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

DONALD R. MOODY, as Public
Guardian, etc.,

Plaintiff and Respondent,

v.

ANTHONY ALAIMO, as Successor
Trustee, etc.,

Defendant and Appellant.

H036914
(Santa Clara County
Super. Ct. No. PR168118)

Anthony Alaimo ("Anthony") appeals from the February 18, 2011 order removing him as the successor trustee of the Alaimo Family 2005 Trust ("Trust") and appointing the Public Guardian of Santa Clara County ("Public Guardian") as the successor trustee.¹ Since our review of the record discloses no judicial abuse of discretion, we will affirm.

I

Procedural History

On December 17, 2010, the Public Guardian filed a verified petition to remove Anthony as the successor trustee of the Trust and appoint a successor trustee.

¹ To avoid confusion due to the shared surname, we will refer to members of the Alaimo family by their first names. No disrespect is intended.

The verified petition stated the following facts. The Public Guardian is the conservator of the person and estate of Grace G. Alaimo ("Grace"). Grace and Sylvio Alaimo ("Sylvio"), Grace's husband and Anthony's father, executed the Trust on or about February 1, 2005. Grace is the sole life beneficiary of the Trust. The only known Trust asset is her home, which had an estimated value of \$615,000 as of July 20, 2010. Anthony lives in the house.

The petition stated that Grace "does not have a good relationship with her son and has indicated to [the Public Guardian] that she fears him, does not want him living in her house, and does not trust him to make any decisions for her." In 2008, Grace obtained a temporary restraining order against Anthony for elder abuse. Since November 17, 2008, Grace's durable power of attorney for health care designated a friend.

The letters of conservatorship were issued on or about July 8, 2009. After the appointment of the Public Guardian as her conservator, Sylvio served as trustee of the Trust.

While Grace was residing at a nursing facility during her recovery from a fractured hip, she had a number of upsetting contacts with Anthony. Staff at the facility notified the Public Guardian that "phone conversations to [Grace] from her son were very upsetting to her." After Anthony caused a disturbance at the facility and upset Grace, the assigned social worker asked him to leave and staff threatened to call the police. On another occasion, Anthony agreed to bring Grace's dog Spike to visit her but Anthony failed to show up.

The Trust provided for Anthony to become the successor trustee upon Sylvio's death. By letter dated February 16, 2010, the Public Guardian inquired whether Anthony intended to serve as the successor trustee following Sylvio's death and informed Anthony that it was the opinion of Grace's doctor that she no longer required skilled nursing care and should be placed in "a comfortable assisted living facility with appropriate care" and

that the Public Guardian needed the successor trustee to "provide funds from the trust assets on a monthly basis for the care and benefit of the Conservatee."

After Anthony stated his intention to serve as successor trustee by letter dated February 24, 2010, the Public Guardian informed Anthony, in a letter dated March 1, 2010, of Grace's scheduled move into an assisted living facility and the "estimated monthly cost for [her] private care, personal needs, medical, life insurance, and miscellaneous expenses." The Public Guardian also asked Anthony as the successor trustee to provide information regarding Grace's home, including the payment of property taxes, the necessary expenditures to maintain the property, proof of homeowner's insurance, a copy of the rental agreement, and documentation showing the collection of rent at the fair market value.

In a letter dated March 4, 2010, Anthony stated that he was in the process of obtaining legal counsel to represent "the estate" and legal counsel for himself. He stated that "the "estate has limited or not liquid assets so it is impossible for it to fund my Mother's hospital fees presently" and he had "lived in the family house for over twenty years as a family member and it was neither my father's wish nor is my mother's desire for me to ever be treated like a tenant." Although he had indicated that property taxes for 2009 and a homeowner insurance policy had been paid, the Public Guardian had learned otherwise. A review of County tax records showed that the last tax payment was made on April 13, 2009 and no payments had been made for the 2009-2010 tax roll year and the first installment for the next year was due and would be delinquent after December 10, 2010. The homeowner's insurance had been cancelled due to non-payment.

The verified petition stated that Grace was then living in a senior assisted living facility and was looking forward to returning to her house and reuniting with her dog Spike. She would be physically able live at home with 24-hour live-in care according to her physician.

The verified petition stated that Anthony had "failed to cooperate with [the Public Guardian] in providing funding for Conservatee's care, support, and maintenance, and ha[d] failed to pay all monthly expenses (i.e., property taxes) attributable to the Trust real property." It further stated that "[d]elinquent property taxes accrue penalties." The petition complained that Anthony had provided only limited information and the Public Guardian had no knowledge of the property's condition or need for repairs. It averred that Anthony had failed to provide "a plan to manage Conservatee's assets and ongoing financial needs."

The Public Guardian requested that the court remove Anthony as successor trustee pursuant to Probate Code section 15634 because Anthony had "failed to act and perform his duties as Sucessor Trustee for the benefit of the Trust estate and to Conservatee as Life Beneficiary."² The Public Guardian also requested appointment as the successor trustee and an order compelling Anthony to file an accounting.

On January 21, 2011, the date of the scheduled hearing on the petition, the Public Guardian's counsel informed the court that past property taxes for the home were delinquent and current property taxes were past due. She complained that Anthony had not been straightforward with the Public Guardian's office about a care-giving plan for Grace. Anthony's counsel explained that he had been retained the previous day, orally objected to the petition, and asked the court for a continuance to file a written objection. The matter was continued to February 18, 2011.

A written objection to the petition was filed on February 16, 2011. Anthony's supporting declaration stated the following facts. His parents were the trustors and original trustees under the Trust. His mother had been diagnosed with dementia and the Public Guardian was appointed as her conservator. His father died on January 28, 2010. He is the only child and the only named successor trustee. His mother is the sole lifetime

² All further statutory references are to the Probate Code.

beneficiary and he is the sole residual beneficiary under the terms of the Trust. The Trust has no income.

In his declaration, Anthony stated his belief that his "parents planned for the event of incapacity when they set up a Special Needs Trust within the Trust" as reflected in section 11.09 of the Trust. It was his understanding that his parents "wanted to protect and maintain the family home, with the thought that it would always be available for family members left behind after the death of first spouse." He stated that his mother "intended to qualify for Medi-Cal, and [he was and had been] willing . . . to work with the Trustee toward that end." He also stated that his "parents expected they would be eligible for and would receive public benefits in their later years." He asserted that his parents wanted to preserve the family home and they "did not want the house to be sold or encumbered unless not do so would interfere with, limit or reduce the receipt of or eligibility for any government benefits." In support of these views, Anthony cited various subparagraphs of section 11 of the Trust.

Anthony stated in his declaration that he "believe[s] that the goal of the Conservator [the Public Guardian] is, rather than to assist her in applying for Medi-Cal, to succeed as Trustee so he can authorize borrowing against the family home and then use those funds to pay for the support of [his] mother." According to Anthony, his "mother is eligible for Medi-Cal benefits" and "there is no need to encumber the property." He mentioned that she was currently receiving about \$1600 a month in Social Security income.

In his declaration, Anthony referred to the Trust's conclusive presumption that each trustor intends to return to the personal residence during incapacity. He stated: "I believe that my mother's wish and intent today, were she not suffering from dementia, would be to return home."

Anthony asserted in his declaration that he understands that the prudent person rule governs his actions and he is "doing [his] best to maintain the property and pay the

expenses." Since he does not "believe this is a good market in which to sell the family home," he has "been paying expenses as they arise out of [his] own funds." He had personally paid all expenses associated with services to the home (e.g. water, garbage, PG&E), \$5,125 to remedy a plumbing leak, and the monthly expenses of approximately \$200 for care of his mother's dog. He regularly performed the landscape maintenance that would otherwise cost approximately \$200 a month. Even though he was entitled to reasonable compensation under the Trust, Anthony had not taken a fee for acting as the successor trustee.

Anthony indicated in his declaration that he had also paid other costs with his own separate funds. Although the Trust permits the last illness and funeral expenses to be paid from the Trust assets, Anthony he had "used the proceeds of a life insurance policy on [his] father's life, wherein [he] was named an individual beneficiary (i.e., the Trust was not the named beneficiary) to pay [his] father's funeral expenses." As to property taxes, Anthony stated that, since "the Trust continues to have no income," he "will pay from [his] own funds the 2009-2010 tax and the 2010-2011 tax year no later than the date of [the] hearing" on the removal petition. As to homeowner's insurance, he stated that on November 23, 2010, he switched insurance carriers and purchased homeowner's insurance through a new carrier. Anthony acknowledged that the prior homeowner's insurance policy expired on November 22, 2010 but stated that there was "no lapse in coverage."

As to his residing in the home without paying rent, Anthony indicated that he had lived in the home for 24 years without ever paying rent and his parents did not intend him to pay rent to live in the family home. He stated that his parents and he worked in the family business, which was unspecified, until 2006. Anthony cited subparagraph F. of Section 11.09 of the Trust, which gave the trustee discretion to not charge rent unless "the failure to do so would impair, diminish or cause ineligibility for any governmental or private benefits."

In opposition papers, Anthony's counsel argued that there was no cause for Anthony's removal as successor trustee and Anthony had managed the Trust in light of the specific provisions of the Special Needs Trust and consistent with his duty to act as a prudent person. Counsel contended that Anthony's failure to timely pay property taxes after his father's death in 2010 was an isolated incident and, by the time of the hearing, the property taxes will have been paid from Anthony's own funds because the Trust has no income. She asserted that Anthony had not allowed the home owner's insurance coverage to lapse.

At the hearing on February 18, 2011, the Public Guardian's counsel told the court that in order to provide 24-hour care to Grace in her home, the trustee will have to use the Trust's only asset, the home, and obtain a reverse mortgage to fund that care. In addition, counsel informed the court that property taxes were still unpaid when she checked on the property tax situation the previous day.

Grace's counsel described Grace as "cogent with respect to most things that you talk to her about" although she had "some selected delusions that relate primarily to her son coming down to her facility in the middle of the night and doing things." Counsel told the court that his client wanted to return to her home but she did not want her son to live there while she was there.

The Public Guardian's counsel indicated that the next steps would be to go forward with a reverse mortgage and have Anthony removed from the residence.

Anthony's counsel informed the court that he had a printout from the county tax assessor showing that the property taxes had been "paid current" and there was no lapse in home owner's insurance coverage. Counsel contended that legal grounds to remove Anthony as successor trustee did not presently exist. Counsel acknowledged that a reverse mortgage was an option that Anthony would need to explore if that was the only way to meet his mother's needs. Counsel argued for further investigation into whether

Grace really wanted to return home because there were times when she was happy outside the home according to Anthony.

Anthony spoke directly to the court. He maintained that his mother "didn't want any burden on [him] or the house or the established trust." He said that his mother had never mentioned to him that she wanted to move home now. He also maintained that his mother didn't want him moving out of the house and she intended to leave it as an inheritance to him. He asserted that his mother had social security income and could get Medi-Cal. He blamed his father, the predecessor trustee, for failing to pay taxes and bills.

The Public Guardian's counsel argued that Medi-Cal was a red herring issue because it does not pay for care in the home. Counsel explained that, regardless of Grace's past intentions, Grace did not want Anthony living in the home with her now. Counsel reported that his mother was scared of Anthony and she had previously obtained a restraining order against him. Counsel indicated that her current understanding was that Grace's health care agent had a restraining order against Anthony. She asserted that it would be "an untenable situation" to force Grace, an elderly mother with dementia who was scared of her son, to share her home with him.

Anthony insisted that his mother wanted him to have the house, "wanted no money taken out of the house," and wanted her care paid for with Social Security and Medi-Cal benefits.

Grace's counsel told the court that Grace had requested to move, and had moved, from a San Jose facility to a Hollister facility because, "[i]n part, . . . because she wanted to get away from her son and didn't want her son to know where she was living." Grace had disliked the Hollister facility and again moved because, her counsel believed, most of the other patients were lower functioning than was she. Grace's counsel conveyed that Grace adamantly wanted to return to her house.

The parties implicitly submitted the matter for decision upon the verified petition, Anthony's declaration, and the argument. The court indicated that it was going to grant the petition and remove Anthony as the successive trustee and appoint the Public Guardian. The judge stated that "I believe that [the Public Guardian] would be in the best position to appropriately ascertain the conservatee's true intent and to take the appropriate action, where[as] I have little or no faith that Mr. Alaimo would do so, perceiving that he's motivated in large part by his own self interest in this matter."

A formal order issued, filed February 18, 2011, removed Anthony as successor trustee of the Trust, appointed the Public Guardian as the successor trustee of the Trust, and directed Anthony to file an accounting with the court and to turn over all documents and information concerning the Trust and his activities as successor trustee to the Public Guardian.

II

Discussion

Anthony urges reversal on the ground that he did not breach the trust and did not abuse his power as the successor trustee and, therefore, the court erred in removing him. He asserts that since there is no actual conflict of interest between his duties as trustee and his private interests, the court could not remove him based on a potential conflict of interest. He maintains that he was following the terms of the Trust, especially those "special needs" provisions set forth in section 11.09.

A. The Trust Provisions

The Trust states that a purpose is to "provide for the protection and management of the Trustors' assets during their joint lifetimes" During their joint lifetimes, the trustors were the exclusive beneficiaries of the trust. Upon the "death of one of the Trustors, the Surviving Trustor [became] the sole lifetime beneficiary of the Trust." Anthony is named as a residuary beneficiary of the Trust.

As to a trustor's rights during incapacity, section 3.03 of the Trust provides that "[n]otwithstanding any other provision of this instrument, . . . it is conclusively presumed that each Trustor intends to return to the personal residence." Section 4.06 of the Trust states that "the Surviving Trustor shall have the right to continue to occupy all real property in the Trusts which the Surviving Trustor and Deceased Trustor were using for residential purposes whether on a full or part-time basis, including resort property"

With regard to payments to the surviving trustor, section 4.03 of the Trust requires the Trustee to periodically pay to, or apply for the benefit of, the surviving trustor *all* of the Trust's net income. It also requires the trustee "pay to or apply for the benefit of the Surviving Trustor, such sums out of the principal of the Trust as the Trustee in the Trustee's discretion deems necessary for the Surviving Trustor's proper health, support, comfort, enjoyment, welfare and tax liabilities attributable to the Trust." It mandates that "[t]he discretion of the Trustee shall be exercised liberally in favor of the Surviving Trustor" and explicitly states that the trustors' intention was that "the Surviving Trustor shall have, in addition to the necessities, a reasonable number of the luxuries of life."

Section 4.04 of the Trust clarifies that the Trustors established the Trust "primarily to provide for the Surviving Trustor during the survivor's lifetime" and it was their wish that the trustee "exercise the power to pay over such amounts of principal to or for such beneficiary" "without taking into consideration each succeeding generation, including children during the lifetime of the Surviving Trustor or any precept of conservation of principal for remaindermen." But the provision also makes clear that this language does not restrict the trustee's discretion.

Section 11.09 of the Trust is aimed at preventing premature distribution where a beneficiary's disability makes the beneficiary "eligible to seek financial assistance from governmental resources such as SSI or Medi-Cal" It states the trustors' intention that the Trust assets "supplement but not supplant, impair or diminish alternative forms of support or benefit which the beneficiary is receiving, should receive or become eligible to

receive."³ But section 11.09 of the Trust expressly states: "This provision shall *not* apply to distributions made to or for the benefit of the Surviving Trustor from the Trust."

(Italics added.)

B. *Trust Law*

"On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to [Division 9 of the Probate Code]." (§ 16000.) "The trustee has a duty to administer the trust solely in the interest of the beneficiaries." (§ 16002, subd. (a).) "The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary." (§ 16004, subd. (a).) "The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." (§ 16006.)

"The trustee shall administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." (§ 16040.) "A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation." (§ 16041.)

³ Section 11.09 of the Trust provides that "[f]or so long as the beneficiary is living, the Trustee shall apply for his or her benefit so much of the net income and principal of the Trust as the Trustee deems necessary for the beneficiary's support, maintenance, and health needs after taking into consideration, to the extent the Trustee deems advisable, any other income or resources or state or local benefits . . . available for such purposes." It limits distributions for the beneficiary's benefit to "special needs" which are defined as "the requisites for maintaining the beneficiary's good health, safety and welfare when, in the discretion of the Trustee, such requisites are not being provided by any public agency" or any state or federal office or department. The trustee is required to, "in the exercise of the Trustee's best judgment and fiduciary duty, seek support and maintenance for the beneficiary from all available public resources" including Medi-Cal.

"The grant of a power to a trustee . . . does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties." (§ 16202.) "A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust." (§ 16400.)

"A trustee may be removed in accordance with the trust instrument . . . on petition of a settlor . . . or beneficiary under Section 17200." (§ 15642, subd. (a).) There are nine statutory grounds for removal under section 15642, subdivision (b), including the trustee's commission of a breach of trust (§ 15642, subd. (b)(1)), the trustee's failure to act (§ 15642, subd. (b)(4)), and "other good cause" (§ 15642, subd. (b)(9)).

"The removal and substitution of a trustee is largely within the discretion of the trial court. [Citations.]" (*In re Gilmaker's Estate* (1962) 57 Cal.2d 627, 633.)

C. No Abuse of Discretion

Appellant argues that he adhered to section 11.09 of the Trust and, therefore, the court erred in removing him as successor trustee because he was "simply following the requirements of the Trust." While appellant is correct that a trustee has the general duty to administer the trust according to the trust instrument (§ 16000), he completely overlooks the fact that section 11.09 of the Trust is expressly inapplicable to the Surviving Trustor, his mother Grace. Anthony also neglects the primary purpose of the Trust "to provide for the Surviving Trustor during the survivor's lifetime" and the trustors' desire that the trustee "exercise the power to pay over such amounts of principal to or for such beneficiary" "without taking into consideration each succeeding generation, including children during the lifetime of the Surviving Trustor or any precept of conservation of principal for remaindermen." He disregards the provisions mandating the trustee "pay to or apply for the benefit of the Surviving Trustor, such sums out of the principal of the Trust as the Trustee in the Trustee's discretion deems necessary for the Surviving Trustor's proper health, support, comfort, enjoyment, welfare and tax liabilities

attributable to the Trust" and requiring "[t]he discretion of the Trustee" to "be exercised liberally in favor of the Surviving Trustor."

Anthony made no showing that his mother is eligible for Medi-Cal benefits or that such benefits may be used for and would be sufficient to cover the comprehensive in-home care appropriate for his mother. In seeking to preserve the sole asset of the Trust, the residence, as unencumbered regardless of the Trust's other provisions and his mother's circumstances, Anthony failed to properly ascertain and comply with all the terms and purposes of the Trust. The breach of the duty to administer the trust according to the trust instrument is a breach of trust and a basis for removal. (§§ 15642, subd. (b)(1), 16000, 16400.)

Anthony argues that "even if the Trust could be interpreted as requiring the trustee to provide the necessary monies to pay for the beneficiary's expenses, thus supplanting any public monies, [his] actions are compatible with the prudent person rule governing trust administration." He maintains that the rule supports his decision not to sell or rent the house, especially in light of the provision establishing a presumption that his mother intends to return to the residence. Anthony claims that the amounts he personally pays for home owner's insurance, property taxes, and upkeep "more than offsets whatever rent he would pay."

Since the record does not disclose the reasonable rental value of the home, Anthony's offset claim is not supported. For the same reason, it is impossible to conclude that the prudent person rule justifies Anthony's failure as trustee to charge himself rent. Even assuming that it would be imprudent to sell or rent the home to a third party at this time, Anthony has not demonstrated that the prudent person rule barred him from obtaining a reverse mortgage on the home. If a reverse mortgage is the only reasonable means to generate income to fund appropriate care for his mother, the surviving trustor and sole life beneficiary, the prudent person rule may compel the successor trustee to take that step and govern its selection.

Here, Anthony's actions and comments clearly indicated his unwillingness to encumber the home regardless of his mother's needs and desires and maintain his rent-free living situation. His stance was incompatible with his duties to administer the trust according to the trust instrument (§ 16000), to administer the trust solely in the interest of the beneficiaries (§ 16002, subd. (a)), and to not "deal with trust property . . . for any other purpose unconnected with the trust" (§ 16004, subd. (a)). Anthony as the successor trustee owed his mother undivided loyalty and it was improper for him to be influenced by personal considerations regarding protecting the house as his residence and his "inheritance." (See § 16002, subd. (a).)

The fact that Anthony apparently finally paid the property taxes, and presumably any penalties, out of his own pocket did not preclude the court from concluding that Anthony failed to pay overdue property taxes within a reasonable time after he became the successor trustee. It was within the court's sound discretion to determine that Anthony had failed to act with reasonable care by belatedly paying property taxes (only after a petition for removal had been filed) and that this breach of the duty of care constituted a breach of trust justifying removal. (§§ 15642, subd. (b)(1), 16040, 16400.) Moreover, if the Trust lacked income or funds to pay ordinary expenses such as property taxes, the trustee was responsible for taking reasonable steps to generate income to pay those taxes and avoid unnecessary penalties. The court could reasonably conclude that Anthony unreasonably failed to act and this was a further ground for removal. (§§ 15642, subds. (b)(1) and (b)(4), 16006, 16040, 16400.)

The court also had good reason to be concerned that the relationship problems between Grace and Anthony were impairing or likely to impair the proper administration of the trust. "Hostility between the beneficiary and the trustee is a ground for removal of the trustee when the hostility impairs the proper administration of the trust. [Citations.]" (*In re Gilmaker's Estate, supra*, 57 Cal.2d at p. 632.) In addition to past difficulties between them, Grace wanted to return home, she was scared of Anthony, and she did not

want Anthony living there with her. This situation was a new conflict of interest between Anthony's personal interests and his obligations as trustee toward his mother, a conflict that did not exist when the trust was executed and provided good cause for his removal. (See § 15642, subd. (b)(9).)

We reject Anthony's argument that he could not be removed because "the trustors knew of the potential conflict between [his] duties as trustee and his private interests as a [residual] beneficiary of the trust." As he notes, the Restatement Third of Trusts, section 37, comment f, observes that "[t]he court will less readily remove a trustee named by the settlor than one appointed by a court." Comment f(1) to that section also states that "the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee" But Anthony fails to mention that "[a] trustee's removal may be warranted, however, by a conflict of interests . . . that came into being at a later time." (Rest.3d Trusts, § 37, com. f(1).) He also ignores the Restatement's comment that "when a beneficiary serves as trustee or when other conflict-of-interest situations exist, the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny. [Citations.]" (Rest.3d Trusts, § 37, com. f(1).)

The court acted well within the scope of its discretion in removing Anthony as the successor trustee and appointing the Public Guardian as the new successor trustee.

DISPOSITION

The February 18, 2011 order is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.