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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN JAMES GALLIHER, Defendant and Appellant.	D058702 (Super. Ct. Nos. SCD218699, SCD227235)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kronberger, Jr., Judge. Affirmed.

It is axiomatic that, as here, the trustee of a trust may be found guilty of embezzling trust funds or assets. The law of embezzlement is not so much concerned with who has legal title to money or property, but with whether the defendant's use of money or property violated the purposes for which the defendant was entrusted with the money or property. Here, the record shows the defendant took large sums of money for his personal use from three family trusts for which he served as trustee. Because there is

no dispute the defendant acted outside the purposes for which he was given control over the trusts' assets, there is sufficient evidence to support his theft convictions. We reject defendant's argument his convictions for theft from the trusts must be reversed because in civil proceedings a trust, as opposed to a trustee, lacks the capacity to sue or be sued. That circumstance is entirely unrelated to defendant's breach of trust and hence it has no bearing on defendant's culpability for the crime of embezzlement.

FACTUAL AND PROCEDURAL BACKGROUND

At all pertinent times, defendant and appellant Steven James Galliher was a financial planner. In his role as a financial planner he advised three married couples with substantial assets, the Burroughses, the Roons and the Dobans, to create three irrevocable trusts and provide each trust with funds sufficient to obtain life insurance policies on the lives of each husband and wife. The couples' children were the respective beneficiaries of the trusts and Galliher was the trustee of the trusts.

In addition to his work as a financial planner, Galliher was also the owner of a company which was developing and planned to market a hands free technology for use with mobile telephones.

In 2008 the Roons' eldest son Steven Roon became aware of $100,000 in unpaid loans his mother had provided to Galliher in 2007 and asked Galliher to resign as trustee of the Roon family trust. Steven Roon then became trustee of the trust and discovered that in addition to borrowing $100,000 directly from his mother, Galliher had borrowed $442,242 against the value of the insurance policy held by the trust. Galliher told Steven

Roon he had used the funds from the loans to support his hands free technology business and his family.

Further investigation disclosed Galliher had borrowed $130,000 against the value of the insurance policy held in the Burroughs family trust and $233,222.07 against the value of the policy held in the Doban family trust.

In addition to borrowing funds against the value of the respective insurance policies, Galliher diverted funds which had been provided to him to pay premiums on the respective policies and thereby caused some of the policies to lapse. Finally, in addition to his misuse of the life insurance policies and the premiums, Galliher borrowed substantial sums from other elderly clients on the promise the loans would be repaid when his hands free company became profitable.

Galliher was charged with 10 counts of theft and elder abuse (Pen. Code,[1] §§ 368, subd. (d), 487, 12022.6, subd. (a)(2)) and found guilty of most of them following a court trial. The trial court sentenced Galliher to a total of 10 years in state prison.

DISCUSSION

On appeal Galliher challenges the sufficiency of evidence with respect to three counts of theft related to embezzlement from the Burroughs, Roon and Doban family trusts. Galliher relies on the fact that by virtue of the irrevocable nature of the trusts the three married couples had no interest in the trust assets and the beneficiaries were only

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1 All further statutory references are to the Penal Code unless otherwise specified.

contingent beneficiaries. Given those circumstances and the legal principle that the trusts themselves have no legal identity, Galliher argues that he did not take property from another person and hence is not liable for his conceded unauthorized use of the trusts' assets. Galliher's opening brief candidly concedes "[t]here is no doubt that this is a hard case but it would be error to allow a hard case to make bad law." With due respect, this is not a hard case and the law which penalizes Galliher's conduct is good law—very good law.

We begin by recognizing that embezzlement is punishable under our statutory scheme as a species of theft. (§ 490a.) Section 503 defines embezzlement as "the fraudulent appropriation of property by a person." Section 506 further defines embezzlement: "Every trustee . . . intrusted with or having in his control property *for the use* of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust . . . is guilty of embezzlement." Thus, " ' "The gist of the offense is the appropriation to one's own use of property held by him *for devotion to a specified purpose other than his own enjoyment of it*." [Citation.]' [Citation.]" (*People v. Nazary* (2010) 191 Cal.App.4th 727, 742; accord *People v. Miller* (1961) 188 Cal.App.2d 156, 167; *People v. Hodges* (1957) 153 Cal.App.2d 788, 793.)

In *People v. Miller* the defendant took funds from the prospective purchaser of real estate and instead of using the funds as a down payment as promised, diverted the funds to his own use; similarly, the defendant in *People v. Hodges* took funds which were supposed to be used as a down payment on bulk newsprint and diverted it to his own

pocket. In both cases at the time of the diversion the payor had given up ownership of the subject funds and the prospective payee did not yet have any right to the funds. Nonetheless, the defendants' violations of the purposes for which the funds had been provided supported embezzlement convictions in both instances. (See *People v. Miller, supra,* 188 Cal.App.2d at p. 167; *People v. Hodges, supra,* 153 Cal.App.2d at p. 793.)

Here, the fundamental flaw in Galliher's argument is his assumption that embezzlement requires an identifiable victim with an unconditional right to the property which has been stolen. Not so. The focus of embezzlement is not on any victim's right to property at a particular time but on the defendant's conduct in violating the purposes—express or implied—for which the defendant was entrusted with the property. (See *People v. Nazary, supra,* 191 Cal.App.4th at p. 742.) Thus here, although each married couple had parted with any ownership of the funds in the trust, they had done so with the express purpose of benefitting their children under the terms of the trust. Even though the children may not have had any right to the trust funds at the time Galliher stole them, their right to the funds is irrelevant: Galliher clearly violated the purposes for which he was given control of the funds and for that reason is guilty of embezzlement.

Because it is Galliher's deviation from the purposes for which he was given control over the respective trust assets which makes him liable as an embezzler, the fact trusts themselves are not legal entities (see *Stolenberg v. Newman* (2009) 179 Cal.App.4th 287, 293), is of no consequence here.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.