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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JAMES E. ROGERS, as Trustee, etc.,
et al.,

Plaintiffs and Respondents,

v.

SALLY SHERMAN,

Defendant and Appellant.

B234621

(Los Angeles County
Super. Ct. No. BP121949)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Gifford, Dearing & Abernathy and Henry H. Dearing for Defendant and Appellant.

Magasinn & Feldman, Vicki Fisher Magasinn and Amanda Morrison; Scheuer & Gillett and Keith Scheuer for Plaintiff and Respondent James E. Rogers.

Donald L. Scoggins, in pro. per. and for Plaintiffs and Respondents Patricia T. et al.

I. INTRODUCTION

Objector, Sally Sherman, appeals from a probate court order determining she and eight other lifetime beneficiaries of the Kathryn Z. Grayson Revocable Trust, as amended, cannot invade the principal. We conclude the trust instrument is unambiguous and does not require invasion of the principal. Nothing in the trust allows the lifetime beneficiaries to invade the trust papers. We affirm.

II. BACKGROUND

A. The Trust

Ms. Grayson, the trustor, created the trust on August 23, 2004, and was the original trustee. The trust was amended three times. March 27 and October 26, 2006, and September 24, 2009. Section 4.1 of the trust authorized Ms. Grayson to make distributions to herself of the “net income of the trust” Sections 4.2, 4.3 and 4.4 allowed Ms. Grayson to distribute principal from the trust. The trust became irrevocable upon Ms. Grayson’s death on February 17, 2010. Also upon her death, James E. Rogers became the trustee.

Section 6.1 makes provision for nine named individuals upon Ms. Grayson’s death. The named nine lifetime beneficiaries are related to trustor as follows: Ms. Sherman (a friend); Patricia Kathryn Towers (the daughter); Robert Towers (a son-in-law); Jordan Towers (a grandson); Kristin Elizabeth Rowles (a granddaughter); and Kathleen Barnes, Madeline Day, Patricia Kiser and Maria Ritter (nieces).

Section 6.1 of the trust provides: “Disposition of Trust for Those Holding Life Estate. [¶] During the lifetime of [the nine lifetime beneficiaries], the trustee shall hold, administer, and distribute the assets of the Trust as follows: at any time or times during the trust term, the trustee shall pay to or apply for the benefit of each individual named above as much of the net income of the trust as the trustee deems proper for their health,

education, support and maintenance. However, in making such determinations, the trustee shall take into consideration [trustor's] wishes that each individual named above is entitled to distribution from the assets of the Trust in the following proportions: [objector] is entitled to 25%, Patricia Kathryn Towers is entitled to 25%, Robert Towers is entitled to 12.5%, Jordan Christopher Towers is entitled to 12.5%, Kristin Elizabeth Rowles is entitled to 12.5%, [and] Kathleen Barnes, Madeline Day, Patricia Kiser and Maria Riter are entitled, collectively, to 12.5%. Upon the death of any of the above named individuals, their respective share shall be placed back into the trust and distributed in accordance with section 6.2 below. [¶] The trustee shall give the consideration that the trustee deems proper to all other income and resources that are known to the trustee and that are readily available to each individual for use for these purposes. In taking all of these factors into consideration, the trustee shall also consult with [objector] and it is [trustor's] wish that the opinion of [objector] shall be given substantial weight by the trustee. All decisions of the trustee, with the assistance of [objector] are within the trustee's discretion and shall be final and incontestable by anyone. The trustee shall accumulate and add to principal any net income not distributed."

Section 6.2 provides that upon the last death of nine lifetime beneficiaries, "the trustee shall hold, administer, and distribute trust property" to each of Ms. Grayson's great-grandchildren. Section 6.3 provides that each of the great-grandchildren's share shall be held, administered and distributed as a separate trust. Section 6.3 provides that the net income of the trust shall be paid to the great-grandchildren. The trustee is also authorized to pay the great-grandchildren or his or her issue "as much of the principal of the trust as is necessary for their proper health, education, support and maintenance." After the age of 35 years, the great-grandchildren have the power to withdraw all the remaining trust principal.

B. Mr. Rogers's Petition

On December 10, 2010, Mr. Rogers filed a petition for modification of the trust and instructions. As will be noted, Mr. Rogers later changed his position concerning the best way to manage the trust. The original petition alleged the following. The trust had assets of approximately \$4 million which would be reduced by a capital gains tax of approximately \$900,000. The trust assets consisted of stocks, bonds, mutual funds and a home described as the Bundy residence. The Bundy residence is held in trust for Ms. Grayson's granddaughter, Ms. Rowles.

The Santa Monica property, which was Ms. Grayson's primary residence, was sold by Mr. Rogers. It was alleged the principal of the trust was most likely lower than Ms. Grayson had anticipated. This was due to economic conditions in the housing market. In addition, the City of Santa Monica had recently taken actions to have the Santa Monica property declared as a historic landmark. This would reduce a potential buyer's use of the Santa Monica property. The petition also alleged Ms. Grayson had a reverse mortgage against her residence which caused monthly debt to meet her living expenses. Ms. Grayson originally drafted the trust with the expectation of a much larger principal balance. Certain provisions of the trust are impractical due to the changed circumstances.

Mr. Rogers also alleged that certain provisions are ambiguous and need modification. Mr. Rogers alleged that he believed Ms. Grayson intended to provide a steady stream of income to the nine lifetime beneficiaries in the percentages provided. Because of changed circumstances, the trust principal balance was low and the return on investments would be relatively low in the current economy. Mr. Rogers requested among other things a modification of Section 6.1 of the trust to create a unitrust for the nine lifetime beneficiaries rather than net income distribution. Mr. Rogers requested that the trust be modified to allow for a payment of five percent of its assets to be distributed annually to the nine lifetime beneficiaries and be divided into separate shares. Mr. Rogers alleged the proposed modification would ease administration and would be

consistent with Ms. Grayson's original intent. Mr. Rogers further alleged a willingness to relinquish his discretion in annually determining the amounts of distributions to each beneficiary.

C. The Objection And Modification Request

On February 14, 2011, Ms. Sherman, the objector, filed an objection to Mr. Rogers's modification petition. Ms. Sherman: argued that the unitrust modification as well as Mr. Rogers's willingness to relinquish his discretion was contrary to Ms. Grayson's intent; asserted Mr. Rogers's discretion was the means for dealing with changed circumstances; and requested the appointment of a guardian ad litem for living and unborn great-grandchildren. On March 18, 2011, Ms. Sherman filed a supplement to her February 14, 2011 objection. The supplement proposed the modification of Section 6.1 of the trust to allow Mr. Rogers to divide trust assets into proportionate shares for the nine lifetime beneficiaries. The proposed modification would also allow Mr. Rogers to distribute not only the net income but allow the nine lifetime beneficiaries to invade the trust principal.

D. The Amended Petition

On March 29, 2011, Mr. Rogers filed an amended petition. In the amended petition, Mr. Rogers withdrew the request to create a unitrust. Mr. Rogers responded to Ms. Sherman's proposed modifications. Citing section 6.1 of the trust, Mr. Rogers argued that only net income could be distributed to the lifetime beneficiaries but no principal. Rather, according to Mr. Rogers, section 6.1 indicates a precatory desire that net income be distributed. But according to Mr. Rogers, nothing in the trust language allows principal distributions to the nine lifetime beneficiaries. By contrast, he noted section 6.3 of the trust clearly provides for principal distribution to Ms. Grayson's great-grandchildren.

E. The Guardian Ad Litem

On March 18, 2011, the probate court appointed Donald L. Scoggins, Esq., as guardian ad litem for the born and unborn great-grandchildren. On April 27, 2011, Mr. Scoggins filed a report. Mr. Scoggins asserted that: the plain language of the trust indicated the intent the principal be held as a “pot trust” for the life estate holders; Mr. Rogers has discretion to distribute trust income to the life estate holders for their support; Mr. Rogers’s power to distribute income was in proportion to what he deemed appropriate; but, the trust principal was to be preserved and subsequently distributed to Ms. Grayson’s great-grandchildren. Mr. Scoggins argued the language in Section 6.1 of the trust regarding “distribution from the assets of the trust” does not mean principal. Rather, Mr. Scoggins argued: the trust provides that the distributions are *from* as opposed to *of* the assets; the distinction illustrates the concept that income is generated “*from*” trust assets and not the corpus itself; section 6.1 does not refer to principal distributions; and this is in contrast to other trust provisions, which required principal accumulations and which allowed Mr. Rogers to distribute principal to Ms. Grayson’s great-grandchildren.

Mr. Scoggins further asserted that the meaning of life estate should be given its technical legal meaning as used in Black’s Law Dictionary 5th Ed. (West Publishing). In anticipation of Ms. Sherman’s request, Mr. Scoggins contended that parol evidence was not admissible to explain the intent to allow principal invasion by the nine lifetime beneficiaries. This is because the “net trust income” provision for lifetime beneficiaries was unequivocal.

F. The Probate Court Ruling

On April 28, 2011, the probate court heard argument on the amended petition and objection. Ms. Sherman requested an opportunity to submit extrinsic evidence by testimony of the drafter of the trust, Christine Carlino, an attorney. The probate court

took the matter under submission. On June 29, 2011, the probate court denied a number of matters as not ripe for decision. Citing Mr. Scoggins' analysis, the probate court also denied the objector's request to modify Sections 6.1, 6.2 and 6.3 of the trust to allow for distribution of principal. This timely appeal followed.

III. DISCUSSION

A. Construction Of Trust And Extrinsic Evidence Standards

Ms. Sherman contends the trust terms are ambiguous as to whether Ms. Grayson intended to permit principal distributions to the nine lifetime beneficiaries. Therefore, Ms. Sherman argues the probate court should have allowed Ms. Carlino to testify as to Ms. Grayson's intent. We disagree.

In construing a trust, we examine Ms. Grayson's intent as expressed by the language of the trust instrument. (*Title Ins. Trust Co. v. Duffill* (1923) 191 Cal. 629, 642; *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033, 1044-1045.) However, the focus of the inquiry is the intention of Ms. Grayson, not the lawyer who drafted the trust. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-453; *Estate of Lindner* (1978) 85 Cal.App.3d 219, 226; *Estate of Gansner* (1963) 222 Cal.App.2d 390, 393-394.) We review the issue de novo giving effect to Ms. Grayson's intent as far as it is possible. (*Estate of Russell* (1968) 69 Cal.2d 200, 213; *Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 834.)

The question here is whether the trust is ambiguous as to whether Ms. Grayson intended to allow principal distributions to the nine lifetime beneficiaries. If so, then Ms. Carlino's testimony would have been admissible. Our Supreme Court explained the admissibility of extrinsic evidence standards in construing wills in *Estate of Russell*, *supra*, 69 Cal.2d at pages 205-207: "The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as

possible.’ (*Estate of Wilson* (1920) 184 Cal. 63, 66-67.) . . . Its objective is to ascertain what the testator meant by the language he used. [¶] When the language of a will is ambiguous or uncertain resort may be had to extrinsic evidence in order to ascertain the intention of the testator. We have said that extrinsic evidence is admissible ‘to explain any ambiguity arising on the face of a will, or to resolve a latent ambiguity which does not so appear.’ (*Estate of Torregano* (1960) 54 Cal.2d 234, 246. . . .) A latent ambiguity is one which is not apparent on the face of the will but is disclosed by some fact collateral to it. [Citation.] [¶] . . . A patent ambiguity is an uncertainty which appears on the face of the will. (*Estate of Womersley* (1912) 164 Cal. 85, 87. . . .)” (Fns. omitted.) The same rules of interpretation apply to trust instruments. (Prob. Code § 21101 [the same rules of interpretation governing wills applies to construction of trusts]; *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134 [same].)

If the trust instrument is ambiguous or uncertain, extrinsic evidence is admissible to ascertain the trustor’s intent. (Prob. Code, § 21102; *Estate of Russell, supra*, 69 Cal.2d at p. 206; *Kropp v. Sterling Sav. & Loan Assn., supra*, 9 Cal.App.3d at p. 1045.) Our Supreme Court has explained that an ambiguity exists when the trust is fairly susceptible of two or more constructions. (*Estate of Russell, supra*, 69 Cal.2d at p. 211; *Hulse v. Juillard Fancy Foods Co.* (1964) 61 Cal.2d 571, 573.) Each case depends upon its own facts. (*Estate of Russell, supra*, 69 Cal.2d at pp. 210-211; *Wells Fargo Bank v. Marshall, supra*, 20 Cal.App.4th at pp. 452-453.) But we use extrinsic evidence to give the instrument a meaning which is not reasonably susceptible. (*Estate of Russell, supra*, 69 Cal.2d at p. 211; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) In addition, extrinsic evidence is never admissible to explain a testamentary instrument when the language is clear on its face. (*Estate of Barnes* (1965) 63 Cal.2d 580, 582-583; *Estate of Duke* (2011) 201 Cal.App.4th 559, 570-571.)

B. Interpretation of the Trust

Here, Ms. Sherman, the objector, sought to introduce evidence from Ms. Grayson's attorney, who drafted the trust instrument. The purpose of the testimony was to show Ms. Grayson did not intend to foreclose the possibility of invasion of principal. But, nothing in Section 6.1 suggests that trustor intended to provide *principal* distributions to the nine lifetime beneficiaries. Rather, the plain language of the trust states Ms. Grayson's intent was to provide the nine lifetime beneficiaries *net income*. In that respect, the trust provides, "during the lifetime" of each of nine beneficiaries, they are to receive "as much of the net income of the trust as the trustee deems proper" for their health, education, support and maintenance. The trust instrument only provides that, upon Ms. Grayson's death, the trustee (who is now Mr. Rogers) can distribute current net income to nine lifetime beneficiaries. There is no ambiguity in the instrument concerning whether Ms. Grayson intended to provide the nine lifetime beneficiaries with principal. Thus, no extrinsic evidence is admissible. (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 889; *Estate of Edwards* (1988) 203 Cal.App.3d 1366, 1371.) As a result, we need not refer to other parts of the trust document because Ms. Grayson's intent can be determined from her actual words. (*Estate of Simoncini, supra*, 229 Cal.App.3d at p. 889; *Estate of Edwards, supra*, 203 Cal.App.3d at p. 1371.)

C. Determinations Language Argument

Ms. Sherman relies on the following language in section 6.1 to support her contention that the principal can be invaded, "However, in making such determinations, the trustee shall take into consideration the [trustor's] wishes that each individual named above is entitled to distribution from the assets of the Trust [in the aforementioned proportions]." According to Ms. Sherman, the terms "determinations" and "distribution of from the assets of Trusts" mean that the principal can be invaded. This is because the

language is not *precatory* but a command to the trustee to administer the trust in “fixed percentage shares” rather than a “common pot” trust.

The meaning of the terms “determinations” and “distributions of assets” are found simply by referring to the source of funds which are to be used. The funds to be used are contained in the preceding sentence instructing the trustee to make distributions of net income. Nothing about this language permits the trustee to use the principal as a source of the net income payments. (See *Estate of Markham* (1946) 28 Cal.2d 69, 77.)

And we disagree with objector that trustor’s “wishes” equates to authority to invade the principal. No doubt, the use of the word “wishes,” which is addressed to the trustee, would under general standards of interpretation be construed as a command. (See *Estate of Collias* (1951) 37 Cal.2d 587, 589-590; *Estate of Williams* (2007) 155 Cal.App.4th 197, 213-214; *Estate of Beauchamp* (1967) 256 Cal.App.2d 563, 568-569; *Estate of Hood* (1943) 57 Cal.App.2d 782, 786-788.) However, the general standards of interpretation do not apply. There is no clear intent to permit a beneficiary to withdraw his or her fixed share from the corpus. The trustee’s exercise of discretion is not restricted. (*Estate of Duncan* (1956) 145 Cal.App.2d 612, 614-615; *Estate of Hood, supra*, 57 Cal.App.2d at pp. 786-788.) Rather, the trustee is also directed to consider a beneficiary’s other incomes and resources. Ms. Grayson clearly intended the trustee to make “net income” distributions based on the factors of: need; the proportions identified by the trustor; and the objector’s input. But, ultimately the distributions are left to Mr. Rogers’s discretion. In this case, the precatory word did not impose an imperative obligation to Mr. Rogers to use the trust corpus to pay proportional shares to the beneficiaries. (*Estate of Sanderson* (1962) 58 Cal.2d 522, 527-528; *Estate of Hamilton* (1919) 181 Cal. 758, 769-770; *Estate of Duncan, supra*, 145 Cal.App.2d at pp. 614-615.) Thus, the probate court did not err in refusing to consider Ms. Carlino’s testimony.

IV. DISPOSITION

The order denying the request to modify the trust is affirmed in all respects. James E. Rogers, as trustee of the Kathryn Z. Grayson Irrevocable Trust and Donald L. Scoggins, as guardian ad litem for her born and unborn great-grandchildren, are awarded their costs on appeal from objector, Sally Sherman.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.