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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ASHLEY DEASE et al.,

Plaintiffs and Respondents,

v.

ALLEN VANEK, as Trustee, etc.,

Defendant and Appellant.

B222504

(Los Angeles County
Super. Ct. No. BP116615)

APPEAL from an order of the Superior Court of Los Angeles County. Michael I. Levanas, Judge. Affirmed.

Morrison & Foerster, Joseph L. Wyatt, Jr. and Monica D. Castillo; John B. McIlroy for Defendant and Appellant.

Fuller & Fuller, Bruce P. Fuller and Christine M. Allen for Plaintiffs and Respondents.

Allen Vanek (trustee), Trustee of the Miriam C. Vanek Revocable Trust dated June 14, 2008 (trust) appeals from an order made pursuant to former Probate Code section 21320 (section 21320).¹ Ashley B. Dease and Alexander Dease (collectively respondents), beneficiaries of the trust, filed a petition pursuant to section 21320 (safe harbor petition) in order to determine if their proposed petition to compel accounting and for order surcharging successor trustee (proposed petition) constituted a contest within the terms of the no contest clause of the trust.

The superior court determined that the proposed petition does not constitute a contest of the trust. We affirm.

CONTENTIONS

The trustee contends that both the safe harbor petition and the proposed petition constituted contests of the trust in that they designated the settlor's ex-husband, Edward Dease, as a person interested in the trust.

The trustee further contends that the probate court's order is invalid because respondents' counsel engaged in a fraud upon the court, and that the trial court's denial of the trustee's request for judicial notice was an abuse of discretion.

FACTUAL AND PROCEDURAL BACKGROUND

Settlor Miriam Vanek executed the trust on June 14, 2008. The trust contained the following two provisions:

“2.6 No-Contest Clause

“If any beneficiary under this instrument or any amendment thereto in any manner, directly or indirectly, contests or attacks this instrument or amendment thereto or any of its provisions in any legal or equitable proceeding that is designed to thwart my wishes as expressed herein, any share or interest in the Trust Estate given to such beneficiary under this instrument is revoked and shall be disposed of as if he or she had predeceased me without Issue.”

¹ Effective January 1, 2010, the Legislature repealed section 21320 and related sections of the Probate Code and enacted new statutes governing no contest clauses. Former section 21320 and the other repealed statutes were in effect at the time of the decision at issue in this appeal and therefore govern the questions before us. (See Prob. Code, § 3, subs. (e) & (g).)

“2.7 Ex-Husband

“Edward Dease, my ex-husband, has no interest in my estate and shall have no access to any information or decision-making power with respect to my property, including (but not limited to) my house or any of the proceeds from any sale of my house by the Trustee. It is my express direction to the Trustee, the Guardian of my minor children, and the earnest request to my children as adults that Edward may not live in the house with my three children. Since he is neither a beneficiary nor an heir, he is entitled to no rights under this trust as if he were such an heir, beneficiary, or otherwise interested in the trust estate in either an individual or fiduciary capacity.”

By the terms of the trust, Miriam Vanek appointed her brother, Allen Vanek, as trustee in the event that she ceased to act as the trustee.

Miriam Vanek died on June 25, 2008. Her three children, Ashley B. Dease, Alexander B. Dease, and Leslie A. Dease, are beneficiaries of the trust.² At the time of Miriam Vanek’s death, Ashley was an adult. Alexander became an adult on October 25, 2008, four months after his mother’s death. Leslie Dease, born July 8, 1998, was 10 years old at the time of her mother’s death. Leslie’s father, Edward Dease, has had custody of Leslie during the litigation and she resides with him.

In May 2009, pursuant to section 21320, respondents filed a safe harbor petition to determine if the proposed petition would be considered a contest within the no contest clause of the trust. The proposed petition asks that the court order an accounting of the trust and further requests orders surcharging the trustee for alleged wrongful actions; requiring him to return trust property; and seeking monetary sanctions.

In paragraph 4 of the safe harbor petition, and paragraph 10 of the proposed petition, the respondents listed “[t]he names, addresses, ages and relationships of all persons interested in this trust and entitled to notice of this hearing.” The persons listed in both petitions are Ashley, Alexander, Leslie, the trustee (listed as the settlor’s brother),

² The children of Miriam Vanek shall be referred to by their first names, for ease of reference.

Virginia and Frank Vanek (listed as the settlor's parents), and Edward Dease, whose relationship to the settlor is described as "Father of Leslie Dease (Minor)."

The trustee objected to the safe harbor petition and the proposed petition, claiming that, in violation of clause 2.7 of the trust (the ex-husband clause), both petitions "specifically allege that ex-husband Edward Dease is one of the 'persons interested in this trust and entitled to notice of this hearing.'" The trustee claimed that these "repeated allegations" attack clause 2.7, the ex-husband clause, and were designed to "thwart" the settlor's wishes, in violation of the no contest clause.

The trustee further alleged that Edward Dease was trying to obtain an interest in the settlor's estate in direct conflict with the interest of his minor daughter Leslie. In support of this allegation, the trustee filed a request for judicial notice in support of his objections to the safe harbor petition and the proposed petition. The trustee requested that the court take judicial notice of an answer to a complaint in interpleader filed in a federal action pending in the Central District of California, case No. CV 09-3461 VBF, captioned "Standard Insurance Company, an Oregon Corporation, Plaintiff v. Alexander Dease, Ashley Dease, Edward Dease and Edward Dease on behalf of Leslie Dease, Defendants." With this document, the trustee sought to support his allegation that Edward Dease was "independently seeking to obtain for himself a share of the proceeds of an insurance policy that was designated by the Settlor as part of the corpus -- in direct conflict with the interest of the same child he is alleged to represent."

The trustee asked that the safe harbor petition be denied and that both the safe harbor petition and the proposed petition be deemed to be contests.

At the hearing on September 17, 2009, counsel for respondents explained: "We're not alleging that Edward Dease has any beneficial interest in this trust. Nowhere in the petition does it make any sort of such an allegation. Under the local rules, we're required to give notice to the parent of the minor. That makes sense. That's the court's requirement, not ours, and that's the only way that he's been mentioned at all in our petition." Upon the court's request for further briefing, respondents' counsel directed the

court's attention to rule 7.51(d) of the California Rules of Court (rule 7.51(d)), which provides:

“Except as permitted in Probate Code section 1460.1 for guardianships, conservatorships, and certain protective proceedings under division 4 of the Probate Code, notice to a minor must be sent directly to the minor. A separate copy of the notice must be sent to the person or persons having legal custody of the minor, with whom the minor resides.”

Respondents argued that pursuant to rule 7.51(d), it is appropriate for notice to go to Edward Dease, the parent of minor trust beneficiary Leslie, as he is the person with legal custody of the child and the person with whom she resides.

A hearing was held on October 22, 2009. The court denied the trustee's request for judicial notice, finding that the document filed in the federal court action was not relevant to the issues before it. The court further found that the proposed petition was not a contest. The court signed and filed a statement of decision on November 25, 2009. Notice of entry of judgment was served on December 24, 2009.

On February 19, 2010, the trustee filed his notice of appeal.

DISCUSSION

I. The proposed petition

A. Standard of review

Where there is no conflict of evidence or question of credibility regarding extrinsic evidence, interpretation of a trust is a question of law subject to our independent review. (*Fazzi v. Klein* (2010) 190 Cal.App.4th 1280, 1285.) Whether there is a contest within the meaning of a specific no-contest clause depends upon the factual circumstances of the case and the language of the trust clause. (*Cook v. Cook* (2009) 177 Cal.App.4th 1436, 1442.) It is the testator's intentions that control. (*Ibid.*; see also *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134.)

No contest clauses are favored by the policy of discouraging litigation, but disfavored by the policy against forfeiture. (*Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1073.) A no contest clause must be strictly construed and may not be

extended beyond its plainly intended function. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604 (*Johnson*).)

B. The probate court did not err in determining that the proposed petition is not a contest

The trustee argues that the proposed petition violates section 2.7 of the trust, the ex-husband clause. In the ex-husband clause, the settlor deliberately prohibited Edward Dease from having access to any information about the decedent's estate or any rights under the trust, "in either an individual or fiduciary capacity." By alleging that Edward Dease is a person "interested in" the trust, the trustee argues, respondents have "essentially excised" this clause from the trust.

The trustee challenges only one allegation in the proposed petition: "The names, addresses, ages and relationships of all persons interested in this trust and entitled to notice of this hearing are as follows: . . . Edward Dease . . . Father of Leslie Dease (Minor)."

The trustee contends that, at a minimum, respondents have indirectly attacked the ex-husband clause through this allegation. The trustee claims that respondents triggered the no contest clause when their lawyers drafted the petition "as a vehicle to insert their other client, Edward Dease -- as an interested party, thus enabling him to participate in the trust proceedings." The trustee states that respondents wrongly elevated parent/custodian Edward Dease's limited right to notice to the forbidden status of a person interested in the trust. By doing so, the trustee argues, respondents have intentionally thwarted the settlor's wishes and run afoul of the no contest clause.

The trial court concluded that the proposed petition was not a contest under the terms of the no contest clause. The court noted that the proposed petition "concerns only the requesting of an accounting of the actions of the successor-trustee and challenging the actions of the successor-trustee since the Decedent's death." In addition, the court noted that the "language of the no-contest clause refers only specifically to challenges to the validity of the Trust." As the proposed petition is limited to requesting an accounting and

challenging the actions of the successor-trustee, the court concluded that it did not constitute a challenge under the no contest clause.

The trial court overruled the trustee's objection regarding the inclusion of Edward Dease as a person "interested in this trust and entitled to notice of this hearing." The court noted that it is appropriate for Edward Dease to receive notice of the proceedings under rule 7.51(d). Thus, the trial court concluded, it was not a violation of the no contest clause to include Edward Dease's name in the petition in this manner. The court noted that Probate Code section 48, subdivision (b), states that "[t]he meaning of 'interested person' as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding." The court reasoned that the meaning of the words "interested person" are not limited to a meaning which would exclude Edward Dease, who is required to be mailed notice.

We find that the trial court did not err. The language of the no contest clause limits its application to a beneficiary who contests or attacks the trust instrument "in any legal or equitable proceeding that is designed to thwart my wishes as expressed herein." This language must be strictly construed and may not be extended beyond its intended function. (*Johnson, supra*, 47 Cal.4th at p. 604.) Therefore, we find that the language of the no contest clause limits its scope to *proceedings* that are designed to thwart the settlor's intentions.

In this case, the proceeding is designed to require the trustee to file an accounting and to hold him accountable for alleged wrongful actions. The trustee does not argue that these requests thwart the settlor's intention in any way. Because the proposed petition does not initiate a legal proceeding designed to thwart the settlor's intentions, it does not violate the no contest clause.

Applicable law directs that when determining whether a proposed petition violates a no contest clause, a court should look to the purpose of the proceeding. In other words, the court must consider what relief the petitioner ultimately seeks. A "direct contest" is defined as a pleading "alleging the invalidity of an instrument or one or more of its

terms.” (Former Prob. Code, § 21300, subd. (b), repealed Jan. 1, 2010.)³ Respondents’ proposed petition does not seek a determination that the trust is invalid, nor does it seek to invalidate any term of the trust. Thus, under the applicable law, the proposed petition does not constitute a direct contest of the trust.

In determining whether a proposed petition constitutes an indirect contest, a court must also look to the purpose of the proceeding, or the ultimate relief requested. An indirect contest “is one that attacks the validity of an instrument by seeking relief inconsistent with its terms.” (*Johnson, supra*, 47 Cal.4th at p. 605.) It is the “effect of the beneficiary’s proposed action” that determines whether an action constitutes a contest. (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1608.) Here, again, the respondents seek no relief that is inconsistent with the terms of the trust, nor does the trustee so contend.

As the trial court noted, the language to which the trustee objects does not grant Edward Dease any prohibited interest under the trust. The purpose of the language is to inform the court that Edward Dease is entitled to notice of the proceedings due to his status as guardian of a minor beneficiary. His relationship to the settlor is specifically limited: “Father of Leslie Dease (Minor).” As set forth in Probate Code section 48, subdivision (b), the meaning of the term interested person “may vary” and “shall be determined according to the particular purposes of, and matter involved in, any proceeding.” This statute allows a court to read the words “interested person” in a reasonable way given the context of the phrase. In the context of the specific matter at hand, the words “all persons interested in this trust and entitled to notice of this hearing” may be read to include an individual whose “interest” is limited to his status as the father of a minor beneficiary, without conferring on him any legal interest to which he is not entitled by the trust instrument.

³ Respondents argue that we should analyze the proposed petition under the statutes that became effective on January 1, 2010. We decline to apply these statutes. We find that, because the petition was filed and the decision was rendered prior to January 1, 2010, the 2009 statutes apply to our analysis of the order appealed from. (See Prob. Code, § 3, subds. (e) & (g).)

In sum, we conclude that the trial court did not err in determining that the proposed petition does not constitute a contest under the no contest provision of the trust.⁴

II. The safe harbor petition

The trustee also argues that the safe harbor petition constitutes a contest under the terms of the no-contest clause of the trust. The trustee's argument is based on identical language found in the safe harbor petition, naming "persons interested in this trust and entitled to notice of this hearing." Listed is Edward Dease, who is described as "Father of Leslie Dease (Minor)."

Pursuant to former section 21320, a safe harbor petition does not constitute a contest as a matter of law. Subdivision (a) explains that a beneficiary "may apply to the court for a determination of whether a particular . . . petition . . . would be a contest within the terms of the no contest clause." Subdivision (b) provides that "[a] no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a)."

Thus, section 21320 makes it clear that an application for an advance ruling pursuant to the safe harbor provision is not itself a contest -- as long as that application is limited to the procedure and purpose described in subdivision (a). (*Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1427.) We reject the trustee's arguments that respondents' application is not so limited. For the reasons set forth above in section I.B., the respondents' language listing "persons interested in this trust and entitled to notice" does

⁴ The trustee argues that, in drafting the disputed language in the proposed petition, the respondents ignored the required notice form, DE-120. However, as respondents point out, the proposed petition has not been filed and set for hearing, therefore no notice has been given. There is no reason to assume that respondents will not use the required form. The trustee draws attention to the fact that form DE-120 was served on Edward Dease 29 days before the hearing on respondents' safe harbor petition. This undermines the trustee's argument that respondents have ignored the proper form of notice. It appears that respondents are in compliance with the rules regarding notice to the minor beneficiary's guardian, and that respondents properly informed the court that such notice was required.

not attempt to create in Edward Dease any interest that he was specifically barred from enjoying by the terms of the trust. The purpose of the respondents' safe harbor petition did not exceed the limitations described in section 21320, subdivision (a), and may not be considered a contest.

III. Conflict of interest

The trustee asserts that respondents' attorneys committed a fraud upon the court. Specifically, the trustee argues that the failure of respondents' attorneys to disclose their conflicting representation of Edward Dease to the probate court nullifies the court's order finding that respondents' proposed petition was not a contest. The trustee cites *Potter v. Moran* (1966) 239 Cal.App.2d 873, 878-879 (*Potter*) as support for his position that, if an attorney in a probate proceeding fails to disclose her dual representation of parties with conflicting interests, the court may set aside a contested order due to extrinsic fraud.

The trustee's complaint stems from respondents' lawyers' representation of all three Dease children and Edward Dease in a federal action in which Edward Dease was seeking a share of Miriam Vanek's life insurance policy. Preliminarily, we note that this fact was brought to the trial court's attention before it made its decision on the safe harbor petition. The trustee asked the court to take judicial notice of an answer filed in the federal interpleader action. The trustee's counsel specifically mentioned to the court that it was a request for judicial notice of the "appearance by counsel on behalf of Edward Dease" in the federal action. Respondents' counsel responded that the federal matter was "a separate case. We only represent Ashley and Alexander Dease in the matter before this court." Thus, respondents' counsel implicitly admitted that they represented Edward Dease in a separate matter. The trustee's position that respondents' counsel failed to disclose this fact is not supported by the record. Despite its knowledge that respondents' attorneys represented Edward Dease in a separate federal matter, the trial court determined that the federal pleading was "absolutely irrelevant" to the limited question before it: whether the filing of the proposed petition would constitute a contest under the no contest clause of the trust.

“Extrinsic fraud which will warrant a court of equity in setting aside a judgment or decree consists of fraud which prevents a real trial of the issues involved in the case, such as conduct which prevents the injured party from receiving notice of the action or which causes the absence of necessary witnesses. [Citation.]” (*Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 313 (*Morales*)). Because the trial court was aware of respondents’ attorneys’ representation of Edward Dease in a separate matter, and respondents’ attorneys implicitly acknowledged this fact, no fraud occurred.

The cases cited by the trustee are factually distinguishable. The trustee first relies on *Morales*. In *Morales*, attorneys for a testamentary trustee reassured the beneficiary that “[s]ince all aspects of probate administration will be under court supervision and subject to court orders, you should feel reasonably assured that your interests will be protected.” (*Morales, supra*, 99 Cal.App.3d at p. 312.) The same attorneys also represented various third parties with whom the trust carried out business transactions. Upon the beneficiary’s later challenges to these transactions, the court held that the trustee’s attorney had an obligation to disclose to the beneficiary that they represented not only the trustee but also the company with whom the trustee was doing business at the time of the business transaction. (*Id.* at p. 316.) The matter before us is different. Here, there is no allegation that respondents’ attorneys represented Edward Dease in any business transaction affecting the trust. In addition, the beneficiaries are not the complaining parties. Instead, the trustee complains that the beneficiaries’ attorneys represented a third party, Edward Dease, in a separate proceeding in federal court. Unlike in *Morales*, this fact was known to the trial court before it made its ruling. In short, *Morales* does not support a determination that the judgment should be vacated in this matter.

The trustee also cites *Potter, supra*, 239 Cal.App.2d 873. In *Potter*, the same attorneys were representing the trustee and the guardian of the estates of the minor beneficiaries. The court was not informed of this conflict of interest, and one of the beneficiaries later sought to remove the trustee and challenged certain orders awarding fees to the trustee and his attorneys. Because the court was not aware that “the attorneys

for the guardian were those who could not give it impartial and fair advice,” the appellate court concluded that “no valid order could be made while the attorneys represented the conflicting interests.” (*Id.* at pp. 876, 879.) Again, *Potter* is distinguishable from the matter before us. First, respondents’ attorneys did not represent both the trustee and the guardian of the minor beneficiary. In fact, in the matter before the court, the respondents’ attorneys represented only the respondents. Further, in *Potter*, the court was not “fully informed as to all facts that might influence the decision to be made.” (*Id.* at p. 877.) Here, in contrast, the court was informed of respondents’ attorneys’ representation of Edward Dease in a separate matter. The court found this fact to be irrelevant to its decision. We find no error in this determination.

IV. Denial of request for judicial notice

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (See *People v. Waidla* (2000) 22 Cal.4th 690, 717.) Specifically, “it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question.” (*Ibid.*) Here, the trustee challenges the trial court’s decision not to grant his request for judicial notice of a federal pleading -- a decision made due to the trial court’s determination that the document was irrelevant. A trial judge’s decision not to take judicial notice ““will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.” [Citation.]” (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 291.)

The trustee contends that the trial court’s decision was an abuse of discretion. He argues that judicial notice was compulsory under Evidence Code sections 452 and 453. Section 452 provides that a court may take judicial notice of, among other things, the records of “any court . . . of the United States.” (Evid. Code, § 452, subd. (d).) Section 453 provides that the trial court “shall take judicial notice of any matter specified in Section 452 if a party requests it” and (1) gives each adverse party sufficient notice of the

request; and (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter. (Evid. Code, § 453.)

However, Evidence Code section 453 does not compel the court to admit irrelevant matters that would result in the undue consumption of time. (*Mitroff v. United Services Automobile Assn.* (1999) 72 Cal.App.4th 1230, 1243.) Here, the trial court reasoned:

“The Safe Harbor Petition is inherently limited in its subject matter. It exclusively requests that the Court examine the Proposed Petition sought to be filed by Petitioners and to determine whether filing that particular pleading would violate the no contest clause of the Trust. The Answer in the federal court interpleader action is absolutely irrelevant to that limited question.”

This decision was not an abuse of discretion. As the trial court noted, the determination to be made on respondents’ safe harbor petition was very limited. The court’s role was to consider only whether the proposed petition violated the no contest clause of the trust. When interpreting a trust, extrinsic evidence is generally only admissible to determine whether an ambiguity exists and to interpret the clause in order to decide the petition. (See, e.g., *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1135.)⁵ The evidence offered by the trustee was not relevant to the question of the proper interpretation of the trust or whether the proposed petition constituted a violation of the no contest clause. Under the circumstances, the information offered in the trustee’s request for judicial notice cannot be considered “so persuasive that no reasonable judge

⁵ The trustee claims that extrinsic evidence in the form of correspondence was offered by both sides and was objected to by neither. The question of the admissibility of this evidence is not before us and we decline to address it. Even if such evidence was admitted without objection, this does not suggest that the court’s decision to exclude the evidence proffered in the trustee’s request for judicial notice was error.

would have refused to take judicial notice of the matter.’” (*Willis v. State of California, supra*, 22 Cal.App.4th at p. 291.) The court’s exclusion of this evidence was not error.⁶

Even if error had occurred -- which it did not -- we would find that such error is not reversible. A trial court’s error in excluding evidence is grounds for reversal only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783.) Contrary to the trustee’s contentions, it is not reasonably probable that the trial court would have interpreted the proposed petition as a contest if it admitted the federal answer into evidence. As set forth above, the court was aware that respondents’ attorneys represented Edward Dease in the federal action, and the court considered the federal pleading to be irrelevant to the question before it.

V. Respondents’ motion for sanctions

Respondents have filed a motion for sanctions against the trustee and his counsel pursuant to California Rules of Court, rule 8.276 and Code of Civil Procedure section 907.

An appeal is considered frivolous “when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]” (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Respondents argue that the trustee’s appeal is objectively frivolous for several reasons. First, respondents argue that the trustee’s arguments are based on repealed law which is not applicable to the proposed petition. Since the petition has not yet been filed,

⁶ We decline the trustee’s request that we take judicial notice of the federal pleading pursuant to Evidence Code section 459.

respondents argue, if filed, it would be subject to the new laws related to the enforcement of no contest clauses, not the old law.⁷

Second, respondents argue that the trustee has frivolously appealed beyond the order issued by the court below. The order appealed from is a determination that the proposed petition did not constitute a contest of the trust. The trustee improperly argues that the safe harbor petition violated the terms of the no contest clause -- a question that was never before the trial court. In a related argument, respondents point out that the trustee meritlessly claims that the safe harbor provision violates the no contest clause of the trust, despite the fact that relevant law at the time expressly exempted such petitions from constituting a contest.

Further, respondents argue that the trustee's brief contains frivolous arguments related to the actions of Edward Dease, who is not a party to this action. Respondents argue that Edward Dease's actions have nothing to do with whether or not the respondents' proposed petition violated the no contest clause of the trust. Finally, respondents argue that several of the trustee's arguments lack merit.

Respondents contend that the appeal was brought for an improper purpose: to harass respondents and delay the trial of the trustee regarding his actions as trustee. Respondents reference the transcript of a status hearing on December 13, 2011, where the trustee's attorney attempted unsuccessfully to have the trial court proceedings stayed due to this appeal. Respondents seek sanctions in the form of payment of their attorneys' fees and costs in this appeal.

An appeal that is without merit is not by definition frivolous. (*In re Marriage of Flaherty, supra*, 31 Cal.3d at p. 650.) Imposition of sanctions should be used sparingly, to deter only the most egregious conduct. (*Id.* at p. 651.) While the trustee's appeal lacks

⁷ As explained above in footnote 3, our review of the validity of the order at issue in this appeal is subject to the law applicable at the time the order was rendered. Respondents do not dispute this fact, but argue for the first time in their motion for sanctions that "the [a]ppel with regard to the declaratory order on the [p]roposed [p]etition based on old law is moot." The question of whether the order at issue in this appeal is moot was not raised in the appeal, therefore we decline to address it.

merit, his arguments are not totally devoid of merit. We do not find sufficient evidence of the type of egregious conduct which warrants sanctions. Therefore, we deny respondents' motion.

DISPOSITION

The order is affirmed. Respondents are entitled to their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD