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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCOTT GOLDSTEIN et al.,

Plaintiffs and Appellants,

v.

DEBRA JOHNSON, as Trustee, etc.,

Defendant and Respondent.

G045689

(Super. Ct. No. 30-2009-00263802)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
Mary Fingal Schulte, Judge. Affirmed.

Law Offices of David N. Thatcher & Associates and David N. Thatcher for  
Plaintiffs and Appellants.

Vogt, Resnick & Sherak, David A. Sherak and Jeany A. Duff for Defendant  
and Respondent.

\* \* \*

## INTRODUCTION

The trial court concluded an objection to a trustee's account and report, filed by three of the trust's residuary beneficiaries, was a contest under the trust's no contest clause. We affirm.

The objection sought to change the settlor's estate plan by forcing the transfer of certain property, which was to be distributed under the terms of the settlor's will, to the trust's residuary beneficiaries, who were not named as beneficiaries under the will. Additionally, the objection challenged the discretion given to the will's executor; because the will specifically and clearly gave the executor broad discretionary powers to act as she did, the objection contested or sought to invalidate the will's provisions, thus implicating the trust's no contest clause.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

On January 12, 1999, Morton J. Moore executed both a will and a revocable living trust. Moore later executed a codicil to the will, and amended the trust. Moore died on December 10, 2000, at which time the trust become irrevocable. Pursuant to the terms of the will and the amended trust, Debra Johnson became the sole executor and the sole successor trustee.

The will provided for one specific gift of personal property, and directed that the balance of Moore's tangible personal property should be divided among his nieces and nephews. (Scott Goldstein, Aaron Goldstein, and Amanda Goldstein (Appellants) are not named beneficiaries under the will.) The will gave the executor broad powers as to how to distribute property under the will: "I give all of my tangible personal property that is not otherwise disposed of as a specific gift in this will, including my interest in any insurance on that property, to those of the following persons who survive me, to be divided among them by the executor *as the executor believes to be in accordance with my wishes, the decision of the executor as to this division to be final and*

*incontestable by anyone: my nieces and nephews, Larry Goldstein, Debra Johnson, Steve Goldstein, Mitchell Goldstein, and Gayle Goldstein. If none of those beneficiaries survive me, or if in the executor's opinion any of the property should not be distributed to any of the beneficiaries, the executor may sell the undistributed items, and any proceeds shall be added to the residue of my estate and disposed of accordingly.*" (Italics added; some capitalization omitted.) The will further provided that any residue of the estate was to pour over into the trust.

The trust provided for distributions to be made after Moore's death. Specifically, the trust provided for a charitable donation and the payment of taxes and other death expenses, and specified monetary gifts to Moore's nephews, Mitchell Goldstein and Larry Goldstein, and his grandnephew, Jonathan Goldstein. After those distributions were made, the trust directed the trustee to divide the remaining trust property in equal shares to Moore's grandnieces and grandnephews, including Appellants.

Johnson established separate accounts for the trust's residual beneficiaries, including Appellants, in April 2001. Distributions were made to the beneficiaries from their designated accounts; Appellants' accounts were closed no later than December 2004.

In May 2010, Johnson, as trustee, filed a first and final account and report. In July 2010, Appellants filed an objection to Johnson's account and report, requesting that Johnson be removed and surcharged. In August 2010, Johnson filed a petition to enforce the trust's no contest clause, contending Appellants' objection to the trustee's account and report violated the trust's no contest clause. If Appellants violated the no contest clause, their interests under the trust would be void and each would be required to return all earlier distributions.

Following a bench trial, the court issued a statement of decision finding Appellants' objection violated the no contest clause. The court determined their interests

under the trust were void, and ordered them to return the distributions previously made to them from the trust. Judgment was entered, and Appellants timely appealed.

#### DISCUSSION

In the absence of any factual disputes, the standard of review where the applicability of a no contest clause is at issue is *de novo*. (*Bradley v. Gilbert* (2009) 172 Cal.App.4th 1058, 1068.)

“No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. [Citations.] Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator’s intent. [Citations.]” (*Burch v. George* (1994) 7 Cal.4th 246, 254.)

The no contest clause in the trust reads as follows: “If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument, any amendment to this instrument, or the will of the settlor in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or the will of the settlor, or seeks to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlor, then the right of that person to take any interest given to him or her by this instrument or any amendment to this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without issue.” The no contest clause in the trust is the same type of clause that has been held to be broadly worded. (See *Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1202; *Nairne v. Jessop-Humble* (2002) 101 Cal.App.4th 1124, 1131; *Estate of Pittman* (1998) 63 Cal.App.4th 290, 298.)

Appellants argue their actions did not trigger the trust’s no contest clause, under the analysis of *Estate of Ferber* (1998) 66 Cal.App.4th 244. In *Estate of Ferber*,

the decedent's will contained a broad no contest clause. (*Id.* at p. 248.) A named beneficiary under the will filed a series of safe harbor petitions (Prob. Code, § 21320) to determine whether certain actions she contemplated taking would violate the no contest clause. Those actions included a petition to remove the executor, a petition to determine certain portions of the no contest clause violated public policy and to determine the meaning of the term "co-owners" as used in the will, and a petition to file objections to the executor's accounting. (*Estate of Ferber, supra*, at pp. 248-249.) The appellate court held the no contest clause was invalid as contrary to public policy to the extent it purported to bar all attempts to oust the executor and all objections to the executor's accountings, but that it could bar frivolous attempts and objections. (*Id.* at pp. 254-255.) The appellate court also held an action to determine the meaning of the term "co-owner" would trigger the no contest clause, because it would constitute a challenge to an interpretation of the will adopted by the executor, and because the portion of the no contest clause barring such challenges did not violate public policy. (*Id.* at p. 255.) Finally, the court held a blanket determination that certain portions of the no contest clause violated public policy was improper, and that such determinations must be made on a case-by-case basis. (*Id.* at pp. 255-256.)

Appellants argue that their objection "sought to clarify the actions of the executor and hold her accountable for the distribution of the estate. No challenges to the terms of the will were contemplated."

In their objection to the trustee's account and report, Appellants argued that Johnson failed to gather significant assets into the trust, of which they were beneficiaries. Specifically, Appellants argued Johnson (as both executor and trustee) should have marshaled Moore's mobilehome, the contents of the mobilehome, and Moore's automobile, as assets of the estate. Appellants further argued that because Johnson did not divide those assets among the will beneficiaries, Johnson should have sold those assets and added them to the residue of the will, which would then pour over into the

trust, inuring to Appellants' benefit: "[T]he remainder beneficiaries of the trust were entitled to have those assets added to the trust." The stipulated facts filed by the parties before trial include the following: "[Appellants'] Objection sought the recovery of the value of tangible personal property distributed under the Will by [Johnson]."

The language of the objection itself, as well as the facts to which Appellants stipulated, make clear that Appellants' objection sought to do much more than clarify Johnson's actions as trustee or hold her accountable for the distribution of assets to the beneficiaries under the will. Appellants sought to obtain the value of the tangible personal property to which they, as beneficiaries under the trust, had no claim. Appellants are not named as beneficiaries under the will. The will named the residuary beneficiaries who were to share in Moore's tangible personal property, with the division of property left to the sole discretion of the executor. The executor did distribute those assets, meaning that there were no assets to pour over into the trust from the estate. Through the objection, Appellants "[sought] to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlor," and therefore violated the trust's no contest clause.

To the extent Appellants sought nothing more than to hold Johnson accountable, they would still be in violation of the no contest clause. In *Hearst v. Ganzi*, *supra*, 145 Cal.App.4th at page 1209, the appellate court reiterated the rule that the settlor of a trust or will may grant to a trustee or executor broad powers of discretion: "If discretion is conferred upon the trustee in the exercise of a power, *'the court will not interfere 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 a reasonable judgment.*" The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee. Thus, if the trustee is empowered to apply so much of the trust property as he may deem

necessary for the support of the beneficiary, the court will not interfere with the discretion of the trustee on the ground that he has applied too small an amount, if in the exercise of his judgment honestly and with proper motives he applies at least the minimum amount which could reasonably be considered necessary, even though if the matter were left to the court to determine in its discretion it might have applied a larger amount.’ [Citation.]” And, if such broad discretion is granted, challenges to the exercise of that discretion will constitute a contest of the trust or will, even where that exercise benefits one group of beneficiaries over another. (*Id.* at pp. 1210-1213.)

The will gave Johnson broad power as to how and to whom to distribute Moore’s tangible personal property. Johnson could divide the personal property in any way she chose among the five beneficiaries under the will. Appellants’ objection is a direct challenge to the discretion Moore gave to Johnson as executor, challenges the language of the will and Moore’s intent, and therefore constitutes a contest.

#### DISPOSITION

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.