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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Estate of JOHN E. KASCH, Deceased.

JOHN A. KASCH et al.,

Plaintiffs and Appellants,

v.

HAROLD SMALL et al.,

Defendants and Respondents.

D060255

(Super. Ct. No. PN29963)

APPEAL from an order of the Superior Court of San Diego County, Richard G. Cline and Harry L. Powazek, Judges. Reversed.

In this case we reverse an order which sustained a demurrer without leave to amend and dismissed a petition brought under Probate Code¹ section 850. Section 850, subdivision (a)(2)(C) permits probate petitions with respect to property a decedent died in possession of, or holding title to and in which the petitioner claims an interest. Contrary

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

to the probate court's interpretation of section 850, subdivision (a)(2)(C), the statute embraces appellants' claims that under the terms of an earlier marital dissolution agreement, appellants are entitled to one-half of the proceeds of their father's retirement account and one-half the proceeds of two trusts which their father held at the time of his death.

FACTUAL AND PROCEDURAL BACKGROUND

1. *MOA*

In 1977 John E. Kasch (John) and Katherine Kasch (Katherine) dissolved their marriage by way of a judgment of dissolution entered in the state of Illinois. The Illinois judgment incorporated the terms of a memorandum of agreement (MOA).

In pertinent part the MOA required John leave one-half of his "net estate" to the two children he had with Katherine, appellants John A. Kasch and Barbara Kasch-Leshinski. The MOA defined John's net estate as his "taxable estate . . . *as currently defined in the Internal Revenue Code of 1954*, as amended, less all costs and expenses of administration, funeral and burial expenses, debts paid by the estate of such party, claims allowed against the decedent, or his or her estate, and [estate taxes]." (Italics added.) The MOA required John make the agreed provisions for his children either by way of a valid last will and testament or by creation of trusts for the sole benefit of appellants.

2. *Estate Plan and Administration*

Following the dissolution of his marriage to Katherine, John married respondent Louise Kasich (Louise). While John was still living, he engaged the services of respondent Harold Small, an estate planning attorney. Small prepared a number of estate

planning documents by which John named Louise the sole surviving direct beneficiary of a substantial retirement account and the beneficiary of two inter vivos trusts in which John placed other substantial assets. Small and Louise were named as successor trustees of the trusts.

John died on September 25, 1998. On June 24, 1999, Small wrote to appellants and advised them: (1) they were beneficiaries of one of the two trusts established by John before his death; (2) the trust which provided for them expressed John's belief an individual retirement account he held was not part of his net estate within the meaning of the Internal Revenue Code of 1954 as it existed in 1977 and hence was not part of his net estate within the meaning of the MOA; and (3) after deductions provided for in the MOA, appellants were each entitled to a total distribution from the trust of approximately \$450,000.²

Although Small and Louise filed an estate tax return on December 27, 1999, they declined appellants' request for a copy of the return. Appellants made a Freedom of Information Act (FOIA) (Title 5, United States Code, section 552 et seq.) request for the return and obtained a copy of it on or about April 25, 2004. The estate tax return reported that John's net estate for purposes of complying with the provisions of the Internal Revenue Code amounted to \$8,173,491. Thereafter, appellants retained an estate tax lawyer who, based on his review of the return and the provisions of the MOA, advised

² In addition, the trust provided that if appellants did not contest the benefit calculations set forth in the trust instrument, upon Louise's death they would receive an additional \$1 million, to be divided between them.

appellants that for purposes of complying with the MOA, John's net estate at the time of his death had a value of \$4,324,845, and that appellants were each entitled to a distribution of \$1,081,221.25 under the terms of the MOA.

3. *Litigation*

In April 25, 2007, appellants filed a petition in probate court which alleged they were entitled to relief under section 850. In addition to seeking relief under section 850, appellants filed a petition for letters of special administration which the probate court granted; accordingly, appellants were appointed special administrators of their father's estate and issued letters of special administration.

Over the following four years, Small and Louise challenged various iterations of appellants' section 850 petition. In February 2011 appellants filed a fourth amended petition which alleged Small and Louise had control of assets, half of which should have been provided to appellants under the terms of the MOA. The petition further alleged that Small and Louise were aware of appellants' claims to the assets at the time John died, that Small and Louise were constructive trustees of the amounts belonging to appellants, and that under section 859 Small and Louise were liable for double the amount of the assets they held unlawfully.

Small and Louise filed a demurrer to the fourth amended petition. They argued the claims set forth in appellants' petition were not cognizable as probate matters. The trial court agreed and in particular rejected appellants' contention the petition stated claims under section 850, subdivision (a)(2)(C); hence the probate court sustained the

demurrer without leave to amend and ordered the petition dismissed. Appellants filed a notice of appeal from the order dismissing their petition.³

DISCUSSION

I

Standard of Review

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.

³ The probate court's June 30, 2011 order in pertinent part stated "the Fourth Amended Petition is dismissed." On July 11, 2011, appellants filed their notice of appeal from what they described as the June 30, 2011 "judgment of dismissal." Louise and Small moved to dismiss appellants' petition in this court on the grounds the order was not appealable. This court denied the motion. In their respondents' brief, Louise and Small renew their contention the June 11, 2011 order was not appealable. Once again we reject Louise and Small's contentions; the order dismissing the petition was an appealable order. (§ 1300, subd. (k); *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 698-699; see also *Estate of Dito* (2011) 198 Cal.App.4th 791, 799-800 [order sustaining demurrer to probate petition without leave to amend amended to specify it is a judgment of dismissal and thereby save appeal].)

[Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.] [Citation.]" (*Estate of Gardner* (2010) 187 Cal.App.4th 543, 548-549, quoting *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

II

Section 850

A. Legal Principles

Section 850, subdivision (a)(2)(C) states: "(a) The following persons may file a petition requesting that the court make an order under this part: [¶] . . . [¶]

"(2) The personal representative or any interested person in any of the following cases: [¶] . . . [¶]

"(C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another."⁴

⁴ Section 850 in full provides: "(a) The following persons may file a petition requesting that the court make an order under this part:

"(1) A guardian, conservator, or any claimant, in the following cases:

"(A) Where the conservatee is bound by a contract in writing to convey real property or to transfer personal property, executed by the conservatee while competent or executed by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced.

"(B) Where the minor has succeeded to the interest of a person bound by a contract in writing to convey real property or to transfer personal property, and the contract is one that can be specifically enforced.

"(C) Where the guardian or conservator or the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest therein is claimed to belong to another.

"(D) Where the minor or conservatee has a claim to real or personal property title to or possession of which is held by another.

"(2) The personal representative or any interested person in any of the following cases:

Section 856 in turn provides "if the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief."

As the court in *Estate of Myers* (2006) 139 Cal.App.4th 434, 441 (*Myers*) noted, section 850 replaced former section 851.5 and broadened the scope of claims which may be made by way of a probate petition: "Former section 851.5, provided in pertinent part: 'If a person dies in possession of, or holding title to, real or personal property which, or some interest in which, is claimed to belong to another, or dies having a claim to real or personal property, title to or possession of which is held by another, *the executor*,

"(A) Where the decedent while living is bound by a contract in writing to convey real property or to transfer personal property and dies before making the conveyance or transfer and the decedent, if living, could have been compelled to make the conveyance or transfer.

"(B) Where the decedent while living binds himself or herself or his or her personal representative by a contract in writing to convey real property or to transfer personal property upon or after his or her death and the contract is one which can be specifically enforced.

"(C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.

"(D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another.

"(3) The trustee or any interested person in any of the following cases:

"(A) Where the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another.

"(B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another.

"(C) Where the property of the trust is claimed to be subject to a creditor of the settlor of the trust.

"(b) The petition shall set forth facts upon which the claim is based."

administrator, or any claimant may file with the clerk of the court a verified petition setting forth the facts upon which the claim is predicated. . . .' [Citations.] Hence, under that provision, standing was expressly limited to the estate representative or a 'claimant.' As explained in *Estate of Scott* (1987) 197 Cal.App.3d 913 . . . , '[section 851.5] thus provides a vehicle for the executrix to recover property that belongs in the estate, or for a claimant to recover from the estate property that rightfully belongs to the claimant.' [Citation.] That is no longer true, however, since the current incarnation of section 850 is not limited to estate representatives and property 'claimants.' It has a broader standing provision, allowing any sufficiently 'interested person,' presumptively including a creditor, to also independently pursue such an order within the probate proceeding."

In *Myers* the decedent died while in bankruptcy and left a large unpaid debt. Shortly before her death, the decedent transferred her residence to her daughter's boyfriend. Notwithstanding the transfer, the decedent stayed in the home until her death and purported to dispose, by way of a holographic will, of a beneficial interest in the home. Following the decedent's death and after the daughter was named the personal representative of her estate, the daughter's boyfriend sold the home and kept the proceeds of the sale. The unpaid creditor filed a petition under section 850 in which he alleged that the transfer to the daughter's boyfriend was a fraudulent conveyance and that the proceeds from the sale should be returned to the estate to satisfy the decedent's creditors. The court found the creditor's allegations that, at the time of her death, the decedent was living in the home and claimed at least a beneficial interest in the property, taken together

with creditors' claim against the decedent, brought the claim "squarely" within the provisions of section 850. (139 Cal.App.4th at p. 440.)

The court in *Estate of Kraus (Kraus)* (2010) 184 Cal.App.4th 103, 112 also considered the scope of section 850 and the broad relief available both under section 856 and by way of the probate court's well-established equitable powers. In *Kraus* the decedent had established a trust prior to her death and by way of a will devised her estate to the trust. Two non-profit organizations were the beneficiaries of the trust. Two days before she died, and while she was receiving hospice care, the decedent's brother was able to obtain from the decedent a power of attorney, which the decedent executed with an "X." On the day before the decedent died, her brother liquidated a number of certificates of deposit held by the decedent and deposited the proceeds into accounts he held jointly with his wife. The non-profit organizations, as beneficiaries under the trust, filed a petition under section 850 in which they asked that the probate court order the brother to return the proceeds of the bank deposits plus twice the value of the proceeds as permitted under section 859.

The probate court granted the beneficiaries' petition and ordered that the brother return the deposits plus the penalty provided for in section 859 to a personal representative of the estate, who would thereafter be appointed by the probate court. In addition, the trial court ordered that the matter be referred to the public administrator with respect to its availability to act as the personal representative of the estate. Finally, the probate court ordered the funds returned to the estate be distributed according to the decedent's will and to others with claims against the decedent's estate.

On appeal the brother argued the probate court had no power under section 850 because, as against the claims of creditors and heirs, the trust beneficiaries failed to establish they had any right to the funds. In rejecting this argument, the court stated: "Section 850, by its clear and plain terms, does not *require* the probate court to find that the property in question belongs to the interested petitioning party. Here, the trust beneficiaries sought an order requiring [the brother] to relinquish misappropriated property. That it is unclear who is entitled to the property does not deny the beneficiaries of their interest in its rightful disposition—even if, ultimately, it does not go to the trust." (*Kraus, supra*, 184 Cal.App.4th at p. 113.)

The brother also argued the probate court had no power to order payment to an unnamed personal representative. In rejecting this contention, the court described the broad powers of a probate court in determining the persons entitled to distribution of a decedent's estate, including, in particular, its powers under section 856: "Section 856 clearly and unambiguously grants the probate court the power not only to order a conveyance or transfer to the person entitled to the property in question, but also to *grant other appropriate relief*. Even apart from the statutory authority, the probate court is a court of general jurisdiction [citations] with broad equitable powers. [Citations.] The probate court has jurisdiction to determine whether property is part of the decedent's estate or living trust. [Citations.] As the Court of Appeal discussed in *Estate of Heggstad* [1993] 16 Cal.App.4th [943, 952]: 'The probate court has general subject matter jurisdiction over the decedent's property and as such, it is empowered to resolve competing claims over the title to and distribution of the decedent's property. [Citations.]'

[Citation.] The probate court may apply general equitable principles in fashioning remedies and granting relief. [Citations.] Our Supreme Court has held, 'In the exercise of its legal and equitable powers [citations], a superior court sitting in probate that has jurisdiction over one aspect of a claim to certain property can determine all aspects of the claim.' [Citation.] Our Supreme Court explained: 'The ultimate aim and purpose of administrative proceedings, including any special proceeding or contest to determine heirship, is to ascertain the persons entitled to share in the estate of the decedent and to decree distribution accordingly. It will not be questioned that justice and sound policy require that the estates of decedents be distributed to persons rightfully entitled thereto and that every concern and endeavor of a probate court should be to the accomplishment of that purpose.' [Citations.] It is pointless to deny a probate court the power to determine the whole controversy between the parties before it. [Citations].'" (*Kraus, supra*, 184 Cal.App.4th at pp. 113-114.)

B. *Analysis*

As in *Myers*, the claims set forth in appellants' fourth amended petition fall squarely within the express terms of section 850, subdivision (a)(2)(C). The appellants are plainly "interested persons" within the meaning of section 850, subdivision (a)(2). Section 48 defines "interested person" as including "[a]n heir, devisee, child, spouse, creditor, beneficiary, and *any other person having a property right in or claim against a trust estate or the estate of a decedent* which may be affected by the proceeding." (Italics added.) As direct beneficiaries of the MOA, appellants had a claim on John's estate and

plainly that interest will be affected by a determination of what assets were within John's "net estate" at the time of his death.

Importantly, the record shows that at the time of his death John had possession of or title to assets which appellants claim rightfully belong to them. There can be no question that at the time of his death John was in fact the owner of the retirement account which named Louise as beneficiary. Moreover, Small's June 24, 1999 letter identifies Louise and himself as *successor* co-trustees of the disputed trusts; the obvious inference of this statement—and more than sufficient to withstand a demurrer—is that until his death John was trustee of his trusts and thus in possession of trust assets at the time of his death within the meaning of the section 850.

Finally, it is self-evident that, as required by the statute, appellants claim an interest, under the terms of the MOA, in the retirement account and trust assets as well as the proceeds of those assets.

Notwithstanding the express terms of the statute and the broad interpretation of the statute set forth in *Myers* and *Kraus*, Small and Louise argue that because at the time of John's death all of his assets were either subject to the survivorship provisions of his retirement account or in his inter vivos trusts, no probate estate existed and accordingly relief under section 850 is not available. There is nothing on the face of the section 850 which limits relief to instances where the decedent has left an estate subject to probate.⁵

⁵ We recognize that the probate court, in ruling on Small's and Louise's demurrer to the third amended complaint, appeared to have determined that such a limitation existed. As indicated by our analysis, in doing so the probate court erred.

In *Myers* the fact the decedent plainly and intentionally placed her home outside her probate estate prior to her death did not prevent the probate court from acting under section 850 to recover the value of the home from her daughter's boyfriend. More particularly, in *Kraus* the fact that, by virtue of the power of attorney, the decedent's brother took possession of her assets, did not prevent the probate court from using sections 850 and 856 and the court's inherent equitable powers to compel the creation of a probate estate and order the disputed assets transferred to the estate. Here, if, as we must, we accept appellants' contention John breached the MOA by placing his assets in the retirement account subject to Louise's right of survivorship and in inter vivos trusts which made her a beneficiary, John committed an act analogous to the decedent's transfer of her home, discussed in *Myers*, and gave rise to a claim subject to the probate's power under section 850. As in both *Myers* and *Kraus* the fact that upon his death John's assets were not within his probate estate did not prevent the probate court from ordering those assets be returned and made subject to appellants' rights under the MOA.

In sum then, the trial court erred in sustaining Small's and Louise's demurrer.

III

In the probate court Small and Louise also argued appellants' claims were barred by the statute of limitations. However, in ruling on Small's and Louise's demurrer to the fourth amended petition, the probate court did not reach Small's and Louise's statute of limitations argument. As an alternative to their argument, appellants' petition was not

cognizable under section 850, on appeal Small and Louise renew their contention the petition was time-barred.⁶

As we have noted, appellants allege Small and Louise are holding assets which, under the terms of the MOA, rightfully belong to appellants and ask the probate court to find that Small and Louise are constructive trustees of those assets. Appellants further contend that until they received a copy of the estate's tax return in April 2004 and their estate lawyer thereafter determined John's net estate was twice as large as Small represented to them, they did not know assets, which are rightfully theirs, were being held unlawfully by Small and Louise. These allegations, if proven, would establish that appellants' initial 2007 petition was timely filed.

As appellants point out, arguably the statute of limitations is not available as a defense to allegations Small and Louise are constructive trustees. "One who has assumed the relation and undertaken to act in the capacity of a trustee and who has thereby come into the possession and control of the money or property of another cannot be heard to deny the validity of the trust under which he has admittedly acted and the benefits of which he has received and holds. [Citation.] . . . [A] person may become a trustee by construction by intermeddling with and assuming the management of property without authority, and . . . during the possession and management thereof by such constructive trustees they are subject to the same rules and remedies as other trustees, and

⁶ In ruling on earlier challenges to appellants' petition, the probate court had previously found the petition was not subject to demurrer on statute of limitations grounds.

cannot avoid their liability as such by showing they were not in fact trustees, *nor can they set up the statute of limitations.*' " (*King v. Johnston* (2009) 178 Cal.App.4th 1488, 1505, quoting *England v. Winslow* (1925) 196 Cal. 260, 267, italics added.)

However, if the statute of limitations is available, the record here does not establish the defense as a matter of law. Cases which have found constructive trust claims subject to the statute of limitations have applied either the catch-all four-year statute of limitations, Code of Civil Procedure section 343, or the three-year statute of limitations set forth in Code of Civil Procedure section 338, subdivision (d). (See 3 Witkin, Cal. Procedure (5th ed.) Actions, §§ 680-681, pp. 897-899 (*Witkin*.) Neither statute began running until appellants became aware Small and Louise held property in violation of the MOA. (See *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 560; *Witkin, supra*, § 682, p. 901.) Thus, if appellants are able to show they did not discover the violation until they received their estate lawyer's conclusions, they would be able to show that their initial petition was timely under either Code of Civil Procedure section 343 or Code of Civil Procedure section 338, subdivision (d). Contrary to Small and Louise's argument, their fourth amended petition, which they brought in their capacities as special administrators of John's estate, would relate back to their original 2007 petition which they brought as individuals. Both petitions were based on the same basic set of facts and the initial petition gave Small and Louise adequate notice of appellants' claims. (See *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277.)

DISPOSITION

The order dismissing appellants' petition is reversed and the case is remanded for further proceedings. Appellants to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.