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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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LAWRENCE GEORGE HASH,  
  
Petitioner and Appellant,  
  
v.  
  
JAMES HASH,  
  
Objector and Respondent.

C068869  
  
(Super. Ct.  
No. 34201000088985PRTRFRC)

Lawrence George Hash, who is currently serving a life sentence in state prison for a homicide not connected with this case, petitioned the probate court for production of documents and moved to reopen a testamentary trust (Hash Revocable Living Trust) originally established by his parents. The petition and motion were opposed by the successor trustee, James Hash, who is Lawrence’s brother.<sup>1</sup> The probate court dropped

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<sup>1</sup> For clarity, we refer to members of the Hash family by their first names. No disrespect is intended. (*Young v. McCoy* (2007) 147 Cal.App.4th 1078, 1081, fn. 2 (*Young*).)

from its calendar the motion to recalendar the hearing on the petition for production of documents and denied the motion to reopen the testamentary trust.

On appeal, Lawrence contends the trial court erred by (1) denying the motion to recalendar the hearing on the petition for production of documents because James hid the location of the funds held in trust for Lawrence, and (2) denying his motion to reopen the testamentary trust after James moved Lawrence's inheritance into a Totten trust.<sup>2</sup>

We conclude that Lawrence's purported appeal from the denial of the petition for production of documents must be dismissed because the probate court has not yet granted nor denied the petition. As to the denial of Lawrence's motion to reopen the trust, it is appealable. However, the record shows that James acted within his discretion as trustee by safeguarding funds in order to give his brother a "fresh start" when released from prison. Accordingly, the probate court did not err in denying Lawrence's motion to reopen the trust.

## FACTUAL AND PROCEDURAL HISTORY

### *Trust Assets for the Benefit of Lawrence*

In 1990, Arthur Hash and Shirley Hash created a revocable living trust. When Arthur died in 2002, Shirley became sole trustee.

In 2003, Shirley amended the terms of the trust. In her amendment, she instructed the successor trustee to divide among her four children any trust assets remaining after her death. Her son, James was named as successor trustee. James and his brother David

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<sup>2</sup> A Totten trust is "a bank account opened by a depositor in his [or her] own name as trustee for another person where the depositor reserves the power to withdraw the funds during his [or her] lifetime. If the depositor has not revoked the trust then, upon his [or her] death, any balance left in the account is payable to the beneficiary." (Estate of Fisher (1988) 198 Cal.App.3d 418, 424; see also § 80.)" (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1124-25.)

were to receive their shares of the trust “outright and free of trust.” However, Shirley’s other two children -- Lawrence and Donald -- were to receive their shares in a lifetime trust. As to Lawrence, the amended trust provides:

“One-Fourth (1/4) of the Estate shall be held in a lifetime trust for the benefit of LAWRENCE G. HASH, whose birthdate is May 2, 1957, as outlined forthwith, My Trustee shall hold, manage, invest and distribute the Trust Estate in trust for LAWRENCE G. HASH, for his lifetime. During the term of this trust, my Trustee shall distribute income and principal, if income is insufficient, to said beneficiary for his respective health, maintenance, support, education, comfort and welfare. *My Trustee may make such distributions of income and principal to the beneficiary as my Trustee determines is reasonable and appropriate under circumstances known by my Trustee to be relevant to the making of any such distributions.*” (Italics added.) At the time Shirley conferred the successor trustee with this discretion, she was aware that Lawrence was serving a life sentence in prison.<sup>3</sup>

Shirley died on April 15, 2008, and was survived by all four of her children. James became successor trustee and liquidated Shirley’s estate.

Lawrence began a lengthy exchange of letters with James about the proceeds of the lifetime trust established for him by Shirley. Lawrence began the exchange by stating that his assets were combined with those of his parents (presumably after his incarceration) and that Shirley promised a defense fund of \$60,000 for him. Lawrence also wanted more information about where his trust assets were being held. James’s wife responded that Lawrence was entitled to a quarter of his mother’s estate and detailed the

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<sup>3</sup> At the time of their father’s death in 2002, Lawrence had served eight years of a life sentence. The record on appeal does not indicate the exact nature of Lawrence’s criminal conviction but does show that it involved homicide.

assets comprising that estate. James also responded that he had no knowledge of any combining of assets, but that such combining would make no difference because substantially all of the estate was derived from the sale of Shirley's home and annuity. James also pointed out that no testamentary documents mentioned a defense fund for Lawrence. Finally, James noted that another \$58.50 would be deducted from Lawrence's trust due to an unpaid bill owed by Shirley.

In January 2009, Lawrence wrote to James to urgently request his inheritance because "[s]omething has come up . . . ." Lawrence followed up with additional letters inquiring about the inheritance. James's wife responded that Lawrence could have the money sent anywhere he wanted but that James needed a "notarized letter directing us as to how to dispose of your funds . . . ."

In a subsequent letter, James's wife explained that they were not accepting Lawrence's collect calls from prison because the calls were very expensive. She further indicated that James did not want to be responsible for Lawrence's inheritance and was looking forward to transferring the money to an account to be indicated by Lawrence.

James and Lawrence exchanged more letters. At one point, Lawrence instructed that his inheritance be given to a person named Sandi Meyer who was traveling from Oregon to help with "this transaction." James answered that he would transfer the money to anyone Lawrence wished, but that a notarized letter was needed from Lawrence. He also stated, "[W]e do not appreciate your giving our telephone number to strangers without our permission. That is not the way to gain our favor or influence us to do anything for you. I do not care what your reasons may have been, **it is not cool.**"

A month later, James wrote to Lawrence to explain: "After much thought and consultation, we have made a family decision regarding the disposition of your portion of Mom and Dad's estate. We feel that this is what Mom and Dad would want for you. [¶]"

All of your funds will be placed in a **Trust Account**, in your name. I will continue to be the trustee. The money will be held in trust, for you (all the while accruing interest), until such time that you are released from custody. That way, you will have a ‘nest egg’ built up for a fresh start in life. I am certain that this is what Mom and Dad had in mind, when they dictated their individual *Wills and Testaments*. [¶] I am pretty sure that this is not what you had in mind, but your history of poor judgment when it comes to dealing with attorneys and related concerns, leads the family to believe that this is the best course of action. [¶] The decision has been made and it is final.” (Punctuation added.)

Lawrence answered that he still wanted to receive his inheritance immediately. James responded with a lengthy letter that concluded: “Your funds are on deposit in a local savings institution, earning 0.90% interest. The current balance is \$69,597.05 as of 9-24-09. [¶] As directed by the Trust, your funds will be held in trust until your release. As required by the Trust, you will be advised twice each year as to your current balance. This notice is the first. They will follow each January and July. [¶] Your letters have become tiresome and annoying. This will be the last communication until January.” (Punctuation added.)

In November 2009, Lawrence executed an “Affidavit of Truth” in which he accused James of having “secretly taken and or embezzled” funds from the trust. The affidavit of truth contained numerous accusations against James and called for his criminal prosecution, but it did not specify where the inheritance funds were to be received.

James responded to Lawrence in December 2009. James acknowledged receiving an affidavit of truth but noted that it originated in tax cases in which it is used “by such groups as the ‘Freemen’ to revoke their status as ‘Tax Slaves’ or ‘Feudal Subjects.’”

James concluded, “In as much as your ‘Affidavit’ is a piece of fiction, I am not going to respond to it.”

Around the same time, James wrote to the warden at Lawrence’s prison to inquire about the fact that “Lawrence has been demanding that I send him money so that he can have a surgical procedure, that he claims the State will not pay for. It is my understanding that the State is responsible for all of his medical needs.” James further noted that he was checking on the request for money because “Lawrence has not always been completely truthful in the past, and as a result squandered much of my parents’ funds before they passed away.”

In January 2010, the associate warden for health services at the California State Prison, Solano, wrote to James. The associate warden was unable to disclose any medical records of Lawrence, but noted: “Once the inmate has been evaluated by the triage nurse and treatment has begun, all treatments, including medications, office visits, procedures, surgeries, and follow-up visits ordered by the attending physician will be completed at no expense to the inmate.” The associate warden concluded that “I . . . re-assure you that your brother’s medical needs are being attended to by appropriate medical staff.”

James issued semi-annual statements about the trust to Lawrence in January and July 2010.

In August 2010, James wrote to Lawrence to state: “I am well aware of your efforts to locate the victim’s shirt and have it subjected to forensic testing for ‘gun-shot residue.’” In response to Lawrence’s request, James sent \$2,000 to Meixa Tech to have the fabric tested for the presence of gunshot residue. However, James refused to divulge to Lawrence the account or institution that held his trust funds. James explained that “because of prior behavior on your part, I feel that it would not be prudent to give you

that information. You have demonstrated that you have little or no tact when dealing with business matters that do not necessarily proceed in a fashion that you would like. Due to your present circumstances (your incarceration), it has been necessary for your funds to be placed in an account connected to my name. The account can not [*sic*] be in your name unless you are present to complete a signature card and present identification. I would like to preserve a cordial and non-adversarial relationship with that group of people. I have complied with the requirement to inform you each six months of your balance and the prevailing interest rate.”

James’s letter also stated, “I have complied with all reasonable requests from you, for the purchase of quarterly packages, etc.” Finally, James noted: “I should also point out that your frequent letters regarding your inheritance might draw increased attention to the fact that you have money. Not only do you owe restitution to the state of California, but the victim’s family may want to sue for wrongful death or some such cause.”

*Petition for Production of Documents and Motion to Reopen the Testamentary Trust*

In October 2010, Lawrence filed a petition for production of documents and answer to inquiries under Probate Code section 17200, subdivision (b)(7).<sup>4</sup> Lawrence sought to have James provide an accounting of Shirley’s testamentary trust from October 2004 through October 2010. James opposed the petition. In March 2011, Lawrence filed a motion for an order directing James to reopen Shirley’s testamentary trust. The motion was based on Lawrence’s request for “a protective order . . . directing [James] to close the ‘Totten Trust’ he opened with [Lawrence’s] inheritance, and to reinstate the Hash Revocable Living Trust.”

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<sup>4</sup> Undesignated statutory references are to the Probate Code.

At the hearing on the petition and motion, James personally appeared and Lawrence appeared telephonically. The probate court denied Lawrence’s request to reschedule the hearing on his petition for production of documents and dropped the matter from its calendar. The court also denied his motion to reopen the Hash Revocable Living Trust.

Lawrence filed a notice of appeal following the probate court’s orders.

## DISCUSSION

### I

#### *Appealability of the Probate Court’s Order on Petition for Production of Documents*

Lawrence contends the trial court “abused its discretion when it failed to compel [James] to provide [Lawrence] a complete accounting of the [trust], including the name and address of the bank, the account number and copies of the bank statements, and instead granted [James’s] objections and dropped [Lawrence’s] motion to re-calendar the 17200 Petition.”

We have a duty to consider whether this court has jurisdiction to consider an appeal, even if the parties do not address the issue. (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 195.) Upon examination of the probate court’s order regarding Lawrence’s petition, we conclude that we must dismiss the purported appeal from the denial of the petition.

Section 17200 allows a beneficiary of a trust to petition the court, among other things, for production of documents and accounting by a trustee. “In the case of trusts, the Probate Code permits an appeal to be taken from any *final* order under . . . section 17200 et seq., with two exceptions, identified in . . . section 1304, subdivision (a). One exception is an order ‘[c]ompelling the trustee to submit an account or report acts as

trustee.’ (. . . § 1304, subd. (a)(1).)” (*Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 522 (*Esslinger*), italics added.) Although an appeal from an order on a petition for reporting or accounting is generally not appealable, such an order is appealable when the issue addressed in the order “is broader than the order of a mere accounting . . . .” (*Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 622.)

We need not decide whether Lawrence raised issues broader than mere reporting or accounting in his petition because the probate court did not enter a final order on the petition. Instead, the court’s order provides: “On 5/12/2011, good cause having been shown, the Court hereby orders that the motion to recalendar petition for production of documents hearing of Lawrence Hash petitioner be dropped from its calendar.”

We note that “[i]t is permissible for good cause to delay a trial or hearing to a later date or to drop or strike a case from the calendar, to be restored on motion of one or more of the litigants or on the court’s own motion. ‘Off Calendar’ is not synonymous with ‘dismissal.’ ‘Off’ merely means a postponement whereas a ‘dismissal’ in judicial procedure has reference to a cessation of consideration.” (*Guardianship of Lyle* (1946) 77 Cal.App.2d 153, 155-156.) Thus, the order dropping the motion to recalendar the hearing on the petition from the court’s calendar is not a final order.

In the absence of a final order on Lawrence’s petition, appellate challenge regarding the merits of the petition is premature. Lacking an appealable order, we do not have jurisdiction to consider Lawrence’s argument regarding his petition. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697-698.) Accordingly, we dismiss Lawrence’s appeal from the probate court’s order regarding his petition for production of documents.

## II

### *Motion to Reopen the Testamentary Trust*

Lawrence next contends the probate court erred when it “approved the Trustee’s termination of [Lawrence’s] Trust.” Specifically, Lawrence argues that the probate court should have found that James was not allowed to move trust assets from Shirley’s estate into a Totten trust for which Lawrence is the beneficiary. We conclude the trial court did not err when it denied Lawrence’s motion.

#### A.

##### *Appealability*

By motion, Lawrence sought to establish that James engaged in a breach of trust by closing Shirley’s testamentary trust and opening the Totten trust. The probate court has power to “[c]ompel[] redress of a breach of the trust by any available remedy.” (§ 17200, subd. (b)(12).) “An order determining the existence of a power, duty, or right under a trust is appealable.” (*Esslinger, supra*, 144 Cal.App.4th at p. 523.) Thus, the probate court’s denial of the motion to determine James’s prerogative as trustee to transfer Lawrence’s inheritance to a Totten trust is appealable.

#### B.

##### *Powers of a Trustee over a Discretionary Trust*

A discretionary trust is one that expressly confers the trustee with discretion to make or withhold distributions of trust income or principal. (*Ventura County Dept. of Child Support Services v. Brown* (2004) 117 Cal.App.4th 144, 150.) A trustee does not abuse the discretion granted by the trust by paying nothing — so long as there is no improper motivation in withholding distributions. (*Ibid.*) Moreover, the discretion conferred on a trustee “‘is not subject to control by the court, except to prevent an abuse by the trustee of his [or her] discretion.’” (Rest.2d Trusts, § 187, p. 402; 11 Witkin,

Summary of Cal. Law, *supra*, Trusts, § 97, p. 973.) The court will not interfere with a trustee's exercise of discretion 'unless the trustee, in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of reasonable judgment.' (Rest.2d Trusts, § 157, com. e, p. 403.)" (*Id.* at p. 154.)

The question of whether the trustee has exceeded the discretion conferred by the trust turns on whether the trustee has acted in conformity with the trustor's intent. "[T]he basic inquiry, whenever the exercise of a trustee's discretion, absolute or otherwise, is challenged, is always whether the trustee acted in the state of mind contemplated by the trustor.' (*Estate of Greenleaf* (1951) 101 Cal.App.2d 658, 662; see also *Estate of Lackmann* (1958) 156 Cal.App.2d 674, 680; *Estate of Canfield* (1947) 80 Cal.App.2d 443, 450.)" (*Young, supra*, 147 Cal.App.4th at p. 1087.)

### C.

#### *Placement of Lawrence's Inheritance in a Totten Trust for his Benefit*

At the time Shirley amended her testamentary trust, she was aware that Lawrence was serving a life sentence in prison. The amendment appears to have taken into account Lawrence's incarceration because he was to receive his distribution of Shirley's trust in a manner different from two of his brothers. James and David were to receive their distributions "outright and free of trust." By contrast, Lawrence and Donald were to receive their distributions "in a lifetime trust" that would provide for their "health, maintenance, support, education, comfort and welfare." However, the trust did not require the trustee to make any particular distributions to Lawrence or Donald. Instead, the trust conferred the trustee with discretion to "make such distributions of income and principal to the beneficiary as my Trustee determines is reasonable and appropriate under

circumstances known by my Trustee to be relevant to the making of any such distributions.”

The first amended trust also provided that only James or David could serve as successor trustees. In that capacity, the successor trustee was vested with broad discretion to manage the assets of the trust. The trust provides that “[t]he exercise by any Trustee of the discretionary powers herein granted with respect to the allocation or distribution of property or gifts and making adjustment with respect thereto shall be final and conclusive on all interested persons and shall not be subject to any review.”

Consistent with the terms of the trust, James became successor trustee upon the death of his mother. Acting as trustee, he liquidated Shirley’s estate, divided the proceeds, and informed Lawrence of his entitlement to one quarter of the estate. As the correspondence between the brothers shows, James indicated that he was initially willing to transfer Lawrence’s share to any account or person that he wished so long as he executed a notarized document containing his instructions.

The content of the frequent communications received from Lawrence eventually changed James’s mind. Lawrence urgently sought the money, but did not wish it deposited into his prison account. He also pleaded to receive funds for surgery even though the prison noted that inmates receive medical procedures ordered by the attending physicians free of charge to the inmate. And, Lawrence irked James by giving out James’s phone number to a stranger who was traveling from Oregon to receive the inheritance funds. Noting that Lawrence had a history of bad decisions, James came to the conclusion that Lawrence’s money needed to be safeguarded for him while he was incarcerated.

James did not completely refuse to make distributions to Lawrence during his incarceration. Instead, James continued to pay for Lawrence to receive quarterly

packages in prison. James also appears to have released, at Lawrence's insistence, \$2,000 for forensic testing of the victim's shirt for the presence of gunshot residue.

James placed the remainder of Lawrence's inheritance in a Totten trust at a local bank. "California has long recognized the legitimacy of Totten trusts." (*Estate of Allen* (1993) 12 Cal.App.4th 1762, 1766.)

Having established the Totten trust, James informed Lawrence of the balance and interest rate in semi-annual letters to Lawrence. He also informed Lawrence that the money in the Totten trust was being held to provide him with a "fresh start" on his release from prison.

The probate court did not err in denying Lawrence's motion to compel James to close the Totten trust and reopen the testamentary trust established by his parents. The record shows that Shirley did not intend for Lawrence to receive his inheritance "free of trust" upon her death. She also did not allow Lawrence to serve as successor trustee to her trust. Instead, she provided the trustee -- who would be either James or David -- discretion to make or withhold distributions as "reasonable and appropriate." James exercised his discretion based on a wariness about Lawrence's frequent and changing pleadings for the urgent transmission of money. And, as James noted, Lawrence was still incarcerated, had a history of poor judgment, and had demonstrated "little to no tact when dealing with business matters" that do not go his way.

No abuse of discretion appears in James's establishment of a Totten trust for Lawrence's benefit or in refusing to disclose to Lawrence where the Totten trust was held. James's actions demonstrate the same concerns for Lawrence's ability to handle his inheritance as indicated by Shirley's instruction that the funds be held for Lawrence in a lifetime trust. Accordingly, the probate court properly denied Lawrence's motion to compel James to close the Totten trust and reopen Shirley's testamentary trust.

DISPOSITION

The appeal from the order dropping the motion to recalendar the hearing on the petition for production of documents from the probate court's calendar is dismissed. The order denying the motion to reopen the testamentary trust is affirmed. Respondent James Hash shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

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HOCH \_\_\_\_\_, J.

We concur:

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ROBIE \_\_\_\_\_, Acting P. J.

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MURRAY \_\_\_\_\_, J.