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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

BONNIE BURDETT as Interim Trustee,
etc. et al.,

Plaintiffs,

v.

OLSON & LE,

Defendants.

H035152
(Santa Clara County
Super. Ct. Nos. PR157838)

KURT SELANDER et al.,

Plaintiffs and Appellants,

v.

JAMES VALENTINE,

Defendant and Respondent.

H035152
(Santa Clara County
Super. Ct. No. CV112230)

Appellants Kurt and Derek Selander appeal a judgment entered denying their petition to remove and surcharge respondent James Valentine as trustee of their trust.

STATEMENT OF THE FACTS AND CASE

Appellants Kurt and Derek Selander are the beneficiaries of a life insurance trust (hereinafter referred to as the “KMP Trust”) established by Kurt and Derek’s mother,

Kelsey Phipps, to provide for the “health, maintenance, education, travel and welfare, and general welfare,” of her sons at the time of her death. Phipps died in a plane crash on October 2, 2000.

Respondent James Valentine is the suspended trustee of the KMP Trust. Upon Phipps’s death in 2000, when Kurt and Derek were still minors, their father, Hal Selander became the single guardian of the boys. Valentine served as trustee of the KMP Trust, and provided support for the boys pursuant to the provisions of the trust.

After Phipps’s death, Valentine hired lawyers, Anthony Caselli and Frank Doyle to assist him in setting up the trust. He hired Frank Willoughby to help him collect the life insurance proceeds for the trust. In May 2001, the trust was funded with \$20,524,234 from the proceeds of Phipps’s life insurance policy. In addition, Valentine hired an accountant, Steve Olson to assist him with trust accounting. Valentine set his annual compensation amount as \$250,000 based on the opinions of two CPAs who advised him that the compensation should be set based on a range of one and one-fourth percent to 6 percent of the value of the trust assets.

Valentine set a budget with Kurt and Derek’s guardian of \$12,000 per month for the boys’ support. Valentine wired this amount into the guardianship account each month.

Valentine began investing the trust funds in high tech stocks, buying and holding the stocks for very short periods of time. Valentine had a practice of selling the stocks when the stock price increased, but not selling when the stock price fell. As a result, the trust had short-term gains, but unrealized long-term losses.

The value of the trust’s stock portfolio decreased dramatically along with the entire market following the terrorist attacks on September 11, 2001, and gradually increased to \$17 million by the time Valentine was suspended by the trial court in 2007.

Valentine continued his short-term investing from 2001 through 2004. He invested in high quality high tech stocks, such as Cisco, Intel, Oracle and Sun Microsystems, monitored them closely, and held them for short periods of time.

On August 29, 2002, Valentine made his first financial report to Kurt and Derek. The report was prepared by the accountant Valentine hired to assist him with the trust, Steve Olson. None of the beneficiaries challenged this report, despite having the option to do so. Valentine did not send another financial report until November 2004, to account for the year ending in 2003. This report was also unchallenged.

In April 2005, Hal Selander, as Kurt's guardian,¹ having only received financial reports for 2001 and 2003, sent an e-mail to Valentine requesting information about the "value of the Trust." Valentine did not respond to Hal's e-mail. On June 8, 2005, Hal had attorney Douglas Barnes send a letter to Valentine requesting "a proper formal accounting as mandated by the Probate Code and the trust instrument." In August 2005, Valentine sent out the financial report for the year ending in 2004. This report stated that the value of the trust was \$16,158,847.² None of these reports described Valentine's short-term investment practices. Valentine relied on Olson's advice in creating the reports.

In May 2006, Valentine sent a financial report for the year ending in 2005. Derek's attorney filed a petition to compel Valentine to submit additional accounting for 2005. The trial court granted the petition in October 2006. Valentine failed to meet the court's deadline of November 16, 2006 to submit the additional accounting for the 2005 year.

¹ Derek turned 18 in October 2004.

² Kurt and Derek's expert at trial, Daniel Hoffman, testified that the reported value of the trust was incorrect, and was actually \$2 million less at the time. The differences in reported value versus actual value can be attributed to the fact that Valentine had not sold stocks for which he had long-term losses.

At this point, the parties began engaging in substantial litigation over the accountings, including motions, petitions, and ex-parte requests. Ultimately, the trial court suspended Valentine as trustee of the KMP Trust, and appointed successor interim trustees, Bonnie Burdett and Joyce Anthony.

Following Valentine's suspension as trustee, the litigation continued, including numerous appeals in this court.³

The current petition to remove Valentine as trustee was originally brought by Hal Selander as guardian for Kurt. The petition was later joined by Derek. After the court suspended Valentine as trustee, the interim trustees, Burdett and Anthony also joined in the petition, who added a petition for surcharges as damages.

The trial on the petition started on July 7, 2009. Valentine proceeded in pro per. The parties called expert witnesses, introduced evidence and submitted written briefs. Kurt and Derek's expert, Meir Statman calculated that the net of Valentine's short-term gains against his long-term losses was \$616,657. Statman also opined that had Valentine followed a strategy of investing the trust assets in the Vanguard Total Stock Market Index mutual fund, combined with the Vanguard Intermediate California Municipal Bond Fund while he was trustee, he could have made the trust approximately \$4 million. However, Statman acknowledged that one cannot judge investment strategy by using "hindsight."

In reviewing the evidence at trial, the court concluded that the trust did not suffer an overall loss while Valentine served as trustee. This conclusion was based on the evidence that the trust was valued at approximately \$17 million at the time he was

³ These appeals address insufficient accountings, sanctions, discovery, a SLAPP motion, and a petition to remove Valentine for insolvency under Probate Code section 15642, among other issues. (See *Guardianship of K.S.* (2009) 177 Cal.App.4th 1525; *Burdett v. Doyle* (Dec. 15, 2009, H033061) [nonpub.opn.]; *Selander v. Valentine* (Aug. 30, 2010, H034324) [nonpub. opn.]; and *Burdett v. Caselli* (Sept. 29, 2010, H033356) [nonpub. opn.])

suspended in 2007, and Valentine made approximately \$3 million in distributions up until that point.

The court entered judgment on January 21, 2010. The court denied Kurt and Derek's request to remove Valentine, and instead ordered a set amount of future compensation for Valentine's service as trustee, and ordered him to pay a surcharge for his breaches of trust.

Kurt and Derek filed a petition for writ of supersedeas to stay the court's order pending the outcome of this appeal. This court granted the petition, leaving the trial court's 2007 order suspending Valentine as trustee, and appointing successor interim trustees in effect until the final determination of this appeal.

DISCUSSION

In this appeal, Kurt and Derek assert the trial court erred when it refused to permanently remove Valentine as trustee of the KMP Trust.

Kurt and Derek's petition to remove Valentine as trustee was brought pursuant to Probate Code sections 17200 subdivision (b)(10) and 15642. Kurt and Derek stated the grounds for removal of Valentine as breach of the duty to provide beneficiaries with information regarding the trust under Probate Code section 16060 et seq., breach of the duty of loyalty under Probate Code section 16004 and violation of Probate Code sections 16006 and 16007 for failure to preserve trust property consistent with the Prudent Investor Act.

The decision whether to remove a trustee "rests largely in the discretion of the trial court." (*Estate of Bixby* (1961) 55 Cal.2d 819, 826.) Moreover, we review the court's exercise of discretion deferentially. "In the absence of a clear showing of abuse, the court's determination will not be disturbed on appeal." (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 769.) "The test is not whether we would have made a different decision had the matter been submitted to us in the first instance. Rather, the discretion is that of the trial court, and we will only interfere with its ruling if we find that under all

the evidence, viewed most favorably in support of the trial court's action, no judge reasonably could have reached the challenged result.' ” (*Estate of Hammer* (1993) 19 Cal.App.4th 1621, 1634.) That said, “[w]e do not defer to the trial court's ruling when there is no evidence to support it.” (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) The court's discretionary decision will be upheld “as long as its determination is within the range of the evidence presented.” (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 670.)

In this case, the court considered the evidence at trial and found that a number of Valentine's actions supported a conclusion that he violated duties to Kurt and Derek, and as a result, breached the trust. However, rather than remove Valentine as Kurt and Derek requested, the court instead ordered alternative remedies, including setting the amount of Valentine's future compensation, and ordering Valentine to pay a surcharge to the trust. In this appeal, Kurt and Derek argue the court abused its discretion.

Petition and Court's Findings

Kurt and Derek alleged in their petition that Valentine should be removed as trustee because he failed to provide information to them that is required under the Probate Code. Probate Code section 16060 provides, “[t]he trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration,” and Probate Code section 16061, which provides, “[e]xcept as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest.”

Following trial, the court found Valentine failed to report to the beneficiaries as required, and therefore, breached his duty under Probate Code section 16060 et seq. In particular, the court noted that Valentine's accountings were not timely under the terms of the KMP Trust, did not include the 90 day objection language required under the

Probate Code, were “misleading,” and did not clearly contain a “statement of assets and liabilities.”

In addition to breach of the duty to provide information to trustees, the petition also alleged Valentine breached his duty of loyalty by, among other things, paying himself excessive compensation, failing to properly designate distributions from principal requiring beneficiaries to pay excess taxes, and failing to treat beneficiaries equally.

Probate Code sections 16002 and 16004 provide that the trustee has a duty to avoid conflicts, and to administer the trust solely in the interest of the beneficiaries.

Following trial, the court found Valentine breached his duty of loyalty in a number of ways. The court specifically found that Valentine paid himself excessive compensation by commencing payment in October 2000 before the trust was fully funded, and by failing to adjust his compensation downward as the value of the trust decreased. In addition, the court found Valentine’s failure to provide adequate accounting was a breach of loyalty to the beneficiaries. Finally, the court found Valentine’s improper resistance of reasonable requests for information from the beneficiaries, and failure to properly respond to court orders, for which he was repeatedly sanctioned by the court, constituted breach of loyalty. The court specifically stated: “Valentine violated his duty of loyalty by expending unnecessary attorney fees from the trust funds for this unbridled stubbornness and intransigence.”

The most serious of the petition’s allegations is that Valentine’s conduct of “day trading” assets in the trust was contrary to his obligations as trustee to preserve trust property, and violated the Prudent Investor Act. (See Probate Code, §§ 16006,⁴ 16007,⁵ 16047, et seq.)

⁴ Probate Code section 16006 provides, “The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”

The trial court found Valentine's short-term trading practices violated the Prudent Investor Act. In support of this conclusion, the court noted that the uncontested evidence at trial showed that Valentine began "day trading" high tech stocks in 2001, making thousands of buys and sells each year. The portfolio of stocks in which he invested dropped significantly in value in 2001-2002. Valentine had no written investment strategy, did not establish formal risk and return objectives, and did not establish an expected total return. Valentine did not establish or measure his performance against benchmarks, and did not consider the tax consequences of his investments. These actions were not within the strict requirements of the Prudent Investment Act.

While the trial court found Valentine's "day trading" violated the Prudent Investor Act, it did not find this violated Valentine's duty to preserve trust property under Probate Code section 16006 and 16007. In making this determination, the court focused not only on the language of the KMP Trust, but also the decisions of appellate courts reviewing the effect of a violation of the Prudent Investor Act on a determination of breach of trust.

Of particular importance to the court was the language of the trust itself. The trust provided: "B. Trustee shall have the power to invest and reinvest all or any part of the Trust Estate in such common or preferred stocks, shares or investment trust, mutual funds and investment companies' bonds, debentures, mortgages, deeds of trust, notes, real estate or other property as Trustee, in Trustee's *absolute discretion*, may select. It is Settlor's express desire and intention that Trustee shall have full power to invest and reinvest trust funds without being restricted as to forms of investment that trustee may otherwise be permitted to make, and the investments need not be diversified." (Emphasis added.) In addition, the court specifically noted that the trust contained language giving

⁵ Probate Code section 16007 provides, "The trustee has a duty to make the trust property production under the circumstances and in furtherance of the purposes of the trust."

the Trustee “discretion,” seven times, “sole discretion,” six times, and “absolute discretion” once in its provisions.

While the duties on a trustee imposed by statute “must give way to directions contained in the governing trust instrument,” (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 279 (*Copley*)), the provision allowing a trustee “absolute discretion,” as contained in the KMP Trust does not allow a trustee to “‘neglect its trust or abdicate its judgment’ [citation] or show a ‘reckless indifference’ to the interests of the beneficiary. [Citation.]” (*Collins v. Collins* (1977) 72 Cal.App.3d 663, 672 (*Collins*)). “A grant of absolute discretion to a trustee to administer assets does not mean it can do as it pleases, but rather that the grantor has waived the requirement that the conduct of the trustee at all times satisfy the standard of judgment and care exercised by a reasonable, prudent man.” (*Coberly v. Superior Court* (1965) 231 Cal.App.2d 685, 689.) “A grant of absolute discretion in dealing with trust assets may entitle a trustee to speculate, concentrate, buy and sell for appreciation, [or] assume large risks.” (*Ibid.*) However, “[t]he trustee is still required to avoid arbitrary action and to use best judgment.” (*Ibid.*)

Here, the court reviewed the evidence presented by the parties regarding Valentine’s investment practices. In particular, the court considered the testimony of experts who reviewed Valentine’s practices against others in the industry. Statman testified that Valentine failed to properly diversify his investments and subjected the trust to an unacceptable level of risk because he created a portfolio that contained too few investments, among other things. However, Statman also testified that Valentine took his job as trustee seriously, purchased stock in leading high tech companies, and knew at all times what was going on in the trust portfolio. Valentine’s expert, Randy Sugarman testified that risk cannot be measured in terms of short term trades, as Valentine conducted, and long term trades. Sugarman opined that short term trades often reduce the risk to a portfolio.

After considering the testimony of the experts and reviewing the evidence in this case, the court concluded that while Valentine may have been “marginally competent” to serve as trustee, he worked diligently in trading stocks he purchased for the trust, and he chose high quality stocks in which to invest. The court further found there was no evidence of “co-mingling of funds, gross negligence, embezzlement, squandering of assets, bad faith or fraud.”

In light of the court’s factual findings, it ultimately concluded that Valentine did not neglect his duties as trustee, abdicate his judgment, or show a “reckless indifference’ to the interests of the beneficiar[ies]. [Citation.]” (*Collins, supra*, 72 Cal.App.3d at p. 672.) Therefore, the court concluded that Valentine did not commit a breach of trust by violating his duties to preserve trust property under Probate Code sections 16006 and 16007.

Remedy Imposed

In this case, Kurt and Derek sought the permanent removal of Valentine as trustee of the KMP Trust as a remedy for his breach of trust.

A trustee’s violation of any duty owed to the beneficiaries constitutes a breach of trust. (Prob. Code, § 16400.) Here, the court specifically found that Valentine committed a breach of trust by breaching his duty to provide information to the beneficiaries (Prob. Code, §16060 et seq.), and breaching his duty of loyalty to the beneficiaries (Prob. Code, §§ 16002, 16004)

Probate Code section 16420 outlines the various remedies for breach of trust, including a petition for removal of trustee. (Prob. Code, § 16420, subd. (a)(5).) However, the choice of remedy, including the removal of a trustee is discretionary, and left to the decision of the trial court. (*Estate of Bixby, supra*, 55 Cal.2d at p. 826.)

Here, the court considered Kurt and Derek’s requested remedy of removal, and chose alternative remedies. The court noted that Valentine could be removed for his breach of trust for failing to provide information to the beneficiaries, or for his excessive

compensation. (Prob. Code, §§ 15642, subds. (b)(1) and (5).) However, the court also considered the fact that Phipps specifically named Valentine as her chosen trustee. As such, his removal should be exercised with caution. (*Estate of Brown* (1937) 22 Cal.App. 2d 480, 486.) In addition, the court noted Valentine never “abdicated his judgment,” and there was no finding of a breach of the duty to preserve trust property under Probate Code sections 16006 and 16007.

Based on the findings and considerations, the court ordered as an alternative to removal that Valentine be reinstated as Trustee with conditions, including paying all the court ordered sanctions in the litigation of the trust, and an order that all administrative costs to the trust, including his fees and the fees of any investment advisor cannot exceed one percent of the total of the trust value on the first of February each year. In addition, the court ordered that one half of the one percent that Valentine can take as a fee must be returned to the trust as a surcharge for Valentine’s breach of trust.

Kurt and Derek assert the court abused its discretion in opting for the alternative remedies, and not removing Valentine as trustee. However, a showing of abuse of discretion is not made by merely arguing that a different ruling would have been better. Here, we cannot say the trial court abused its discretion in ordering an alternative remedy to removal of the trustee. The court’s decision was based on factual findings supported by the record, and did not “ ‘exceed[] the bounds of reason, all of the circumstances before it being considered.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Moreover, the court’s discretionary order is supported by longstanding legal principles of trust law. Phipps specifically named Valentine as the trustee when she created the trust. A “named trustee will be removed only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust.” (*Copley, supra*, 126 Cal.App.3d at p. 287.) Here, the court found Valentine was marginally qualified to administer the trust, acted diligently in his investment decisions, and did not “abdicate his judgment.”

The principal of law outlined in *Copley*, that a named trustee should only be removed under extreme circumstances is sufficient grounds to support the court's exercise of discretion in this case. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.