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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAMELA K. JONES,

Plaintiff and Appellant,

v.

JIM Q. LEIVAS, SR.,

Defendant and Respondent.

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PAMELA K. JONES, et al., Individually  
and as Trustees, etc.,

Plaintiffs and Appellants,

JIM Q. LEIVAS, SR., Individually and as  
Trustee, etc.,

Defendant and Respondent.

G050909

(Super. Ct. No. 30-2012-00609008)

O P I N I O N

G050932

(Super. Ct. No. 30-2012-00609235)

Appeal from judgments of the Superior Court of Orange County, Kim R. Hubbard, Judge. Affirmed.

Velasco Law Group, Paul D. Velasco and Richard J. Radcliffe for Plaintiffs and Appellants.

Horwitz + Armstrong, John R. Armstrong and Matthew S. Henderson for  
Defendant and Respondent.

\* \* \*

This consolidated appeal arises out of an attempt by Kathleen Leivas, the now deceased co-trustee and wife of defendant Jim Q. Leivas, Sr., to revoke the Jim and Kathleen Leivas Family Trust (Trust) and create a new trust (new or KGL trust) better benefitting her daughters, plaintiffs Pamela K. Jones and Tiffany D. Jones. Because the facts involve persons sharing the same last name, we will refer to each by first name, solely for the sake of clarity. (*In re Marriage of Barth* (2012) 210 Cal.App.4th 363, 365, fn. 2.)

The trial court denied plaintiffs' petitions to determine the Trust revoked as to all of Kathleen's separate and community property (*Jones v. Leivas* (Super. Ct. Orange County, 2014, No. 30-2012-00609008, filed by Pamela alone) and to confirm such property as assets of the KGL trust (*Jones et al. v. Leivas* (Super. Ct. Orange County, 2014, No. 30-2012-00609235, filed by both Pamela and Tiffany). Plaintiffs contend this was error because Kathleen had a right to revoke the Trust and had communicated the revocation and results of her revocation to Jim, Sr. They also argue the court erroneously found Kathleen had breached her fiduciary duty to Jim, Sr., because there was no petition naming her or her estate as a defendant or respondent. Finally, plaintiffs' assert the court's judgment eliminating the "Bypass Trust" without a request prejudiced them and requires reversal. We disagree and affirm the judgments.

## FACTUAL AND PROCEDURAL BACKGROUND

At the time of their marriage in 2000, Jim, Sr., was 67 years old, with two children Jim Leivas, Jr. and Cathy Cardos, and Kathleen was 60 years old, also with two children, Pamela and Tiffany. In March 2004, Jim, Sr., and Kathleen, as settlers and trustees, created the Trust.

Kathleen had been concerned about maintaining the higher standard of living she had acquired after marrying Jim, Sr., should he predecease her. The Trust changed the character of their separate property to community property in order to provide them each with access to the other's assets during their lifetimes. Upon the death of the first spouse, the Trust was to be divided into a survivor's trust and a bypass trust. "All separate property of the Surviving Spouse and his or her half of the community property go to the Survivor's Trust," with the applicable exclusion going to the Bypass Trust. Upon the death of both spouses, the balance of the Survivor's Trust would be distributed to their respective children according to the separate assets identified by each spouse for purposes of the Trust. Jim, Jr., and Cathy were to each receive 39 percent of the estate (78 percent), while Pamela and Tiffany each would receive 11 percent (22 percent).

Under the Trust, Jim, Sr., and Kathleen had powers "co-extensive with, but not more extensive than, those powers possessed by a husband and wife under Section 1100, et seq., of the California Family Code." They each reserved several rights, including the right to revoke the Trust. As to the latter, they "each reserve[d] the right to revoke at any time all or any part of this Trust Agreement, without obtaining the consent of or giving notice to any beneficiary. If this Trust Agreement is revoked in whole or in part during our joint lifetimes, the Trustees shall immediately deliver to us the entire trust estate or the portion of the trust estate subject to revocation. Upon any such revocation, the property shall be transferred to us as our community or separate property as if the

trust had not been created. However, upon the death of either of us, all the trusts created by this Trust Agreement are irrevocable and not subject to amendment. Moreover, upon the death of the Surviving Spouse, all the trusts created by this Trust Agreement are irrevocable and not subject to amendment.” Section 2.10 allowed them to “exercise the rights reserved to us only by a signed writing delivered to the Trustees. This Trust Agreement may not, however, be revoked or amended by either of us in our respective Wills.”

In 2009, Kathleen was diagnosed with cancer. In April 2010, Kathleen executed a new trust, the KGL trust, purporting to revoke the Trust and devise all of her separate property and all of the community property to which she was entitled for her benefit during her lifetime and thereafter to plaintiffs.

The day before, Kathleen had e-mailed Jim, Sr., stating, “I am sending this to you in an e-mail so that you are able to see, read and understand what I am saying to you in private and without other people around. [¶] I have recently made changes to my finances which include creating a new trust so that my children directly benefit, should something happen to me. [¶] I have only withdrawn money from my annuity which was mine. This is something I have been thinking about for a long time, but because of my recent diagnosis of [c]ancer, I feel very strongly that this is the right thing to do for both our families, and will just make things easier for you once I am gone. [¶] . . . [¶] When you are ready, I would like to talk about this more.” She ended the e-mail with “Love, [¶] Kay.”

Jim, Sr., received the e-mail and knew it said Kathleen had formed a new trust. He asked her what it meant but she would not talk about it. “Sometime after,” Kathleen told him she had created the new trust. But they “did not discuss the trust. She only said that she had initiated it.” When Jim, Sr., asked to see the new trust, she refused. Jim, Sr., never received any written document signed by Kathleen indicating she had revoked the Trust.

Kathleen passed away on April 16, 2012. Subsequently, Jim, Sr., made several withdrawals from the Trust. Some of the withdrawals were done to pay utility bills, food, gas, and attorney fees. None of the money was transferred to family members.

After Kathleen's death, a handwritten note by her was found among her records. It was dated the same date Kathleen executed the KGL trust and described the reasons why she believed she needed to revoke the Trust and to create a new one to protect herself and her children. Jim, Sr., never received a copy of the letter until after Kathleen had died.

Pamela filed a petition for orders (1) determining revocation of the Trust as to all of Kathleen's separate and community property, (2) imposing a constructive trust, and (3) requiring Jim, Sr., to deliver Kathleen's property to Pamela and Tiffany. (*Jones v. Leivas* (Super. Ct. Orange County, 2014, No. 30-2012-00609008). Pamela and Tiffany thereafter petitioned for an order confirming Kathleen's property as assets of the KGL trust. (*Jones et al. v. Leivas* (Super. Ct. Orange County, 2014, No. 30-2012-00609235.)

The trial court denied the petitions. It ordered "[a]ll assets either removed or transferred from the Trust . . . be restored to the Trust. Everything distributed must be disgorged to the Trust, with interest from the date that these things were transferred. If in fact the assets taken are sitting in accounts and the interest has already accrued and has stayed in those accounts, then the interest that has accrued shall be returned to the Trust; [¶] . . . All beneficiary designations created from and after the date Kathleen Leivas attempted to revoke the Trust or from the date Jim Leivas transferred assets and which attempted to change the designation from the Trust to any other person or entity are invalid; [¶] . . . The Trust became irrevocable upon Ka[thleen] Leivas' death; and [¶] . . . The bypass sub-trust of the Trust is hereby terminated. The Trust shall be administered as a single trust in accordance with the terms of the trust following the death

of the first spouse.” The court terminated the bypass subtrust as being unnecessary due to the lack of an “estate tax return issue.”

## DISCUSSION

### *1. Standards of Review*

Aside from a few challenges to the facts presented by the other side, this case does not require the resolution of disputed facts but the application of law to the undisputed relevant facts. As a result, the standard of review is not substantial evidence, as Jim, Sr., argues, but de novo. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1018.) The interpretation of a trust instrument also presents a question of law for independent review on appeal when its meaning does not depend upon resolving a conflict in extrinsic evidence. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.)

### *2. Sufficiency of Kathleen’s Attempt to Revoke the Trust*

Plaintiffs contend the court erred in finding Kathleen did not revoke the Trust because under *Masry v. Masry* (2008) 166 Cal.App.4th 738 (*Masry*), Kathleen’s delivery of a notice of revocation to herself as trustee was sufficient, and even if not, it satisfied the Trust’s requirement of “a signed writing delivered to the Trustees.” We disagree.

Probate Code section 15401 (all further undesignated statutory references are to this code) provides in pertinent part: “(a) A trust that is revocable by the settlor or any other person may be revoked in whole or in part by any of the following methods:  
[¶] (1) By compliance with any method of revocation provided in the trust instrument.  
[¶] (2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. If the trust instrument explicitly makes the

method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.”

In *Masry, supra*, 166 Cal.App.4th 738, a husband and wife created a trust containing a provision for revocation. Subsequently, the husband executed a document revoking his interest in the trust but the wife did not receive notice of the revocation until after his death. The appellate court upheld the revocation, stating, “We agree with respondents that section 2.1 of the Family Trust does not state that the method of revocation it provides is explicitly exclusive. It is simply one method of revocation in addition to that provided in . . . section 15401, subdivision (a)(2). [The respondent husband] complied with section 15401, subdivision (a)(2), by giving notice to himself as trustee. If the language in the trust were sufficient to qualify as the explicitly exclusive method, then the language in section 15401, subdivision (a)(2) would be unnecessary.” (*Id.* at p. 742.)

Plaintiffs claim this case is similar because “Kathleen revoked the family trust, pursuant to section 15401(a)(2), by revoking the family trust in writing and delivering a notice to herself as trustee.” The analogy is inapt.

The revocation provision in *Masry, supra*, 166 Cal.App.4th at page 740 stated: “Each of the Trustors hereby reserves the right and power to revoke this Trust, in whole or in part, from time to time during their joint lifetimes, by written direction delivered to the other Trustor and to the Trustee.” Here, in contrast, section 2.10 of the Trust, governing the manner in which the parties must exercise their reserved rights, reads: “We may exercise the rights reserved to us [including the right to revoke the Trust Agreement] *only* by a signed writing delivered to the Trustees.” (Italics added.) The word “only” demonstrates that the language in the Trust is the exclusive method of revoking the trust, making section 15401, subdivision (a)(2) inapplicable.

Plaintiffs maintain Kathleen complied with the Trust’s requirement of “a signed writing delivered to the Trustees” in several ways. None have merit.

First, plaintiffs assert Kathleen “inform[ed] Jim[, Sr.] that she revoked the family trust.” But at the referenced record page, Jim, Sr., testified only that Kathleen had told him she had *created* a new trust, not that she had *revoked* the family Trust. Even if plaintiffs’ claim was supported by the evidence, an oral advisement does not qualify as a “signed writing.”

Second, they assert the KGL trust was a signed writing Kathleen delivered to herself. Section 2.10 of the Trust, however requires “a signed writing delivered to the Trustees.” The word trustees is plural, indicating an intent by the settlors that the signed writing be delivered to *both* trustees, not just one.

Third, plaintiffs assert the April 9, 2010 e-mail Kathleen sent to Jim, Sr., qualified as a “signed writing” because she ended it with “Love, [¶] Kay,” which they claim constitutes a valid signature. But the e-mail contains no indication Kathleen was revoking the trust, only that she was creating a new one. We are also not persuaded that ending the e-mail with “Love, [¶] Kay” turned it into a signed writing.

Plaintiffs rely primarily on authority concerning breach of contract actions and the Statute of Frauds. (See, e.g., *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261 (*Donovan*); *Marks v. Walter G. McCarty Corp.* (1949) 33 Cal.2d 814 (*Marks*); *Brewer v. Horst and Lachmund Co.* (1900) 127 Cal. 643 (*Brewer*); *Lamle v. Mattel, Inc.* (Fed. Cir. 2005) 394 F.3d 1355 (*Lamle*); *Joseph Denunzio Fruit Co. v. Crane* (1951) 188 F.2d 569; Rest. Contracts, § 210.) This case involves neither.

Even if it did, “a typed name at the end of an e-mail is not, by itself, a signature under case law. Courts have held that typed names appearing on the end of telegrams or names typewritten are, in certain circumstances, sufficient to be signatures to satisfy the California statute of frauds. [Citations.] . . . [¶] . . . [A] printed name is not a signature under contract law simply because the person deliberately printed his or her name. ‘[I]t is a universal requirement that the statute of frauds is not satisfied unless it is proved that the name relied upon as a signature was placed on the document or adopted

by the party to be charged *with the intention of authenticating the writing.*' [Citation.] The evidence must also demonstrate that the person printing his or her name intended to execute the document." (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 991-992 [addressing whether a printed name on an e-mail qualified as a signature under contract law for purposes of enforcing a settlement agreement under Code of Civil Procedure section 664.6], citing *Marks, supra*, 33 Cal.2d 814, *Brewer, supra*, 127 Cal. 643, and *Lamle, supra*, 394 F.3d 1355.)

Here, no evidence was presented that Kathleen placed the words, "Love, [¶] Kay" at the bottom of the April 9, 2010 e-mail, along with her e-mail address, with the intent to authenticate or execute it as an official binding notification. As noted above, the e-mail mentioned only that she was creating a new trust, not that she was revoking it. When Jim, Sr., asked her what it meant that she had formed the new trust, she would not talk about it and refused to show it to him. This absence of evidence that Kathleen meant for the e-mail to be a written notice of intent to revoke distinguishes this case from *Smith v. Ostly* (1959) 53 Cal.2d 262, 265-266, cited by plaintiffs, where "the admitted fact here that petitioner personally sent the notice to respondent as his 'Notice of Appeal' sufficiently shows that petitioner adopted the name thereon as his signature with the intention of authenticating the document as fully as though the document had been entirely written by him."

Plaintiffs request this court to use our equitable power to modify the Trust to accomplish Kathleen's intent to revoke the Trust. We decline to do so.

### *3. Breach of Fiduciary Duty Finding*

In its statement of decision, the trial court found Kathleen had breached her fiduciary duty to Jim, Sr., in several respects. Plaintiffs argue this was error because since Kathleen was not named as a party or served with notice, her rights cannot be affected and "an order requiring her to act would violate her right to due process."

(Quoting *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297.) But the court never made an order requiring Kathleen to act or affecting her rights in any manner. It merely found she had breached her fiduciary duty to Jim, Sr. The finding did not have an effect on the court's determination that "the alleged revocation by Kay Leivas was legally ineffective." Even if, as plaintiffs claim, the breach of fiduciary duty "constituted a purported basis" for the court's ruling, "we review the trial court's actual ruling, not its reasons," and "[a] judgment or order correct in theory will be affirmed, even where the trial court's given reasoning is erroneous." (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 368.) As discussed in the prior section, plaintiffs failed to show the court erred in ruling that Kathleen did not effectively revoke the Trust because she failed to deliver a signed writing to Jim, Sr., indicating she was revoking the Trust.

#### 4. *Bypass Trust*

Plaintiffs contend the trial court erred by unilaterally eliminating the bypass trust because it was not requested and unnecessary. No error occurred.

Under the Trust, two separate subtrusts were to be created upon the death of the first spouse: the survivor's trust and the bypass trust. The trustee was to allocate "[f]rom the balance of the Deceased Spouse's share of the trust estate [after "mak[ing] distributions of the Deceased Spouse's personal tangible property as provided in Article 5"], to the Survivor's Trust the smallest pecuniary amount which, if allowed as a federal estate tax marital deduction, would result in the least possible federal estate tax payable by reason of the Deceased Spouse's death." (Trust, § 4.2, subds. (a), (b)(i).) Thereafter, "[t]he Trustee shall allocate to the Bypass Trust the balance of the remainder of the Deceased Spouse's share of the trust estate." (Trust, § 4.2, subd. (b)(ii).)

Our Supreme Court explained the rationale for using a bypass trust like the one here in *Donkin v. Donkin* (2013) 58 Cal.4th 412, 416 (*Donkin*): "Federal law allows the property of a deceased spouse to be passed to the surviving spouse without payment

of federal estate tax through the allowance of a ‘marital deduction.’ [Citation.] The value of the estate of the surviving spouse is increased by such a passage of assets and it may be enlarged to the point where it will exceed the federal unified tax credit allowable to the estate when the surviving spouse dies. [Citations.] A common method of addressing such a situation, having the purpose of minimizing the estate taxes owed, is to provide for the transfer to the surviving spouse of only as much of the deceased spouse’s property as necessary to reduce the deceased spouse’s estate tax to zero with use of the applicable federal estate tax exemption. The property remaining in the deceased spouse’s estate is placed in a bypass trust, which makes those assets available for the surviving spouse’s use but does not give the surviving spouse rights to the property in the bypass trust that would cause any of the undistributed trust property to be included in the taxable estate of the surviving spouse upon his or her death. [Citations.] Thus, ‘the undistributed assets of the decedent’s estate . . . “bypass” the survivor’s estate.’”

“Effective January 1, 2013, the American Taxpayer Relief Act of 2012 (PL 112-240, ‘ATRA 2012’) made ‘permanent’ a \$5 million gift and estate tax exclusion (indexed for inflation) with portability and a maximum tax rate of 40%.” (Ross & Cohen, *Cal. Practice Guide: Probate* (The Rutter Group 2015) ¶ 10:1, p. 10-1.) Jim, Sr.’s, expert testified that the estate was worth \$1.6 million net at the time of Kathleen’s death.

Because the amount of the estate was significantly less than the exclusion allowable under ATRA 2012, and Kathleen’s “estate tax [was already reduced] to zero with use of the applicable federal estate tax exemption” (*Donkin, supra*, 58 Cal.4th at p. 416), there was no property remaining in Kathleen’s estate to place in a bypass trust that remains the case regardless of the irrevocable nature of the Trust. Plaintiffs have not argued to the contrary. Accordingly, we cannot conclude the court erred in terminating it. (See § 15407, subd. (a), (a)(2) [“A trust terminates when,” among other things, “[t]he trust purpose is fulfilled”].)

Plaintiffs assert that due process required a request for the termination of the bypass trust be set forth in the pleadings to allow them an opportunity to oppose it. Additionally, they claim the termination of the bypass clause prejudiced them because it allowed Jim, Sr., “to use the entire trust res without regard to the beneficiaries.” But in reality Jim, Sr., as the sole trustee, would have such discretion with or without the bypass trust.

Section 6.3 of the Trust, governing the distributions of net income and principal, states, “During the Surviving Spouse’s lifetime, the Trustees shall distribute to him . . . from the trust estate of the Survivor’s Trust that amount of net income and principal as he . . . directs. Also, the Trustees are authorized to distribute to the Surviving Spouse that amount of net income and principal, up to the whole of the trust estate, as the Trustees deem appropriate in the exercise of their discretion, using the Surviving Spouse’s accustomed manner of living as a guide and *without regard to his . . . other sources of support*. The Trustees shall exercise this discretion in a liberal manner, and the rights of remainder beneficiaries shall be of no importance.” (Italics added.)

As to the bypass trust, section 7.1 of the Trust authorizes “The Trustees [to] distribute to the Surviving Spouse that amount of net income and principal that the Trustees shall deem reasonably necessary for the proper health, education, maintenance, and support of each beneficiary in his . . . accustomed manner of living. Such payments, if any, shall be made in the amounts and at the time selected by the Trustees in their discretion. Any net income not distributed shall be accumulated and added to trust principal. In determining the distributions to be made to the Surviving Spouse under these provisions, the *Trustees may take into consideration other income and property available to the Surviving Spouse, including the assets held in the Survivor’s Trust*.” (Italics added.)

The only significant difference between the two provisions is what the trustee may take into account in distributing income from the Trust. Under either

provision, Jim, Sr., had sole discretion as to the amount he believed was necessary to maintain his “accustomed manner of living.” And as the sole trustee, Jim, Sr., also had sole discretion whether or not to consider other assets available to him had the bypass trust not been terminated. Finally, the amounts to be distributed to each beneficiary after Jim, Sr.’s, death remain the same under either the survivor’s trust or the bypass trust. We thus reject plaintiffs’ claims of prejudice and violation of due process.

#### DISPOSITION

The judgments are affirmed. Respondent shall recover his costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.