a duty to supervise Gordon and a duty to avoid conflicts of interest. (§§ 16012, subd. (b), 16004, subd. (a); *Cairns, supra*, 188 Cal.App.4th at p. 949.)

The trustee cannot abdicate administration of the estate or knowingly acquiesce in an attorney's failure to comply with the Probate Code. (*Spirtos, supra*, 34 Cal.App.3d at p. 489.) In *Spirtos*, the trustee was apprised of the need to inform the trial court of the sale of trust property but she chose to rely on her attorney's advice to bypass the court. (*Id.* at p. 490.) "Even though [the trustee] may not have been negligent in the selection of her attorneys, it cannot be said that she was not negligent when she knowingly abdicated her duties to the estate." (*Id.* at p. 491.)

Delgman abdicated his duties as trustee by failing to ensure that either he or Gordon filed an accounting as ordered by the court. Further Delgman acquiesced or

ignored the conflict created by Gordon's representation of Greene. The court could properly hold him accountable.

B. *Delgman Has Forfeited His Claim Seeking Recusal of Trial Judge*

Delgman argues the trial judge should have recused himself based on an alleged statement at an unreported hearing where the court purportedly asked respondents' counsel: "If I remove the trustee, will you protect me?" There is no support in the record for this assertion. There is no hearing transcript and Delgman did not provide a sworn declaration from himself or other witnesses that this statement was made at the hearing. Delgman cites only to his own motion reciting this statement as evidence.

"The absence of a record concerning what actually occurred at the hearing precludes a determination that the court abused its discretion. [Citations.]" (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) Where a party asserts abuse of discretion by the trial court, we are unable to make such a determination when no record is provided. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448.)

Additionally, Delgman has forfeited this claim on appeal under Code of Civil Procedure section 170.3. In his petition for reconsideration before the probate court, Delgman argued the judge should be disqualified pursuant to Code of Civil Procedure section 170.1, because the judge was not impartial. Delgman requested "the court consider whether it should recuse itself from any further proceedings in this action." At the hearing, the court advised Delgman he would need to file and serve a motion pursuant to Code of Civil Procedure section 170.1 in order for the court to consider it.

There is nothing in the record confirming that Delgman ever filed and served the motion. But, even if he had, a writ of mandate would have been the exclusive method for review by this court of a challenge to a trial judge. Our Supreme Court recently held: "To the extent that defendant's claim is that his statutory rights under Code of Civil Procedure section 170.1 were violated, he has failed to preserve it. An order denying a motion to disqualify a judge is 'not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after

service of written notice of entry of the court’s order determining the question of disqualification.’ . . .” (*People v. Peoples* (2016) 62 Cal.4th 718, 786-787 (*Peoples*); Code Civ. Proc., § 170.3, subd. (d).³) The statute “ ‘means what it says . . . [and] provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory.’ Since defendant failed to file a petition for a writ of mandate, he has forfeited his claim on appeal.” (*Peoples*, at p. 787, quoting *People v. Panah* (2005) 35 Cal.4th 395, 444.)

Therefore, Delgman has failed to demonstrate any grounds for disqualification based on the record before this court, and he has forfeited his claim on appeal by failing to seek a writ of mandate.

IV.

DISPOSITION

The orders of the probate court are affirmed.

³ “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court’s order determining the question of disqualification.” (Code Civ. Proc., § 170.3, subd. (d).)

RUVOLO, P. J.

We concur:

REARDON, J.

STREETER, J.

A143931, *Desbiens v. Delgman*