THE 'WHOLE TRUTH' ABOUT JUDGES

Judges as Measured by Myers Briggs Test Indicator

A. 80% of Judges are **I** (Introversion) **S** (Sensing) **T** (Thinking) **J** (Judging)

B. Judges like:
   a. Rules **(I)**
   b. Concise, well-written briefs **(I)**
   c. Statutory and case law support for a decision/order **(S)**
   d. Logical reasoning and factual distinguishing if not going to follow precedent in order to do what is practical **(S)**
   e. Charts, diagrams, timelines and other visual tools that display the facts **(S)**
   f. Burdens of proof, burden of persuasion and presumptions **(T)**
   g. Stipulations re undisputed, relevant facts **(T)**
   h. Stipulations re admission to authenticity and admission of evidence **(T)**
   i. Attorneys and litigants to be on time **(J).**
   j. Coherent, logical theories as to orders sought **(J)**
   k. Understandable witness and exhibit lists **(J)**
   l. Cogent and brief opening statements even for court trials **(J)**

C. Judges do NOT like:
   a. Surprises!!!
   b. Late filed pleadings
   c. Cell phones going off
   d. Background noise/distractions during virtual appearances
   e. Incivility, cross-talk, personal attacks

(With credit to Judge Mary Thornton-House, Ret.—Los Angeles Superior Court)

The Off Ramp: Strategies to Resolve Contested Probate Cases Efficiently (Ways to Move Your Case)

Bottom Line: Pro-Active case management is essential in probate cases. Don't be afraid of it!! Don't be shy about pushing for it like a football team marching down the field for a score!!! And do not give up yards already gained during the drive!!!!

Public Policy to Settle Cases: Stating the obvious that "there is a well-established policy in the law to discourage litigation and favor settlement. Pretrial settlements are highly favored because they diminish the expense of litigation." *Kaufman v. Goldman*, (2011) 195 Cal. App. 4th 734, 745

The art of settlement is (i) when in the lifecycle of the dispute; and (ii) how? If too early, a litigant or interested party may not have enough information to feel comfortable settling the contested issue(s). If too late, the litigation costs (in particular the attorneys' fees) become the issue, not the original dispute. Should resolution be achieved via mediation (facilitative so that parties craft their own settlement) or mandatory settlement conference (evaluative so that parties are told what their best settlement will be)?

Trust Cases

In Probate, look to see what levers are available under the applicable state law. Generally the court will have broad powers to manage a case because of the court's duty to supervisor the administration of trusts and to take remedial action.

"Probate court has the general power and duty to supervise the administration of trusts that includes the power to decide all incidental issues necessary to carry out this function. The court has inherent equitable power to take all remedial action. The court can intervene to prevent or rectify abuses of a trustee's powers. Where an accounting is necessary to determine the status of trust assets, the court may order one sua sponte." *Christie V Kimball* (2012) 202 Cal.App.4th 1407, 1413

This case says the probate court, sitting as the super fiduciary, has

- a duty to supervise trust administration
- equitable powers to remedy
- broad authority to intervene in the trust
- ability to order an accounting. Early and often!
- powers to appoint an interim Trustee
- power to order a bond
- discretion as to payment of trustee fees and/or trustee's attorneys fees

Court Orders -the Devil is in the Details

Be the trustee that agrees to provide an accounting at the earliest possible time. It is important that the accounting period (beginning & end) be specific. Be sure to be honest about when accounting can be filed and served. Don't be that trustee that is always asking for more time.

If you are successor trustee/interim trustee following someone other than original settlor(s), be sure to have judge make specific orders for turnover of trust administration documents including date such

documents are to be delivered, method of delivery. Generally, the predecessor trustee cannot assert the attorney-client privilege as to documents reflecting confidential communications between the predecessor and an attorney on trust administration matters to the extent the predecessor trustee was acting in the official capacity as trustee. (See *Moeller v Superior Court* (1997) 16 Cal. 4th 1124). The battle for any predecessor trustee is assertion of the attorney-client privilege for legal advice sought in its personal capacity because of legitimate concerns of possible future litigation for breach of fiduciary duties, financial elder abuse, intentional interference of expected inheritance, etc.

Consider the use of Petition for Instructions (or comparable pleading) to seek the approval of the court before taking action where SNT beneficiary or their family/friends are critical or scrutinizing of the trustee's decisions/acts.

If you are the conservator of person who is beneficiary of SNT and find that the trustee is less than cooperative in making legitimate disbursements to the conservatee/beneficiary, document, document, document and seek an order suspending, as opposed to removing (which may require an evidentiary hearing), the trustee. Push the court to make preliminary finding that trustee is hostile and/or uncooperative. (See *Schwartz v Labow* (2008) 164 Cal. App. 4th 417)

Consider the use of sanctions for (i) recalcitrance by a prior trustee to produce trust administration documents or file an accounting; or (ii) failure to make SNT distributions requested by the conservator of the person for the beneficiary. (See *Conservatorship of Farrant* (2021) 67 Cal. App. 5th 370 where trial court's sanctions order of $1,000 per day until accounting filed upheld; result was $121,000.00 sanction ordered payable to conservatorship estate in addition to surcharge against former agent-in-fact of conservatee.)

Fees

Generally the trustee cannot use trust assets to defend against the trustee's alleged mismanagement. The court eventually makes the decision on fees at the end of the litigation and will be looking to see how the litigation costs resulted in a benefit to the trust. Trustee should pay own fees at the outset. Generally this levels the playing field as to the litigants and pushes them to be reasonable. (See *Whittlesey v Aiello* (2002) 104 CA4th 1221, 1227.

A judge is particularly concerned about who is being paid by the SNT, what is being paid by the SNT and whether requested compensation is reasonable. Factors to be considered include:

a) Gross income of the trust estate which, pursuant to Uniform Prudent Investor Act, is total return to the trust (income produced by trust assets plus capital appreciation of trust assets);
b) Success or failure of the trustee's administration;
c) Was work performed routine or required more than ordinary skill and judgment/
d) Unusual skill, expertise or experience furnished by trustee to the trust;
e) Loyalty or disloyalty displayed by trustee;
f) Amount of risk and responsibility assumed by trustee;
g) Time spent by trustee in performance of duties;
h) Custom in the community.

As SNT trustee, make suggestions to the court re payment of fees to family members/friends (generally working as caregivers or support persons) who are not performing duties as anticipated such as allowing only X-Y of fees to be paid in current accounting period with difference of X-Y to be considered in next accounting period so court can assess the services provided.

As SNT trustee or counsel for the trustee, avoid any circumstances where there could be a clawback of fees already paid. Transparency is key. (See *Hudson v. Foster* (2021) 68 Cal.App.5th 640 where appellate court found that fiduciary/conservator had misrepresented a material fact in an accounting that had already been approved by the court).

Take Notice of Notice Requirements

Fundamental due process requires reasonable notice of any proceeding that adversely affects a property interest. *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314. Published notice is not enough if there are more effective ways of giving personal notice or notice by mail. *Mennonite Board of Missions v. Adams* (1983) 462 U.S. 791, 795.

Be sure to collect and maintain current the names and addresses (including e-mail addresses) of the contingent/remainder beneficiaries of the SNT as well as the heirs at law of the SNT beneficiary. Notice of any action by the trustee which will affect a property interest of beneficiaries/heirs at law should be given. (See *Roth v. Jelly* (2021) 45 Cal. App. 5th 655—1991 decree entered pursuant to settlement agreement was found void thirty (30) years later as to settlor's grandson's contingent future remainder interest because grandson was not provided notice of hearing seeking approval of settlement agreement).

Ask court if notice via e-mail, Facebook or other social media will be deemed acceptable if that is the only information that SNT trustee has or can locate. Be mindful of need for appointment of a guardian ad litem for minor/incapacitated contingent/remainder beneficiaries if SNT trustee taking action with regard to such person's property interest in trust.

PRE-CONFERENCE INTENSIVE SESSION:

THE COURT'S VIEW ON THE PERFECT ACCOUNTING

Presented by
Judge Roger L. Lund, Ventura Superior Court
Kelly Murphy Berlingeri, Esq., Judge Pro Tem & Former Probate Examiner

The Court's goal is to approve your accounting on the first review.
What follows are common problems with accountings.

1. FIDUCIARIES

A. The relationship of Guardian-Ward, Conservator-Conservatee and Trustee-Beneficiaries are fiduciary relationships that are governed by the law of trusts.

B. Governed by the probate provisions relating to estate management by Guardian/ Conservator/Trustee. **(Prob. C. §16000, et seq., Duties of Trustees in General; Prob. C. §16040, et seq., Standard of Care; and Prob. C. §16045, et seq., Uniform Prudent Investor Act.)**

C. Subject to the regulation and control of the court in the performance of their duties. **Prob. C. §2102**

D. Fiduciaries typically

1. Operate day-to-day activities without court instruction.
2. How well they perform their duties is subject to ongoing court regulations and review.
3. Failure to properly perform is the cause for removal. **Prob. C. §2650**

Common Problem:	**Fiduciaries use estate funds like their own money or commingle funds.**
Court Tip:	**Fiduciaries signed duties and are personally liable for mismanagement of funds.**

2. PROBATE COURT

A. **Superfiduciary.** The Probate Court must oversee Guardian/Conservator/Trusts funded by court order (SNT).

B. Trustees can choose to seek court approval of accounts. **Prob. C. §17200(b)(5)**

C. The court has a **duty** to scrutinize accounts and determine all issues.

D. **Discretionary Review by Court - Prob. C. §2620(d)** – Each accounting is subject to random or discretionary, full or partial review by the Court.

1. If the account has **material errors**, the Court shall make an express finding as to the severity of the error
   - **Minor** deficiencies and actions called for.
   - **Major** deficiencies need corrections.
2. The Court shall make an express finding as to what **further action** is appropriate in response to the error.
   a) **Supplement** as to <u>minor</u> defects
      - Corrects errors in account.
      - Includes omitted information.
   b) **Amendment** due to <u>major</u> material errors
      - Replaces prior account.
      - Changes starting balance and/or schedules. (File corrected I&A)

4. TITLE OF PLEADING

A. Petition Caption vs. Prayer/Order - CRC 7.102

1. All **requests** must be in the Caption, so consistent with what is being asked in the Prayer and Order.
2. Petition must clearly and completely identify the nature of the relief sought or granted.
   - Need to put the other parties on notice of what you are asking for.
   - Cannot bury the request in the petition. *Due Process issue.*

B. Notice - CRC 7.50 - The Notice must state the **complete** title of the pleading.

Common Problem:	**Failing to ask for Fees or Allowance in the Title of the Pleading.**
Court Tip:	**Make sure title, body and prayer all ask for the same thing.**

5. ACCOUNTING FORMAT

A. Format

1. <u>Probate:</u> **Prob. C. §10900** states to use content and format of **Prob. C. §1060, et seq**
2. <u>Trust:</u> **Prob. C. §16063(b)** states to use content and format of **Prob. C. §1060, et seq**
3. <u>Conservatorship:</u> **Prob. C. §1060, et seq** states to use content and format
   a) **California Rules of Court, Rule 7.575 (e)** and Judicial Council Forms GC-400, et seq.
   b) **Prob. C. §1061** - Summary, Content & Format
   c) **Prob. C. §1062** – Support of Summary & Schedules
   d) **Prob. C. §1063** – Additional Schedules
   e) **Prob. C. §1064** – Petition for Approval of Account, Contents & Additional Petitions
   f) **Prob. C. §2620** – Periodic/Final Court Account & Original Statements

Common Problem:	**The accounting does not include the temporary period.**
Court Tip:	**When did Fiduciary have access to the funds or utilize the funds?**

B. Formal vs. Informal

1. **Formal:** Trusts, Probate Estates and Conservatorships that are filed with the Court are required to comply with **Prob. C. 1060-1064**.
   a) Summary of Account
   b) Starting Balance
   c) Additional Property Received
   d) Income - Receipts
   e) Net Income – Trade or Business
   f) Gains on Sales
   g) Disbursements – Expenses
   h) Losses on Sales
   i) Distributions
   j) Net Loss – Trade of Business
   k) Ending Balance
   l) Market Value
   m) Liabilities
   n) Proposed Distributions

i. date of death Conservator/Ward. **Prob. C. §2620(b)**
ii. termination of Guardianship/Conservatorship. **Prob. C. §1863(c)/CRC 7.1004**
iii. removal or resignation of Guardian/Conservator. **Prob. C. §2653(b) & §2660**

- *Example:* Date of death 7/4/19. Period is 5/18/18 through 7/4/19

4. **Stub Account:** (subsequent period)
   a) Starting date is one day *after* date of death.
   b) Ending date is when all administrative expenses have been paid. (2-3 months)
   - *Example:* File account by 10/4/19. Period is 7/5/19 through 9/30/19
5. File final account timely within **90 days** following death. **Local Court Rule 10.03(E)**
6. File death certificate within **30 days** of death of Conservator. **Local Court Rule 10.03(D)**

Common Problem:	**File Final Account up to Date of Death, and never file a separate Stub Account -OR- File Stub Account separately requiring new notice and filing fee.**
Court Tip:	**Do file Final Account and Stub Account in the same petition**

E. Beginning Balance on Hand - Prob. C. §2610(a)(1)

1. I&A is the value of the estate as of the date of the **appointment**.
   - I&A is due **90 days** after the appointment.
2. If **Subsequent Account,** then Beginning Balance on Hand Schedule **must equal** the previous account's Ending Balance on Hand Schedule.

F. Receipts - Prob. C. §2610(a)(2)(3)(4)&(5)

1. **Wages** of Ward/Limited Conservator are **not** part of the estate. Wage income should not be reported in the accounting. **Prob. C. §2601(a)(1)**
   - *Example:* Income - Grocery Store Bagger, Movie Theater Usher; ARC

Common Problem:	**Description of Transactions are not detailed enough.**
Court Tip:	**Each Income transaction should have 1) name of payor 2) date 3) purpose/source of receipt & 4) amount**

- *Example:*

Great Call	7/17/19	Cell Phone Refund - June 2019	$123.00
State Farm	8/21/19	Prorated HO Refund	$500.00

2. **Additional Property Received**
   a) Additional assets located during administration of conservatorship.
   b) Assets not on I&A; Purchases, Inherited, recently found.

G. Disbursements - Prob. C. §2610(a)(6)(7)(8)&(9)

1. Disbursements are Expenses, Loss on Sales, Net Loss on trade or business.
2. Distributions are payments/allowances to Conservatee/Ward

Common Problem:	**Description of Transactions are not detailed enough**
Court Tip:	**Each Disbursement transaction should include 1) name of payee 2) date 3) check # 4) detailed description of purpose & 5) amount**

- *Example:*

Coastal View	#123	7/17/19	Care giving R&B - June 2019	$3,123.00
MediPro	#124	8/21/19	Low-air loss mattress	$1,500.00
Chase	#125	9/10/19	Payoff Pre-Death c/c charges	$2,222.00

H. Categorize Expenses by Subject Matter - Prob. C. §2610(a)(6)(7)(8)&(9)

1. Summarize Expenses in report/petition - **Prob. C. 1061(a)(6)**
2. Brief description of expense categories in **THIS** account period
   a) Set forth care giving/family agreement- R&B, utilities included, Truelink, etc.
   b) Sub-categories (Administration Expenses – Attorney fees, court fees, supplies, postage)

Common Problem:	**Categorizing expenses by Bank Account**
Court Tip:	**List expense by subject matter categories - then by bank account**

- *Example:* **Income -** Interest, dividends, SS, pension, VA benefits, rents, tax refunds
  Expenses – Medical, real property, groceries, income taxes, utilities, care giving.

L. Change in Form of Assets - Prob. C. §1063(b)

1. Identifying purchases, sales or other changes in form of assets on designated schedule.
2. Payments on promissory notes and security transactions (spin off, stock splits and exchanges)
3. Transfers between cash or accounts in a financial institution do not need to be reported.

Common Problem:	**Listing transfers from the Conservatorship to the SNT is shown as a receipt of income**
Court Tip:	**Transfer from/to Conservatorship to Trust/SNT are "Additional Properties Received" NOT income. They are "Change in Form of Assets", NOT deposit of income. This causes expense and income to be improperly over-inflated.**

M. Liabilities - Prob. C. §1063(g) - List attorney fees, PPF fees, **and** taxes due but unpaid; notes payable; judgments against the estate.

- *Example:* Mortgages, Reverse Mortgages, Notes Payable, Taxes due, any lien on assets

Court Common Problem:	**No Liabilities are identified.**
Court Tip:	**Identify earned but not yet court-approved fiduciary/attorney fees.**

N. Proposed Distributions - Prob. C. §1063

1. Distributions seeking Court for approval must have schedules.
2. Calculate the distribution - Assets on Hand at End of Period, reduced by Liabilities, reduced Reserves/Holdback, Fees, and calculation proposed distribution allocated to each beneficiary.
3. Schedule MUST BALANCE!

O. Additional Important Items

1. **Full Disclosure** - If you make a mistake, disclose it. Tell the Court how you have or are going to correct the mistake. Identify, evaluate, and disclose the errors within each fiduciary accounting.
2. **Forced Adjustment -** The Court allows small "forced adjustment" but any are frowned upon.
3. **Footnotes –** If footnotes cannot be avoided, then must discuss as an UNUSAL ITEMS.

Common Problem:	**Schedules DON'T Balance**
Court Tip:	**Total Charges (In) MUST equal total Credits (Out). Prob. C. §1061(c). Adjustments may be needed.**

Common Problem:	**Do not throw good money after bad**
Court Tip:	**Do not spend $600 in attorney fees to look for a $100 discrepancy.**

6. DISCLOSURES & REQUESTS FOR APPROVAL - Prob. C. §1064(a)

A. Disclosure Family/Affiliate Relationship - Prob. C. §1064(c)

1. Disclose relationship between Guardian/Conservator/ Trustee and those hired to work for/by Guardianship/Conservatorship.
   - **Family** – relationship created by blood or marriage.
   - **Affiliate** – entity that directly/indirectly related through one/more intermediates controlled/is controlled by or under common control with Guardian/Conservator.
2. Disclose when paying **family members** from estate funds.
   - What was done? What skill was involved? What is the value of the estate?
   - Could the work be done by a professional?
   - Attach a quote from 1-800-GotJunk, Care Manager's fees, etc.

Common Problem:	**Hiring family to clean out residence or do yard work.**
Court Tip:	**Disclose that a family member was hired, at what rate, and what work was provided. Disclose what a professional would have charged. Describe the benefits to the estate by hiring the family member.**

- *Example:* Paying $35/hour to Conservator's son to do yard work. Provide cost estimate by a professional for the same services.

D. **Original Escrow Statements - Prob. C. §2620(c)(4)** (Seller's Closing Escrow Statement).
   1. Closing Cost amounts should be itemized on the schedule.
   2. The statement shall be attached as an exhibit.
   3. Briefly explain sale in Petition, even if a notice of proposed action was already approved/filed with the Court.

Common Problem:	**Sales of Real Property are completely omitted.**
Court Tip:	**Sales of Real Property are always Unusual Items that require explanation and copy of settlement statement as an exhibit.**

E. **Original Residential/Long-term Care Facility Statements - Prob. C. §2620(c)(5)**
   - Statements for ALL months covered in the account period.

F. **Confidential Documents - Prob. C. §2620(c)(7).**
   1. An Affidavit is needed to set forth specific facts for consideration as to why the documents are "different" and should be deemed **confidential**.
   2. Redact what you think is confidential, so it can be filed in the regular court file.
      - SSN on Death Certificates can be redacted.

Common Problem:	**Bank statements are submitted as Confidential.**
Court Tip:	**Bank account numbers, and balances are items that would normally be presented on I&A or in account & report and are NOT confidential.**
Common Problem:	**Filing a HUGE cumbersome Account Petition.**
Court Tip:	**File the account and report SEPARATE from the account statements. Since you only need beginning and ending statements it should not be so voluminous.**

8. BOND – Prob. C. §2300 & §2320

A. A sufficient bond is essential.
   1. Guardians/Conservators rarely have personal funds available to pay surcharge judgment.
   2. Sufficient bond will allow estate to collect or to be made whole.

B. Guardian/Conservator of *estate* must post bond. **Prob. C. §2300**
   1. Bond must be posted before Letters issued. **Prob. C. §2320**
   2. Amount to be posted by a surety insurer **Prob. C. §2320.**
   3. If bond is given by "personal sureties" it must be twice about amount. **Prob. C. §2320(d).**

Common Problem:	**Petitioner does not provide calculation.**
Court Tip:	**Insert formula CRC 7.207 calculation in your Petition.**

C. Placing money in **a blocked account** results in a decline in estate value and can reduce the bond. **Prob. C. §2328-2329**

D. If the bond is insufficient.
   1. Then Guardian/Conservator **MUST** make **Ex Parte** application for order **increasing** bond **immediately** upon occurrence of facts making additional bond necessary. **CRC 7.204(a).**
   2. If Guardian/Conservator does not act, then attorney **MUST** make ex parte application "immediately upon becoming aware of the need to increase bond". **CRC 7.204(b) & Prob. C. §2320.1**. *At least annually.*

Common Problem:	**Attorney waits for next account period to increase bond.**
Court Tip:	**Ex Parte Petition to increase bond should be filed.**

E. Additional bond required?
   1. If the sale of real property results in the need for additional bond, then the bond should be required in Order Confirming Sale. **Prob. C. §2330.**
   2. If additional bond is needed when account is heard, then Court should not approve until additional bond is posted. **Prob. C. §2320.2. & CRC 7.206.**

Common Problem:	Accounting was waived for <u>one</u> account period under Prob. C. §2628 and Fiduciary fails to account when conditions <u>change</u> and all three requirements of are no longer met.
Court Tip:	At the account period closing date Fiduciary should review statements to determine if conditions have changed. ASK:

1. Is the beginning or ending balance over $15,000?
2. Is monthly income still under $2,000?
3. Was all income spent on Conservatee?

11. FAILURE TO FILE ACCOUNT

A. Why Account?

1. It is a Court order to account.
    - Due date and hearing dates are set at the time of appointment.
2. Accounting actions to the Court AND obtaining an approval will cut off the time to object.
    - Think Res Judicata and Collateral Estoppel.

B. Failure to file an account by deadline or obtain extension shall constitute contempt. **CCP§1209**

1. Sanctions
2. Removal
3. Suspension of powers
4. Temporary appointment of Public Guardian

12. INVESTMENTS

A. Reinvested Income

1. IF reinvested dividends, it shall appear on "receipt" schedule THEN reported on "change in the form of assets" schedule.
2. THEN there shall be an increase on "ending balance" schedule AS SECURITIES SHARES, not cash.
3. Good practice to include 1) Share, 2) Cost and 3) Value on the ending balance.

B. On Schedules

1. Include "cost of shares" on Ending Balance schedule because when the security is sold, you can calculate the gain/loss correctly.
2. Most petitioners do NOT include "cost of shares". Then they cannot figure out why the account does not balance and there must be a "forced adjustment" to make it balance.

C. Review Types of Investments

1. **Managed Accounts**
    a) Multiple buys/sells for small shares
    b) Constantly buying/selling (daily)
    c) Labor intensive to input into account schedules
        - Update 1) receipts, 2) gains/loses, 3) ending balances and 4) change in assets.
    d) Increases G/C/A fees but without much benefit to the estate
        - The number of hours to input all transactions results in excessive fees.
2. **Investment Advisory Fees**
    a) Fees vs. gain or value to the estate
    b) Explain if there is a huge market factor.
    c) Explain why selling if there was a drop in the market.

Accounting Checklist

1. Financial Statements
    - for EACH account from beginning to ending of accounting period.
    - Interest payments
    - ORIGINAL statements if Conservatorship
2. Checking Accounts
    - copy of check register indicating
    - to whom check was written
    - purpose of check/withdrawal
3. Explanation of Unusual Items or transactions
    - Write in the checkbook register
    - Make comments
4. Inventory and Appraisal
    - to obtain beginning balance
5. List of advanced costs the trustee/administrator/conservator is seeking reimbursement for
    - Back up documentation
6. Real Property
    - Appraisal
    - If sold: need an estimated value and sold for value. Gain or Loss
    - Gain/loss on sale
    - Closing costs
    - Net proceeds deposited
    - Copy of closing escrow statement
7. Personal Property
    - If sold: need an estimated value and sold for value. Gain or Loss
    - If distributed to beneficiaries: the amounts given to each beneficiary
8. Investment Accounts
    - Letter from the institution indicating the DOD value which becomes the carry value.
    - Or full statements to determine carry value.
    - Statements for EACH account from beginning to ending of accounting period.
    - ORIGINAL statements if Conservatorship

CALIFORNIA CASES

(You can’t always get what you want, but you might get what you need!)

164 Cal.App.4th 417
Court of Appeal, Second District, Division 3, California.

Lawrence I. SCHWARTZ, Plaintiff and Appellant,
v.
Frumeh LABOW, as Trustee, etc.,
et al., Defendants and Respondents.

Nos. B191484, B191488, B191491, B192908.
|
June 26, 2008.
|
Certified for Partial Publication. *
|
As Modified July 9, 2008.
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Review Denied Oct. 16, 2008.

Synopsis

Background: Trustee filed first account, seeking approval of his actions and requesting trustee's fees, after paying himself and his attorneys approximately $1.3 million of trust funds to obtain a judgment of around $700,000. Conservators of settlors' persons and estates, and Probate Volunteer Panelist (PVP) attorney for settlors, objected. The Superior Court, Los Angeles County, Nos. BP079790, BP079789, and BP093891, Aviva K. Bobb, J., suspended trustee, vacated suspension nunc pro tunc, reinstated trustee but limited his powers to pursuing fees in the separate suit, appointed interim successor trustee, ordered trust documents and books turned over to successor, and suspended predecessor trustee. Predecessor trustee appealed.

Holdings: The Court of Appeal, Aldrich, J., held that:

[1] probate court had the power to limit predecessor's powers and appoint successor pending hearing;

[2] probate court properly suspended predecessor;

[3] predecessor's stipulation estopped him from appealing order limiting his powers and appointing interim successor;

[4] predecessor's stipulation estopped him from challenging probate court's order to turn over original documents;

[5] predecessor was required to turn over original documents; and

[6] predecessor had no attorney-client privilege with respect to documents.

Affirmed.

See also 78 Cal.Rptr.3d 851, 2008 WL 2573718.

West Headnotes (21)

[1] **Courts** Review and vacation of proceedings

Probate court's order suspending trustee of revocable trust was not appealable. West's Ann.Cal.Prob.Code § 1300(g).

[2] **Courts** Review and vacation of proceedings

The Court of Appeal could examine probate court's order suspending trustee, even though it was not an appealable order and trustee did not appeal from it, where trustee appealed from later orders vacating suspension nunc pro tunc and reinstating him with limited powers, appointing interim successor trustee, ordering trust documents and books turned over to successor, and again suspending predecessor trustee. West's Ann.Cal.Prob.Code § 1300(g).

1 Cases that cite this headnote

[3] **Courts** Jurisdiction of Cause of Action
Courts Jurisdiction of the Person in General

"Lack of jurisdiction" in its most fundamental or strict sense means an entire absence of power to hear or determine the case, or an absence of authority over the subject matter or the parties, but in its ordinary usage the phrase "lack of

jurisdiction" is also employed where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction," or power, to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

2 Cases that cite this headnote

[4] **Trusts** Supervision and discretionary powers

The probate court has general power and duty to supervise the administration of trusts. West's Ann.Cal.Prob.Code § 17200.

16 Cases that cite this headnote

[5] **Trusts** Proceedings

Probate court had the power to suspend most of trustee's powers and appoint interim trustee pending a hearing, where trustee had filed first account petitioning for approval of his actions and requesting trustee's fees, and Probate Volunteer Panelist (PVP) attorney for settlors and conservators of settlors' persons and estates had requested trustee's suspension in their objections to trustee's account; no further petition for removal or suspension pending removal was required. West's Ann.Cal.Prob.Code §§ 15642(a, e), 17200(b)(5, 9, 10), 17206.

See Cal. Civil Practice (Thomson/West 2007) Probate and Trust Proceedings, §§ 24:27, 24:47; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 229; Cal. Jur. 3d, Trusts, §§ 63, 64.

6 Cases that cite this headnote

[6] **Trusts** Proceedings for Final Settlement

Presented with a petition to settle a trust account, the probate court has a duty imposed by law to inquire into the prudence of the trustee's administration. West's Ann.Cal.Prob.Code § 17200.

19 Cases that cite this headnote

[7] **Trusts** Supervision and discretionary powers

A probate court has the inherent power to decide all incidental issues necessary to carry out its express powers to supervise the administration of a trust, including the authority to take remedial action.

21 Cases that cite this headnote

[8] **Trusts** Power to remove

Where a probate court has the express authority to remove a trustee sua sponte, it necessarily has the inherent equitable power to employ the less extreme remedy of suspending most of the trustee's powers and appointing an interim trustee pending a hearing. West's Ann.Cal.Prob.Code § 15642(a).

6 Cases that cite this headnote

[9] **Trusts** Hearing or reference

Trustee was entitled to a hearing on his petition for approval of his acts in administering trust, even though probate court had held hearing on petition to settle account, and trustee had stipulated to limitation of his powers and appointment of interim successor trustee. West's Ann.Cal.Prob.Code § 17200(b)(5).

2 Cases that cite this headnote

[10] **Trusts** Grounds

Probate court acted within its discretion in suspending trustee pending a hearing on whether he should be removed fully and surcharged, after trustee filed account petitioning for approval of his actions and requesting trustee's fees, where trustee had spent approximately $1.3 million in trust funds, without court order, to obtain a judgment against settlors' daughter of just under $700,000, which judgment was likely to be only partly collectible. West's Ann.Cal.Prob.Code § 17200(b)(5).

2 Cases that cite this headnote

[11] **Trusts** Power to remove

Where the decision to remove a trustee lies within the probate court's discretion, the decision to suspend most of the trustee's powers likewise falls within the court's discretion.

5 Cases that cite this headnote

[12] **Appeal and Error** Appeal on judgment roll

In the case of a judgment roll appeal, unless error appears on the face of the record, all intendments will be in support of the judgment.

3 Cases that cite this headnote

[13] **Courts** Review and vacation of proceedings

Trustee's failure to include his petition for probate court's approval of his actions and to settle his account, in appendix of his judgment roll appeal of order suspending him as trustee, waived on appeal his argument that probate court did not receive any evidence or make findings to justify the order, since the Court of Appeal presumed the probate court made the necessary findings. West's Ann.Cal.Prob.Code § 17200(b)(5).

4 Cases that cite this headnote

[14] **Courts** Review and vacation of proceedings

Trustee who stipulated to probate court's order, limiting trustee's powers and appointing interim successor trustee, was estopped from appealing from that order.

3 Cases that cite this headnote

[15] **Courts** Acts and proceedings without jurisdiction

Conduct that is in excess of jurisdiction by a court that has subject matter jurisdiction is voidable, not void.

2 Cases that cite this headnote

[16] **Courts** Estoppel arising from submitting to or invoking jurisdiction

When the court has jurisdiction of the subject, a party who seeks or consents to action that might be beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction.

1 Cases that cite this headnote

[17] **Trusts** Estoppel

Predecessor trustee was estopped to challenge probate court's order to turn over original documents pertaining to trust administration to the successor trustee, by predecessor's stipulation that successor "would be successor trustee," even though according to stipulation predecessor retained the carved-out power to pursue fees on behalf of trust in another civil action.

1 Cases that cite this headnote

[18] **Trusts** Successive trustees

When a probate court appoints a successor trustee, that new trustee accedes to the position of the former trustee along with the same powers granted by the trust documents.

1 Cases that cite this headnote

[19] **Trusts** Successive trustees

Predecessor trustee was required to turn over to successor trustee all documents pertaining to trust administration, including originals of documents connected with a separate civil action and predecessor's motion for attorney's and trustee's fees in that action, since successor held the attorney-client privilege as to the documents, even though predecessor trustee retained the carved-out power to pursue fees in the separate action. West's Ann.Cal.Prob.Code § 15644.

1 Cases that cite this headnote

[20] **Trusts** Successive trustees

If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds.

[21] **Privileged Communications and Confidentiality** Trustees, guardians, and administrators; pension plans

Trusts Successive trustees

Pursuant to predecessor trustee's stipulation to probate court's order limiting his powers and appointing interim successor trustee, predecessor had no attorney-client privilege with respect to communications about trust administration, including communications regarding prosecution by the trust of a separate civil action, and thus attorney-client privilege was not available to justify his refusal to turn trust documents over to successor trustee, even though predecessor retained a carved-out power to pursue fees in the separate civil action.

2 Cases that cite this headnote

Attorneys and Law Firms

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No appearance for Defendants and Respondents Cheryl Lawson, Craig Lawson, Michelle Lawson and Lionel Sanders.

ALDRICH, J.

***420** INTRODUCTION

Lawrence I. Schwartz, as trustee of the Lawson Revocable Trust (the Trust), appeals from various orders of the probate court suspending most of his powers and appointing Frumeh Labow as "interim trustee," and ordering him to turn over all Trust documents and books to Labow. He contends that, in the absence of a proper petition before it, the court had no jurisdiction to ***421** issue these orders. In the published portion of this opinion, we hold that appellant's petition for approval of his account under Probate Code section 17200, subdivision (b)(5) [1] invoked the court's inherent equity power to suspend certain of appellant's powers as trustee for perceived breaches of trust pending a full hearing. Accordingly, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Trust*

Louis W. and Sylvia Lawson, now deceased, established the Trust in November 1995. The beneficiaries are the three adult children of the now-deceased trustors. Cheryl Lawson (Cheryl) is one of the beneficiaries. [2] The total value of the Trust's assets on hand as of May 24, 2003, was $2,104,780.63. Of that, $74,780.63 was cash held by the trustee. The Trust's largest asset was the family residence.

The settlors served as trustees until they became conservatees in May 2003. Appellant succeeded the trustors as the sole trustee. In January 2003, appellant drafted the Trust's sole amendment and restatement. In August 2003, the probate court appointed Lionel B. Sanders, Certified Public Accountant, conservator of Sylvia's and Louis's estates in the related conservatorships.

****842** 2. *The civil action*

One of the Trust's assets was title to an undivided one-half interest in real property in Santa Barbara, California. Beneficiary Cheryl held the other one-half interest. In May 2003, Louis and Sylvia executed a quitclaim deed conveying the Trust's interest in that property to Cheryl. Cheryl then filed a complaint against the Trust to quiet title in Santa Barbara Superior Court. According to appellant in his later-filed account, Cheryl's litigation style drove up the cost to the Trust of the lawsuit.

As a solution to the cost problem, appellant proposed filing an elder abuse action (Welf. & Inst.Code, § 15600 et seq.) against Cheryl to "permit the recovery of attorneys' fees" from her. Although conservator Sanders opposed filing such a lawsuit for more than six months because of the health of the senior Lawsons, he eventually acquiesced.

***422** Accordingly, for the express purpose of obtaining a recovery of attorney's fees, appellant and conservator Sanders sued Cheryl alleging elder abuse (the civil action).[3] In July 2005, after the case was removed to Los Angeles County, the trial court in the civil action entered judgment in favor of appellant and conservator Sanders and against Cheryl in the amount of $683,769.83, plus yet-to-be fixed costs and fees. Cheryl appealed from the judgment and so it is not final. Cheryl also filed for bankruptcy court protection under Chapter 11.

3. *The trustee's account*

On August 25, 2005, appellant filed his first account, seeking approval of his actions and requesting trustee's fees pursuant to section 17200, subdivision (b)(5) and (9). Appellant's supplement to the account, dated September 16, 2005, focused on the litigation against Cheryl. Appellant's account showed that the value of the Trust assets at the end of the accounting period was $1,376,587.78, of which $731,847.83 was the as-of-yet uncollected judgment against Cheryl, and $5,222.10 was cash. The trustee had encumbered and then sold the senior Lawsons' residence to pay the "expense of the litigation...."

4. *The suspension of the trustee's powers*

Verified objections to appellant's account were filed by Labow as conservator of the persons of Louis and Sylvia Lawson, conservator Sanders, and the probate volunteer panel attorney for the senior Lawsons. Each objector requested that appellant be immediately suspended and surcharged, and Labow requested that she be appointed interim trustee until the court ruled on appellant's account. Among the bases for the objections was that appellant had spent the trust's assets on trustee's and attorney's fees leaving insufficient money for the level of care the senior Lawsons' deserved. Conservator Sanders explained how, according to the account, appellant spent $1,271,593.40 on attorney and trustee fees and requested appellant be required to justify spending that sum to pursue a judgment of $683,769.83 where the likelihood of recovering those fees in addition to the judgment was "extremely low."

***423** The probate court's notes indicated its concerns about appellant's account. The notes questioned the authority for appellant to borrow money to finance the ****843** lawsuit. They also asked what the legal services were to justify the fees paid, and whether those services benefitted the estate. The notes stated, "Notwithstanding terms of tr[ust] re h[ou]rly rate of t[rust]ee, who is an att[orne]y, *fees appear outrageous considering size of tr[ust] estate* ...." (Italics added.)

a. *The order of October 17, 2005*

At the hearing on the petition to settle the account held on October 17, 2005, the objectors pressed their arguments. Appellant countered, among other things, that a motion for fees against Cheryl in the civil action was pending and only he and his attorney had the information and ability to pursue that motion. After hearing these arguments, the court suspended appellant as trustee.

Appellant's attorney then responded by broaching a proposal discussed by the parties under which the court would carve out of any suspension order the power to pursue the fee motion in the civil action on behalf of the trust. Appellant's counsel found the "carve-out" to be "intrigu[ing]." The court asked the parties whether they would like to discuss a "carve-out" outside the courtroom. Although the conservator was doubtful, appellant's counsel agreed. The court ordered the parties to discuss a "carve out."

b. *The order of November 17, 2005*

By the November 17, 2005 hearing, the parties had reached an agreement about the "carve out" raised in court by appellant's attorney. Appellant stipulated, among other things, that Labow would be appointed successor trustee under *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 69 Cal.Rptr.2d 317, 947 P.2d 279 (*Moeller*) and *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 91 Cal.Rptr.2d 716, 990 P.2d 591 (*Boltwood*). The probate court vacated its previous orders suspending appellant, nunc pro tunc to October 17, 2005, and reinstated appellant *but limited his powers to seeking the attorneys' and trustee's fees in the civil action, at no cost to the Trust.*

The court issued its order on March 30, 2006, reflecting its ruling, inter alia, that appellant would remain trustee with powers limited *solely* to the completion, at his own cost, of the pending fee matter in the civil action. The ***424** court

specified that appellant would have no power to file any motions or engage in any other activity in the bankruptcy court with regard to Cheryl's bankruptcy, and would have no power to seek enforcement of the judgment in the civil action. The court ordered appellant to serve on Labow all documents filed by him or served upon him by Cheryl in the civil action, and ruled that Labow, as temporary trustee, was entitled to obtain copies of all future communications between appellant and his attorney with respect to the civil action only. Appellant appealed from that order.

c. *The orders of January 19, 2006 and May 22, 2006*

The court ordered appellant on January 19, 2006, to turn over all personal property of the senior Lawsons to the successor trustee and to clear the probate court's notes by the next hearing.

On May 22, 2006, Labow, as successor trustee, argued that appellant was refusing to turn documents over to her on the ground she was only an interim trustee. The court ordered that Labow be successor trustee "forthwith." The court ordered appellant to hand over all books and records of the Trust to Labow's attorney and to transfer all privilege issues to Labow. Appellant appealed from that order.

d. *The order of July 24, 2006*

On July 17, 2006, Labow, as interim trustee, petitioned the probate court under section 17200, subdivision (b)(10) to remove ****844** appellant as trustee for all purposes for appellant's refusal to comply with previous court orders to turn the Trust documents over to her. As appellant had been insisting that he was not suspended and that Labow was not an interim trustee, on July 19, 2006, Labow applied ex parte for an order under section 15642, subdivision (e) to *suspend* appellant's remaining powers and compel him to surrender all Trust property, including documents subject to the attorney-client and work-product privileges, pending the court's order on the removal petition.

On July 24, 2006, the probate court issued an order finding that the suspension of appellant had been warranted. The court stated that it had suspended appellant's powers on October 17, 2005, for asserted breaches of duty, including paying himself and his attorneys approximately $1.3 million of Trust funds to obtain a judgment of around $700,000 in the civil action without probate court order and without filing a fee petition. It was likely that the judgment against Cheryl would be only partially collectible, the court ***425** found. After appellant was suspended, the court found, Labow stipulated to an order at appellant's attorney's urging, appointing appellant as trustee with limited powers to pursue the fee motion in the civil action. This order was based on the express condition that Labow would hold the attorney-client privilege for appellant's acts concerning those fees and the privilege for all actions taken before his suspension. However, appellant refused to turn over the Trust property and records, claiming privilege and asserting that Labow was only an interim trustee.

[1] Based on these facts, the probate court suspended appellant, effective "forthwith;" ordered Labow to succeed immediately to appellant's position in the civil action; and granted Labow authority to do all that was necessary to protect the Trust. The court directed appellant to turn over to Labow all Trust files, records, and books, irrespective of attorney-client privilege. The court scheduled a hearing on the removal petition for September 11, 2006. Appellant appealed from that order and we consolidated the three appeals.

DISCUSSION

1. *The probate court had jurisdiction in November 2005 to suspend appellant's trustee's powers.* [4]

[2] Appellant contends, in the absence of the procedural prerequisite of a petition for removal, that the probate court had no jurisdiction to suspend or limit his powers, appoint Labow as interim [5] or successor trustee, or to order him to turn Trust documents over to Labow before July 2006, when it received the first petition for removal under section 15642, subdivision (e). [6] ***426** He observes that sections 17200 [7] ****845** (petition for removal of trustee), 17206 [8] (petition to take action), and 15642, subdivision (e) [9] (petition for suspension of trustee), all contemplate that a petition for removal be filed before the court can remove, suspend, or appoint a trustee, and no such petition was before the probate court in October or November 2005.

[3] The question of jurisdiction here does not involve the probate court's subject matter jurisdiction. The probate court's general jurisdiction encompasses "the internal affairs of trusts" and "[o]ther actions and proceedings involving *trustees* ...." (§ 17000, subds. (a) & (b)(3), italics added.) Rather, we are concerned with jurisdiction in the sense of the court's power or authority to act. (See *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087, 56 Cal.Rptr.2d

386, disapproved on another point in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280, 109 Cal.Rptr.2d 807, 27 P.3d 702.) "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation.]" (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288, 109 P.2d 942.) "But in its ordinary usage the phrase 'lack of jurisdiction' " is also employed "where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Ibid.;* accord, *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1022, 43 Cal.Rptr.2d 717 (*Bell*).) The question presented here involves the latter form of jurisdiction, i.e., whether the probate court, having fundamental subject matter jurisdiction, acted in excess thereof in ordering appellant's suspension, without the prerequisite of a petition for removal.

[4] **[5]** ***427** The probate court has general power and duty to supervise the administration of trusts. Proceedings in the probate court "concerning the internal affairs of the trust" are commenced with the filing of a petition. (§§ 17201 & 17200, subd. (a); Ross, Cal. Practice Guide: Probate (The Rutter Group 2007) ¶ 2:116.20, p. 2–76.13.) Contrary to appellant's contention, such a petition was filed here: *appellant's own* ****846** "First Account Current & Report of Trustee, and Petition for: 1. Approval of Acts of Trustee; and 2. Approval of Trustee's Fees" *pursuant to section 17200, subdivision (b)(5)* and (9). Although appellant is correct that the petition was not one for removal (§ 17200, subd. (b)(10)), or suspension pending removal (§ 15642, subd. (e)), the petition was filed under section 17200, subdivision (b)(5) which asked the court not only to approve his account, but also *to pass upon his acts.*

[6] Presented with a section 17200 petition to settle an account, "the probate court has a duty *imposed by law* to inquire into the prudence of the trustee's administration." (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 594, & fn. 10, 226 Cal.Rptr. 855, citing *McLellan v. McLellan* (1941) 17 Cal.2d 552, 110 P.2d 1034 & *Carr v. Bank of America etc. Assn.* (1938) 11 Cal.2d 366, 79 P.2d 1096.) Appellant's petition to settle his account under section 17200 activated the probate court's duty and authority to scrutinize appellant's account.

To preserve the trust and to respond to perceived breaches of trust, the probate court has wide, express powers to "make any orders and take any other action necessary or proper to dispose of the matters presented" by the section 17200 petition. (§ 17206.) Among the remedies in the probate court's arsenal is the express power to remove a trustee on its own motion, *without a petition* (§ 15642, subd. (a); see 3 Cal. Civil Practice: Probate & Trust Proceedings (2d ed. 2005) Remedies, §§ 24:96, pp. 24–102 to 24–105 & 24:47, p. 24–60), along with the express authority to suspend a trustee pending a hearing on a petition for the trustee's removal. (§ 15642, subd. (e).)

[7] **[8]** More important, the probate court has the "*inherent power* to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust." (*Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951, 20 Cal.Rptr.2d 433, italics added.) This inherent equitable power of the probate court has long been recognized to encompass the authority to take remedial action. "Under California trust law, a court can intervene to prevent or rectify abuses of a trustee's powers. [Citations.]" (*Edwards v. Edwards* (1998) 61 Cal.App.4th 599, 604, 71 Cal.Rptr.2d 653.) And, where a probate court has the express authority to remove a trustee sua sponte (***428** § 15642, subd. (a)), it necessarily has the inherent equitable power to employ the less extreme remedy of suspending most of the trustee's powers and appointing an interim trustee pending a hearing. (*Getty v. Getty* (1988) 205 Cal.App.3d 134, 142, 252 Cal.Rptr. 342 [where probate court has authority in exercise of its general jurisdiction to *remove* a trustee, it may also, in exercise of inherent equity jurisdiction, take the ancillary step of removing only some of the trustee's powers and appointing a trustee ad litem].)

Here, appellant submitted himself to the jurisdiction of the probate court when he filed his *petition under section 17200, subdivision (b)(5)* asking the court to settle his account and pass on his acts. His petition triggered the probate court's duty to scrutinize the prudence of his administration of the Trust. (*Lazzarone v. Bank of America, supra,* 181 Cal.App.3d at p. 594 & fn. 10, 226 Cal.Rptr. 855.) Appellant's account and supplement, together with the verified objections and supplemental objections from at least three parties requesting that appellant's powers be suspended and that he be surcharged, raised red flags about appellant's actions

as reflected in appellant's petition. Equipped with broad, express and inherent powers to take any action necessary to dispose of matters presented by the petition (§ 17206), manifestly the probate court had the jurisdiction (i.e., power) to ****847** take the steps it did in October and November 2005 to protect the trust from perceived and threatened abuse by suspending most of appellant's powers and appointing a successor trustee in accordance with the carve-out stipulation, pending a hearing. [10]

Our conclusion "makes sense as a matter of judicial economy[.]" (*Estate of Heggstad, supra,* 16 Cal.App.4th at p. 951, 20 Cal.Rptr.2d 433.) We reject appellant's implication that a trustee may be removed or suspended only in response to petitions under section 17200, subdivision (b)(10) or section 15642, subdivision (e). (Cf. *Estate of Heggstad, supra,* at p. 952, 20 Cal.Rptr.2d 433 [no legal significance that trustee sought relief through petition for instruction under section 17200 rather than for conveyance under section 9860].) "Even if the petition did not fall within the literal provisions of section 17200, subdivision (b), it nevertheless would fall within the general jurisdiction of probate courts under sections 17000 and 17200 for proceedings concerning the internal affairs of a trust" (*Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1342–1343, 47 Cal.Rptr.2d 587; cf. *Stewart v. Towse* (1988) 203 Cal.App.3d 425, 428–429, 249 Cal.Rptr. 622), or "involving trustees" (§ 17000). It would be illogical, in light of the probate court's authority to remove a trustee sua sponte (§ 15642, subd. (a)), its general jurisdiction, and its inherent equitable powers—where there is already a section 17200 petition pending—to require the court ***429** to wait for a beneficiary's petition for removal or suspension pending removal (§§ 17200, subd. (b)(10) & 15642, subd. (e)) before the court could take action to protect the trust from possible injury or loss shown by a trustee's petition to settle an account. (Cf. *Estate of Heggstad, supra,* at p. 951, 20 Cal.Rptr.2d 433 [trustee's petition for instruction under section 17200, subdivision (b)(1) invokes probate court's "general jurisdiction to decide the merits of a third party challenge to the inclusion of property in a trust"].) The suggestion that the court may pass on the trustee's acts under section 17200, subdivision (b)(5), and take any action necessary to dispose of the matters presented by the section 17200 petition (§ 17206), but may not suspend that trustee for those same acts, even where it appears that the trust may be injured, simply ignores the probate court's extensive, general express, and inherent equity powers.

[9] We are mindful of appellant's due process rights. Appellant had the requisite notice of the effort to suspend his powers. Even if the objections were untimely in October 2005 because filed within 30 days of that hearing (§ 17203, subd. (a)), they *were not untimely* with respect to the November 2005 hearing appealed from. Long before that hearing, appellant had his account and supplement, along with the verified objections and supplemental objections from three parties containing requests to suspend appellant's powers and surcharge him for enumerated breaches of duty. These various documents all provided appellant with the requisite notice in advance of the November 17, 2005 hearing that the precise issue before the court was his suspension and surcharge. Finally, as the probate court was aware, appellant was entitled to a hearing on his petition for approval of his acts, which hearing was scheduled but postponed because of appellant's appeals.

****848** **[10]** **[11]** **[12]** **[13]** Appellant next argues that the probate court did not receive any evidence or make findings to justify the suspension order. The probate court made findings in July 2006 that reflect its earlier suspension rulings. Respondent's appendix contains [11] appellant's account and supplement, the verified objections, and the probate court's notes showing the issues the court wanted resolved. These documents provide support for the July 2006 minute order in ***430** which the court found that it had suspended appellant for spending approximately $1.3 million in Trust funds, without court order, to obtain a judgment in the civil action of just under $700,000, which judgment was likely to be only partly collectible. Where the decision to remove a trustee lies within the probate court's discretion (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633, 21 Cal.Rptr. 585, 371 P.2d 321), the decision to suspend most of the trustee's powers likewise falls within the court's discretion. We cannot say based on the documents it had before it that the court abused its discretion in suspending appellant's powers pending a hearing on whether he should be fully removed and surcharged.

[14] **[15]** **[16]** In any event, appellant is estopped from appealing from the order in November 2005 restricting his powers as trustee to proceed against Cheryl for fees in the civil action and appointing Labow interim trustee because he stipulated to it. His contention on appeal to the contrary notwithstanding, appellant did not object to the order restricting his authority on November 17, 2005. [12] On

October 17, 2005, *his attorney raised the subject of a "carve out" to limit his power,* and on November 17, 2005, *he stipulated that his power would be restricted to* pursuing the pending fee motion against Cheryl. "[A] party may, by its conduct, be estopped from contesting an action *in excess of* jurisdiction[ ]" (*Bell, supra,* 36 Cal.App.4th at pp. 1022–1023, 43 Cal.Rptr.2d 717, italics added) because conduct that is in excess of jurisdiction by a court that has subject matter jurisdiction is voidable not void. (*Conservatorship of O'Connor, supra,* 48 Cal.App.4th at p. 1088, 56 Cal.Rptr.2d 386.) When, as here, " ' "the court has jurisdiction of the subject, a party who seeks or consents to action [that might be] beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citations.]" ' " (*Id.* at p. 1092, 56 Cal.Rptr.2d 386; *Bell, supra,* at pp. 1023–1024, 43 Cal.Rptr.2d 717.) Having suggested the "carve-out" to the probate court and then stipulating to it, appellant is estopped to challenge the ensuing ****849** November 2005 suspension order as taken in excess of the court's jurisdiction.

2. *As the predecessor trustee, appellant had no right after November 17, 2005, to refuse to turn over original documents pertaining to Trust administration to the successor trustee.*

Appellant contends he could not be required to turn over Trust documents to a "stranger" to the Trust, i.e., Labow. As trustee, he had a "duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." (§ 16006.) Appellant argues that, where his efforts ***431** to protect the Trust documents were consistent with that duty, he could not be ordered to turn over documents that include attorney-client privilege to a stranger. The contention is unavailing.

[17] Again, appellant is estopped to challenge the order. (*Bell, supra,* 36 Cal.App.4th at pp. 1023–1024, 43 Cal.Rptr.2d 717.) Just as with appellant's stipulation to the limitation of his powers, at the November 17th hearing, he stipulated that "Miss Lebeau [*sic*], as I said, would be successor trustee for *Moeller* and *Boltwood.*" Where appellant stipulated to Labow's appointment as successor trustee with the powers and rights under *Moeller* and *Boltwood,* he is estopped to challenge any perceived error in that order.

[18] **[19]** **[20]** Nor was the successor trustee a "stranger" to the Trust after November 2005, and certainly after May 2006, when the court declared Labow the successor trustee. When the probate court appoints a successor trustee, that new trustee accedes to the position of the former trustee along with the same powers granted by the trust documents. In *Moeller,* our Supreme Court held that a predecessor trustee may not assert the attorney-client privilege as to documents reflecting confidential communications between the predecessor and an attorney on trust administration matters to the extent the predecessor trustee was acting in the official capacity as trustee. (*Moeller, supra,* 16 Cal.4th at pp. 1127, 1134, 69 Cal.Rptr.2d 317, 947 P.2d 279.) The Supreme Court explained: "The powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee. It has been the law in California for over a century that a new trustee 'succeed[s] to *all* the rights, duties, and responsibilities of his predecessors.' [Citations.] ... 'The powers conferred upon a trustee can properly be exercised by his successors, unless it is otherwise provided by the terms of the trust.' ... [T]he power to assert the attorney-client privilege follows from the trustee's power to hire an attorney in order to obtain advice regarding administration of the trust and to litigate to protect trust property. The trustee's power to assert that privilege thus is certainly essential to its effective administration of the trust. *Therefore, when a successor trustee takes office it assumes all of the powers of trustee, including the power to assert the privilege with respect to confidential communications between a predecessor trustee and an attorney on matters of trust administration.*" (*Id.* at p. 1131, 69 Cal.Rptr.2d 317, 947 P.2d 279, first italics in original, second italics added; accord *Boltwood, supra,* 22 Cal.4th at pp. 208–209, 91 Cal.Rptr.2d 716, 990 P.2d 591; see also, 3 Cal. Civil Practice: Probate & Trust Proceedings, *supra,* § 24:48, pp. 24–61 to 24–63.) [13]

****850** **[21]** ***432** When appellant stipulated on November 17, 2005, to treating Labow as successor trustee, Labow assumed all powers of trustee under the Trust, except for the carved-out power to pursue fees against Cheryl in the civil action. Moreover, pursuant to the stipulation, *Moeller,* and *Boltwood,* appellant had no attorney-client privilege with respect to communications about Trust administration, which included the prosecution by the Trust of the civil action against Cheryl. Therefore, the attorney-client privilege was not available to appellant as predecessor trustee to justify his refusal to turn the Trust documents over to Labow as successor trustee.

At oral argument, the parties disputed whether a predecessor trustee had the obligation to surrender *original* Trust documents to a successor trustee. As of the November 2005 and certainly the May 2006 orders that appellant turn over all books and records of the Trust to Labow and transfer all privilege issues to her, appellant, as predecessor trustee, had no justification for retaining *any originals.* He was obligated to "deliver the trust property to the successor trustee[.]" (§ 15644.)[14] Labow had been unequivocally appointed successor trustee assuming most of appellant's powers (see § 16420, subd. (a)(4))[15] and so, under *Moeller,* Labow held the attorney-client privilege as to all documents, books, and things involving Trust administration matters. (*Moeller, supra,* 16 Cal.4th at p. 1127, 69 Cal.Rptr.2d 317, 947 P.2d 279.) As predecessor trustee, appellant had no right to the Trust papers which means no right to keep the originals.

3. *No undertaking was paid and sanctions are not appropriate in this case.*[**]

***433** DISPOSITION

The orders appealed from are affirmed. Respondent Labow shall recover costs of appeal.

We concur: KLEIN, P.J., and KITCHING, J.

All Citations

164 Cal.App.4th 417, 78 Cal.Rptr.3d 838, 08 Cal. Daily Op. Serv. 8293, 2008 Daily Journal D.A.R. 9965

Footnotes

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part 3 of the Discussion.

1 All further statutory references are to the Probate Code.

2 We refer to various Lawsons by their first names for clarity and intend no disrespect thereby. (See *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 459, 69 Cal.Rptr.3d 789.)

3 The action was entitled *Lionel B. Sanders as conservator of the Estates of Sylvia Lawson and Louis W. Lawson, Conservatees; and Lawrence I. Schwartz, successor trustee of the Lawson Revocable Trust, etc. v. Cheryl Lawson, etc., et al.* (Super.Ct.L.A.County, No. 081896) and is the subject of a companion appeal in this court (B185999).

4 Labow observes that appellant never appealed from the October 17, 2005 order suspending him and so we may not address it. Appellant responds that it was not an appealable order under section 1300, subdivision (g) because that subdivision provides for an appeal from orders surcharging, removing, or discharging a fiduciary, but not suspending one. He further asserts that he has challenged three separate and substantively different orders to turn over trust property, "any one of which can be the occasion for examination of the October 17, 2005, suspension." We agree with appellant that the November 17, 2005 order was the first appealable one (§ 1300, subd. (c)) and that his appeals allow us to examine the October 17, 2005 order.

5 For purposes of this case, we see no distinction between a "successor trustee" and a successor trustee whose appointment was of "interim" power or duration, until a full hearing is held. (See *Estate of Joslyn* (1967) 256 Cal.App.2d 671, 676–677, 64 Cal.Rptr. 386.)

6 Appellant also observes that the probate court was aware of the petition requirement because the court's notes from October 17, 2005, indicate that a matter to be cleared was the "request for suspension of powers and appointment of receiver to be made in separate pet[itio]n."

7 Section 17200 reads in relevant part, "(a) ... a trustee or beneficiary of a trust *may petition* the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust. [¶] (b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes: [¶] ... [¶] (5) Settling the accounts and passing upon the acts of the trustee.... [¶] ... [¶] (10) Appointing or removing a trustee. [¶] ... [¶] (12) Compelling redress of a breach of the trust by any available remedy." (Italics added.)

8 Section 17206 authorizes the probate court "in its discretion [to] make any orders and take any other action necessary or proper to dispose of the matters presented by *the petition,* including appointment of a temporary trustee to administer the trust in whole or in part." (Italics added.)

9 Section 15642, subdivision (e) provides that "If it appears to the court that trust property or the interests of a beneficiary *may suffer loss* or injury *pending a decision on a petition for removal of a trustee* and any appellate review, *the court may, on its own motion* or on petition of a cotrustee or beneficiary, *compel the trustee whose removal is sought to surrender trust property* to a cotrustee or *to a* receiver or *temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.*" (Italics added.)

10 Accordingly, because the probate court here had a petition before it and appellant had notice of the requests to suspend him, *Estate of Joslyn, supra,* 256 Cal.App.2d at 676, 64 Cal.Rptr. 386 is distinguished. (See *Conservatorship of O'Connor, supra,* 48 Cal.App.4th at p. 1091, 56 Cal.Rptr.2d 386.)

11 Appellant filed a judgment roll appeal. His appendix (Cal. Rules of Court, rule 8.124) consists of the probate court's orders, appellant's notices of appeal, Labow's July 2006 ex parte petition to suspend appellant's remaining powers (§ 15642, subd. (e)), a transcript from one hearing, and the docket. *It did not contain appellant's section 17200 petition to settle his account* under subdivision (b)(5). Our powers are limited in the case of a judgment roll appeal. "[U]nless error appears on the face of the record, all intendments will be in support of the judgment. [Citation.]" (*Maywood Mut. Water Co. v. County of Los Angeles* (1970) 12 Cal.App.3d 957, 959–960, 91 Cal.Rptr. 206.) We therefore presume the court made the necessary findings, and for that reason alone, appellant's challenge to the probate court's findings is unavailing. However, Labow filed a 559–page respondent's appendix and 9–document request for judicial notice because the appellant's appendix contained a paucity of relevant information. We reviewed the evidence contained in the respondent's appendix and conclude it supports the court's findings.

12 A fair review of the transcript from October 17, 2005, shows that appellant objected to the court's suspending him before holding an evidentiary hearing and before he had the opportunity to appear at the hearing on the fee motion in the civil action. Appellant never raised an objection based on jurisdiction.

13 Accordingly, appellant must turn over all of the documents pertaining to Trust administration, including all documents in connection with the civil action and motion for attorney's and trustee's fees in that action. "If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a *separate lawyer* and paying for the advice out of *its personal funds.* [Citations.]" (*Moeller, supra,* 16 Cal.4th at p. 1134, 69 Cal.Rptr.2d 317, 947 P.2d 279, italics added, fn. omitted.)

14 Section 15644 reads: "When a vacancy has occurred in the office of trustee, the former trustee who holds property of the trust shall deliver the trust property to the successor trustee or a person appointed by the

court to receive the property and remains responsible for the trust property until it is delivered. A trustee who has resigned or is removed has the powers reasonably necessary under the circumstances to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resigning or removed trustee's administration of the trust."

15 Section 16420 reads in relevant part: "(a) If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may commence a proceeding for any of the following purposes that is appropriate: [¶] ... [¶] (4) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust."

** See footnote *, *ante*.

45 Cal.App.5th 655
Court of Appeal, First District, Division 2, California.

Mark ROTH, Plaintiff and Appellant,
v.
Philip M. JELLEY, as Trustee, etc.,
et al., Defendants and Respondents.

A155742
|
Filed 2/24/2020

Synopsis

Background: Grandson petitioned probate court to be recognized as beneficiary of trust created by his grandfather. The Superior Court, Contra Costa County, No. MSP1700555, John H. Sugiyama, J., denied the petition. Grandson appealed.

Holdings: The Court of Appeal, Miller, J., held that:

[1] grandson had actual property interest in trust;

[2] decree entered following settlement agreement between certain trust beneficiaries and settlor's estate adversely affected property interest of grandson;

[3] settlement agreement in which beneficiary disclaimed his contingent remainder interest in trust did not eliminate contingent future remainder interest of grandson of settlor;

[4] grandson was entitled to notice by mail and opportunity to be heard prior to probate hearing that resulted in decree that purported to eliminate his interest in trust; and

[5] decree by probate court based on settlement agreement between certain beneficiaries of trust and settlor's estate was void.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (19)

[1] **Appeal and Error** Stipulations

The Court of Appeal reviews de novo questions of law submitted on stipulated facts.

[2] **Appeal and Error** Constitutional law

The Court of Appeal independently reviews due process claims because the ultimate determination of procedural fairness amounts to a question of law. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[3] **Constitutional Law** Duration and timing of deprivation; pre- or post-deprivation remedies

Prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause, a state must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. U.S. Const. Amend. 14.

[4] **Constitutional Law** Proceedings

Blind labeling of probate proceedings as "in rem" does not satisfy constitutional requirements of due process, which mandates that notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections is necessary to meet constitutional standards. U.S. Const. Amend. 14.

[5] **Constitutional Law** Proceedings

An unsecured creditor's claim against an estate is an intangible property interest protected by the Fourteenth Amendment and statutory notice of the debtor's probate by publication alone does not necessarily comply with due process; as

to known or reasonably ascertainable creditors, actual notice of the debtor's probate proceeding is required for a state nonclaims statute to satisfy due process. U.S. Const. Amend. 14.

[6] **Trusts** Estate or interest of remaindermen

Wills Estate, title, or interest of beneficiaries

Grandson had actual property interest in trust established by grandfather, although it was subject to complete divestment if grandmother chose to exercise testamentary power of appointment, where grandson had contingent future interest in remainder of trust created by grandfather's will.

[7] **Property** Real property

A contingent future interest is property, no matter how improbable the contingency.

[8] **Property** Contingent remainders

A contingent remainder is an estate and not a mere expectancy.

[9] **Powers** Interest of Donee or Grantee

Takers in default, i.e., persons specified by a donor of a power of appointment to take property in default of the appointment, hold property interests even though their interests are subject to complete divestment through exercise of a power of appointment.

[10] **Constitutional Law** Notice and Hearing

Constitutional Law Notice

If a proceeding will adversely affect a person's property interest, due process requires that the person be given notice by mail of the proceeding and an opportunity to be heard when the person's name and address are reasonably ascertainable. U.S. Const. Amend. 14.

[11] **Constitutional Law** Proceedings

Executors and Administrators Construction and operation

Executors and Administrators Private accounting and settlement

Trusts Private accounting and settlement

Trusts Judgment or Decree and Enforcement Thereof

For purposes of due process analysis, decree entered following settlement agreement between certain trust beneficiaries and settlor's estate adversely affected property interest of grandson of settlor, where decree eliminated grandson's contingent future remainder interest in trust, decree did not alter terms of grandfather's will establishing grandson's interest, and grandson was not party to decree. U.S. Const. Amend. 14.

[12] **Executors and Administrators** Private accounting and settlement

Trusts Private accounting and settlement

Settlement agreement between certain beneficiaries of trust and estate of settlor in which beneficiary disclaimed his contingent remainder interest in trust did not eliminate contingent future remainder interest of grandson of settlor, nor vest beneficiary's interest; grandson's interest was created by settlor's will which contained spendthrift provision prohibiting alienation of any beneficiary's right, and settlement agreement's effect on rights of beneficiaries was contractual and not testamentary.

[13] **Constitutional Law** Proceedings

Executors and Administrators Process and appearance

Executors and Administrators Hearing or Reference

Trusts Parties

Trusts Process and appearance

Under due process principles, grandson who had contingent future remainder interest in trust

established by grandfather was entitled to notice by mail and opportunity to be heard prior to probate hearing that resulted in decree that purported to eliminate his interest in trust, where grandson's existence and whereabouts were either known or reasonably ascertainable, and his interest in trust was not conjectural. U.S. Const. Amend. 14.

[14] **Constitutional Law** Proceedings

Under due process principles, when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties to a court proceeding. U.S. Const. Amend. 14.

[15] **Constitutional Law** Wills, Trusts, Probate, Inheritance, and Dower

Even remote interests in a trust are entitled to a measure of due process. U.S. Const. Amend. 14.

[16] **Constitutional Law** Notice

Notice given according to statutory ritual will not necessarily meet due process standards. U.S. Const. Amend. 14.

[17] **Executors and Administrators** Process and appearance

Executors and Administrators Private accounting and settlement

Trusts Private accounting and settlement

Trusts Process and appearance

Decree by probate court based on settlement agreement between certain beneficiaries of trust and settlor's estate was void, where decree purported to eliminate contingent future remainder interest in trust of grandson of settlor, and grandson was not given notice of probate hearing.

[18] **Res Judicata** Void determination

The doctrine of res judicata is inapplicable to void judgments.

[19] **Judgment** Effect of Invalidity

A void judgment may be attacked anywhere, directly or collaterally, whenever it presents itself.

Witkin Library Reference: 14 Witkin, Summary of Cal. Law (11th ed. 2017) Wills and Probate, § 426 [Notice Requirements Are Jurisdictional.]

****11** Trial Court: Superior Court of Contra Costa County Trial Judge: Hon. John H. Sugiyama (Contra Costa County Super. Ct. No. MSP1700555)

Attorneys and Law Firms

Law Offices of James A. Bush, P.C., James A. Bush, Encinitas, for Plaintiff and Appellant.

Donahue Fitzgerald LLP, Lawrence K. Rockwell, Daniel B. Newbold, Lorin B. Bender, Oakland, for Defendants and Respondents.

Opinion

Miller, J.

***659** Petitioner Mark Roth (Mark) petitioned the probate court to be recognized as the beneficiary of a trust created by his grandfather pursuant to the default distribution provision of his grandfather's will. The probate court rejected the petition on the ground that an order made in the probate of the grandfather's estate in 1991 (which we refer to as the "1991 Decree") eliminated ****12** Mark's interest in the trust and was binding on him, even though he received no notice of the court proceeding that resulted in the 1991 Decree. This appeal presents the question whether Mark had a property interest in the testamentary trust created by his grandfather such that he had a due process right to notice and an opportunity to be heard before the probate court could enter the 1991 Decree that eliminated his interest in the trust.

Mark's grandfather, McKie Roth, Sr. (McKie Sr.), created a trust in his will for the benefit of his wife Yvonne Roth

(Yvonne) during her life and granted her a testamentary power of appointment over the remainder. The will provided a default distribution scheme in case Yvonne did not exercise her appointment power, under which McKie Sr.'s three adult children from a prior marriage and Yvonne's one adult son from a prior marriage would each take a one-quarter share of the remainder of the trust, with the proviso that, if an adult child did not survive Yvonne, then that child's surviving issue would take that child's share per stirpes. Thus, under the will, the issue of each of the four adult children had a contingent remainder interest in the trust, subject to divestment by Yvonne's exercise of her appointment power.

When McKie Sr. died in 1988, his three adult children raised claims against their father McKie Sr.'s estate unrelated to the trust; they eventually settled their claims with McKie Sr.'s estate, Yvonne (his surviving wife), and the estate executor. One of the terms of the settlement was that McKie Sr.'s three adult children disclaimed any interest in the trust.

In 1991, the probate court issued a decree of final distribution of McKie Sr.'s estate—the 1991 Decree—which included language changing the default distribution of the trust upon Yvonne's death, ostensibly based on the terms of the settlement. The 1991 Decree specified that the remainder of the trust ***660** was to be distributed solely to Yvonne's son or his surviving issue in case of default (i.e., failure of Yvonne to exercise her testamentary power of appointment). But McKie Sr.'s grandchildren (specifically, Mark and the other then-living issue of McKie Sr.'s three adult children) were not given prior notice of the 1991 decree, even though the decree *eliminated* their contingent interests in the remainder of the trust. Yvonne died in 2016 without having exercised her testamentary power of appointment.

Mark's father, McKie Roth Jr. (McKie Jr.), predeceased Yvonne. Mark petitioned the probate court to be recognized as a beneficiary of the trust pursuant to the default distribution provision of McKie Sr.'s will. He asserted the 1991 Decree was void because he never received notice of the proceeding that culminated in the 1991 Decree.

At the parties' agreement, the probate court decided the following dispositive issue in a bifurcated proceeding: was the 1991 Decree binding on the parties? The court determined the 1991 Decree was binding even though Mark received no prior notice because, in the court's view, Mark had no cognizable property interest in the trust.

We conclude, however, that Mark did have a property interest in the trust in 1991 and that the 1991 Decree adversely affected his interest. Since it is not contested that Mark's existence and address were reasonably ascertainable at the time, due process required that Mark be given notice of the proceeding that resulted in the 1991 Decree and an opportunity to object. Because Mark was not given such notice, the 1991 Decree is void. Accordingly, we reverse.

****13 FACTUAL AND PROCEDURAL BACKGROUND

McKie Sr. and his wife Marion Roth had three children, McKie Jr. (Mark's father), Diane Roth Lauer (Diane), and Joanne Roth Gibbons (Joanne). Marion Roth died in 1966.

After Marion died, McKie Sr. married Yvonne, who had one son from a prior marriage, respondent James Barron (James).

McKie Sr. died in 1988.

The MWR Will and the FYR Trust

McKie Sr. left a will and codicil (MWR Will), which created two trusts, the "First Yvonne Roth Trust" (FYR Trust) and the "Second Yvonne Roth Trust" (SYR Trust) with respondent Philip M. Jelley, an attorney, named as ***661** trustee. In both trusts, the trustee was to pay the net income to Yvonne, and portions of the principal could be distributed to Yvonne as necessary for her maintenance, support, and comfort and as needed in an emergency. This appeal involves the FYR Trust only.

The FYR Trust was described in the fourth paragraph of the MWR Will. Subparagraph (c) of the fourth paragraph specified that the trust would terminate upon Yvonne's death, and Yvonne was granted a testamentary power of appointment over the balance of the trust. Subparagraph (d) provided a default scheme of distribution of the balance of the trust at its termination if Yvonne did not exercise her testamentary power of appointment.

The relevant language reads, "Any portion of the principal and accrued and undistributed income of this trust not validly and effectively appointed by my said wife pursuant to subparagraph (c), shall, upon the death of my said wife, be distributed in equal portions to McKie W. Roth, Jr., Diane Roth Lauer, Joanne Roth Gibbons and James Barron,

provided however if such persons should not be then living, but leave issue surviving them, then such issue shall take per stirpes, the portion that such individual would have taken if then living ...."

Probate of McKie Sr.'s Estate

In 1988, Jelley filed a petition for probate of the MWR Will and to be appointed executor of McKie Sr.'s estate. Notice of the probate petition was served by mail to Yvonne, McKie Jr., Diane, Joanne, James, William Henry Barron (James's son), and James C. Soper (the person named as alternate executor in the MWR Will). These persons' names, their relationships to McKie Sr., and their addresses were listed in the MWR Will.

Mark, who was over the age of 21 when McKie Sr. died, was not named on the proof of service of the notice of the probate petition.

Notice of the probate petition was also given by publication.

Settlement Agreement

Prior to his death, McKie Sr. served as trustee of the Marion Roth Trust, whose beneficiaries were McKie Sr., McKie Jr., Diane, and Joanne. When McKie Sr. died, McKie Jr. became the successor trustee. In July 1988, McKie Jr. filed a creditor's claim against McKie Sr.'s estate. By 1990, there were various claims and objections pending in the probate of McKie Sr.'s estate and the separate probate of the Marion Roth Trust and two lawsuits alleging ***662** legal malpractice against Jelley and his law firm pending in Marin County. These claims, objections, and lawsuits were based on allegations of misconduct by McKie Sr., his attorney Jelley and Jelley's law firm (among other things) and included objections to the final account and report of ****14** trustee McKie Sr. in the Marion Roth Trust probate case and objections to the first account and report of executor Jelley in the McKie Sr. estate probate case.

In April 1990, the disputants reached a settlement embodied in a document titled "Settlement and Release Agreement" (Settlement Agreement). The signatories were, on one side, McKie Sr.'s adult children, McKie Jr., Diane and Joanne (together referred to as "Claimants" in the Settlement Agreement) and, on the other side, Jelley, his law firm and Yvonne (Respondents). Claimants settled and released all pending claims related to McKie Jr.'s alleged misconduct in managing Claimants' mother's trust (the Marion Roth Trust), as well as all other claims known or unknown against Respondents in exchange for consideration that included payment of $ 2,250,000. The payment was from McKie Sr.'s estate (not from the FYR Trust) and was paid in part to Diane as a beneficiary of the Marion Roth Trust and in larger part to McKie Jr. as the successor trustee of the Marion Roth Trust.

The Settlement Agreement included a term regarding Claimants' interest in the FYR Trust. Paragraph 2.a.(i) of the agreement provided, "Claimants irrevocably disclaim and renounce all other interest in the Estate of McKie W. Roth, Sr., and the First Yvonne Roth Trust ...." The agreement also provided, "All of the terms and provisions contained herein shall inure to the benefit of and shall be binding upon Claimants and Respondents and their respective legal representatives, successors and assigns."

The probate court approved the Settlement Agreement and authorized the executor to pay out of McKie Sr.'s estate $2,250,000 according to the terms of the Settlement Agreement. There is no record evidence that a copy of this order was formally served on Mark, and Mark denies being served with the order.

1991 Decree

In August 1991, Jelley as executor of McKie Sr.'s estate filed his third and final account and report and petition for final distribution of the estate (Final Account and Petition for Distribution). In the Final Account and Petition for Distribution, Jelley averred that the bulk of the estate was distributable "upon the terms set forth in paragraphs FOURTH [describing the FYR Trust] and SIXTH of the [MWR W]ill ..., *as modified* by paragraphs 2.a.(i) and ***663** 2.a.(iv) of the Settlement and Release Agreement." [1] (Italics added.) However, no proposed modified terms of the FYR Trust were included in the Final Account and Petition for Distribution.

Mark was not named on the proof of service for the hearing on the Final Account and Petition for Distribution.

In September 1991, the probate court approved an order prepared by Jelley's law firm titled "Order Settling Third and Final Account and Report of Executor, Approving Payment of Balance of Statutory Compensation to Executor and His Attorneys and For Final Distribution of the Estate." This is the 1991 Decree that Mark claims is void due to lack of notice.

The 1991 Decree stated the distribution of assets was based on "the terms of the ****15** decedent's will, the Settlement and

Release Agreement and the laws of the State of California." Subdivision IV of the 1991 Decree described the terms of the FYR Trust (to which estate assets were distributed). The first three subparagraphs generally tracked the language of the MWR Will.

Subparagraph (d) of subdivision IV, however, varied from paragraph four, subparagraph (d) of the MWR Will, the default distribution provision. It stated the following term of the FYR Trust: "(d) Any portion of the principal and accrued and undistributed income of this trust not validly and effectively appointed by Yvonne Roth pursuant to subparagraph (c), shall, upon the death of Yvonne Roth, be distributed to James Barron, or, if James Barron shall not be then deceased leaving descendants then living, to the then living descendants of James Barron per stirpes ...." Thus, under the 1991 Decree, if Yvonne did not exercise her testamentary power of appointment, the remainder of the FYR Trust would be distributed to James or, if he predeceased Yvonne, to his issue alone upon Yvonne's death.

There is no record evidence that a copy of the 1991 Decree was formally served on Mark, and Mark denies being served with the decree.

Declination of Exercise of Power of Appointment

On August 12, 2005, Yvonne signed a document called "Declination of Exercise of Power of Appointment" (Yvonne's declination). It was prepared ***664** by James Soper, identified as the attorney for Jelley as "Trustee," and was captioned for filing in the McKie Sr. estate probate case. Yvonne's declination referred to and quoted from the 1991 Decree as the source of her testamentary power of appointment and did not mention the MWR Will. It provided, "Yvonne Roth does hereby decline to exercise her power of appointment set forth in the [1991] Decree ...."

The Current Petition

McKie Jr. predeceased Yvonne, leaving Mark as his sole issue. In October 2016, Yvonne died without having exercised the power of appointment over the remainder of the FYR Trust. McKie Sr.'s other children, Diane and Joanne, survived Yvonne.

Mark Petitions To Be Recognized as a Beneficiary of the FYR Trust

In April 2017, Mark filed a petition in the matter of the FYR Trust. Mark sought orders directing the trustee to recognize him as a beneficiary of the trust and imposing a constructive trust on one-half of any distributions of the residue already made, among other things.

Mark alleged that, as a consequence of the Settlement Agreement, he and James are now the only two vested beneficiaries of the residue of the FYR Trust pursuant to the default distribution provision of the MWR Will (Diane and Joanne having disclaimed their interest in the trust). He asserted the 1991 Decree was void to the extent it "purports to affect [his] interests" in the FYR Trust on grounds of (1) "lack of due process rights to notice and opportunity to be heard" and (2) "failure to comply with Cal. Probate Code §§ 15403, et seq.," which govern the modification or termination of an irrevocable trust such as the FYR Trust.

Jelley and James Respond to the Petition

Jelley as trustee and James filed separate answers, objections, and responses. In his answer, Jelley alleged the FYR Trust was created by the 1991 Decree and denied Mark was a beneficiary of the trust. Jelley and James both asserted as affirmative ****16** defenses laches, estoppel, waiver, unjust enrichment, and lack of standing.

The Parties Agree to Bifurcation

At a hearing on April 3, 2018, Mark, Jelley, and James agreed to bifurcate the trial of certain issues raised by Mark's petition. The parties framed the first issue to be decided as whether the parties were bound by the 1991 ***665** Decree. The parties together filed "Stipulated Facts re Bifurcated Issue as to Whether 1991 Decree of Distribution Binds Parties," which included documents related to the probate of McKie Sr.'s estate. According to the probate court, the parties "agreed to brief the issues and submit them on oral argument as a matter of law."

The Probate Court Rules Against Mark

The court issued its decision in a written "Order Denying Mark Roth's Petition for Orders Regarding the First Yvonne Roth Trust" on September 27, 2018. It rejected Jelley and James's argument that the FYR Trust did not exist until it was funded by the 1991 Decree and determined instead that the FYR Trust came into existence when McKie Sr. died in 1988. The court further recognized that "Mark's future interest as a contingent remainder beneficiary also came into existence

when McKie Sr. died" and that "Mark's interest could not be defeated by McKie Jr.'s forfeiture of his intermediate or precedent interest," citing *Estate of Lefranc* (1952) 38 Cal.2d 289, 297, 239 P.2d 617.

But, the court found, "McKie Jr. received his interest in the trust" "[b]y way of the Settlement Agreement," and "because McKie Jr. received his interest under the trust while he was alive (before he predeceased Yvonne), Mark's contingent remainder interest did not vest."

The court next observed, "Because he may have had a property right based on his future contingent remainder interest in the trust, Mark should have objected at the time of the Court's approval of the Settlement Agreement [in 1990], or before the issuance of the 1991 [Decree]." The court went on to consider whether Mark received sufficient notice of the McKie Sr. estate probate proceedings "from a due process perspective."

First, the court found Mark was not statutorily entitled to personal notice of the hearing on the 1991 Decree under Probate Code section 11000.[2] Second, it determined that due process considerations did not entitle Mark to personal notice of the hearing either. The court believed Mark "had no more than a ***666** unilateral expectation to a share of the [FYR] Trust" and "[t]hat expectation never amounted to a legitimate claim of entitlement to it because his interest did not vest for lack of ... two conditions precedent."[3] It concluded, "In these circumstances, although ****17** he may have had an abstract concern in obtaining an inheritance through McKie Jr., Mark did not have a *property* interest sufficient to require the trustee, other beneficiaries, or the Court to notice him of the hearing when the orders were issued approving the settlement agreement and distributing the estate's funds, and more importantly, approving McKie Jr.'s actions as to his vested interest in the trust and estate at that time."

Third, the court rejected Mark's argument that the 1991 Decree modified the FYR Trust by changing the default distribution provision specified in the MWR Will. The court reasoned that the signatories to the Settlement Agreement "did not modify the terms of the testamentary trust. Instead, they bargained for the vesting and release of their interests."

In its conclusion, the court denied Mark's petition for an order directing the trustee to recognize him as a beneficiary of the trust and other relief.

DISCUSSION

A. *Standard of Review*

[1] **[2]** We review de novo questions of law submitted on stipulated facts. (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 347, 86 Cal.Rptr.3d 383.) We independently review due process claims "because 'the ultimate determination of procedural fairness amounts to a question of law.' " (*In re Jonathan V.* (2018) 19 Cal.App.5th 236, 241, 228 Cal.Rptr.3d 161.)

B. *Mark Was Entitled to Notice of the Proceeding That Resulted in the 1991 Decree as a Matter of Due Process Because the Decree Affected His Property Interest in the FYR Trust*

Mark contends due process required that he be mailed notice of the proposed change to the default distribution provision and an opportunity to be heard before the probate court could issue the 1991 Decree because that decree affected his property interest in the FYR Trust. Respondents argue Mark had no due process right to notice because he had no property right in ***667** the FYR Trust or, alternatively, because his property right was so remote, mailed notice was not required. We agree with Mark.

1. Due Process Requires Reasonable Notice of Any Proceeding Adversely Affecting a Property Interest

[3] In 1950, the United States Supreme Court in *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (*Mullane*) "recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' ... [T]he Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice." (*Mennonite Board of*

Missions v. Adams (1983) 462 U.S. 791, 795, 103 S.Ct. 2706, 77 L.Ed.2d 180 (*Mennonite*).)

In *Mennonite*, the United States Supreme Court succinctly stated the rule, ****18** "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party ... if [that party's] name and address are reasonably ascertainable." (*Mennonite*, *supra*, 462 U.S. at p. 800, 103 S.Ct. 2706.)

In California, courts have applied *Mullane* in probate matters since at least 1968. In *Estate of Reed* (1968) 259 Cal.App.2d 14, 66 Cal.Rptr. 193, a decedent's will created a trust under which his children Paul and Bessie each received half of the income of the trust, the trust was to end upon the death of Bessie, and Paul was given the power of appointment over both his half of the income and the corpus of the trust at its termination. (*Id*. at p. 15, 66 Cal.Rptr. 193.) Paul died before Bessie, and his will left the remainder of his estate to three named charities. After Paul died, the trustee filed a 16th account of the trust, which included a request that the probate court find Paul's will was ineffective as an exercise of the appointment power over the trust. The trustee, however, did not give notice of the 16th account of the trust to any of the three charities named in Paul's will even though the trustee knew about these residuary charity beneficiaries. Following the trustee's request, the probate court in 1954 made an order finding Paul failed to exercise his power of appointment. ***668** In 1967, after Bessie died and the trust terminated, the three named charities moved to vacate the 1954 order, and the probate court granted the motion. (*Id*. at pp. 16–19, 66 Cal.Rptr. 193.)

The Court of Appeal affirmed, observing that *Mullane* "on the facts before us, clearly holds that the statutory notice cannot be equated with due process." (*Estate of Reed*, *supra*, 259 Cal.App.2d at p. 20, 66 Cal.Rptr. 193.) The court explained, "*Mullane* discusses at some length the in rem character of some judgments but holds that a proceeding to determine the rights of beneficiaries under a trust is not embraced within the in rem classification and that *when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice* and are indispensable parties. The mere statement of this principle as a general proposition, is to accept it." (*Id* at p. 21, 66 Cal.Rptr. 193, italics added.) "At the very least, the beneficiaries [i.e., the three charities] in the present case were entitled to notice 'reasonably calculated' to reach them.... The statutory notice which was given was in effect no notice to respondents." (*Id*. at p. 22, 66 Cal.Rptr. 193 fn.omitted.) The court concluded, "[T]he failure of the trustee to join the respondents and/or give more adequate notice to enable them to defend their interests in the trust resulted in a *void* order." (*Ibid.*, italics added.)

[4] **[5]** In 1975, an appellate court citing *Mullane* stated, "The United States Supreme Court has now made it clear that blind labeling of probate proceedings as 'in rem' does not satisfy constitutional requirements of due process. Those requirements mandate that 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections....' is necessary to meet constitutional standards." (*Estate of Lacy* (1975) 54 Cal.App.3d 172, 187, 126 Cal.Rptr. 432.)[4]

****19** 2. Mark Had a Property Interest in the FYR Trust

As we have seen, the MWR Will created the FYR Trust, granted Yvonne a testamentary power of appointment over the remainder of the trust, and provided a default distribution if Yvonne did not exercise her testamentary power of appointment. In case of default, the MWR Will provided that the remainder "shall, upon the death of my said wife, be distributed in equal ***669** portions to McKie W. Roth, Jr., Diane Roth Lauer, Joanne Roth Gibbons and James Barron, provided however if such persons should not be then living, but leave issue surviving them, then such issue shall take per stirpes, the portion that such individual would have taken if then living ...."

We agree with the probate court that the FYR Trust came into existence at the death of McKie Sr. pursuant to the MWR Will and that Mark's "future interest as contingent remainder beneficiary also came into existence when McKie Sr. died." (See *Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 131–132, 17 Cal.Rptr. 823, 367 P.2d 415 [if a will "creates an express trust, the legal title of the trustee and the equitable title of the beneficiary vest as of the date of death" of the testator]; (*Estate of Baird* (1955) 135 Cal.App.2d 333, 341, 287 P.2d 365 [regardless of whether their remainder interests were vested or contingent, the interests of the remaindermen came into existence on the testator's death]; *Estate of Lefranc*, *supra*, 38 Cal.2d at pp. 291, 297, 239 P.2d 617 [where income

of a testamentary trust was to go to the decedent's niece during her life and, upon the niece's death, contingent remaindermen were to take the balance of a trust, the remaindermen held "future interests" that came into existence at the decedent's death]; § 24, subd. (c) [as it relates to a trust, a "beneficiary" includes "a person who has any present or future interest, vested or contingent"].)

Mark's property interest in the FYR Trust was contingent, not vested, because Mark would only take a share of the remainder if certain conditions precedent occurred: McKie Jr. had to predecease Yvonne ("not be then living" upon Yvonne's death) and Mark had to survive McKie Jr. ("leave issue surviving them"). Further, there had to be some balance left in the trust at its termination and Yvonne had to refrain from using her testamentary power of appointment. Mark's interest was future, not present, because he could only take a share of the remainder upon Yvonne's death in the future.

[6] [7] [8] [9] But we reject the probate court's determination that Mark "had no more than a unilateral expectation to a share of the [FYR] Trust." Mark had an actual property interest in the trust as set forth in the MWR Will. Mark's property interest was contingent and subject to divestiture if Yvonne exercised her testamentary power of appointment, but it was more than a "mere unilateral expectation" as claimed by respondents. First, "[t]he law has long recognized that a contingent future interest is property [citation] no matter how improbable the contingency" (*In re Marriage of Brown* (1976) 15 Cal.3d 838, 846, fn. 8, 126 Cal.Rptr. 633, 544 P.2d 561), and "a contingent remainder is an estate and not a mere expectancy" (*Estate of Zuber* (1956) 146 Cal.App.2d 584, 591, 304 P.2d 247). Second, takers in default (i.e., persons specified by a donor of a power of ****20** appointment to take property in default of the appointment) hold property interests even though "their interests are subject to complete divestment" through exercise of a power of ***670** appointment. (*Ammco Ornamental Iron, Inc. v. Wing* (1994) 26 Cal.App.4th 409, 418-419, 31 Cal.Rptr.2d 564 ["persons in existence, who are specifically designated in a trust instrument to take in default of the exercise of a power of appointment by the holder of the preceding estate, are beneficiaries of that trust and acquire vested remainder interests, although their interests are subject to complete divestment"]; see § 672, subd (a) ["if the powerholder of a discretionary power of appointment fails to appoint the property, releases the entire power, or makes an ineffective appointment, in whole or in part, the appointive property not effectively appointed passes to the person named by the donor as taker in default"].) Thus, Mark's contingent future interest in the remainder of the FYR Trust created by the MWR Will upon McKie Sr.'s death was a cognizable property interest, not a mere expectancy, and this property interest did not disappear simply because it was subject to complete divestment if Yvonne chose to exercise her testamentary power of appointment.

3. The 1991 Decree Adversely Affected Mark's Property Interest

[10] [11] If a proceeding will "adversely affect" a person's property interest, due process requires that the person be given notice by mail of the proceeding and an opportunity to be heard when the person's name and address are reasonably ascertainable. (*Mennonite, supra*, 462 U.S. at pp. 795, 800, 103 S.Ct. 2706.) That the 1991 Decree adversely affected Mark's property interest in the FYR Trust seems undeniable. Under the MWR Will, Mark had a contingent future remainder interest in the trust, but under the 1991 Decree, he had no property interest in the trust.

Respondents, however, take the position the 1991 Decree did not affect Mark's property interest because Mark lost his interest under the MWR Will when McKie Jr. signed the Settlement Agreement. Respondents rely on the language of the default distribution provision that if the identified adult children "should not be then living, but leave issue surviving them, then such issue shall take per stirpes, the portion *that such individual would have taken if then living*." (Italics added.) Respondents argue that, if McKie Jr. had been living, he would not have taken anything because he disclaimed his interest in the FYR Trust in the Settlement Agreement, and urge that Mark likewise must take nothing.

But the Settlement Agreement did not alter the MWR Will. (*Estate of Muhammad* (1971) 16 Cal.App.3d 726, 736, 94 Cal.Rptr. 856 (*Muhammad*) [an agreement of compromise, even when approved by the court, does not modify the will; the rights of parties under the agreement are contractual not testamentary].) Nor could the Settlement Agreement bind Mark, who was not a party to the agreement. (***671** *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810–811, 71 Cal.Rptr.2d 265 [a settlement agreement is a contract, and an essential element of any contract is consent]; see *Ferraro v. Camarlinghi* (2008)

161 Cal.App.4th 509, 542, 75 Cal.Rptr.3d 19 [stipulated judgment based on settlement agreement had no preclusive effect on a stranger to the settlement agreement].)

[12] The phrase "that such individual would have taken if then living" as used in the MWR Will, therefore, cannot reasonably be read to incorporate later contracts McKie Jr. may have made promising not to enforce his own contingent remainder ****21** interest. As Mark argues, "because McKie Sr. could not possibly know or control what circumstances might occur beyond his will, he obviously meant that Mark might take the share that McKie Jr. would take *by virtue of the terms of the MWR Will* if McKie Jr. was living at the time of Yvonne's death." [5]

Here, we disagree with the probate court's interpretation of what the Settlement Agreement accomplished. It believed McKie Jr. bargained for the vesting and release of his interest in the FYR Trust. But McKie Jr. could only disclaim his *own* interest in the FYR Trust, which was a contingent remainder. His interest could not vest until the condition precedent of surviving Yvonne occurred (and this did not occur). Nor did Yvonne have the power to "vest" McKie Jr.'s interest in the trust before she died. She had a *testamentary* power of appointment, meaning she could appoint the remainder in a will. She could not appoint the remainder while she was alive, and she could not exercise her power by any instrument other than a will. (See § 630, subd. (a) ["if the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements"].) Accordingly, Yvonne and McKie Jr. could not agree to "vest" McKie Jr.'s contingent interest in the FYR Trust in a manner that would destroy Mark's contingent ***672** remainder interest. [6] Moreover, the Settlement Agreement involved claims McKie Jr., Diane, and Joanne made, as beneficiaries of the Marion Roth Trust, against McKie Sr. for alleged misconduct in managing that trust. [7] Mark had nothing to do with these claims, which were not related to the FYR Trust.

In short, we reject respondents' claim that McKie Jr. effectively signed away Mark's property interest in the FYR Trust through the Settlement Agreement. It was only the 1991 Decree, and not the earlier Settlement Agreement, that affected Mark's property interest in the FYR Trust ****22** by eliminating his contingent remainder interest.

4. *Due Process Required Notice To Mark of the Proceeding That Resulted in the 1991 Decree*

[13] Because the 1991 Decree adversely affected Mark's property interest in the FYR Trust, he was entitled to notice by mail and an opportunity to be heard if his name and address were reasonably ascertainable. (*Mennonite*, *supra*, 462 U.S. at pp. 795, 800, 103 S.Ct. 2706.)

At the time the 1991 Decree was adopted, Mark was McKie Jr.'s adult son and McKie Sr.'s grandson, and Jelley had apparently been dealing with disputes with McKie Jr. (and his siblings) for some years. It appears Jelley only had to ask McKie Jr. for the names and addresses of his existing children in order to provide Mark mailed notice. [8] Mark has maintained below and on appeal that his existence and whereabouts were either known or reasonably ascertainable, and respondents do not contest this point. Under these circumstances, we conclude due process required that Mark be given mailed notice of the probate hearing that resulted in the 1991 Decree and an opportunity to object.

Respondents claim that even if Mark had a property interest in the FYR Trust, *Mullane* does not require actual notice "given the remoteness of his ***673** interest." They rely on the *Mullane* court's observation, "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are *either conjectural or future* or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee." (*Mullane*, *supra*, 339 U.S. at p. 317, 70 S.Ct. 652, italics added.) They argue this observation shows Mark was not entitled to mailed notice. We are not persuaded.

First, Mark's property interest in the FYR Trust was not conjectural. The MWR Will created a contingent future remainder interest in the trust. Second, we do not read *Mullane* to mean due process notice requirements do not apply to holders of future property interests. In *Mullane*, the appellant was "appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had *or might thereafter have* any interest in the income of the common trust fund." (*Mullane*, *supra*, 339 U.S. at p. 310, 70 S.Ct. 652, italics added.) In this context, when the court spoke of interests that were "future," it likely was

referring to persons who did not currently have a property interest in the common fund but might acquire an interest in the future, not to beneficiaries who currently had future property interests in the fund. On the other hand, if the court did mean current beneficiaries with future interests were not entitled to mailed notice, the court may have determined that, because the common fund involved 113 trusts (*id.* at p. 309, 70 S.Ct. 652), it was too burdensome to expect the trustee to attempt to identify all current holders of future interests in the fund; but even if that was the court's reasoning, it would not apply here since it cannot be said in this case that it would have been burdensome for the trustee to ask the three adult children of McKie Sr. for the names and addresses of their own children. In any event, we do not think the *Mullane* court intended to *exclude* reasonably ****23** ascertainable holders of future property interests from due process considerations.

[14] That holders of future property interests *are* entitled to notice as a matter of due process is demonstrated by the facts of *Estate of Reed*. There, the court recognized that three charity beneficiaries were entitled to notice of Paul's probate proceeding in 1954 even though the charities at that time held only future interests in the remainder of the trust (and their interest only became present when Bessie died in 1964). (*Estate of Reed*, *supra*, 259 Cal.App.2d at pp. 16–17, 22, 66 Cal.Rptr. 193.) The court recognized, "[W]hen the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties." (*Id* at p. 21, 66 Cal.Rptr. 193.) The court did not differentiate property interests that were present from property interests that were future.

[15] Respondent's claim fails for another reason. They argue *Mullane* does not require mailed notice given the remoteness of Mark's interest. But "even remote interests are entitled to a measure of due process." (***674** *Estate of Sigourney* (2001) 93 Cal.App.4th 593, 604, 113 Cal.Rptr.2d 274, citing *Mullane*, *supra*, 339 U.S. at pp. 317–318, 70 S.Ct. 652.) In *Mullane*, the court held that published notice of the trustee's petition for settlement of account was sufficient as to "[t]hose beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained." (*Mullane*, *supra*, 339 U.S. at p. 317, 70 S.Ct. 652.) Here, on the other hand, respondents do not claim Mark was given constructive notice by publication of the hearing that resulted in the 1991 Decree. We believe Mark was entitled to mailed notice under the circumstances presented, but there can be no doubt he was entitled to *some* form of notice, and he was given none.

[16] Respondents also argue that, in his capacity as executor of McKie Sr.'s estate, Jelley followed the statutory requirements for notice of probate proceedings and that should be enough to satisfy due process. But *Mullane* itself shows that meeting a state's statutory notice requirements does not automatically satisfy federal due process. (*Mullane*, *supra*, 339 U.S. at p. 319, 70 S.Ct. 652 [holding "statutory notice to known beneficiaries" was inadequate as a matter of due process].) Citing *Mullane*, Division Four of this court has observed, "Notice given according to statutory ritual will not necessarily meet due process standards." (*Dohrmann Co. v. Security Sav. & Loan Assn.* (1970) 8 Cal.App.3d 655, 664, 87 Cal.Rptr. 792.)

Estate of Sigourney, *supra*, 93 Cal.App.4th 593, 113 Cal.Rptr.2d 274, is instructive on this point. In that case, decedent Sigourney left a will that created a charitable trust, named the initial two cotrustees, and provided that the successor trustee was to be selected by the American Psychoanalytic Association (APA). The executor of Sigourney's estate filed a petition to construe, amend, and conform the will and trust in a manner allegedly consistent with Sigourney's intent (petition to amend). The petition asked the probate court to amend the charitable trust provisions so that the APA would not have ultimate authority to select the successor trustees. But the executor gave no notice to the APA of the petition to amend. In 1989, the probate court granted the petition and amended the terms of the charitable trust as proposed by the executor. (*Id.* at pp. 596–598, 113 Cal.Rptr.2d 274.)

Over 10 years later in 1999, one of the original trustees of the charitable trust filed a petition for instructions in the matter of Sigourney's estate regarding appointing ****24** a successor trustee. At that point, the APA objected and argued the 1989 order amending the terms of the charitable trust should be declared void because the APA was not given notice of the proceeding that resulted in the 1989 order. (***675** *Estate of Sigourney*, *supra*, 93 Cal.App.4th at pp. 597–599, 113 Cal.Rptr.2d 274.) The probate court granted the petition over the objection, finding the APA was not entitled to statutory notice of the earlier petition to amend, and the APA could not collaterally attack the 1989 order. (*Id.* at pp. 600–601, 113 Cal.Rptr.2d 274.)

On appeal, the trustee of the charitable trust and the APA raised various arguments about whether notice of the proceeding that resulted in the 1989 order was required under various statutes. The Court of Appeal acknowledged, "None of these statutory paths to a notice requirement leads to a clear-cut answer. But constitutional due process principles do." (*Estate of Sigourney*, *supra*, 93 Cal.App.4th at p. 603, 113 Cal.Rptr.2d 274.) The court then held the APA was entitled to notice of the 1989 proceedings, finding the APA's "rights and powers" related to the selection of a trustee amounted to a property interest protected by due process. (*Id.* at p. 604, 113 Cal.Rptr.2d 274.) The court reasoned that, in 1989, the executor knew or should have known that the APA would have an opportunity to exercise its power to select a cotrustee and that, as a result, the executor should have given the APA notice of the proposed amendment. The court observed that the lack of notice deprived the APA of the opportunity to advocate in favor of its interpretation of the will and argue against the "redraft" of the will proposed by the executor. (*Id.* at p. 605, 113 Cal.Rptr.2d 274.) The court concluded with the observation, "We are constrained to add for the trial court's guidance that a trust can be modified if provisions are ambiguous or if 'slavish adherence' to the terms of the trust would defeat the primary purpose of the trust; but neither former Probate Code section 17200 nor the common law of trusts permits the creation of a new agreement under the guise of a modification or reformation." (*Ibid.*)

In *Estate of Sigourney*, the court held that where a will gave an organization authority to select future trustees of a testamentary charitable trust, that organization had a property interest in the selection power created by the will, and the executor could not simply eliminate the organization's interest in the charitable trust under the guise of construing the will without providing notice to the organization and opportunity to be heard. Similarly, in this case, the executor could not eliminate Mark's contingent remainder interest in the FYR Trust without notice to him under the guise of a petition for final distribution of McKie Sr.'s estate.

Finally, respondents suggest that requiring notice in this case will cause great uncertainty for practitioners administering estates because they will not be able to rely on compliance with statutory notice requirements to meet their due process obligations. We do not share their concern. The reason Mark is entitled to notice of the proceeding that resulted in the 1991 Decree is that the executor of McKie Sr.'s estate used this final order of distribution as a vehicle to change the terms of the FYR Trust in a manner that eliminated ***676** Mark's property interest. If a reasonably ascertainable person has a property interest in a testamentary trust, it is not unreasonable or onerous to require the executor to give notice to that person when the executor seeks a court order in the testator's probate case that would *change* the terms of the trust from those specified in the testator's will in a manner that *adversely* ****25** *affects* the person's property interest.

C. *The 1991 Decree Is Void*

[17] In *Estate of Reed*, *supra*, the interested charities were not given notice of the 16th accounting which resulted in the 1954 order finding Paul did not exercise his power of appointment. The court concluded the failure to give notice to the charities and an opportunity to defend their interests meant that the 1954 order was void. (*Estate of Reed*, *supra*, 259 Cal.App.2d at p. 22, 66 Cal.Rptr. 193.) In *Estate of Lacy*, the court held that if trustees knew of the existence of the remaindermen when the trustees petitioned for approval of their account but did not give notice of the hearing to the known remaindermen, under *Mullane* and *Estate of Reed*, the failure of notice "would render void the order approving the account." (*Estate of Lacy*, 54 Cal.App.3d at pp. 188, 190–191, 126 Cal.Rptr. 432.) Here, Mark did not receive notice of the proceeding at which the court adopted the 1991 Decree and he had no opportunity to object to the elimination of his property interest in the FYR Trust. Therefore, the 1991 Decree is void.

[18] **[19]** Respondents' attempts to salvage the 1991 Decree are unavailing. They argue the 1991 Decree cannot be collaterally attacked, citing *Estate of Callnon* (1969) 70 Cal.2d 150, 157, 74 Cal.Rptr. 250, 449 P.2d 186, in which the court stated, "If the decree erroneously interprets the intention of the testator it must be attacked by appeal and not collaterally. [Citations.] If not corrected by appeal an 'erroneous decree ... is as conclusive as a decree that contains no error.' " *Estate of Callnon*, however, did not involve a claim of voidness based on lack of notice. "The doctrine of res judicata is inapplicable to void judgments." (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239, 79 Cal.Rptr.2d 719.) A void judgment " 'may be attacked anywhere, directly or collaterally, whenever it presents itself.' " (*Andrews v. Superior Court* (1946) 29 Cal.2d 208, 214, 174 P.2d 313.) In *Estate of Reed*, for example, the charities successfully moved to set aside a 1954

probate court order for failure of notice more than a decade later in 1967. (*Estate of Reed, supra,* 259 Cal.App.2d at p. 18, 66 Cal.Rptr. 193.)

Respondents next argue Mark's petition fails because he cannot prove he would be entitled to a different decree. The simple answer to this is he would ***677** have been entitled to a different decree that did not eliminate his property interest. Had Mark been given notice of the proposed 1991 Decree, he could have objected on the ground the Settlement Agreement could not affect his contingent future remainder interest in the FYR Trust and he could have argued (successfully) that the proposed change to the default distribution provision improperly eliminated his property interest.

Throughout their appellate brief, respondents suggest the equities favor affirming the probate court's order denying Mark's petition because it would accomplish Yvonne's apparent intention to leave the remainder of the FYR Trust solely to James. But respondents offer no authority for the proposition that such equitable considerations can excuse the taking away of Mark's property interest without notice and an opportunity to be heard. [9]

We also agree with Mark's response to respondents' claims of equity. He asserts, ****26** "[T]he equities are clearly not in Respondents' favor. On the one hand is Mark, a person whose grandfather gave him an interest in the FYR Trust residue and which interest was taken from him without his knowledge and without him having any opportunity to object. There was no evidence before the probate court, and there is none before this Court, that Mark knew anything about the 1991 Decree of Distribution or its purported effect on his interest until he inquired of Respondent Jelley about that interest after Yvonne's death.... On the other hand is Respondent Jelley, whose law firm represented Yvonne at least when she filed the Declination of Exercise of Power of Appointment, whose law firm represents James now, and who was the petitioner for the original probate proceeding, the petitioner for approval of the Settlement Agreement in 1990, and the petitioner for the 1991 Decree of Distribution. He is the person who did not give Mark notice of the Petition for Final Distribution or the 1991 Decree of Distribution and thereby created whatever inequity he claims were thereafter visited upon his clients. It is Mr. Jelley who, through the auspices of the probate court, wrongfully took the interest that McKie Sr. had given Mark and did so without bothering to give notice to Mark and an opportunity to be heard. It is hardly unfair to charge him and his clients with the consequences and not reward them for wrongfully taking Mark's interest and then hiding such action from him for the remainder of Yvonne's life."

*678 DISPOSITION

The order denying the petition filed September 27, 2018, is reversed, and the matter is remanded for further proceedings consistent with this opinion. Respondents' request for judicial notice is denied. [10]

Kline, P. J., and Stewart, J., concurred.

A petition for a rehearing was denied March 12, 2020, and respondents' petition for review by the Supreme Court was denied July 15, 2020, S261995.

All Citations

45 Cal.App.5th 655, 259 Cal.Rptr.3d 9, 20 Cal. Daily Op. Serv. 1541, 2020 Daily Journal D.A.R. 1508

Footnotes

1 As we have seen, McKie Sr.'s three adult children disclaimed any interest in the FYR Trust in paragraph 2.a.(i) of the Settlement Agreement. In paragraph 2.a.(iv), they promised (1) not to assert any claims against the McKie Sr. estate, (2) not to object to the second account and final report of the executor in the McKie Sr. estate, and (3) as to the SYR Trust, not to object to any account or other proceeding except as provided elsewhere in the agreement (regarding administration of the SYR Trust only).

2 Probate Code section 11000 provides that notice of a hearing on an account of an estate "shall" be given to "[e]ach known heir whose interest in the estate would be affected by the account" and "[e]ach known

devisee whose interest in the estate would be affected by the account." (Prob. Code, § 11000, subd. (a)(2) and (3).) Here, the probate court reasoned, "Mark's contingent remainder interest in the estate, however, was so far removed from McKie Sr. that his interest *could* be affected only by the account, potentially, and did not amount to an heir whose interest *would* be affected by the account, certainly, as the Legislature intended." (Further undesignated statutory references are to the Probate Code.) The probate court further found that, as a contingent remainder beneficiary, Mark was not statutorily entitled to personal notice under sections 1201, 1202, and 1206.

3 The probate court described the two "condition precedents" or contingencies that had to occur for Mark to have an interest in the FYR Trust as (1) "Yvonne had to leave property in trust for distribution to McKie Jr." and (2) "McKie Jr. had to outlive Yvonne before receiving his interest in the trust," but "[n]either of these contingencies occurred."

4 The United States Supreme Court itself applied *Mullane*/*Mennonite* due process principles in the probate context in *Tulsa Professional Collection Services v. Pope* (1988) 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565. In that case, the court recognized that an unsecured creditor's claim against an estate was an intangible property interest protected by the Fourteenth Amendment and that statutory notice of the debtor's probate by publication alone did not necessarily comply with due process. As to known or reasonably ascertainable creditors, *actual* notice of the debtor's probate proceeding was required for a state nonclaims statute to satisfy due process. (*Tulsa Professional,* at pp. 480–481, 485–490, 108 S.Ct. 1340.)

5 We also note that the MWR Will provided, "Each and every beneficiary under this trust is hereby restrained from and is and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, or in any other manner affect or impair his or her beneficial or legal right, title, interest, claim or estate in and to the income and principal, or income or principal, of this trust during the entire existence thereof ...." This spendthrift provision further shows it was McKie Sr.'s intent that the beneficiaries of the FYR Trust not be allowed to contract away their interests in the trust. That the disclaimers by McKie Jr., Diane, and Joanne of their own interest in the FYR Trust are nonetheless enforceable by the trustee *against them* is a matter of contract, not because the Settlement Agreement modified the terms of the MWR Will. (See *Muhammad*, *supra*, 16 Cal.App.3d at p. 736, 94 Cal.Rptr. 856 [where the beneficiaries reached a settlement agreement regarding the administration of a testamentary trust, "the rights of the parties so far as they rest upon the agreement are contractual and not testamentary"].)

6 McKie Jr. and his siblings agreed that the Settlement Agreement would be binding on "their respective legal representatives, successors and assigns." To the extent respondents suggest Mark is bound by the Settlement Agreement because he is McKie Jr.'s successor, this suggestion is unavailing. Mark does not claim a share of the remainder of the FYR Trust as the successor or assignee of McKie Jr.'s property right. Mark's property right in the trust arises directly from the MWR Will.

7 Recall that McKie Sr.'s children settled claims against McKie Sr. in his capacity as trustee of the Marion Roth Trust, and the payment to them was made by McKie Sr.'s estate, not the FYR Trust. Although McKie Sr.'s children agreed to give up their contingent remainder interests in the FYR Trust as part of the settlement, the primary purpose of the Settlement Agreement was to settle claims unrelated to the FYR Trust.

8 Likewise, Jelley should have ascertained the names and addresses of any children of Diane and Joanne since such persons were readily identifiable contingent remaindermen and the proposed 1991 Decree adversely affected their property interests in the FYR Trust by eliminating their interests.

9 We further note it was testator McKie Sr.'s expressed intent that, if Yvonne exercised her power of appointment, she do so "by will duly admitted to probate and specifically referring to and exercising this power of appointment," and Yvonne did not do that.

10 The documents respondents ask us to take judicial notice of are not relevant to the issues raised in this appeal. (See *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 770, 130 Cal.Rptr.3d 454 [declining to take judicial notice of a document that was "not relevant to our consideration of the issues raised on appeal"]; *Mangini v. R.J. Reynolds Tobacco Co. (*1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73 [matters subject to judicial notice must be relevant to issues raised on appeal], overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106.)

68 Cal.App.5th 640
Court of Appeal, Second District, Division 5, California.

Nigel HUDSON, Plaintiff and Appellant,
v.
Lucas FOSTER, Defendant and Respondent.

B300017
|
Filed 9/7/2021

Synopsis

Background: Conservatee filed a motion asking the probate court to exercise its inherent equitable authority to set aside an order approving his former conservator's final account due to misrepresentations of material fact in the account. The Superior Court, Los Angeles County, No. SP008763, Brenda Penny, J., denied the motion, and conservatee appealed.

Holdings: The Court of Appeal, Moor, J., held that:

[1] order denying conservatee's motion was appealable;

[2] evidence did not support finding that conservatee was aware of the defects in the final account at the time it was made, and thus any such awareness did not preclude set aside of the approval of the final account on the basis of conservator's fraud; and

[3] court considering whether conservatee acted with reasonable diligence was required first to determine when conservatee actually discovered formerly unknown information sufficient to put a reasonable person on notice of fraud.

Reversed and remanded with directions.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Order or Judgment.

West Headnotes (53)

[1] Courts Review and vacation of proceedings

An order in a probate proceeding denying a motion to vacate an order on equitable grounds is generally not appealable.

3 Cases that cite this headnote

[2] Courts Review and vacation of proceedings

Under limited circumstances, probate court order denying motion to vacate on equitable grounds is appealable; if judgment or decree was final and appealable, then order refusing to vacate judgment or decree is appealable when, for reasons involving no fault of appealing party, he has never been given opportunity to appeal directly from judgment or decree.

2 Cases that cite this headnote

[3] Mental Health Review

Order denying conservatee's motion to set aside order approving his former conservator's final account due to misrepresentations of material fact in the account was appealable; initial order approving the final account was an appealable order, and motion seeking to vacate the order was based on equitable fraud in the form of misrepresentations of fact by a fiduciary which deprived the conservatee of a full and fair opportunity to object to the final account prior to entry of the order approving the account. Cal. Prob. Code § 1300(b).

1 Case that cites this headnote

[4] Appeal and Error Equitable remedies in general

Court of Appeal reviews an order denying equitable relief for an abuse of discretion.

1 Case that cites this headnote

[5] Appeal and Error Equitable remedies in general

In reviewing an order denying equitable relief for an abuse of discretion, Court of Appeal determines whether the trial court's factual findings are supported by substantial

evidence and independently reviews its statutory interpretations and legal conclusions.

[6] **Appeal and Error** Verdict, Findings, and Sufficiency of Evidence

In assessing whether any substantial evidence exists, Court of Appeal views the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor.

1 Case that cites this headnote

[7] **Appeal and Error** Reasonableness

A finding based upon a reasonable inference will not be set aside by an appellate court unless it appears that the inference was wholly irreconcilable with the evidence.

1 Case that cites this headnote

[8] **Appeal and Error** Substantial Evidence

On review for substantial evidence, when the evidence gives rise to conflicting reasonable inferences, one of which supports the finding of the trial court, the trial court's finding is conclusive on appeal.

2 Cases that cite this headnote

[9] **Appeal and Error** Lower court's knowledge and application of law

Normally, Court of Appeal must presume the trial court was aware of and understood the scope of its authority and discretion under the applicable law.

1 Case that cites this headnote

[10] **Appeal and Error** Lower court's knowledge and application of law

Appeal and Error Judgments and orders

If record demonstrates that trial court was unaware of its discretion or that it misunderstood scope of its discretion under applicable law, presumption that trial court was aware of and understood scope of its authority and discretion under applicable law has been rebutted, and order must be reversed.

1 Case that cites this headnote

[11] **Courts** Discretion of court in general

All exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to particular matter at issue.

[12] **Appeal and Error** Abuse of discretion

A discretionary decision may be reversed if improper criteria were applied or incorrect legal assumptions were made.

[13] **Appeal and Error** Discretion of Lower Court

Appeal and Error Construction, Interpretation, or Application of Law

If trial court's decision is influenced by erroneous understanding of applicable law or reflects unawareness of full scope of its discretion, it cannot be said that court has properly exercised its discretion under law.

[14] **Appeal and Error** Discretion of Lower Court

Appeal and Error Construction, Interpretation, or Application of Law

Discretionary order based on application of improper criteria or incorrect legal assumptions is not exercise of informed discretion and is subject to reversal even though there may be substantial evidence to support that order.

[15] **Appeal and Error** Particular Errors and Defects Warranting Further Proceedings Below

If the record affirmatively shows the trial court misunderstood the proper scope of its discretion, remand to the trial court is required to permit that court to exercise informed discretion with

awareness of the full scope of its discretion and applicable law.

1 Case that cites this headnote

[16] **Mental Health** Authority, duties, and liability of guardians in general

There is fiduciary relationship between conservator and conservatee. Cal. Prob. Code § 2101.

[17] **Mental Health** Duty to account

Conservator must account to court for property of conservatee with information about receipts, disbursements, transactions, and remaining assets.

[18] **Mental Health** Duties and liabilities of guardian or committee in general

Conservator must prevent misappropriation of conservatee's assets.

[19] **Fraud** Duty to disclose facts

Fiduciary has duty to provide full disclosure of all material facts that affect beneficiary's interest.

More cases on this issue

[20] **Fraud** Duty to disclose facts

Even a fiduciary's lack of full disclosure of all material facts affecting a beneficiary's interest will amount to fraud, because the fiduciary's obligation is affirmative.

More cases on this issue

[21] **Fraud** Fiduciary or confidential relations

A confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship; it is particularly likely to exist when there is a family relationship or one of friendship.

[22] **Fraud** Fiduciary or confidential relations

When a person places confidence in another person, the person who voluntarily accepted the confidence cannot take any advantage from acts undertaken for the other party without the knowledge or consent of that party.

[23] **Fraud** Fiduciary or confidential relations

Technically, a "fiduciary relationship" is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client, whereas a "confidential relationship" may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.

1 Case that cites this headnote

[24] **Fraud** Fiduciary or confidential relations

Essence of a "fiduciary relationship" or "confidential relationship" is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.

[25] **Res Judicata** Probate courts and jurisdiction

Doctrine of res judicata applies in probate proceedings to bar party from relitigating claim that has been finally determined in prior proceeding.

1 Case that cites this headnote

[26] **Courts** Judgment, orders, and records

The probate court has inherent equitable authority to set aside an order or decree when extrinsic factors have deprived a party of a fair adversary hearing.

[27] **Courts** Judgment, orders, and records

To set aside an order or decree when extrinsic factors have deprived a party of a fair adversary hearing, probate courts require a showing of extrinsic fraud or mistake, in order to balance the public policy in favor of the finality of judgments with the policy in favor of providing litigants a fair opportunity to present a case.

[28] **Res Judicata** Claim preclusion in general

"Claim preclusion," the primary aspect of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties.

[29] **Res Judicata** Issues or Questions in General

"Issue preclusion," the secondary aspect of res judicata, historically called "collateral estoppel," describes the bar on relitigating issues that were argued and decided in the first suit.

[30] **Motions** Proceedings

In order to set aside final order based on extrinsic fraud, moving party must demonstrate that he or she has meritorious case, that they have satisfactory excuse for not presenting defense to original action, and that they exercised diligence in seeking to set aside once fraud had been discovered.

1 Case that cites this headnote

[31] **Fraud** Elements of Actual Fraud

Elements of fraud are misrepresentation, knowledge of falsity, intent to induce reliance on misrepresentation, justifiable reliance on misrepresentation, and resulting damages.

More cases on this issue

[32] **Judgment** Fraud in preventing defense or procuring judgment

Fraud is extrinsic, for purposes of a motion for relief from judgment, when party is prevented from fully participating in proceeding or deprived of opportunity to present claim to court by fraudulent conduct of another party, as opposed to moving party's own negligence.

3 Cases that cite this headnote

[33] **Judgment** Misconduct of Party or Counsel

Fraud is generally considered intrinsic, for purposes of a motion for relief from judgment, when party had notice of action and opportunity to present case, but unreasonably neglected to protect themselves from fraud or mistake involving merits of proceeding.

2 Cases that cite this headnote

[34] **Res Judicata** Public policy considerations; public interest

Res Judicata Effect of fraud in obtaining determination

The public policy underlying the principle of res judicata that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony; this policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case.

[35] **Res Judicata** Effect of fraud in obtaining determination

Equitable relief will be denied where it is sought to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case.

[36] **Judgment** Misconduct of Party or Counsel

Judgment Fraud in preventing defense or procuring judgment

The terms "intrinsic" and "extrinsic" fraud or mistake do not constitute a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment; it is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.

1 Case that cites this headnote

[37] **Judgment** Fraud in preventing defense or procuring judgment

A party may obtain relief from a judgment when the other party concealed facts in violation of a duty arising from a trust or confidential relationship, even though the facts concerned issues in a prior proceeding.

1 Case that cites this headnote

[38] **Judgment** Fraud in preventing defense or procuring judgment

The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to extrinsic fraud rule.

More cases on this issue

[39] **Fraud** Duty to Investigate

Where one is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed merely because opportunities for examination or means of knowledge were open to him where no legal duty devolved upon him to employ such means of knowledge.

More cases on this issue

[40] **Fraud** Duty to disclose facts

Where there exists a relationship of trust and confidence it is the duty of one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts is a fraud; where there is such a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action.

More cases on this issue

[41] **Judgment** Misconduct of Party or Counsel

When judgment is obtained through fiduciary's violation of duty of disclosure to moving party, policy to provide fair adversary proceeding outweighs policy in favor of finality, and moving party's reasonable reliance on disclosures of fiduciary is considered satisfactory excuse for not presenting defense in prior proceeding.

[42] **Judgment** Misconduct of Party or Counsel

Generally, party has duty to take advantage of discovery procedures to fully investigate facts prior to entry of judgment, for purposes of determining whether that party is entitled to setting aside of judgment for fraud.

[43] **Judgment** Fraud in preventing defense or procuring judgment

To set aside judgment based on "false facts" when fraud was part of proceeding itself, party must show such facts could not reasonably have been discovered prior to entry of judgment.

[44] **Mental Health** Duty to account

Conservator's presentation of accounting to court for approval is not adversarial proceeding between parties; conservator is required to account and disclose material information to conservatee.

[45] **Judgment** Limitations and Laches

Plaintiff who has no duty to inquire because of fiduciary relationship does not need to show that he or she could not have discovered facts earlier with diligent inquiry in order to seek equitable relief from the judgment.

2 Cases that cite this headnote

[46] **Judgment** Fraudulent judgments

For purposes of a motion to set aside a judgment based on "false facts" when the fraud was part of the proceeding itself, once a party actually becomes aware of facts which would make a reasonably prudent person suspicious of wrongdoing by a fiduciary, the party is put on inquiry notice and has a duty to investigate; at that point, a person with actual notice of circumstances sufficient to put a prudent man on inquiry is deemed to have constructive notice of all facts that a reasonable inquiry would disclose.

1 Case that cites this headnote

[47] **Judgment** Fraudulent judgments

For purposes of showing that "false facts" could not reasonably been discovered, thus allowing the set aside a judgment based on "false facts" when the fraud was part of the proceeding itself, when a fiduciary relationship exists between the parties, facts which would ordinarily require investigation may not excite suspicion and less diligence is required.

1 Case that cites this headnote

[48] **Mental Health** Opening or vacating

A conservator seeking to prevent the set-aside of the approval of a final account on basis of alleged "false facts" may show that representations of fact in the account were so obviously false that the conservatee was not justified in relying on them; if the conservatee was not actually aware of facts prior to entry of judgment from which a reasonable person would have suspected wrongdoing, however, the conservatee satisfies the duty of diligence by showing the action to set aside the judgment was filed within the limitations period, as measured from the party's actual discovery of formerly unknown information.

[49] **Judgment** Limitations and Laches

Equitable action to set aside judgment is subject to defense of laches.

[50] **Judgment** Misconduct of Party or Counsel

Judgment Fraud in preventing defense or procuring judgment

Within context of nonfiduciary relationship, for purposes of a motion for relief from judgment, misrepresentations of material fact presented in judicial proceeding are considered intrinsic fraud, but misrepresentations of material fact by fiduciary constitute extrinsic fraud.

More cases on this issue

[51] **Mental Health** Collateral attack

Where conservator has misrepresented material fact in account approved by probate court, party bringing subsequent action on behalf of conservatee to set aside that approval does not need to show that misrepresentation could not have been discovered prior to entry of order approving account.

[52] **Mental Health** Opening or vacating

Evidence did not support finding that conservatee was aware of the defects in the final account at the time it was made, and thus any such awareness did not preclude set aside of the approval of the final account on the basis of conservator's fraud; final account included representations that 28 specific checks were paid

directly to conservatee's creditors, when in fact those checks were paid to conservator, who explained the checks were reimbursements that were poorly presented in the account as direct payments to creditors, but certain creditors did not receive any payments from at least two of those checks.

More cases on this issue

[53] Mental Health Opening or vacating

Probate court considering whether conservatee acted with reasonable diligence to set aside court's approval of final account was required first to determine when conservatee actually discovered formerly unknown information sufficient to put a reasonable person on notice of fraud, and could not place burden on conservatee to scrutinize conservator's account; conservatee's mere access to information did not trigger an obligation to comb through the records to verify the truth of conservator's representations.

Witkin Library Reference: 15 Witkin, Summary of Cal. Law (11th ed. 2017) Wills and Probate, § 1039 [Court Supervision.]

More cases on this issue

****827** APPEAL from an order of the Superior Court of Los Angeles County, Brenda Penny, Judge. Reversed and remanded, with directions. (Los Angeles County Super. Ct. No. SP008763)

Attorneys and Law Firms

Law Offices of Martin L. Horwitz and Martin L. Horwitz, Beverly Hills; Klapach & Klapach and Joseph S. Klapach, Beverly Hills, for Petitioner and Appellant.

Garrett & Tully, Ryan C. Squire, Pasadena, Adjoa M. Anim-Appriah, for Respondent.

Opinion

MOOR, J.

****828** ***648** A conservatee filed a motion asking the probate court to exercise its inherent equitable authority to set aside an order approving his former conservator's final account due to misrepresentations of material fact in the account. The probate court denied the motion after finding that the conservatee failed to show he was unaware of the defects in the account at the time it was approved, or failed to act with reasonable diligence to set aside the order in light of information that he should have known. On appeal, the conservatee contends the order denying the motion to vacate is appealable, because it is based on the probate court's equitable power to set aside an order obtained through extrinsic fraud. The conservatee further contends that the order approving the account was not preclusive under Probate Code section 2103, [1] because it was based on misrepresentations of material fact, and as a result, the trial court abused its discretion by refusing to set aside the order.

We agree that the order denying the motion to vacate for extrinsic fraud is appealable in this case. Misrepresentations of material fact in a conservator's account are treated as extrinsic fraud. We hold that a conservatee has no duty to investigate representations of fact in the conservator's account, unless the conservatee becomes aware of facts from which a reasonably prudent person would suspect wrongdoing. Therefore, to set aside an order approving the conservator's account on the ground of extrinsic fraud, a conservatee is not required to establish that the misrepresentations of material fact in the account could not have been discovered prior to entry of the order approving the account. The probate court's ruling relied on legal authority that we find unpersuasive because it placed a higher burden to investigate on the conservatee. The matter must be reversed and remanded for the probate court to exercise its discretion based on an accurate understanding of the applicable law.

*649 FACTUAL AND PROCEDURAL BACKGROUND

Conservatorship of the Estate

In January 2007, petitioner and appellant Nigel Hudson was severely injured in a car accident. An attorney was appointed guardian ad litem for Hudson. A personal injury lawsuit filed on Hudson's behalf resulted in a settlement of $13,863,000. In October 2011, the court in the personal injury case established a qualified settlement fund to receive the settlement proceeds.

The guardian ad litem filed a petition for a voluntary conservatorship of the estate on Hudson's behalf, resulting in the appointment of Hudson's friend, respondent Lucas Foster,

as the general conservator of Hudson's estate on April 6, 2012. [2] Foster is a film producer; he owns Warp Films, Warp Media Development, Inc., Warp LLC, and various single purpose entities. Hudson retained testamentary capacity and the ability to make medical ****829** decisions, so he did not require a conservator of the person. Hudson and Foster agreed that Foster would advance the funds necessary to pay for goods and services for Hudson's benefit, and Foster would be reimbursed after the settlement proceeds were received. Hudson was able to view the records of the conservatorship bank account that were online.

In January 2013, the court in the personal injury case issued an order approving the disposition of the settlement proceeds. $5,090,974.25 was paid directly to the guardian ad litem for attorney fees, and $799,563.96 was paid directly to certain medical providers. In addition, the civil court order directed Foster to pay a total of $1,945,412.43 to creditors listed in attachments to the order. The attachments listed hundreds of creditors, including Miracle Mile and LA Litigation Copy Service. The attachments showed Miracle Mile's total bill was $11,250 and the negotiated balance was $10,125. The attachments listed the total amount owing to LA Litigation as $39,913.25.

Order Approving Final Account

On December 28, 2013, Foster filed a first and final account in the probate case and a petition for approval of the account, allowance of attorney fees and costs, an order terminating conservatorship of the estate, and discharge of the conservator. Foster stated that he received property as conservator totaling ***650** $9,489,265.16, and disbursed $4,314,887.38. The disbursement schedule attached to the final account listed more than one thousand disbursements made to various entities during the accounting period from March 2, 2012, through October 31, 2013. The property on hand at the close of the final account was $5,168,725.63, including cash of $2,730,932.03.

In the petition, Foster carefully explained that 17 checks were paid to him directly or to his film production company which were reimbursements for funds that he advanced to Hudson prior to receipt of the settlement funds. Each amount that Foster described in the petition as a reimbursement corresponded to an entry on the disbursement schedule. The disbursement schedule listed the payee for these transactions as Foster, Warp Film, Inc., or Warp Development, Inc., with a notation that the payment was a reimbursement for a specific expense. In addition to the 17 entries that Foster expressly brought to the court's attention in the petition, there were a few additional entries in the disbursement schedule listing amounts paid directly to Foster or one of his companies and stating the payments were in reimbursement for a specific expenditure made on Hudson's behalf. Foster waived payment of any conservator's commissions.

Foster also explained in the petition that the civil court order had directed him to pay specific creditors of the lawsuit. In some circumstances, a creditor accepted a reduced payment. Foster obtained receipts for all of the direct payments made to creditors. Debts totaling approximately $300,000 remained outstanding, however, because Foster was either unable to contact the creditor or the creditor had been unwilling to execute a receipt. Foster added, "[The remaining debts] will be fully set forth in a noticed supplement hereto. [¶] Conservator submits that these remaining debts simply be transferred to the Conservatee, who will be taking over the process privately."

Among hundreds of individual disbursements listed in the account was a payment on July 9, 2013, to "Miracle Mile Surgical Center – per Court Order" in the amount of $10,000, paid with check number 2294. In addition, Foster made a payment on ****830** April 2, 2013, to "LA Litigation Copy Service – litigation expenses" in the amount of $31,089.25 with check number 2258. Foster made a payment on November 28, 2012, to "Dr. Sam Markzar, DDS – dental" in the amount of $9,839.10 with check number 2227.

Foster did not disclose in the petition that 28 checks shown as paid to third parties, including the checks to Miracle Mile, LA Litigation, and Markzar, were in fact paid to Foster or one of his companies. Miracle Mile and Markzar had not received any payment toward Hudson's debt. In other words, the checks listed as paid to Miracle Mile and Markzar were not paid to them, and the amounts received by Foster through these checks were not ***651** reimbursement for funds advanced to these creditors. LA Litigation received a payment from Foster toward Hudson's debt, but the amount was far less than was listed in the final account. The check numbers and payment amounts listed in the final account matched the information shown in the bank statements for the conservatorship, but the bank statements did not contain the names of the payees on the checks. Only the face of the checks revealed the payee information. The total amount of the 28 checks disbursed to Foster's own accounts, rather than to the payees listed in the final account, was $558,169.47.

Hudson and the guardian ad litem each signed a consent to the final account. On March 28, 2014, the probate court entered an order approving the final account.

Events After Approval of the Final Account

A week after the final account was approved, on April 4, 2014, a representative from Miracle Mile e-mailed an associate of Foster asking about the status of payment for the services that Miracle Mile provided to Hudson on two dates. Miracle Mile sent a second e-mail on April 7, 2014, explaining that the company agreed in June 2011, to accept an offer of $10,125. The associate forwarded the messages to Foster with a note saying the amount needed to be paid and asking Foster to send a release to Miracle Mile. Foster forwarded the messages to Hudson with a note that said, "Let's discuss."

In a declaration filed later, Hudson described meeting with Foster at a coffee shop to discuss the messages from Miracle Mile. Calm and reassuring, Foster confirmed that Miracle Mile's bill was part of the outstanding $300,000 in medical expenses that Foster had been unable to negotiate and remained unpaid. Foster said he would have Miracle Mile sign a release and then the bill would be paid. Hudson never saw a release from Miracle Mile, and Foster never provided a supplement to the final account listing the bills that remained unpaid under the court order.

On October 18, 2014, more than 18 months after the payment date stated in the final account and six months after approval of the final account, LA Litigation signed a document which was provided to Foster, acknowledging receipt of $23,500 in release of all claims against Hudson.

Foster told Hudson that he could settle Hudson's outstanding bill with UCLA for $60,000, so Hudson provided $60,000 to pay the bill. Hudson later learned that Foster negotiated a final payment of $54,500 in full satisfaction of UCLA's lien, but did not return the overpayment of $5,500 to Hudson.

On April 26, 2017, Hudson filed an unrelated civil action against Foster based on loans that Hudson made to Foster after the conservatorship ended. ***652** According to the complaint, the total amount borrowed ****831** was $400,000. Foster refused to sign a promissory note secured by a deed of trust. Hudson filed the civil action to compel Foster to repay the money borrowed after the conservatorship terminated, and to recover the difference between the amount that he gave Foster for payment of the UCLA bill and the amount received by UCLA.

In April 2018, Miracle Mile filed a motion in the personal injury case to enforce the settlement agreement. The motion was brought against Foster in his former role as conservator. Miracle Mile alleged that it had sent two letters to Foster without response. Miracle Mile had not received payment of its bill for $11,250 or any other sum required under the court ordered settlement.

Motion To Vacate Order Approving Final Account

On August 30, 2018, Hudson filed a motion in the probate court to vacate the order approving the conservator's final account on the grounds of fraud and misrepresentation of material fact. Hudson stated that he was not aware of any fraud until Miracle Mile filed its motion seeking to enforce the settlement. After Miracle Mile insisted that it had not received any payment under the court order, Hudson ordered copies of his bank documents, including check images. Hudson saw that check number 2294, which Foster's final account listed as paid to Miracle Mile, was in fact made payable to Warp Media Development, Inc. Hudson compared the check images that he received to the final account and discovered the 28 checks listed in the final account as paid to third parties that were actually made payable to Foster or one of his companies. In addition, Hudson discovered Foster had written four checks totaling more than $60,000 to himself or his company after the final account had been approved, which were not listed in the account. Hudson argued these discrepancies were misrepresentations of material fact that provided grounds to vacate the order approving the final account. Under section 2103, the conservator is not released from claims of the conservatee if the order is obtained by fraud or misrepresentation in the petition, account, or order as to any material fact.

In support of the motion, Hudson submitted his attorney's declaration describing discovery of the misrepresentations in the final account, the pleading filed by Miracle Mile in the civil action, the disbursement schedule from Foster's final account, and copies of bank statements and check images showing that the payees in the check images were not the parties listed in the final account.

***653 Opposition to Motion To Vacate**

On October 11, 2018, Foster filed an opposition to the motion to vacate the order approving the final account. He

explained that the parties had agreed Foster would advance funds for Hudson's benefit and be reimbursed for these sums upon payment of the settlement proceeds from the personal injury case. At all times, Hudson had online access to the conservatorship bank account and was aware of all financial transactions undertaken by Foster.

Foster's counsel arranged for Nan Buchanan to prepare the conservator's account. All of the documents relating to the conservatorship income and expenses, receipts and disbursements, were provided to Buchanan. Buchanan prepared the schedules for the final conservatorship account. The schedules reflected direct payments to medical providers, as well as payments for goods or services that were advanced by Foster and reimbursed to him. The report disclosed and explained ****832** the advances made for Hudson's benefit. Hudson discussed the final account with his guardian ad litem, and each consented to the account in writing. The account was also reviewed by the probate court investigator.

When the conservatorship terminated in 2014, Hudson was aware of the dispute over payment of Miracle Mile's bill. After preparation of the final account, copies of every document related to the account, including cancelled checks, invoices, bills, statements, and other memorandum, were delivered in multiple storage boxes to Hudson, who had ample time to review the documents and object to the account or set aside the order approving the account within the statutory time period.

Foster argued that no fraud had been shown. He admitted it was arguable that the account represented direct payment was made to a medical provider when the check was, in fact, a reimbursement to Foster. He explained, "The fact that the schedule of disbursements prepared by Nan Buchanan reflected the underlying payees who provided services rather than reflecting that Warp paid the provider and was reimbursed is perhaps unclear, but is certainly not a fraud." Hudson had not alleged, and could not show, that the expenditures reflected in the account were not advanced for his benefit. Although the representations "might have been better presented in a separate schedule reflecting both the underlying provider and the reimbursement to Foster, they are not fraudulent, nor are they untrue. There is no evidence suggesting the account is substantively inaccurate." He noted that no medical provider disputed payment other than Miracle Mile, and there was no damage to Hudson because all his bills had been paid.

In addition, Foster argued the motion was untimely. Foster relied on the legal authority of ***654** *Knox v. Dean* (2012) 205 Cal.App.4th 417, 140 Cal.Rptr.3d 569 (*Knox*), to argue that a party seeking to set aside a judgment based on misrepresentations of fact must show the facts could not reasonably have been discovered prior to the entry of judgment. He also noted that Hudson had not submitted his own declaration in support of the motion. Hudson was aware of every transaction reflected in the account and Hudson had not shown that he could not reasonably have discovered the allegedly false information prior to entry of judgment.

Foster submitted his own declaration in support of the opposition. He had advanced hundreds of thousands of dollars to purchase goods and services for Hudson's benefit, which were reimbursed with payments from the conservatorship bank account. He discussed each of the payments and reimbursements with Hudson as they occurred. Hudson had no objections and was grateful that Foster could facilitate the purchases. Hudson was at all times aware of, and agreed to the advances and the reimbursements. Foster did not request or receive any compensation for the time and effort he expended as Hudson's conservator. All of the funds that were reimbursed directly to Foster or any entity for which he is the principal were reimbursements for money advanced for Hudson's use and benefit. Buchanan was provided all the banking records, invoices, and other documents related to the conservatorship account, and Buchanan prepared the various accounting schedules attached to the final account.

When Foster received Miracle Mile's e-mail seeking payment after the court approved the final account and terminated the conservatorship, he forwarded the messages to Hudson with an offer to discuss the bill. He was not sure why Miracle Mile had not been paid long ago, or why ****833** Miracle Mile waited so long to take legal action, but Hudson had been aware of the issue for more than four years, and it was not new information.

Reply and Initial Hearing

Hudson filed a reply on October 17, 2018. He noted that Foster's opposition admitted the payees on the checks were not the payees identified in the account. Hudson, the guardian ad litem, and the court staff had relied on the conservator's statements in the account. There was nothing in the account to put Hudson on notice of any irregularities. They had the right to rely on the statements of the court-appointed conservator.

In support of the reply, Hudson filed his own declaration. He declared that he had no idea, and no reason to believe, the checks listed in the disbursement schedule were not made payable to the parties represented in the account and instead were paid to Foster or his companies. Hudson was not aware of all of the financial transactions undertaken by Foster. He was ***655** shocked and disappointed that the person in whom he had placed his trust and confidence took money from his account in this manner. Hudson disputed Foster's statement that all the expenditures made by Foster or his companies were made for Hudson's benefit. Foster did not give him copies of every document related to the account. When Hudson asked for copies of his records, Foster said all of Hudson's records were swept away and destroyed in mudslides that affected Foster's house in Montecito, California. Before Miracle Mile filed its motion to enforce payment, Hudson had no reason to believe Foster had not paid Miracle Mile the amount approved by the court and no reason to compare the payees on the checks to verify that they matched the payees identified by Foster in his account.

A hearing was held on the motion to vacate the account on October 25, 2018. Foster argued that even if he had taken money as alleged in the motion, his email forwarding Miracle Mile's request for payment in 2014 put Hudson on notice and the statute of limitations began to run. In response, Hudson argued his own access to financial information did not absolve Foster from providing correct information or require Hudson to verify that the payees listed in the account were paid. The court concluded that it did not have sufficient evidence to support a fraud claim and gave Hudson an opportunity to file additional points and authorities.

Supplemental Pleadings

On February 14, 2019, Hudson filed additional points and authorities. He argued that under section 2103, the order settling the final account of the conservator did not provide protection from claims when the order was obtained by fraud or misrepresentation in the petition or the account as to any material fact. The conservator had a duty to accurately disclose all disbursements, but had instead misrepresented the payee information. The amounts in question were not reimbursements; Foster had clearly identified reimbursements elsewhere in the account.

Hudson argued that the statute of limitations did not begin to run until Hudson discovered facts putting him on notice of the fraud, specifically, when Miracle Mile filed the motion to enforce the settlement on April 19, 2018. Hudson's receipt of the message forwarded from Miracle Mile did not put Hudson on notice that the accounting was fraudulent, because Foster also notified the court that medical liens totaling $300,000 remained unsatisfied and would be Hudson's responsibility to negotiate after the conservator was released.

****834** Hudson and the court staff who investigated the accounting did not have access to physical copies of the checks. By accurately listing check numbers ***656** and payment amounts, but changing the identity of the payee, Foster demonstrated an intent to conceal information and deceive Hudson and the court. Hudson was harmed because the funds were not used to pay the named payee for the services stated and the money is no longer in Hudson's account or available for his benefit. The misrepresentations were sufficient to support vacating the order approving the account.

Hudson submitted his declaration stating that Foster never informed Hudson which unpaid liens were assigned to him to negotiate after the conservatorship was terminated. Hudson learned Miracle Mile's bill was not paid as stated in the final account when Miracle Mile filed its motion to enforce payment and Hudson investigated the payment history. After Miracle Mile denied receiving payment and the check image confirmed that payment was not made as stated in the account, Hudson paid Miracle Mile.

Foster filed additional points and authorities, but did not cite any additional legal authority. He argued Hudson knew or should have known of the facts claimed to constitute fraud when Foster forwarded the email about Miracle Mile's unpaid bill. Hudson had ample opportunity to examine the account but had offered no explanation for failing to discover the facts earlier.

On March 19, 2019, Hudson filed a supplemental reply. He argued that the parties who reviewed the final account were not required to confirm that checks had been accurately listed. As a fiduciary, the conservator was required to be truthful and not misrepresent material facts. Hudson identified representations of fact in the account about payments to Markzar, LA Litigation, and an entity named Sunset Studios Media Solutions, which Hudson claimed were false. He submitted the final account and copies of the check images. In the final account, Foster represented that he paid $9,839.10 to Markzar with check number 2227. The check image showed check number 2227 was paid to Warp Film, Inc. Hudson also submitted a declaration from Markzar as a custodian

of records stating the total cost of Hudson's dental care was $8,790, and no check or payment of any type was received on Hudson's account from Foster or any of his business entities. Hudson personally paid for all dental care.

In the final account, Foster represented LA Litigation was paid $31,089.25 with check number 2258. In fact, the check image showed check number 2258 was made payable to Warp Media Development, Inc. Hudson submitted a declaration from Marcelo Marciano as a custodian of records for LA Litigation. Marciano confirmed check number 2258 in the amount of $31,089.25 was not received on Hudson's account at LA Litigation. Hudson submitted a similar declaration from a custodian of records for Sunset Studios Media Solutions.

***657** The probate court held another hearing on March 27, 2019. The court concluded that Hudson had not yet provided sufficient information concerning his personal knowledge of the account to determine whether he acted with diligence in seeking to vacate the order. The court continued the motion and directed Hudson to file a personal declaration within ten days of the continued hearing date discussing in detail the circumstances surrounding the discovery of the disputed issues with the account. Hudson was to address his relevant prior communications with Foster, and his understanding of any advances Foster made for Hudson's benefit during the administration ****835** of the conservatorship. Foster was permitted to file a reply.

Hudson filed a supplemental declaration. When he received the e-mail from Foster to discuss payment to Miracle Mile, Hudson believed there were outstanding bills that had not been settled, as stated in the final account. The information that he still owed money to Miracle Mile did not put Hudson on notice that the payments listed in the final account were false. Hudson described the meeting with Foster at Starbucks. Foster did not say Miracle Mile's bill had been paid already. Instead, Foster confirmed Miracle Mile's request was part of the unpaid medical expenses which he had not been able to negotiate. Foster said before Miracle Mile was paid, he was going to get a release agreement signed, and thereafter, Miracle Mile would be paid. Hudson never had any reason to distrust Foster, who was his friend and advisor, and he had no reason to independently confirm what Foster said. The matter did not come up again until Miracle Mile filed its motion against Foster. Foster did not give Hudson any reason in any of their discussions to think that the checks listed in the final account were false or contained misrepresentations. Hudson would not have been able to discover the fraud without seeing the copies of cancelled checks.

Hudson asked Foster to purchase items and services for him, and he was aware that Foster intended to reimburse himself for the amounts that he spent on behalf of Hudson. The checks represented in the final account as paid to creditors, but which were actually paid to Foster, were not reimbursements, as shown by the declarations from Markzar, LA Litigation, and Sunset Studios Media Solutions. Hudson was also not aware of several checks Foster wrote after the final account was filed with the court and which were not approved by the court. Hudson described the allegations of his civil action against Foster as well.

Hudson also filed a declaration by his attorney Martin Horwitz. Horwitz explained that the motion filed by Miracle Mile against Foster in the personal injury case sought payment of $20,099.89, which included the total principal of the bill, plus fees and interest. Hudson asked Horwitz whether he needed to take any action in response to the motion. The final account had listed a ***658** payment of $10,000 to Miracle Mile, but Horwitz could not tell from any of the documents whether this was a partial payment or payment in full. Horwitz served a subpoena for production of the bank records, which included the check images. Had Miracle Mile not filed a motion to enforce its lien, the false information in the final account would not have been discovered. Horwitz also learned that Foster continued to sign checks on the conservatorship account to himself and his companies in February and March 2014, after the final account had been filed with the court and approved by the guardian ad litem and Hudson. Horwitz also described the civil lawsuit based on acts that took place after the conservatorship terminated.

In May 2019, Foster filed a reply to the supplemental declarations of Hudson and Horwitz, but did not cite any additional legal authority. Foster argued the discrepancies between the final account and the checks were not evidence of fraud. Hudson had intimate involvement in all aspects of his financial affairs. The parties had an understanding that Foster would be reimbursed when Hudson received his personal injury settlement, which is what occurred. The account was not challenged during the statutory period to appeal, even though Hudson had sufficient knowledge to do so. Hudson knew Miracle Mile's bill was unpaid, because Miracle Mile's bill was the subject of the email forwarded to Hudson ****836** in 2014, and Foster had offered to discuss the matter.

Foster argued Marciano's declaration was carefully drafted to suggest that LA Litigation had not been paid at all. In fact, LA Litigation was paid $23,500, and Marciano signed a release dated October 18, 2014, admitting the full amount of any claim due to LA Litigation was paid. Check number 2258, which was listed in the final account as paid to LA Litigation on April 2, 2013, was paid to Warp Media Development for multiple reimbursements to medical providers or purchases on behalf of Hudson that had been lumped together, including the amount paid to LA Litigation.

Foster emphasized that the issue before the probate court was whether extrinsic fraud existed to justify setting aside a final order. Hudson had sufficient information from which he knew, or should have known, about any potential error or discrepancy in the account. If Hudson had any reason to suspect an error, misstatement or deception, he should have acted to challenge the accounting years earlier and should not be rewarded for slumbering on his rights.

In support of the reply, Foster submitted the release that Marciano signed on behalf of LA Litigation on October 18, 2014. Foster submitted his own declaration as well. He attached communications about conservatorship finances between Hudson and Foster. Foster described funds advanced for ***659** specific expenses, which were often coordinated through an employee of Warp Films. Hudson had the ability to view cancelled checks, disbursements, and bank statements at any time. Foster did not believe he made any representation that was false, and he did not believe Hudson relied on a representation by Foster to his detriment. Hudson suffered no damage; no medical providers came forward other than Miracle Mile. There has been no showing of any fraud sufficient to set aside the court order obtained within the framework of normal court procedures years ago and which should be determinative.

Final Hearing on Motion To Vacate

The probate court held a final hearing on the motion to vacate the account on June 5, 2019. Hudson acknowledged that he received items paid for by Foster and he had understood that Foster would be reimbursed for those items, but he argued that reimbursements were a separate issue. Hudson was not challenging the checks listed in the account as paid to Foster in reimbursement for funds that he had advanced. In addition to the reimbursements that Foster disclosed, Foster had written checks to himself that he told the court were written to third parties. Hudson later found out that Foster did not make the payments to third parties that the account said had been made. These checks were not reimbursements. Hudson was not required to conduct a private accounting of the checks that his fiduciary testified to making in the final account. Moreover, Foster wrote additional checks to himself after the final account was approved.

When Miracle Mile filed the motion against Foster alleging more than $20,000 dollars was owed on Hudson's account, Hudson asked his attorney if he needed to take any action. Horwitz saw the payment of $10,000 to Miracle Mile listed in the disbursement schedule, but did not know if that was a full or partial payment. Only after viewing the checks could they determine the check listed in the final account was not made payable to the creditor. Even learning that the check was paid to Foster's company did not provide notice of fraud until Miracle Mile explained that no ****837** payment had been received at all. Hudson was seeking to vacate the order approving the account in order to file objections to the final account and determine whether the fiduciary had acted properly.

Foster's attorney argued that Hudson had notice and an opportunity to investigate whether Miracle Mile's bill was paid in 2014. It was unfair to litigate at this point when everyone's recollection had faded, Foster no longer had documents, and the attorney who had represented Foster was no longer practicing. Although Hudson told Foster during their meeting at Starbucks to get a release from Miracle Mile, Foster had never provided Hudson with a ***660** release or a canceled check showing payment to Miracle Mile. Hudson did nothing and sat on his rights for too long. Foster was disadvantaged because he had access to counsel before the conservatorship was terminated, but could no longer hire an attorney to represent him in his role as conservator and would have to pay out of his own funds to defend himself. The probate court took the matter under submission.

Probate Court Ruling

On June 18, 2019, the probate court issued a minute order denying the motion to vacate the order approving the final account. The order stated, “The Court finds that Nigel Hudson has not provided sufficient information regarding his personal knowledge of the circumstances of the accounting. Former Conservator, Lucas Foster, with support, contends Nigel [Hudson] knew about a certain reimbursement procedure he was undertaking. Nigel Hudson, though specifically given [an] opportunity to describe what he did or did not know about any reimbursements, only addresses the subject in general terms. Movant Nigel Hudson has not shown he was unaware

of the defects in the accounting at the time, or, at the very least, has not shown he acted with reasonable diligence in seeking to vacate the order based on the information that he should have known." Hudson filed a timely notice of appeal from the order. [3]

DISCUSSION

Appealability

Hudson contends that the order denying the motion to vacate the approval of the final account is appealable, because it was based on the court's inherent equitable power to set aside an order obtained through extrinsic fraud. We agree.

[1] The only appealable orders in probate proceedings are those listed in the Probate Code. (§§ 1300–1304; Code Civ. Proc., § 904.1, subd. (a)(10); *Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575–576, 170 Cal.Rptr.3d 755 (*Kalenian*); *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125–1126, 9 Cal.Rptr.3d 770.) An order settling an account of a fiduciary is an appealable order. (§ 1300, subd. (b).) An order denying a motion to vacate an order on equitable grounds is generally not appealable. (*Kalenian*, *supra*, 225 Cal.App.4th at p. 577, 170 Cal.Rptr.3d 755; ***661** *Estate of Baker* (1915) 170 Cal. 578, 581–582, 150 P. 989 (*Baker*).) Otherwise, an unsuccessful party would have two appeals from the same judgment: one appeal provided by law within a limited time period and another at an indefinite time in the future at the convenience of the litigant after the denial of a motion to vacate the judgment. (*Baker*, *supra*, 170 Cal. at p. 582, 150 P. 989.)

****838** **[2]** Under limited circumstances, however, a probate court order denying a motion to vacate on equitable grounds is appealable. (*Kalenian*, *supra*, 225 Cal.App.4th at p. 577, 170 Cal.Rptr.3d 755.) If the judgment or decree was final and appealable, then an order refusing to vacate the judgment or decree is appealable "when, for reasons involving no fault of the appealing party, he has never been given an opportunity to appeal directly from the judgment or decree." (*Baker, supra,* 170 Cal. at p. 582, 150 P. 989.)

[3] In this case, the order approving the final account was an appealable order, so there is no concern of indirectly allowing an appeal from a nonappealable order. The motion seeking to vacate the order was based on equitable fraud in the form of misrepresentations of fact by a fiduciary which deprived the conservatee of a full and fair opportunity to object to the final account prior to entry of the order approving the account. Under the circumstances of this case, the order denying the motion to set aside the order approving the final account is an appealable order.

Standard of Review

[4] **[5]** We review an order denying equitable relief for an abuse of discretion. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230, 113 Cal.Rptr.3d 147.) "In doing so, we determine whether the trial court's factual findings are supported by substantial evidence [citation] and independently review its statutory interpretations and legal conclusions [citations]." (*Ibid*.)

[6] **[7]** **[8]** " 'In assessing whether any substantial evidence exists, we view the record in the light most favorable to respondents, giving them the benefit of every reasonable inference and resolving all conflicts in their favor.' [Citation.]" (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 28 [270 Cal. Rptr. 3d 101].) " '[A] finding ... based upon a reasonable inference ... will not be set aside by an appellate court unless it appears that the inference was wholly irreconcilable with the evidence. [Citations.]' [Citation.] '[W]hen the evidence gives rise to conflicting reasonable inferences, one of which supports the finding of the trial court, the trial court's finding is conclusive on appeal. [Citation.]' [Citation.]" (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 851, 206 Cal.Rptr.3d 492.)

[9] **[10]** **[11]** **[12]** **[13]** **[14]** **[15]** "Normally, we must presume the trial court was aware of and understood the scope of its authority and discretion under the applicable law. ***662** [Citations.]" (*Barriga v. 99 Cents Only Stores LLC* (2020) 51 Cal.App.5th 299, 333–334, 265 Cal.Rptr.3d 1 (*Barriga*).) "If the record demonstrates the trial court was unaware of its discretion or that it misunderstood the scope of its discretion under the applicable law, the presumption has been rebutted, and the order must be reversed. [Citation.] ' "[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." [Citations.] Therefore, a discretionary decision may be reversed if improper criteria were applied or incorrect legal assumptions were made. [Citation.] Alternatively stated, if a trial court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, it cannot be said the court has properly exercised its discretion under the law. [Citations.] Therefore, a discretionary order based on the application of improper

criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order. [Citations.] If the record affirmatively shows the trial court misunderstood the ****839** proper scope of its discretion, remand to the trial court is required to permit that court to exercise *informed* discretion with awareness of the full scope of its discretion and applicable law.' (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15–16 [123 Cal.Rptr.3d 120].)" (*Barriga*, *supra*, 51 Cal.App.5th at p. 334, 265 Cal.Rptr.3d 1.)

Fiduciary Duty To Account Generally

[16] [17] [18] [19] [20] It is undisputed that as conservator, Foster had a fiduciary duty to Hudson that required Foster to account for transactions. "There is a fiduciary relationship between the conservator and conservatee. (§ 2101.)" (*Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 498 [237 Cal. Rptr. 3d 247]; see *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1313 [58 Cal. Rptr. 2d 299].) The conservator must account to the court for the property of the conservatee with information about receipts, disbursements, transactions, and the remaining assets. (*Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 89, 90 Cal.Rptr.2d 99.) The conservator must also prevent misappropriation of the conservatee's assets. (*Ibid.*) A fiduciary has a duty to provide full disclosure of all material facts that affect the beneficiary's interest. (*Ball v. Posey* (1986) 176 Cal.App.3d 1209, 1214, 222 Cal.Rptr. 746.) "Even the lack of full disclosure will amount to fraud, because the fiduciary's obligation is affirmative." (*Ibid.*)

[21] Even without the conservatorship, the parties may have a confidential relationship. "It is well settled that '[a] confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary ***663** relationship; it is particularly likely to exist when there is a family relationship or one of friendship.' [Citations.]" (*Estate of Sanders* (1985) 40 Cal.3d 607, 615, 221 Cal.Rptr. 432, 710 P.2d 232 (*Sanders*).)

[22] [23] [24] "Fiduciary" and "confidential" have been used interchangeably to describe a relationship in which one party has a duty to act in the highest good faith for the benefit of the other party. (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270, 130 Cal.Rptr.2d 601.) When a person places confidence in another person, the person who voluntarily accepted the confidence cannot take any advantage from acts undertaken for the other party without the knowledge or consent of that party. (*Ibid.*) "Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship. [Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382–383, 193 Cal.Rptr. 422.)

Equitable Power of the Probate Court To Vacate Order

[25] [26] [27] [28] [29] The doctrine of res judicata applies in probate proceedings to bar a party from relitigating a claim that has been finally determined in a prior proceeding.[4] (****840** *Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591, 226 Cal.Rptr. 855 (*Lazzarone*).) However, the probate court has inherent equitable authority to set aside an order or decree when extrinsic factors have deprived a party of a fair adversary hearing. (*Sanders, supra,* 40 Cal.3d 607, 614, 221 Cal.Rptr. 432, 710 P.2d 232; *Estate of Charters* (1956) 46 Cal.2d 227, 234–235, 293 P.2d 778; *Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 18, 193 P.2d 728 (*Jorgensen*).) Courts require a showing of extrinsic fraud or mistake in order to balance the public policy in favor of the finality of judgments with the policy in favor of providing litigants a fair opportunity to present a case. (*Sanders*, *supra*, 40 Cal.3d at p. 614, 221 Cal.Rptr. 432, 710 P.2d 232.)

***664 [30]** The requirements for equitable relief have been articulated by some courts as a three-part test. (*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1069, 202 Cal.Rptr. 116 (*Stevenot*) [extrinsic fraud]; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982, 35 Cal.Rptr.2d 669, 884 P.2d 126 [extrinsic mistake].) In order to set aside a final order based on extrinsic fraud, "the moving party must demonstrate that he or she has a meritorious case, that [they have] a satisfactory excuse for not presenting a defense to the original action and that [they] exercised diligence in seeking to set aside the default once the fraud had been discovered." (*Stevenot*, *supra*, 154 Cal.App.3d at p. 1071, 202 Cal.Rptr. 116.)

A. Extrinsic Fraud

[31] In this case, Hudson's claim that the conservator's account contained misrepresentations of material fact

which amounted to extrinsic fraud is both the basis of his case as well as his excuse for failing to object within the original proceeding. The elements of fraud are misrepresentation, knowledge of falsity, intent to induce reliance on the misrepresentation, justifiable reliance on the misrepresentation, and resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981.) The terms extrinsic fraud and extrinsic mistake have been interpreted broadly, encompassing "almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342, 165 Cal.Rptr. 792, 612 P.2d 882.)

[32] Fraud is extrinsic when a party is prevented from fully participating in the proceeding or deprived of the opportunity to present a claim to the court by the fraudulent conduct of another party, as opposed to the moving party's own negligence. (*Stevenot*, *supra*, 154 Cal.App.3d at p.1068, 202 Cal.Rptr. 116; *City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067, 41 Cal.Rptr.2d 797 (*Cartagena*).) "The clearest examples of extrinsic fraud are cases in which the aggrieved party is kept in ignorance of the proceeding or is in some other way induced not to appear. [Citation.]" (*Sanders*, *supra*, 40 Cal.3d at pp. 614–615, 221 Cal.Rptr. 432, 710 P.2d 232.) Other examples include "concealment of the existence of a community property asset, failure to give ****841** notice of the action to the other party, and convincing the other party not to obtain counsel because the matter will not proceed (and then it does proceed). ([*Stevenot*, *supra*, 154 Cal.App.3d at p. 1069 [202 Cal.Rptr. 116]].)" (*Cartagena*, *supra*, 35 Cal.App.4th at p. 1067, 41 Cal.Rptr.2d 797.)

[33] **[34]** **[35]** Fraud is generally considered intrinsic when a party had notice of the action and an opportunity to present a case, but unreasonably neglected to protect themselves from fraud or mistake involving the merits of the proceeding. (*Stevenot*, *supra*, 154 Cal.App.3d at pp. 1069–1070, 202 Cal.Rptr. 116.) "The public policy underlying the principle of res judicata that there must be an end to litigation ***665** requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. Thus, equitable relief will be denied where it is sought to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case. (*Gale v. Witt* [(1948)] 31 Cal.2d 362, 365 [188 P.2d 755]; *Howard v. Howard* [(1945)] 27 Cal.2d 319, 321 [163 P.2d 439]; *Westphal v. Westphal* [(1942)] 20 Cal.2d 393, 397 [126 P.2d 105]; *Larrabee v. Tracy* [(1943)] 21 Cal.2d 645 [134 P.2d 265]; *Olivera v. Grace* [(1942)] 19 Cal.2d 570, 575 [122 P.2d 564]; *Carr v. Bank of America* [(1938)] 11 Cal.2d 366, 371–373 [79 P.2d 1096]; *Purinton v. Dyson* [(1937)] 8 Cal.2d 322, 325–326 [65 P.2d 777]; *Ringwalt v. Bank of America* [(1935)] 3 Cal.2d 680, 684–685 [45 P.2d 967]; *Caldwell v. Taylor* [(1933)] 218 Cal. 471, 476–479 [23 P.2d 758]; *Tracy v. Muir* [(1907)] 151 Cal. 363, 371 [90 P. 832]; see, Restatement, Judgments, p. 588; 3 Freeman, Judgments (5th ed.), §§ 1233–1235; 3 Pomeroy, Equity Jurisprudence (5th ed.), p. 610.)" (*Jorgensen*, *supra*, 32 Cal.2d at pp. 18–19.)

[36] "The terms 'intrinsic' and 'extrinsic' fraud or mistake are generally accepted as appropriate to describe the two different categories of cases to which these policies of the law apply. [Citation.] They do not constitute, however, a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment. [Citations.] It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case." (*Jorgensen*, *supra*, 32 Cal.2d 13 at p. 19, 193 P.2d 728.)

[37] **[38]** A critical wrinkle in the extrinsic fraud rule is applied to fiduciaries. A party may obtain relief from a judgment when the other party concealed facts in violation of a duty arising from a trust or confidential relationship, even though the facts concerned issues in the prior proceeding. (*Jorgensen, supra,* 32 Cal.2d 13 at p. 20, 193 P.2d 728.) " 'The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to extrinsic fraud rule.' [Citations.] In this state equitable relief has been granted ****842** from final judgments settling the ***666** accounts of guardians, administrators, or executors who withheld

information that would have enabled the beneficiaries to attack the accounts. (*Lataillade v. Orena*, 91 Cal. 565, 576 [27 P. 924]; *Silva v. Santos*, 138 Cal. 536, 541 [71 P. 703]; *Aldrich v. Barton*, 138 Cal. 220, 223 [71 P. 169]; *Simonton v. Los Angeles Trust & Sav. Bank*, 192 Cal. 651, 655, 657 [221 P. 368]; *Morgan v. Asher*, 49 Cal.App. 172, 182 [193 P. 288]; see *Griffith v. Godey*, 113 U.S. 89, 93 [5 S.Ct. 383, 28 L.Ed. 934].)" (*Jorgensen,* at pp. 20–21, 193 P.2d 728.)

[39] "[W]here one is justified in relying, and does in fact rely, upon false representations, his right of action is not destroyed merely because opportunities for examination or means of knowledge were open to him where no legal duty devolved upon him to employ such means of knowledge. [Citations.]" (*Stevens v. Marco* (1956) 147 Cal.App.2d 357, 378–379, 305 P.2d 669.) For example, in *Conservatorship of Coffey* (1986) 186 Cal.App.3d 1431, 1443, 231 Cal.Rptr. 421 (*Coffey*), the court concluded a life insurance beneficiary was not required to oversee the activities of the conservator, scrutinize accountings and detect omissions, warn the conservator or take other action, to receive a benefit that the conservator had a statutory duty to conserve. (*Id.* at p.1443, 231 Cal.Rptr. 421.) "Sound policy considerations require that we reject the imposition of such a duty, for otherwise we would encourage the conservator who had acted with less than ordinary care and diligence to hide his failings by nondisclosure, hoping to eliminate or lessen his liability by the beneficiary's failure to detect the omission." (*Ibid*.)

[40] "The courts are particularly likely to grant relief from a judgment where there has been a violation of a special or fiduciary relationship. [Citation.] The commentators have observed that breach of a fiduciary duty may warrant setting aside the judgment even though the same conduct in a nonfiduciary relationship would not be considered extrinsic fraud. (See Freeman, Judgments, *supra,* § 1235, pp. 2575–2576; Moore, Moore's Federal Practice (2d ed. 1948) [¶] 60.37.[1], p. 614; Comment, *Seeking More Equitable Relief From Fraudulent Judgments: Abolishing the Extrinsic-Intrinsic Distinction* (1981) 12 Pacific L.J. 1013, citing above at p. 1021, fns. 65–66.)" (*Sanders*, *supra*, 40 Cal.3d at p. 615, 221 Cal.Rptr. 432, 710 P.2d 232, fn. omitted.) " ' "Where there exists a relationship of trust and confidence it is the duty of one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts is a fraud." ' [Citations.] ' "Where there is [such] a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action." ' [Citations.]" (*Id*. at p. 616, 221 Cal.Rptr. 432, 710 P.2d 232.)

[41] Some legal authorities characterize a fiduciary's failure to disclose material facts as a second form of extrinsic fraud (***667** *Lazzarone*, *supra*, 181 Cal.App.3d at pp. 596–597, 226 Cal.Rptr. 855), while others describe it as an exception to the requirement of extrinsic fraud (*Jorgensen, supra,* 32 Cal.2d 13 at p. 19, 193 P.2d 728). It may also be explained by the balance of public policy considerations: when a judgment is obtained through a fiduciary's violation of the duty of disclosure to the moving party, the policy to provide a fair adversary proceeding outweighs the policy in favor of finality, and the moving party's reasonable reliance on the disclosures of a fiduciary is considered a satisfactory excuse for not presenting a defense in a prior proceeding.

****843 B. Section 2103**

The preclusive effect of probate court orders governing guardians and conservators is established by statute. Section 2103 provides for finality, but incorporates the exception for extrinsic fraud as it is applied to fiduciaries: "(a) When a judgment or order made pursuant to this division becomes final, it releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, 'order' includes an order settling an account of the guardian or conservator, whether an intermediate or final account. [¶] (b) This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. For the purposes of this subdivision, misrepresentation includes, but is not limited to, the omission of a material fact." (Prob. Code, § 2103.)

C. Duty of Diligence To Discover Misrepresentations of Material Fact

[42] **[43]** Generally, a party has a duty to take advantage of discovery procedures to fully investigate the facts prior to entry of judgment. (*Stevenot*, *supra*, 154 Cal.App.3d at pp. 1069–1070, 202 Cal.Rptr. 116.) To set aside a judgment based on "false facts" when the fraud was part of the proceeding itself, a party must show "such facts could not reasonably have been discovered prior to entry of

judgment." (*Cartagena, supra,* 35 Cal.App.4th 1061, 1068, 41 Cal.Rptr.2d 797.)

[44] **[45]** A conservator's presentation of an accounting to the court for approval, however, is not an adversarial proceeding between parties. The conservator is required to account and disclose material information to the conservatee. There is a distinction made "between cases where a plaintiff is under a duty to inquire and those in which he has no such duty until he has notice of facts sufficient to arouse the suspicions of a reasonable man." (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 563, 305 P.2d 20 (*Bennett*).) A plaintiff who has no duty to inquire because of a fiduciary relationship does not need to show that he or she could not have discovered the facts earlier with a diligent inquiry. (*Ibid.*)

***668** **[46]** **[47]** **[48]** **[49]** Once a party actually becomes aware of facts which would make a reasonably prudent person suspicious of wrongdoing by a fiduciary, the party is put on inquiry notice and has a duty to investigate. (*Bennett, supra,* 47 Cal.2d at p. 563; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1394 [124 Cal. Rptr. 3d 271].) At that point, "[a] person with 'actual notice of circumstances sufficient to put a prudent man upon inquiry' is deemed to have constructive notice of all facts that a reasonable inquiry would disclose. [Citations.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319, 64 Cal.Rptr.3d 9.) It is significant, however, that when a fiduciary relationship exists between the parties, facts which would ordinarily require investigation may not excite suspicion and less diligence is required. (*Bennett*, *supra*, at pp. 559–560, 305 P.2d 20.) Therefore, a conservator may show that representations of fact in the account were so obviously false that the conservatee was not justified in relying on them. If the conservatee was not actually aware of facts prior to entry of judgment from which a reasonable person would have suspected wrongdoing, however, the conservatee satisfies the duty of diligence by showing the action to set aside ****844** the judgment was filed within the limitations period, as measured from the party's actual discovery of formerly unknown information. (*Id.* at p. 563, 305 P.2d 20.) [5]

D. *Knox*

As he did in the trial court, Foster relies heavily on the legal authority of *Knox*, *supra*, 205 Cal.App.4th at page 428, 140 Cal.Rptr.3d 569, for the proposition that a party seeking to set aside a judgment for extrinsic fraud based on misrepresentations of fact must show the party could not reasonably have discovered the misrepresentations prior to entry of judgment. To the extent that *Knox* may be interpreted to mean that a conservatee with no actual notice of facts that ***669** suggest wrongdoing has a duty to conduct an investigation to verify the facts in a conservator's account prior to entry of judgment, we respectfully disagree.

In *Knox*, a successor conservator brought an action against former conservator Lawrence A. Dean II for several causes of action, including elder financial abuse. (*Knox*, *supra*, 205 Cal.App.4th at p.422, 140 Cal.Rptr.3d 569.) Dean asserted in a summary judgment motion that the probate court orders approving his accountings were conclusive of the matters contained in them. (*Ibid.*) The *Knox* court considered whether the successor's claims were precluded by section 2103, rather than as here whether to exercise the court's equitable power to set aside the orders approving the accounts, but the same principles of extrinsic fraud have been applied in both contexts. (*Knox*, at pp. 425–426.)

Dean stated in his first accounting that he hired "Girlie Kirbac" as an in-home caregiver for the conservatee and paid her approximately $4,200 for her services. (*Knox*, *supra*, 205 Cal.App.4th at p. 428, 140 Cal.Rptr.3d 569.) In opposition to summary judgment, the successor conservator provided a declaration from Kirbac stating that she had never met Dean and had not provided any services for the conservatee. (*Ibid.*)

The *Knox* court expressed concern about the accuracy of Dean's representations in the first accounting, but the court concluded that the successor conservator "failed to explain why the first accounting did not provide her sufficient information to investigate a fraud claim at the time. In order to establish the second type of extrinsic fraud, ' "it is insufficient for a party to come into court and simply assert that the judgment was premised on false facts. The party must show that such facts could ****845** not reasonably have been discovered prior to the entry of judgment." [(*Cartagena*, *supra*, 35 Cal.App.4th at pp. 1067–1068 [41 Cal.Rptr.2d 797])]' (*In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1295 [85 Cal.Rptr.2d 713].) Thus, the fraud, if any, was intrinsic rather than extrinsic (see *Lazzarone*, *supra*, 181 Cal.App.3d at pp. 588–589 [226 Cal.Rptr. 855]) and does not provide an exception under Probate Code section 2103, subdivision (b) to the preclusive effect of the order approving the first accounting." (*Knox*, *supra*, 205 Cal.App.4th at p. 428, 140 Cal.Rptr.3d 569.)

[50] **[51]** We conclude *Knox* misinterpreted the requirements for establishing extrinsic fraud by a fiduciary that are incorporated in section 2103. Section 2103 clearly states that an order does not operate to release a guardian or conservator when the order is obtained by misrepresentation of material fact in the petition or account. Within the context of a nonfiduciary relationship, misrepresentations of material fact presented in a judicial proceeding are considered intrinsic fraud, but misrepresentations of material fact by a fiduciary constitute extrinsic fraud. Where a conservator has misrepresented a ***670** material fact in an account approved by the probate court, a party bringing a subsequent action on behalf of the conservatee does not need to show that the misrepresentation could not have been discovered prior to entry of the order approving the account. (See *Bennett, supra,* 47 Cal.2d at p. 563, 305 P.2d 20.)

The *Knox* court relied on *In re Margarita D.*, *supra*, 72 Cal.App.4th at page 1295, 85 Cal.Rptr.2d 713, for the proposition that a party must show "false facts" could not reasonably have been discovered prior to the entry of judgment. (*Knox*, *supra*, 205 Cal.App.4th at p. 428, 140 Cal.Rptr.3d 569.) *In re Margarita D.*, however, concerned a motion to set aside a paternity judgment in a nonfiduciary context. (*In re Margarita D.*, *supra,* 72 Cal.App.4th at p. 1293, 85 Cal.Rptr.2d 713.) *In re Margarita D.* had in turn relied on *Cartagena* which also concerned a paternity judgment and did not involve any statement of fact by a fiduciary. (*Id.* at p. 1295, 85 Cal.Rptr.2d 713; *Cartagena*, *supra*, 35 Cal.App.4th at pp. 1066–1068, 41 Cal.Rptr.2d 797.)

The *Knox* court's interpretation of section 2103 incorrectly imposes on fiduciary relationships the discovery obligation that applies in nonfiduciary relationships, thereby substantially limiting the protection of section 2103, subdivision (b). We disagree with *Knox* to the extent it suggests that a conservatee who is not aware of facts suggesting wrongdoing must show the misrepresentations of material fact in a fiduciary's account could not reasonably have been discovered prior to the entry of judgment.

Application

In denying Hudson's motion to vacate, the probate court found that Hudson failed to sufficiently describe his knowledge of reimbursements, and as a result, he had not shown that he was unaware of the defects in the final account at the time of its approval.

[52] The probate court's ruling reflects the incorrect legal standard provided in *Knox*. The court improperly placed the burden on Hudson to show that he could not have discovered the misrepresentations of material fact in the final account prior to entry of the order. To the extent the court found Hudson was aware of the defects in the final account at the time it was made, the finding is not supported by substantial evidence. The probate court focused on Hudson's knowledge of reimbursements, but the entries at issue did not concern reimbursements. The final account included representations that 28 specific ****846** checks were paid directly to Hudson's creditors, when in fact those checks were paid to Foster. In response to Hudson's motion to set aside the final account, Foster's explanation was that these checks were reimbursements that were poorly presented in the account as direct payments to creditors, but Hudson showed that at least two of the checks could not even be characterized as mislabeled reimbursements because the creditors did not receive any payment from Foster.

***671** **[53]** To the extent the probate court further found that Hudson did not act with reasonable diligence to set aside the account based on information that he should have known, the court's ruling did not apply the law governing the diligence of a conservatee asserting extrinsic fraud against his fiduciary. Rather, the court's rational again reflects the incorrect statement of the law made in *Knox*. The court placed a burden on Hudson to scrutinize Foster's account and faulted Hudson for delay in seeking relief based on what he "should have known." We have clarified that Hudson was entitled to rely on the disclosures made by Foster as his conservator and confidant, including after approval of the final account. Hudson's mere access to information did not trigger an obligation to comb through the records to verify the truth of Foster's representations. A correct inquiry into whether Hudson acted diligently would require the court first to determine when Hudson actually discovered formerly unknown information sufficient to put a reasonable person on notice of fraud. We therefore remand the matter to provide the probate court an opportunity to determine whether Hudson has met the requirements for relief, and if so, whether to exercise its discretion to set aside the final account based on a correct statement of the existing law with respect to fiduciaries.

DISPOSITION

The order denying the motion to vacate the order approving the conservator's final account is reversed and the matter is remanded for the probate court to exercise its discretion. Appellant Nigel Hudson is awarded his costs on appeal.

BAKER, Acting P. J., and KIM, J., concurred.

Respondent's petition for review by the Supreme Court was denied December 15, 2021, S271370.

All Citations

68 Cal.App.5th 640, 283 Cal.Rptr.3d 822, 21 Cal. Daily Op. Serv. 9263, 2021 Daily Journal D.A.R. 9344

Footnotes

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

2 On February 13, 2012, Hudson filed a petition for dissolution of his marriage to Cynthia Kendall. A final judgment was entered in the dissolution proceedings on April 3, 2013. Kendall, who was unrepresented, waived spousal support and any interest in the proceeds of the civil action. She received payment of $10,000 pursuant to the dissolution decree.

3 Hudson's corrected motion to take additional evidence on appeal, which was filed with this court on March 22, 2021, is denied. The evidence was not before the trial court and is not necessary to resolve the issues on appeal.

4 Courts have often used “res judicata” to refer to both claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823–824, 189 Cal.Rptr.3d 809, 352 P.3d 378.) “Claim preclusion, the ‘ “ ‘primary aspect’ ” ’ of res judicata, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. [Citation.] Issue preclusion, the ‘ “ ‘secondary aspect’ ” ’ historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit. [Citation.]” (*Id*. at p. 824, 189 Cal.Rptr.3d 809, 352 P.3d 378.) “To avoid future confusion, we will follow the example of other courts and use the terms ‘claim preclusion’ to describe the primary aspect of the res judicata doctrine and ‘issue preclusion’ to encompass the notion of collateral estoppel. [Citation.]” (*Ibid*.)

5 Several authorities hold that an equitable action to set aside a judgment obtained through extrinsic fraud or mistake is governed by the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (d), including its discovery rule. (*Lightner Mining Co. v. Lane* (1911) 161 Cal. 689, 702, 120 P. 771; *Lataillade v. Orena*, *supra*, 91 Cal. at pp. 577–578, 27 P. 924; *Turner v. Milstein* (1951) 103 Cal.App.2d 651, 659, 230 P.2d 25; *Scott v. Dilks* (1941) 47 Cal.App.2d 207, 209–210, 117 P.2d 700; *Zastrow v. Zastrow* (1976) 61 Cal.App.3d 710, 714–715, 132 Cal.Rptr. 536 [the weight of California case law applies statutory limitation periods in equitable actions to vacate a judgment].) Although some courts have stated that an equitable action to set aside a judgment based on extrinsic fraud or mistake is not subject to statutory time limits (*Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 570–571, 123 Cal.Rptr.3d 285; *Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 181, 79 Cal.Rptr. 563), even under this view, courts employ the statute of limitations by analogy to measure laches or unreasonable delay in an action to set aside a judgment. (*Vai v. Bank of America* (1961) 56 Cal.2d 329, 343, 15 Cal.Rptr. 71, 364 P.2d 247; *Protopappas v. Protopappas* (1963) 213 Cal.App.2d 659, 665, 28 Cal.Rptr. 884; *Barritt v. Barritt* (1933) 132 Cal.App. 538, 544, 23 P.2d 54.) An equitable action to set aside a judgment is also subject to a defense of laches. (*Stevenot*, *supra*, 154 Cal.App.3d at p. 1071, 202 Cal.Rptr. 116.)

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67 Cal.App.5th 370
Court of Appeal, Second District, Division 6, California.

CONSERVATORSHIP OF the Person and Estate of Norma FARRANT.
Angelique Friend, as Conservator, etc., Petitioner and Respondent,
v.
Duane Farrant, Objector and Appellant.

2d Civil No. B307338
|
Filed 8/2/2021

Synopsis

Background: Conservator of estate filed petition to compel attorney-in-fact to account for his actions on behalf of conservatee regarding her pension checks and rental income. After probate court ordered attorney-in-fact to do a formal accounting, warned attorney-in-fact after numerous failures to file the accounting, and conservator objected to the final accounting, the Superior Court, Ventura County, No. 56-2016-00483787-PR-CP-OXN, Roger L. Lund, J., ordered attorney-in-fact to pay $63,448.90 for misappropriation of conservatee's assets, surcharged in the same amount attorney-in-fact's share of interpled funds, and imposed sanctions of $121,000 for failing to timely file an accounting of his actions relating to conservatee's estate. Attorney-in-fact appealed.

Holdings: The Court of Appeal, Yegan, J., held that:

[1] attorney-in-fact owed a fiduciary duty to conservatee's estate and thus court's order compelling him to account for pension checks and rental income was not an abuse of discretion, and

[2] attorney-in-fact failed to demonstrate probate court abused its discretion in denying request for evidentiary hearing.

Affirmed.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (14)

[1] **Account** Nature and grounds of right to an account

A probate court generally has discretion to grant or deny a petition for an accounting.

2 Cases that cite this headnote

[2] **Courts** Review and vacation of proceedings

Probate court's decision to grant or deny a petition for an accounting is reviewed for abuse of discretion.

1 Case that cites this headnote

[3] **Courts** Abuse of discretion in general

Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered.

2 Cases that cite this headnote

[4] **Appeal and Error** Abuse of discretion

The burden is on the party complaining to establish an abuse of discretion.

2 Cases that cite this headnote

[5] **Mental Health** Duty to account

Attorney-in-fact owed a fiduciary duty to conservatee's estate, and thus, probate court's order compelling attorney-in-fact to account for the pension checks and rental income was not an abuse of discretion; attorney-in-fact said he had control over conservatee's pension checks and her share of the rental income and was obliged to surrender the payments to the conservatorship estate, attorney-in-fact received his appointment under a durable power of attorney and became effective upon a determination that conservatee was incapacitated, physician opined that conservatee was incapacitated, and it was reasonable for

probate court to draw inference that in exercising control over conservatee's pension checks and half-share of the rental income, attorney-in-fact was acting under durable power of attorney. **Cal**. Prob. Code § 39.

[6] **Account** Fiduciary relations

A fiduciary relationship between the parties is not required to state a cause of action for accounting; all that is required is that some relationship exists that requires an accounting.

1 Case that cites this headnote
More cases on this issue

[7] **Account** Nature and grounds of right to an account

The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender.

1 Case that cites this headnote

[8] **Mental Health** Review

Attorney-in-fact forfeited for appellate review claim the probate court abused its discretion in basing its decision to order an accounting against attorney-in-fact for conservatee's pension checks and rental income on affidavits and declarations against attorney-in-fact's objection, where attorney-in-fact did not object to the probate court's consideration of affidavits and declarations. **Cal**. Prob. Code § 1022.

[9] **Affidavits** Use in evidence

In probate matters affidavits may not be used in evidence unless permitted by statute.

1 Case that cites this headnote

[10] **Courts** Procedure in General

When challenged in a lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing. **Cal**. Prob. Code § 1022.

3 Cases that cite this headnote

[11] **Mental Health** Hearing or reference, and determination

Attorney-in-fact failed to demonstrate the probate court abused its discretion in denying his request for an evidentiary hearing in ordering attorney-in-fact to account for conservatee's pension checks and rental income; attorney-in-fact requested an evidentiary hearing without specifying the factual issues he intended to litigate at the hearing and without explaining why a hearing was necessary, and attorney-in-fact did not identify the witnesses who would testify at the evidentiary hearing, nor did he make an offer of proof as to the substance of the evidence he would present at the hearing.

1 Case that cites this headnote

[12] **Mental Health** Scope of review and trial de novo

Attorney-in-fact failed to demonstrate that he was prejudiced by the probate court's alleged abuse of discretion in ordering attorney-in-fact to account for conservatee's pension checks and rental income, where attorney-in-fact did not make an offer of proof in the probate court, and attorney-in-fact did not discuss the issue of prejudice. **Cal**. Const. art. 6, § 13; **Cal**. Civ. Proc. Code § 475.

[13] **Appeal and Error** Discretion of lower court; abuse of discretion

An abuse of discretion results in reversible error only if it is prejudicial. **Cal**. Const. art. 6, § 13; **Cal**. Civ. Proc. Code § 475.

[14] **Appeal and Error** Abuse of discretion

Burden is on the appellant to show prejudice, for purposes of claim that an abuse of discretion results in reversible error.

Witkin Library Reference: 15 Witkin, Summary of Cal. Law (11th ed. 2017) Wills and Probate, § 901 [Attorney-in-Fact; In General.]

1 Case that cites this headnote

****175** Superior Court County of Ventura, Roger L. Lund, Judge (Super. Ct. No. 56-2016-00483787-PR-CP-OXN) (Ventura County)

Attorneys and Law Firms

Law Offices of Levi Reuben Uku and Levi Reuben Uku, for Objector and Appellant.

Law Offices of David A. Esquibias, David Esquibias, Westlake Village, and Sara J. McLemen, for Petitioner and Respondent.

Opinion

YEGAN, J.

372** This case serves as a textbook example of how a fiduciary should not proceed. Appellant continues to demonstrate that he has no concept of his duty to his elderly and incapacitated mother and her conservatorship estate. This is Duane **Farrant's** third appeal concerning the conservatorship of the person and estate of his mother, Norma **Farrant** (Norma or conservatee). (See *Conservatorship of **Farrant, (Aug. 22, 2019, B289203), 2019 WL 3955860 [nonpub. opn.] and Conservatorship of **Farrant** (Feb. 22, 2021, B306501), 2021 WL 671311 [nonpub. opn.].)[1] He appeals from orders requiring ****176** him to pay $63,448.90 for ***373** misappropriation of Norma's assets, surcharging in the same amount appellant's share of interpled funds, and imposing sanctions of $121,000 for failing to timely file an accounting of his actions relating to Norma's estate. Appellant contends that the probate court erroneously (1) ordered him to render an accounting because he did not owe a fiduciary duty to the estate, (2) based its decision on affidavits and declarations, and (3) denied his request for an evidentiary hearing. We affirm.

Factual and Procedural Background

Norma was born in 1926. In 2008 she executed a durable power of attorney granting appellant, as her attorney-in-fact, broad powers to manage her property. The power of attorney would become effective upon a determination that Norma was " 'incapacitated.' "

In September 2015, when Norma was living in Missouri, a Missouri court ordered appellant to account for all transactions conducted by him on behalf of Norma during the one-year period beginning on September 21, 2014. In 2016 Norma moved back to **California**.

In January 2017 Angelique **Friend**, respondent, was appointed conservator of Norma's person and estate. In November 2017 Diana **Farrant** (Diana), Norma's daughter, filed a petition in the Ventura County Superior Court to compel appellant "to account for his actions on behalf of Norma **Farrant** for the period September 21, 2014, to date ...." As an exhibit to her complaint, Diana attached proof that a physician had examined Norma on June 12, 2015. He opined that Norma is "incapacitated" because "she is unable (completely & totally) to receive & evaluate information or to communicate decisions such that she lacks capacity to meet essential requirements for food, clothing, shelter and safety." She was living in a skilled nursing facility.

In February of 2018, the probate court conducted a hearing on Diana's petition. Diana's counsel said his client was "just piggybacking on the Missouri order" that appellant account for the one-year period beginning on September 21, 2014. He asserted that appellant had "never complied with the Missouri order."

At the hearing appellant appeared in propria persona. He told the court that on September 21, 2014, he had control over Norma's pension checks and her share of the rental income from the Newbury Park property. (See fn. 1, *ante*, at p. 372.) The probate court ordered appellant "to do a formal account -- for ***374** the period September 21, 2014, to January 31, 2018 -- ... for any pension checks you received on behalf of [Norma] and any rental monies you received on [her] behalf ...." The accounting was due on or before March 30, 2018.

In a minute order dated July 10, 2018, the court noted that appellant had failed to file the accounting. The court ordered appellant "to appear in person or by video court call on October 16, 2018, ... and show cause for failure to file his account as ordered."

At the hearing on October 16, 2018, appellant was not present in person or by video court call. His attorney, Mr. Dickens, appeared in court on his behalf. The probate court issued orders to show cause why sanctions should not be imposed against appellant for failing to appear personally or by video court call and for failing to file an accounting. It ordered appellant to file the accounting on or before December 14, 2018. The court warned appellant's counsel: "Now, make no mistake, ****177** Mr. Dickens, the hammer is coming down very hard if I don't get a good accounting. There are no more excuses. There is no more delay.... This is the last ... continuance that he's going to get to get this accounting filed ...."

On January 29, 2019, the probate court conducted a hearing on the orders to show cause. Appellant and his counsel personally appeared in court. Counsel said the accounting had not been prepared. Counsel explained: "[M]y client ... made diligent efforts ... trying to get the bank statements and he was unsuccessful, but we will subpoena those records and I will get the accounting in if you give us a reasonable amount of time." "I believe there was a flood, a lot of [appellant's] records were damaged, and so that's why we're having to subpoena them [from the banks]."

Counsel for respondent (conservator **Friend**) protested: "[T]his is the fourth or fifth time we have been here since the initial order. Each time it's the same argument.... We have racked up over $100,000 in fees ..., all needlessly." The court responded: "The Court ... has heard about every excuse in the book as to why [the accounting] hasn't been provided.... I am left really with no confidence that this will actually occur, despite Counsel's representations to the contrary. [¶] The Court does find it in the best interest of this estate to impose sanctions [against appellant] of $1,000 per day until the accounting is filed ...."

On May 31, 2019, appellant filed an accounting.[2] It showed that he had received two payments of rental income for October and November 2014. ***375** Each payment was $2,575. For the period from September 16, 2014, through November 10, 2017, appellant listed disbursements totaling $44,322.05 for expenses he had incurred in maintaining the Newbury Park property. The accounting mentioned nothing about Norma's pension income. The accounting included bank statements on which most of the information had been redacted.

At a hearing on September 27, 2019, appellant appeared with new counsel (Mr. Uku). The probate court granted counsel's request to file an amended accounting on or before December 20, 2019. The due date was later extended to January 30, 2020. The court found that appellant had "failed to file an Amended Account."

In June 2020 respondent filed an objection to appellant's accounting. After hearings conducted in July 2020, the probate court found that: (1) appellant "was in control of [Norma's] pension income in the amount of $35,656.76, and failed to report said income in his account, and breached his fiduciary duty by comingling funds and self-dealing by using them for his own purposes"; (2) for the Newbury Park property, appellant received rental income of $101,150, one-half of which ($50,575) belonged to Norma since she owned a half-interest in the property; and (3) expenses for the Newbury Park property totaled $45,565.72, one-half of which ($22,782.86) was allocable to Norma's half-interest in the property. Therefore, the amount owed by appellant to Norma was $63,448.90 ($35,656.76 + $50,575 - $22,782.86 = $63,448.90). The court ordered appellant to pay this amount to "the Conservatorship Estate of Norma **Farrant**." The court also ordered that appellant's "share of the [proceeds from the] sale of the [Newbury Park] property ... is hereby surcharged ... $63,448.90." Pursuant to an interpleader action, the sale proceeds had been deposited ****178** with the court. Counsel for respondent claimed that appellant had "already ... received $150,000 out of the interple[ ]d funds."

Finally, the court ordered appellant to pay sanctions totaling $121,000 for the 121-day period from January 29, 2019, to May 31, 2019, when appellant filed his accounting. The court directed: "This sanctioned amount shall be immediately paid by [appellant] to Angelique **Friend**, Conservator of the Estate of Norma **Farrant**, and shall be a judgement against [appellant], until paid in full."[3]

***376** *Claim That Probate Court Erroneously Ordered Accounting Because Appellant Was Not a Fiduciary*

[1] **[2]** **[3]** **[4]** A probate court generally has discretion to grant or deny a petition for an accounting, and the court's decision is reviewed for abuse of discretion. (See *Christie v. Kimball* (2012) 202 Cal.App.4th 1407, 1413, 136 Cal.Rptr.3d 516 ["Determining the need for an accounting is a matter within the trial court's sound discretion"]; *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517, 520, 50 Cal.Rptr.3d

538.) " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion ....' " (*Denham v. Superior Court* (1970) 2 **Cal**.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193 (*Denham*).)

[5] When the probate court ordered appellant to account, the court said, "[I]t's a standard, when there's a fiduciary, to do a formal account." Appellant claims that the probate court abused its discretion and acted "in excess of [its] jurisdiction" because he did not owe a fiduciary duty to conservatee's estate. He is wrong.

[6] **[7]** First, "a fiduciary relationship between the parties is not required to state a cause of action for accounting. All that is required is that some relationship exists that requires an accounting. [Citation.] The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179-180, 92 Cal.Rptr.3d 696.) In open court appellant said that on September 21, 2014, he had control over Norma's pension checks and her share of the rental income from the Newbury Park property. Appellant was obliged to surrender these payments to the conservatorship estate. Thus, there was a special relationship between appellant and Norma that warranted the order compelling appellant to account for the pension checks and rental income.

Second, the court did not err because there was a fiduciary relationship between appellant and Norma. Probate Code section 39 provides: " 'Fiduciary' means ... attorney-in-fact under a power of attorney ...." In 2008 Norma appointed appellant as her attorney-in-fact under a durable power of attorney, the appointment to become ****179** effective upon a determination that she was incapacitated. In January 2009 appellant accepted the appointment in writing. In June 2015 a physician opined that Norma was incapacitated. ***377** Respondent's counsel told the court, "We do know that [appellant] signed ... a deed on the [Newbury Park] property using that power of attorney, because that's recorded, but we don't know what else he did with it." It was reasonable for the probate court to draw the inference that, in exercising control over Norma's pension checks and half-share of the rental income, appellant was purporting to act as her attorney-in-fact under the durable power of attorney. The minute order for the hearing conducted on February 20, 2018, states, "The court grants the petition ordering [appellant] to file a statutorily compliant accounting for his activities as actual or ostensible attorney-in-fact for the [Newbury Park] real property ...."

Appellant Forfeited Claim That the Probate Court's Order Was Based on Affidavits and Declarations

[8] **[9]** **[10]** For the first time on appeal, appellant contends that the probate court "abused its discretion and committed reversible error in ... basing its decision on affidavits and declaration against appellant's objection." (Boldface & capitalization omitted.) "It has long been the rule that in probate matters 'affidavits may not be used in evidence unless permitted by statute....' " (*Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1308-1309, 78 Cal.Rptr.3d 435.) "[T]he Probate Code limits the use of affidavits to 'uncontested proceeding[s].' " (*Id*. at p. 1309, 78 Cal.Rptr.3d 435.) "Consequently, 'when challenged in a lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing....' " (*Ibid;* see also Prob. Code § 1022.)

The probate proceeding here was contested. But appellant did not object to the probate court's consideration of affidavits and declarations. By failing to object, appellant forfeited the issue. The probate court properly considered the affidavits and declarations. (*Estate of Fraysher* (1956) 47 **Cal**.2d 131, 135, 301 P.2d 848 ["evidence which is admitted in the trial court without objection, although incompetent, should be considered in support of that court's action [citations], and objection may not be first raised at the appellate level"].)

The Probate Court Properly Denied Appellant's Request for an Evidentiary Hearing

Appellant argues that the probate court "abused its discretion and committed reversible error in denying [his] request for evidentiary hearing." (Boldface & capitalization omitted.) The standard of review is abuse of discretion. (See *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676, 99 Cal.Rptr.3d 246.)

***378** **[11]** Appellant has failed to show an abuse of discretion. (See *Denham*, *supra*, 2 **Cal**.3d at p. 566, 86 Cal.Rptr. 65, 468 P.2d 193.) Instead of specifying the factual issues he intended to litigate and the relevant evidence

(testimony and exhibits) he would produce at the hearing, appellant's counsel made vague representations. [4]

****180** In the prior appeal decided in February 2021, *Conservatorship of* ***Farrant*** B306501, *supra*, appellant contended that the trial court had abused its discretion in denying his request for an evidentiary hearing concerning the disputed ownership of the Newbury Park property. We rejected appellant's contention for the same reasons that we reject his contention in the present appeal. We stated: "[A]ppellant ... requested an evidentiary hearing without specifying the factual issues he intended to litigate at the hearing and without explaining why a hearing was necessary.... [¶] Furthermore, appellant did not identify the witnesses who would testify at the evidentiary hearing, nor did he make an offer of proof as to the substance of the evidence he would present at the hearing." (*Ibid.*, slip opn. at pp. 8-9.)

Appellant Has Not Shown Prejudice

[12] **[13]** **[14]** "[A]n abuse of discretion results in reversible error only if it is *prejudicial*." (*York v. City of Los Angeles* (2019) 33 Cal.App.5th 1178, 1190, 245 Cal.Rptr.3d 731; see **Cal**. Const., art. VI, § 13; Code Civ. Proc., § 475.) The burden is on the appellant to show prejudice. (*Pool v. City of Oakland* (1986) 42 **Cal**.3d 1051, 1069, 232 Cal.Rptr. 528, 728 P.2d 1163.) An assessment of prejudice cannot be made here because appellant did not make an offer of proof in the probate court. (See *People v. Anderson* (2001) 25 **Cal**.4th 543, 580, 106 Cal.Rptr.2d 575, 22 P.3d 347 [rule requiring offer of proof in the trial court (Evid. Code, § 354, subd. (a)) "is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice"]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282, 88 Cal.Rptr.3d 186 ["the failure to ***379** make an adequate offer of proof in the court below ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence"].) Appellant does not discuss the issue of prejudice. Accordingly, appellant has failed to carry his burden of showing that the alleged abuse of discretion prejudiced him.

New Claims in Appellant's Reply Brief

Appellant makes two new claims in his reply brief. First, appellant claims that, because the Probate Court awarded sanctions pursuant to Code of Civil Procedure section 177.5, the amount of sanctions was limited to $1,500. Section 177.5 provides, "A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, *payable to the court*, for any violation of a lawful court order by a person, done without good cause or substantial justification." (Italics added.)

The probate court did not impose section 177.5 sanctions payable to the court. It ordered that sanctions be payable to the conservatorship estate. (See *Padron v. Watchtower Bible & Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1264, 225 Cal.Rptr.3d 81 [court upheld ****181** award of sanctions at rate of $4,000 per day for refusal to comply with discovery order where sanctioned party "abused the litigation process and has shown little respect for the superior court's authority"].)

The second new claim is that the probate court's order imposing sanctions violated rule 2.30 of the **California** Rules of Court (rule 2.30). Appellant's claim lacks merit. Rule 2.30 is inapplicable. It permits sanctions to be imposed for violations of "the rules in the **California** Rules of Court ...." (Rule 2.30(a); see also rule 2.30(b).) Appellant was not sanctioned for violating a rule of the **California** Rules of Court. He was sanctioned for failing to prepare and file an accounting in violation of the probate court's express order.

Disposition

The orders appealed from are affirmed. Respondent shall recover her costs on appeal.

Gilbert, P. J. and Perren, J. concurred.

All Citations

67 Cal.App.5th 370, 282 Cal.Rptr.3d 173, 21 Cal. Daily Op. Serv. 7914, 2021 Daily Journal D.A.R. 7964

Footnotes

1 In the first appeal appellant appealed from an order directing the sale of a residence in Newbury Park (the Newbury Park property). We dismissed the appeal as moot because the property had already been sold. In the second appeal we affirmed an order voiding a deed in which appellant's mother had purportedly quitclaimed the Newbury Park property to him before it was sold.

2 This was four years after he had been ordered to file an accounting in Missouri in 2015.

3 On January 29, 2019, the probate court ordered sanctions at the rate of $1,000 per day until the accounting was filed. This was fair warning. Nevertheless, appellant contends: “[T]he order imposing the $1,000 daily sanctions for failure to file accounting should be set aside for violation of the appellant's due process rights because the Notice of the Ruling of the said order” was not filed until a week later. This contention borders on being ridiculous. Appellant has not shown how the one-week filing delay prejudiced him. Appellant, not the courts, engaged in lengthy and unexplained delay. Appellant is fortunate that he was not the subject of contempt proceedings and/or referral to the district attorney's office for financial elder abuse investigation.

4 Counsel said: “[A]lmost all of the issues raised by the OSC would dissipate through an evidentiary hearing of the accounting where my client would take this time and explain what happened.” “[A]ll we are asking for is for a hearing on these issues raised by the [court's] tentative [ruling] and ... what is on calendar today. We believe that if there's a full evidentiary hearing, the Court may change its mind, and the result would be different.” “I believe that my client wants an opportunity to be heard. That is his instruction. He wants to address the Court then.... He wants ... testimony taken.... And he believes that you have a fairer shape if he comes to court and the Court examines him in person and to correct some of this notions that he believes the Court now has them.” “[H]e wants to be able to demonstrate to the Court that he cooperated with counsel. He did what he could in good faith. And he believes that his credibilities are at issue, and he believes that that can be righted with an evidentiary hearing. [¶] ... And he asked me to clear with the Court to hear him out in person.... [¶] ... [J]ust for fairness reasons, let's give him his day in court.” “[H]e believes that if the Court give[s] him an opportunity to address the Court and make additional inquiry contemporaneously, ... he would come out better, and the sanction at least could be reduced.”

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Roberts v. Fearey, Or.App., September 15, 1999

16 Cal.4th 1124
Supreme Court of California.

Roger D. MOELLER, Petitioner,
v.
SUPERIOR COURT of Los Angeles County, Respondent.
SANWA BANK, Real Party in Interest.

No. S054624.
|
Dec. 4, 1997.

Synopsis

Successor trustee of trust sought writ of mandate after the Superior Court, Los Angeles County, No. BP029610, Robert M. Letteau, J., denied motion to compel discovery from predecessor trustee based on attorney-client privilege. After issuing alternative writ and suspending proceedings, the Court of Appeal, Croskey, Acting P.J., 53 Cal.Rptr.2d 222, issued writ. Predecessor trustee's petition for review was granted, and the Supreme Court, Werdegar, J., held that power to assert attorney-client privilege with respect to confidential communications predecessor trustee had with attorney on matters concerning trust administration passed from predecessor trustee to successor upon successor's assumption of office of trustee.

Affirmed.

Chin, J., dissented and filed opinion in which Baxter and Brown, JJ., joined.

West Headnotes (15)

[1] Privileged Communications and Confidentiality Trustees, guardians, and administrators; pension plans

Trustee generally has power to assert attorney-client privilege to prevent disclosure of confidential communications between trustee and attorney consulted on behalf of trust. West's Ann.Cal.Evid.Code § 954.

13 Cases that cite this headnote

[2] Privileged Communications and Confidentiality Trustees, guardians, and administrators; pension plans

Since trust instrument bestowed on trustee all powers the law conferred upon trustees and Probate Code implicitly authorized trustee to become attorney's client and to claim attorney-client privilege by allowing trustee to hire attorney to advise or assist trustee in performance of administrative duties, when trustee secured advice of attorney, trustee became attorney's client and acquired right to claim attorney-client privilege with regard to communications made in confidence during course of attorney-client relationship. West's Ann.Cal.Evid.Code § 954; West's Ann.Cal.Prob.Code § 16247.

26 Cases that cite this headnote

[3] Privileged Communications and Confidentiality Relation of Attorney and Client

Attorney-client privilege follows from establishment of professional relationship between client and attorney. West's Ann.Cal.Evid.Code § 954.

5 Cases that cite this headnote

[4] Privileged Communications and Confidentiality Elements in general; definition

Once attorney-client relationship is established, attorney-client privilege attaches to communications made in confidence during course of the relationship. West's Ann.Cal.Evid.Code § 954.

16 Cases that cite this headnote

[5] Trusts Rights and powers of trustee

Powers of trustee are not personal to any particular trustee but, rather, are inherent in office of trustee.

9 Cases that cite this headnote

[6] **Trusts** Successive trustees

New trustee succeeds to all the rights, duties, and responsibilities of his predecessors. Restatement (Second) of Trusts § 196.

8 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality** Trustees, guardians, and administrators; pension plans

Trusts Successive trustees

When successor trustee takes office it assumes all powers of trustee, including power to assert privilege with respect to confidential communications between predecessor trustee and attorney on matters of trust administration. West's Ann.Cal.Evid.Code § 954.

26 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality** Trustees, guardians, and administrators; pension plans

Under plain terms of trust instrument, successor trustee inherited from predecessor trustee the power to assert attorney-client privilege as to communications involving trust administration when successor assumed the office of trustee; accordingly, predecessor could not assert attorney-client privilege in opposition to successor's demand for production and inspection of documents. West's Ann.Cal.Evid.Code § 954.

40 Cases that cite this headnote

[9] **Trusts** Necessary and proper parties in general

Ordinary express trust is not entity separate from its trustees, and, therefore, trustee, rather than trust, is real party in interest in litigation involving trust property.

30 Cases that cite this headnote

[10] **Trusts** Representation of cestui que trust by trustee

Trust is fiduciary relationship with respect to property in which person holding legal title to property, the trustee, has equitable obligation to manage property for benefit of another, the beneficiary.

22 Cases that cite this headnote

[11] **Trusts** Diligence and good faith of trustee

Professional trustees are held to higher standard of care in discharging their legal duties than are others.

1 Case that cites this headnote

[12] **Trusts** Nature and essentials of trusts

In trust relationship, benefits belong to beneficiaries and burdens to the trustee.

1 Case that cites this headnote

[13] **Privileged Communications and Confidentiality** In camera review

While court may not require disclosure of information claimed to be privileged, in order to rule on claim of privilege, litigant may still have to reveal some information in camera to permit court to evaluate basis for the claim.

2 Cases that cite this headnote

[14] **Trusts** Counsel fees and costs

Trustee cannot compel trust to pay his attorney fees unless services so employed were incurred in management and preservation of trust estate.

[15] **Trusts** Successive trustees

Successor trustee has duty, on pain of personal liability for neglect, to make reasonable inquiry into predecessor trustee's administration of trust and remedy any breaches, in order thereby to preserve trust estate for benefit of

the beneficiaries. West's Ann.Cal.Prob.Code § 16403(b)(1, 3).

8 Cases that cite this headnote

Attorneys and Law Firms

*****318 *1126 **280** Lynch & Lynch, Kevin G. Lynch, San Fernando, Craig M. Lynch, Ross, Sacks & Glazier, Bruce R. Ross and Terrence M. Franklin, Los Angeles, for Petitioner.

No appearance for Respondent.

Stephen H. Weiss, Jill Switzer, Phyllis A. Siegel, Mitchell, Silberberg & Knupp, Hayward J. Kaiser, Allan B. Cutrow, Richard B. Sheldon, Los Angeles, Greines, Martin, Stein & Richland, Kent L. Richland and Carolyn Oill, Beverly Hills, for Real Party in Interest.

Christopher Chenoweth, Haight, Brown & Bonesteel, Roy G. Weatherup, R. Roy Finkle, Santa Monica, Bronson, Bronson & McKinnon, James C. Krieg, Elizabeth A. Erskine, Loeb & Loeb, Andrew S. Garb, Jeffrey M. Loeb and David C. Nelson, Los Angeles, as Amici Curiae on behalf of Real Party in Interest.

Opinion

***1127** WERDEGAR, Justice.

In this proceeding for an accounting, the successor trustee of a private express trust seeks to discover from the predecessor trustee documents reflecting confidential communications between the predecessor and an attorney on matters of trust administration. The question before us is whether the predecessor trustee may assert the attorney-client privilege as to such documents and thereby withhold them from the successor. We conclude the answer is no. Upon taking office, a successor trustee assumes all of the powers of trustee, including the power to assert the attorney-client privilege as to confidential communications on the subject of trust administration. Therefore, we affirm the judgment of the Court of Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

George J. Moeller and his wife Grace Todd Moeller, as trustors, established a trust. Initially George was trustee; later, real party in interest Sanwa Bank (hereafter Sanwa) succeeded to this position. Among the beneficiaries of the trust is the Moellers's son, petitioner Roger D. Moeller (hereafter Moeller). The trust property consisted of certain interests in real estate in Southern California, including an undivided one-quarter interest in certain real property in the City of Los Angeles. Sanwa's management of this interest is the subject matter underlying the instant dispute.

For many years, a chrome plating business was operated on the property in Los Angeles. The Environmental Protection Agency eventually ordered the removal of certain toxins that had been deposited on the property as a result of the business. The costs of *****319 **281** this cleanup and associated litigation depleted the trust of assets.

Subsequently Sanwa resigned as trustee, and Moeller succeeded to that position. Upon its resignation, Sanwa submitted a final accounting, petitioned for settlement, and sought to recover from the trust the expenses it had incurred in the cleanup of the Los Angeles property, a trustee's fee, and attorney fees.

Moeller objected to Sanwa's accounting and petition on several grounds. He complained that the accounting contained errors and omissions and lacked supporting evidence for alleged commitments, the assets and liabilities of the trust were not enumerated properly or described adequately, major contingent obligations that were alleged exceeded the trust resources and were not disclosed adequately to the beneficiaries or the successor trustee, and certain expenditures and advances had resulted from imprudent decisions by Sanwa.

***1128** Soon thereafter, Moeller formally demanded production and inspection of certain documents and records related to Sanwa's administration of the trust. The requested papers included: (1) engagement letters, agreements, letters, notes, memoranda, files, telephone notes, invoices, and billings pertaining to legal services provided to the trust; (2) files, memoranda, notes, accountings, billings, and invoices pertaining to any entity that performed services for the trust, including Sanwa, environmental consulting firms, accounting firms, contractors, and subcontractors; and (3) communications, notes, and memoranda between Sanwa and any governmental agency pertaining to trust assets.

Sanwa responded it had already produced many of the documents and records Moeller demanded. Sanwa also claimed those it had not produced were protected from disclosure by the attorney-client privilege. Sanwa asserted the privilege as to all the demanded documents and records except those containing communications between Sanwa and any governmental agency pertaining to trust assets.

Moeller moved for an order to compel full compliance with his demand for production and inspection. He contended Sanwa could not invoke the attorney-client privilege because that privilege belongs to the office of trustee, not to any particular person who at one time or another serves as the trustee. In opposition, Sanwa argued that when a trustee retains counsel, the client for purposes of the attorney-client privilege is the trustee personally and not the trust or the office of trustee. The trial court agreed with Sanwa and ruled that "Sanwa Bank, as former trustee, held and properly asserted an attorney-client privilege and that said privilege neither inured nor transferred to Sanwa's successor, [Moeller]."

Moeller petitioned the Court of Appeal to issue a writ of mandate to compel the trial court to order the production and inspection of the documents and records he had demanded. That court held, "Because the predecessor trustee has a duty to transfer the trust property to the successor trustee, because the successor trustee has a duty to take and keep control of the trust property, and if necessary, to take reasonable steps to compel a previous trustee to deliver the trust property to the successor trustee, and because *Strauss* [*v. Superior Court In and For Los Angeles County* (1950) 36 Cal.2d 396, 224 P.2d 726] holds that trust property includes a trustee's records regarding the administration of the trust, it is clear that petitioner, in his capacity as trustee, has the right and duty to compel Sanwa to transfer its Trust records to him." Accordingly, the Court of Appeal issued the writ.

We granted Sanwa's petition for review.

*1129 DISCUSSION

This case presents the following question: Does the attorney-client privilege permit a predecessor trustee to withhold from a successor trustee documents related to trust administration? Both settled law and practical considerations lead us to conclude the answer is no.

[1] Before addressing the dispute between the predecessor trustee and the successor, however, we address a threshold issue: Can a trustee be a holder of the attorney-client privilege? In other words, ***320 **282 does a trustee generally have the power to assert the attorney-client privilege to prevent disclosure of confidential communications between the trustee and an attorney consulted on behalf of the trust? As common sense suggests, the answer is yes.

Evidentiary privileges are creatures of statute. (Evid.Code, § 911; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 20 Cal.Rptr.2d 330, 853 P.2d 496.) Consequently, whether a trustee can claim the attorney-client privilege, and thereby prevent discovery of confidential communications it has had with an attorney, depends upon statute. A "client" ordinarily has a privilege to refuse to disclose confidential communications the client has had with an attorney. (Evid.Code, § 954.) For purposes of the attorney-client privilege, the term " 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity...." (Evid.Code, § 951.) A trustee therefore can claim the attorney-client privilege if the trustee, *qua* trustee, has the power to become an attorney's client.

[2] A trustee's powers include those specified in the trust instrument, those conferred by statute, and those needed to satisfy the reasonable person and prudent investor standards of care in managing the trust. (Prob.Code, §§ 16200, 16040, subd. (a), 16047, subd. (a).)[1] Although the Moeller trust instrument does not expressly authorize its trustee to claim the attorney-client privilege, it does expressly bestow on its trustee all powers the law confers upon trustees. It provides, "[i]n addition to all other powers and discretions granted to or vested in the trustee *by law* or by this instrument, the trustee shall have the following powers and discretions...." (Italics added.) Consequently, if a statute so permits, the trustee of the Moeller trust may become an attorney's client and, correlatively, exercise the attorney-client privilege.

The Probate Code implicitly authorizes a trustee to become an attorney's client and to claim the attorney-client privilege. A trustee may hire an **1130 attorney "to advise or assist the trustee in the performance of administrative duties." (§ 16247.) A trustee may also "prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties." (§ 16249, subd. (a).) Of course, a trustee involved in litigation

concerning the trust may hire a lawyer—indeed, the trustee often would be well advised to do so. Any trustee who exercises the powers granted in sections 16247 and 16249 "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity" (Evid.Code, § 951), and the trustee does so on behalf of the trust. Therefore, the trustee, *qua* trustee, becomes the attorney's client.

[3] **[4]** The attorney-client privilege follows from the establishment of the professional relationship between client and attorney. Once this relationship is established, the attorney-client privilege attaches to communications made in confidence during the course of the relationship. (*Holm v. Superior Court In and For City and County of San Francisco* (1954) 42 Cal.2d 500, 507, 267 P.2d 1025; *City & County of San Francisco v. Superior Court In and For City and County of San Francisco* (1951) 37 Cal.2d 227, 235, 231 P.2d 26.) The client may assert the privilege and refuse to disclose confidential communications as long as the client is the holder of the privilege. (Evid.Code, § 954.) Accordingly, we conclude that when Sanwa, as trustee of the Moeller trust, secured the advice of an attorney, Sanwa became the attorney's client and acquired the right to claim the attorney-client privilege with regard to communications made in confidence during the course of the attorney-client relationship. Furthermore, Sanwa retained that right as long as it remained the holder of the privilege.

This brings us to the dispositive inquiry: Who is currently the holder of the attorney-client privilege with regard to the legal advice Sanwa procured on behalf of the Moeller trust while Sanwa was trustee? Sanwa contends that its privilege to refuse to disclose confidential communications with its attorneys *****321** ****283** while it was acting as trustee is personal to itself and that Sanwa retains the privilege as long as Sanwa exists. Under this view, if accepted, it would follow that Sanwa might properly invoke the privilege against Moeller, the successor trustee. Moeller, on the other hand, argues the attorney-client privilege "vest[s] in the office [of the trustee] and not in any particular individual or entity who at one time was the trustee...."[2] According to Moeller, when Moeller succeeded Sanwa as trustee, Sanwa lost (and Moeller acquired) the privilege to refuse to disclose confidential attorney-client communications regarding Sanwa's administration of the trust. ***1131** Under this view, if accepted, it would follow that Sanwa could not invoke the attorney-client privilege against Moeller in this proceeding. We conclude Moeller is correct.

[5] **[6]** **[7]** The powers of a trustee are not personal to any particular trustee but, rather, are inherent in the office of trustee. It has been the law in California for over a century that a new trustee "succeed[s] to *all* the rights, duties, and responsibilities of his predecessors." (*Fatjo v. Swasey* (1896) 111 Cal. 628, 636, 44 P. 225, italics added; see also *Baumann v. Harrison* (1941) 46 Cal.App.2d 84, 93, 115 P.2d 530.) In accord is the Restatement Second of Trusts section 196, page 431: "The powers conferred upon a trustee can properly be exercised by his successors, unless it is otherwise provided by the terms of the trust." California courts have explicitly adopted this rule as the law of this state. (See *In re De La Montanya's Estate* (1948) 83 Cal.App.2d 322, 328, 188 P.2d 494; *Estate of Canfield* (1947) 80 Cal.App.2d 443, 447, 181 P.2d 732.) The rule applies, of course, to powers essential to effective administration of the trust. (Rest.2d Trusts, § 196, com. b.) As discussed earlier, the power to assert the attorney-client privilege follows from the trustee's power to hire an attorney in order to obtain advice regarding administration of the trust and to litigate to protect trust property. The trustee's power to assert that privilege thus is certainly essential to its effective administration of the trust. Therefore, when a successor trustee takes office it assumes all of the powers of trustee, including the power to assert the privilege with respect to confidential communications between a predecessor trustee and an attorney on matters of trust administration.

[8] **[9]** The same conclusion flows from an examination of the trust instrument. As already mentioned, a trust instrument may limit a trustee's statutory powers. The instrument at issue here, however, makes clear that Moeller has assumed all of Sanwa's former powers as trustee. The trust instrument provides that, upon resignation, the resigning trustee "shall thereupon be discharged as trustee of this trust and shall have no further powers, discretions, rights, obligations, or duties with reference to the trust estate *and all such powers, discretions, rights, obligations and duties shall inure to and be binding upon such successor trustee.*" (Italics added.) As discussed earlier, the privilege of a trustee to refuse to disclose confidential communications it has had with its attorney regarding trust administration is essential to effective administration of the trust and so certainly qualifies as a power ***1132** "with reference to the trust estate." Thus, according to the plain terms of the Moeller trust instrument, Moeller inherited from Sanwa the power to assert

the attorney-client privilege as to communications involving trust administration when Moeller assumed the office of trustee. [3]

***322 **284 These legal principles are not the only support for our conclusion that the current trustee is generally the holder of the attorney-client privilege with respect to confidential communications between a predecessor trustee and an attorney concerning trust administration. The practical effect of such a rule on the day-to-day administration of trusts also encourages its adoption. A brief survey of the duties and powers of a trustee makes clear the necessity and desirability of such a rule.

A trustee's basic duties relate to management of the trust property. A trustee must preserve trust property and make it productive. (§§ 16006, 16007.) A trustee must also "enforce claims that are part of the trust property" (§ 16010) and "defend actions that may result in a loss to the trust." (§ 16011.) In discharging these duties, a trustee must use "reasonable care, skill, and caution" (§ 16040, subd. (a)) and "invest and manage trust assets as a prudent investor would ...." (§ 16047, subd. (a).) In brief, the trustee's fundamental duty is to use due care to protect the trust property.

The Probate Code confers powers on a trustee that enable effective discharge of this duty. A trustee has the power to "collect, hold, and retain trust property" (§ 16220); to buy and sell property for the trust (§ 16226); to manage trust property (§ 16227); to make investments on behalf of the trust (§ 16047, subd. (a)); to encumber trust property (§ 16228); to "borrow money for any trust purpose" (§ 16241); and to "prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties." (§ 16249, subd. (a).) The trustee also has those powers necessary to act as a reasonable administrator of the trust and as a prudent investor. (§ 16200, subd. (c).) In short, the trustee has all the powers needed for effective transaction of business on behalf of the trust.

*1133 In recognition of a trustee's need for professional advice, including legal advice, in order effectively to discharge these duties and exercise these powers, the trustee may "hire persons, including ... attorneys ... to advise or assist the trustee in the performance of administrative duties." (§ 16247.) As discussed earlier, this power to hire an attorney allows a trustee to become an attorney's client and to assert the attorney-client privilege with respect to confidential communications. It is likely, then, that in performing their day-to-day duties, trustees regularly have confidential communications with their attorneys about trust business (e.g., potential acquisitions and dispositions of property, lawsuits involving trust property). At any given time, therefore, many privileged communications that involve pending trust transactions are in existence. [4] To allow for effective continuous administration of a trust, the right of access to these communications and the privilege to prevent their disclosure must belong to the person presently acting as trustee, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor.

Sanwa and its supporting amicus curiae California Bankers Association express concern that the adoption of such a rule will hamper effective trust administration by frustrating the policy underlying the attorney-client privilege. Relying on our recent opinions in *People v. Gionis* (1995) 9 Cal.4th 1196, 40 Cal.Rptr.2d 456, 892 P.2d 1199 and ***323 **285 *Roberts v. City of Palmdale, supra,* 5 Cal.4th 363, 20 Cal.Rptr.2d 330, 853 P.2d 496, Sanwa correctly observes the attorney-client privilege is designed to foster candor between attorney and client so that the former can give the latter the best legal advice under the circumstances. Sanwa and its supporting amicus curiae contend that, unless a predecessor trustee retains the privilege even after it resigns as trustee, communications between the trustee and attorney will not be frank and, consequently, the attorney's advice will be inadequate, to the detriment of both trustees and beneficiaries.

[10] [11] [12] We recognize that, under the rule we adopt, a trustee must take into account the possibility that its confidential communications with an attorney about trust administration may someday be disclosed to a successor trustee. This is, however, not unfair in light of the nature of a trust and the trustee's duties. A trust is a fiduciary relationship with respect to property in which the person holding legal title to the property—the trustee—has an equitable obligation to manage the property *for the benefit of another*—the *1134 beneficiary. (*Estate of Shaw* (1926) 198 Cal. 352, 360, 246 P. 48; *Askew v. Resource Funding, Ltd.* (1979) 94 Cal.App.3d 402, 407, 156 Cal.Rptr. 208; Rest.2d Trusts, § 2.) A trustee must always act *solely* in the beneficiaries' interest. (§ 16002, subd. (a); *Estate of Feraud* (1979) 92 Cal.App.3d 717, 723, 154 Cal.Rptr. 889.) If the trustee violates *any* duty owed to the beneficiaries, the trustee is liable for breach of trust. (§

16400.) And professional trustees like Sanwa are held to a higher standard of care in discharging their legal duties than are others. (*Coberly v. Superior Court for Los Angeles County* (1965) 231 Cal.App.2d 685, 689, 42 Cal.Rptr. 64.) In a trust relationship, then, the benefits belong to the beneficiaries and the burdens to the trustee. The office of trustee is thus by nature an onerous one, and the proper discharge of its duties necessitates great circumspection. Liability to beneficiaries for mismanagement of trust assets is merely one of the burdens professional trustees take on—for, presumably, an appropriate fee.

Most importantly, the successor trustee inherits the power to assert the privilege only as to those confidential communications that occurred when the predecessor, *in its fiduciary capacity,* sought the attorney's advice *for guidance in administering the trust.* If a predecessor trustee seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty, the predecessor may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds. (See *Talbot v. Marshfield* (1865 Ch.) 62 Eng.Rep. 728, 729;[5] 2A Scott on Trusts (4th ***324 **286 ed.1987) § 173, pp. 465–466 [noting, in the context of a beneficiary's effort to obtain *1135 privileged information from a trustee, the distinction between legal advice sought for guidance in trust administration and legal advice sought for the trustee's own protection]; Bogert, The Law of Trusts and Trustees (2d rev.ed.1983) § 961, p. 11 [same].)

[13] We recognize that the distinction between these two types of confidential trustee-attorney communications —administrative, on the one hand, and defensive, on the other—may not always be clear. Yet to require a trustee to distinguish, scrupulously and painstakingly, his or her own interests from those of the beneficiaries is entirely consistent with the purpose of a trust. Moreover, a trustee can mitigate or avoid the problem by retaining and paying out of his or her own funds separate counsel for legal advice that is personal in nature. Finally, the question of who holds the privilege as to particular communications is ultimately decided by a neutral entity—the court. While a court "may not require disclosure of information claimed to be privileged ... in order to rule on the claim of privilege ..." (Evid.Code, § 915, subd. (a)), the statute is "not absolute" (*Cornish v. Superior Court of Riverside County* (1989) 209 Cal.App.3d 467, 480, 257 Cal.Rptr. 383), in the sense that a litigant may still have to reveal some information in camera to permit the court to evaluate the basis for the claim. (*Cornish v. Superior Court, supra,* 209 Cal.App.3d at p. 480, 257 Cal.Rptr. 383; *In re Lifschutz* (1970) 2 Cal.3d 415, 437, fn. 23, 85 Cal.Rptr. 829, 467 P.2d 557.)

[14] In any event, the instant case does not appear to be one in which Sanwa's fiduciary and personal capacities do overlap. The papers Moeller demands from Sanwa (e.g., agreements, billings, invoices) all seem to involve only matters pertaining to Sanwa's use of professional services in carrying out its administrative duties in managing the Moeller trust specifically, handling the cleanup of the Los Angeles property and its related litigation. Nothing in the record suggests Sanwa obtained any of those services in defense of actual or anticipated charges against it of misconduct by the beneficiaries of the Moeller trust. Indeed, Sanwa has never made such a claim at any time during this litigation. Moreover, in its final accounting, which is the subject matter underlying the instant dispute, Sanwa has requested reimbursement of certain attorney's fees. "A trustee cannot compel the trust to pay his attorney's fees *unless the services so employed were incurred in the management and preservation of the trust estate.*" (*In re Vokal's Estate* (1953) 121 Cal.App.2d 252, 260, 263 P.2d 64, italics added.) Presumably, then, any privileged legal advice contained in the papers Moeller demands was sought by Sanwa in its fiduciary capacity, not in its personal capacity.

*1136 The rule we adopt will, therefore, not have the disastrous consequences Sanwa and its supporting amicus curiae foretell. In contrast, the rule Sanwa proposes—that the attorney-client privilege is personal to the trustee, so that whichever person is the trustee when the confidential communication occurs retains the privilege as long as that person exists—would go far to prevent smooth transitions from one trustee to the next, would disrupt orderly administration of trusts, and would be detrimental to the interests of beneficiaries. The unworkability of Sanwa's rule is apparent when one considers its application to the following situation.

Suppose plaintiff slips and falls and sustains injuries on land which is part of the corpus of "MegaTrust." Plaintiff then sues A, the trustee of MegaTrust, and A hires an attorney to defend the action. While the action is pending, B succeeds A as trustee, and A transfers the case file to B. Under Sanwa's rule, at the time of the transfer A was the holder of the attorney-client privilege with respect to any confidential communications contained in the case file.

Because the holder of an evidentiary privilege waives it by voluntarily disclosing the privileged communication to a third party (Evid.Code, § 912, subd. (a); *Coldwell v. Board of Public Works of City and County of San Francisco* (1921) 187 Cal. 510, 522, 202 P. 879; *Title Ins. etc. Co. v. California Dev. Co.* (1915) 171 Cal. 173, 220, 152 P. 542), the transfer of the ***325 **287 case file from A to B would constitute a waiver of the attorney-client privilege. Plaintiff would then be entitled to discover the confidential communications—a result obviously undesirable to the MegaTrust beneficiaries. Alternatively, if Sanwa's rule were the law, A may refuse to surrender the case file to B in order to preserve the privilege and prevent plaintiff from discovering the confidential communications. B would then have to retain another attorney to defend the action, and that attorney would have to duplicate, at the expense of MegaTrust, all the work A's attorney had done previously —another result obviously undesirable to the MegaTrust beneficiaries.

As consideration of this hypothetical situation illustrates, adoption of Sanwa's proposed rule would have seriously adverse consequences to effective trust administration by the successor trustee. Moreover, although its adoption would relieve trustees of having to distinguish between their fiduciary and personal capacities when they seek legal advice about trust administration, adoption of Sanwa's proposed rule ultimately would harm beneficiaries, as pointed out in the hypothetical situation. As discussed earlier, however, a private express trust exists for the beneficiaries' benefit, not for the trustee's. We therefore conclude we should reject Sanwa's proposed rule as the law of this state.

Similar practical considerations have led other courts to conclude the power to assert the attorney-client privilege passes from a predecessor *1137 officer to a successor in the analogous context of corporate affairs. These decisions include *Commodity Futures Trading Comm'n v. Weintraub* (1985) 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (hereafter *Weintraub*), and *Tekni–Plex, Inc. v. Meyner and Landis* (1996) 89 N.Y.2d 123, 651 N.Y.S.2d 954 674 N.E.2d 663 (hereafter *Tekni–Plex*). The reasoning of these cases is instructive, albeit by analogy.

In *Weintraub, supra,* 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372, the Supreme Court of the United States considered "whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation's attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy." (471 U.S. at p. 345, 105 S.Ct. at p. 1989.) Before deciding this precise issue, the high court pointed out that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." (*Id.* at p. 349, 105 S.Ct. at p. 1991.) Accordingly, a former manager could not assert the privilege in opposition to the current manager, even with respect to statements the former made to an attorney regarding matters within the scope of corporate duties. (*Ibid.*)

The high court then went on to apply these general principles to the context of a corporation in bankruptcy. The high court concluded the trustee in bankruptcy controlled the corporation's attorney-client privilege while the corporation was in bankruptcy, because the trustee was the actor whose duties and powers most closely paralleled those of the corporation's management, which controlled the privilege outside bankruptcy. (*Weintraub, supra,* 471 U.S. at pp. 351–354, 105 S.Ct. at pp. 1992–1994.) In reaching this conclusion, the high court found important the bankruptcy trustee's statutory duty to investigate the conduct of the prior management in order to discover and then pursue claims against managing officers. (*Id.* at p. 353, 105 S.Ct. at p. 1986.) Said the court, "It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets." (*Ibid.*) The high court found this result impermissible, because it would lead to frustration of the goal of the Bankruptcy Code to discover insider fraud. (*Ibid.*)

[15] Like concerns are present in the case of a trustee of a private express trust. A successor trustee is liable to the beneficiaries for a predecessor trustee's breach of trust if the successor unreasonably allows the breach to continue or does not take reasonable steps to redress it. (§ 16403, ***326 **288 subds.(b)(1), (b)(3).) The *1138 Probate Code thus imposes a duty on a successor trustee, on pain of personal liability for neglect, to make reasonable inquiry into the predecessor trustee's administration of the trust and remedy any breaches, in order thereby to preserve the trust estate for the benefit of the beneficiaries. [6] To make this inquiry, the successor trustee must have access to the trust's legal files. Indeed, if the predecessor trustee were allowed to block the successor's access to those files, the successor trustee could be

seriously hampered in the discharge of this duty, and the trust estate could thereby be irreparably damaged, to the detriment of the beneficiaries. Therefore, vesting the attorney-client privilege in the current trustee best comports with the terms of the Probate Code and with its underlying policy that trustees always are to act in the best interests of the beneficiaries. (See § 16002, subd. (a).)

In line with *Weintraub, supra,* 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372, is the decision of the New York Court of Appeals in *Tekni–Plex, supra,* 651 N.Y.S.2d 954, 674 N.E.2d 663. There, in a dispute over corporate acquisition, one of the issues was whether the seller company or the buyer company held the attorney-client privilege with respect to preacquisition confidential communications between the seller company and its attorney. (651 N.Y.S.2d at p. 956, 674 N.E.2d at p. 665.) Relying on *Weintraub,* the New York Court of Appeals held that "where efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company's operations. It follows that, under such circumstances, the prior attorney-client relationship continues with the newly formed entity." (*Id.* at p. 959, 674 N.E.2d at p. 668.) Accordingly, because the buyer continued the business of the seller, control of the attorney-client privilege regarding confidential communications about pre-acquisition business operations—which, incidentally, included compliance with environmental regulations—passed to the buyer. (*Id.* at p. 961, 674 N.E.2d 2d at p. 670.) The court noted this result comported with the buyer's right to invoke the seller's attorney-client relationship if it had to litigate over the rights and obligations it assumed from the seller. (*Ibid.*)

The similarities between *Tekni–Plex, supra,* 651 N.Y.S.2d 954, 674 N.E.2d 663 and the instant case are striking. Moeller has succeeded Sanwa as trustee of the Moeller trust and is continuing its administration under the same terms under which Sanwa managed it. Moeller thus stands in Sanwa's shoes and controls the attorney-client privilege with respect to confidential communications ***1139** Sanwa had with its attorneys on behalf of the trust. Moeller must also continue the cleanup of the Los Angeles property and make sure the property is in compliance with environmental laws. He therefore needs access to communications Sanwa had with its attorneys concerning the cleanup and related litigation. Finally, Moeller has a duty to litigate to protect the trust property because he assumed Sanwa's duties as trustee. Under these circumstances, the power to assert the attorney-client privilege with respect to confidential communications Sanwa had with its attorneys on matters of administration of the Moeller trust must pass to Moeller.

In summary, we conclude the power to assert the attorney-client privilege with respect to confidential communications a predecessor trustee has had with its attorney on matters concerning trust administration passes from the predecessor trustee to its successor upon the successor's assumption of the office of trustee. Sanwa therefore has no privilege to assert in opposition to Moeller's demand for production and inspection of documents. Accordingly, the Court of Appeal properly issued the writ of mandate to compel the trial court to order disclosure.

***327 **289 DISPOSITION

The judgment of the Court of Appeal is affirmed.

GEORGE, C.J., and MOSK and KENNARD, JJ., concur.

CHIN, Justice, dissenting.
I respectfully dissent.

The majority opinion departs from this court's consistent deference to the Legislature's prerogative in defining and controlling evidentiary privileges. The Evidence Code specifically states that "[t]he provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege...." (Evid.Code, § 12, subd. (c).) "Thus, the Legislature has codified, revised, or supplanted any privileges previously available at common law: the courts are no longer free to modify existing privileges or to create new privileges. [Citation.]" (*Pitchess v. Superior Court of Los Angeles County* (1974) 11 Cal.3d 531, 540, 113 Cal.Rptr. 897, 522 P.2d 305.) As Justice Mosk stated for a unanimous court: "Our deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute. (Evid.Code, § 911.)" (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 20 Cal.Rptr.2d 330, 853 P.2d 496.) Except as required by constitutional law, the courts may neither add to the statutory privileges nor imply unwritten exceptions to them. (*Ibid.*)

***1140** The majority frames the question in this case as whether the attorney-client privilege enables a predecessor trustee to withhold from a successor trustee documents related to trust administration. (Maj. opn., *ante,* at p. 319 of 69 Cal.Rptr.2d, p. 281 of 947 P.2d.) A trustee, whether a natural or juridical person, who consults a lawyer to secure legal service or advice in the lawyer's professional capacity is a "client." (Evid.Code, § 951.) The Legislature has given the client "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid.Code, § 954.) With exceptions that are not relevant here (Evid.Code, § 953, subds.(b), (c), (d)), the person who controls the privilege is the client who confidentially communicated with the lawyer. Therefore, when a trustee consults a lawyer for legal advice, that person, not a successor trustee, controls disclosure of communications with the lawyer.

Nothing in these statutes suggests a trustee's privilege to withhold confidential attorney-client communications is an appendage of legal title to trust assets, an accessory to be stripped from the client who consulted the lawyer and passed along to the next person on the job. Instead, the plain import of the Legislature's conception is that the privilege is personal and remains with the person who consulted the attorney. The only circumstances the Evidence Code recognizes for transfer of the privilege are dealt with in the definition of "holder of the privilege" in Evidence Code section 953. Those circumstances are: (1) when the client legally cannot assert the privilege because a guardian or conservator has been appointed; (2) when the client is dead; and (3) in the case of certain juridical persons, when the client "is no longer in existence." (Evid.Code, § 953.) None of those circumstances applies to transfers of title to trust property to successor trustees. The Evidence Code has no provision that displaces the privilege, or designates another as its holder, simply because a new person took over the client's fiduciary duties.

The majority mistakes the matter as one that can be resolved by resort to the Probate Code and the trust instrument. The legislative design forecloses that approach, however, because the Evidence Code provisions "relating to privileges shall govern any claim of privilege...." (Evid.Code, § 12, subd. (c).) Although a successor trustee may assume its predecessor's powers and duties with respect to the trust estate, that does not mean the successor also acquires the privilege the Evidence Code conferred on its predecessor. The predecessor holds the privilege because it was a person who sought legal advice or services from an attorney, not *****328** ****290** because it was a trustee with a question about trust administration.

The majority's view gains no validity by its reliance on the practical benefits that a successor trustee may obtain by invading its predecessor's ***1141** privileged communications. Necessity and desirability afford no basis for judicial revision of legislative dictates on who possesses the privilege. The Legislature already determined that the benefits of the privilege it codified outweigh the risk of unjust results. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1207, 40 Cal.Rptr.2d 456, 892 P.2d 1199.) In this regard, we have described the attorney-client privilege as "essential to our system of justice," even though we recognized it can and does result in suppression of relevant information. (*Id.* at p. 1208, 40 Cal.Rptr.2d 456, 892 P.2d 1199.) Allowing necessity to be the basis for compromising privileged communications would be a step towards the privilege's ultimate abolition. (*Shannon v. Superior Court* (1990) 217 Cal.App.3d 986, 997–998, 266 Cal.Rptr. 242.)

Any reliance on necessity and desirability as a justification for this new rule may well be shortsighted. We do not know whether successor trustees, before now, had any difficulty in functioning adequately without commandeering their predecessors' privileged communications. We similarly do not know whether predecessor trustees, by asserting the attorney-client privilege, have evaded full accountability for mismanagement or breaches of trust. Whether such problems actually exist and, if they do, the appropriate solutions, are the types of questions best dealt with through the legislative process. In any event, the Legislature controls these matters. The code it enacted does not allow a successor trustee to usurp the attorney-client privilege granted to a predecessor trustee who sought legal counsel. If this is a gap in the law of privilege, it is not one that we are free to fill. Any change must come from the Legislature.

The majority too easily discounts the problems its rule will create for trustees. A privilege to withhold confidential communications has little utility when the parties to a communication cannot reliably anticipate whether it will in fact be privileged. The majority posits a distinction between those communications in which a trustee, "*in its fiduciary capacity*, sought the attorney's advice *for guidance in administering the trust* " and those in which a trustee "seeks legal advice in its personal capacity out of a genuine concern for possible future charges of breach of fiduciary duty...." (Maj. opn., *ante*, at p. 324 of 69 Cal.Rptr.2d, p. 286

of 947 P.2d, original italics.) The majority makes the former available to successor trustees, while the latter would still have some chance of remaining confidential.

That distinction is illusory and will not allow predictable implementation as a practical matter. It is the trustee's fiduciary capacity that imposes on the trustee potential personal liability for any breach of trust. Aside from the context of this case, where counsel conducted litigation on behalf of the trustee, one obvious reason for a trustee to consult counsel on trust administration is to avoid breaches of trust and the concomitant personal liability. ***1142** How are trustees and counsel to know when they have crossed the line and exposed their confidential communications to potentially hostile successors? Trial courts too will have little guidance in ruling on these privilege claims. However, notwithstanding Evidence Code section 915' s prohibition, the majority apparently will allow trial courts to require disclosure in camera of as much information as deemed necessary to permit a decision. (Maj. opn., *ante*, at pp. 323–324 of 69 Cal.Rptr.2d, pp. 285–286 of 947 P.2d.) This latitude will not reassure trustees who need to discuss difficult trust problems candidly and in confidence with counsel.

The majority offers only one clear basis for discerning truly privileged communications from those only conditionally privileged: who paid the attorney's bill, the trust or the trustee? As a result, professional trustees can be expected to employ "shadow counsel" for consultation on any trust matters with potentially sensitive implications. In the majority's terms, this too will be "merely one of the burdens professional trustees take on—for, presumably, an appropriate fee." (Maj. opn., *****329** ante, at p. 324 of 69 Cal.Rptr.2d, p. 286 of 947 P.2d.) ****291** Unfortunately, increased trustee fees are the most likely consequence of the majority's innovations in the Legislature's domain.

BAXTER and BROWN, JJ., concur.

All Citations

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Footnotes

1 All subsequent statutory references are to the Probate Code unless otherwise noted.

2 Sanwa interprets Moeller's argument to be that "the 'office of trustee' is the client when a trustee consults legal counsel about trust administration." If this were Moeller's argument, it would fail simply as a matter of linguistics, for only a "person" can be a "client" (Evid.Code, § 951), and the definition of "person" does not include "office of trustee." (See Evid.Code, § 175.)

> We do not, however, interpret Moeller's argument as Sanwa does. Rather, we understand Moeller to argue that the power to control the privilege belongs *to the current occupant of the office of trustee,* not to the office itself, so that the "client" for purposes of the attorney-client privilege is the current trustee. It is this interpretation of Moeller's argument that we address.

3 It was suggested at oral argument that the trust, rather than the trustee, might be viewed as the holder of the attorney-client privilege. Such a rule might lead to the same result as the rule adopted here. The former rule could not, however, be reconciled with the Evidence Code and the relevant principles of trust law. The "client," for purposes of the attorney-client privilege, must be a person, either natural or artificial (Evid.Code, § 951), and a trust is not a person but rather "a fiduciary *relationship* with respect to property." (Rest.2d Trusts, § 2, p. 6, italics added; *Hobbs v. Buck* (1981) 115 Cal.App.3d 176, 180, 171 Cal.Rptr. 258.) Indeed, " ' "an ordinary express trust is not an entity separate from its trustees." ' " (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 753, 27 Cal.Rptr.2d 491.) For that reason, the trustee, rather than the trust, is the real party in interest in litigation involving trust property. (*Ibid.;* see Code Civ. Proc., § 369, subd. (a)(2).)

4 The previous two statements seem quite reasonable in light of amicus curiae California Bankers Association's report that "[a]ccording to statistics from the State Banking Department's 86th Annual Report (1995), California banks and trust companies actively manage over *$430 billion* in fiduciary assets."

5 In *Talbot v. Marshfield, supra,* 62 Eng. Rep. 728, the residual legatees of a testamentary trust sought to compel the trustees to produce two opinions of counsel. Although *Talbot* was a dispute over privileged information between beneficiaries and trustees, a subject we do not here address, the opinion nicely articulates the distinction between a trustee consulting an attorney as trustee to further the beneficiaries' interests, and a trustee consulting an attorney in his personal capacity to defend against a claim by the beneficiaries:

> "The first ... opinion [of counsel], the production of which is sought, [was] respectively stated and taken by the [trustees] to guide them in the exercise of a power delegated to them by the trusts of the will, and which, if exercised, would affect the interests of the other *cestuis que trust.* The opinion was taken before proceedings were commenced or threatened, and in relation to the trust. Under these circumstances it appears ... that all the *cestuis que trust* have a right to see that ... opinion. It was contended that it was not taken for the benefit of all the *cestuis que trust;* but all the *cestuis que trust* have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestuis que trust* a right to see the ... opinion.
>
> "The other ... opinion, however, stands on a totally different footing. This was not to guide the trustees in the execution of their trust; but, after proceedings had been commenced against them, they took advice to know in what position they stood, and how they should defend themselves in the suit. It appears ... that the *cestuis que trust* have no right to see this ... opinion, unless they can make out that the trustees can charge the expense thereof on the trust funds. As to this there is no proof; the trustees may themselves have to bear the expense of this ... opinion, as having been stated and taken by them as litigant parties with the *cestuis que trust.*" (62 Eng.Rep. at p. 729.)

6 The Moeller trust instrument contains the following exculpatory clause: "The successor trustee shall not be responsible for the acts of the former trustee, and *shall not be required* to examine the transactions of the former trustee which have taken place prior to the acceptance of his or her duties as successor trustee." (Italics added.) Although Moeller was thus not obligated to investigate Sanwa's management of the trust, the clause certainly does not prevent him from doing so in an effective manner.

End of Document

SAMPLE LOCAL FORM

(No, it's not an 'app' but it's better than nothing at all)

NO FILING FEE DUE

NAME, ADDRESS, AND TELEPHONE NUMBER OF ATTORNEY OR PARTY WITHOUT ATTORNEY:	STATE BAR NUMBER	*FOR COURT USE ONLY*
TELEPHONE NO.: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES		
COURTHOUSE ADDRESS:		
IN THE MATTER OF:		
NOTICE OF COMMENCEMENT OF PROCEEDINGS FOR A COURT SUPERVISED TRUST (NO FILING FEE DUE)		CASE NUMBER:
		NO HEARING REQUIRED

1. The name of the subject trust is: _____

   _____

2. The trustee(s) of the subject trust is (are): _____

   _____

3. The subject trust was (check one):

   □ created/funded by court order dated _____ under case number _____

   □ brought under court supervision by court order dated _____ under case number _____

4. Attached as **Exhibit A** is (check one):

   □ A copy of the court order establishing the trust.
   □ An executed copy of the trust instrument.

5. Check the first box that applies:

   □ An original bond or conformed copy of the bond file under case number _____ is attached as **Exhibit B**.
   □ No bond has been previously ordered.

6. Check the first box that applies:

☐ The trustee's first account was ordered to be filed not later than _____
☐ The trustee has not previously been ordered to file an accounting.

Dated: _____

_____
(Signature)

_____
Trustee (Typed or Printed Name)

_____
(Signature)

_____
Trustee (Typed or Printed Name)

_____
(Name of Attorney or Law Firm)

By: _____
Attorney for Trustee (Signature)

VERIFICATION

I, _____, declare as follows:
(Name)

1. I have read the foregoing and I certify that the same is true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

2. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this _____ day of _____, 2____, at _____
(City and State)

_____
(Signature)

Print Save Clear