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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ANTOINETTE FERNANDEZ,
as Successor Trustee, etc.,

Petitioner and Respondent,

v.

GEORGE TSEKO,

Objector and Appellant.

E067185

(Super.Ct.No. PROPS1500586)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Law Office of John M. Woodburn and John M. Woodburn for Objector and Appellant.

Jennifer M. Daniel for Petitioner and Respondent.

Antoinette Fernandez is the trustee of a trust. She and George Tseko are both beneficiaries of the trust.

Antoinette served a copy of the trust, as originally executed, on all of the beneficiaries; with it, she served a notice that started a 120-day limitations period on any action to contest the trust. During the 120-day period, however, she served a copy of a purported amendment to the trust on all of the beneficiaries. The amendment reduced George's share of the trust. After the 120-day period had run, she filed a petition asking the trial court to rule that the amendment was valid.

George opposed the petition on the ground that it was, in substance, an action to contest the trust, and therefore it was time-barred. The trial court rejected this argument and granted the petition. We find no error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated to submit briefs in lieu of an evidentiary hearing. As a result, there was no actual evidence before the trial court. We therefore draw our facts from the parties' respective pleadings (which were verified) and from their briefs. In any event, the relevant facts are undisputed; the parties dispute only the legal upshot of those facts.

Angeline Tseko was married to Adam Tseko. George Tseko is Adam's son; Antoinette Fernandez is Angeline's granddaughter.

On October 25, 2011, Angeline created a revocable living trust. It named four beneficiaries, including Antoinette and George; each of the four was entitled to 25 percent of the residue of the trust. It also named Antoinette as successor trustee.

On December 27, 2013, Angeline passed away.

On January 27, 2015, Antoinette's counsel served notice on all of the beneficiaries (including Antoinette) that due to Angeline's death, the trust had become irrevocable. The notice stated: "**WARNING: YOU MAY NOT BRING AN ACTION TO CONTEST THE TRUST MORE THAN 120 DAYS FROM THE DATE . . . THIS NOTIFICATION BY THE TRUSTEE IS SERVED UPON YOU OR 60 DAYS FROM THE DATE ON WHICH A COPY OF THE TERMS OF THE TRUST IS MAILED OR PERSONALLY DELIVERED TO YOU DURING THAT 120 DAY PERIOD, WHICHEVER IS LATER.**" The notice was accompanied by a copy of the original trust.

On March 17, 2015, Antoinette's counsel gave notice to all of the beneficiaries (again, including Antoinette) that Angeline had amended the trust before she passed. The notice included a copy of the amendment. It was dated August 24, 2013. It gave $15,000 to Scott Fernandez (Antoinette's brother); it also reduced George's share of the trust by $30,000 and gave this amount — $15,000 each — to Natalie and Sheena Tseko (George's daughters).

On June 24, 2015, Antoinette filed a petition concerning the internal affairs of the trust pursuant to Probate Code section 17200, subdivision (b). In it, she asked the trial court to confirm that the amendment was valid. She also asked the trial court to construe certain assertedly ambiguous provisions of the amendment and to confirm her interpretation of them.

George filed objections to the petition. He did not dispute Antoinette's interpretation of the amendment. Rather, he asserted that the petition was time-barred under Probate Code section 16061.8, which, in general, provides that an action to contest a trust must be brought within 120 days after notice of irrevocability is given. He also asserted that the amendment "was not properly executed or signed . . . and that it is therefore invalid and a sham." Later, however, Antoinette and George agreed to narrow the issues by "deem[ing]" the amendment to be "valid and properly executed."

After hearing argument, the trial court found that Antoinette's petition was not an action to contest a trust. It therefore overruled the objections and granted the petition.

II

ANTOINETTE'S PETITION WAS NOT AN ACTION TO CONTEST THE TRUST

As mentioned, the relevant facts are undisputed; the only issue before us is one of statutory interpretation. Accordingly, our standard of review is de novo. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 357; *In re Acknowledgment Cases* (2015) 239 Cal.App.4th 1498, 1505, fn. 6.)

Probate Code section 16061.7 requires a trustee to serve notice of various events on all beneficiaries, including "[w]hen a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust . . . ." (*Id.*, subd. (a)(1).) The notice must include "[a] notification that the recipient is entitled, upon

reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust." (*Id.*, subd. (g)(5).)[1]

The "terms of the trust" are defined as those portions of the written trust instrument that have become irrevocable. (Prob. Code, § 16060.5.) "'[T]erms of the trust' includes, but is not limited to, . . . amendments . . . ." (*Ibid.*)

Probate Code section 16061.8 provides: "No person upon whom the notification by the trustee is served pursuant to this chapter . . . may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later."

Antoinette served the notice, with a copy of the original trust, on January 27, 2015. She then served a copy of the amendment on March 17, 2015. George contends that Antoinette's petition under Probate Code section 17200 was, in substance, an action to contest the trust. Because it was not filed within either (1) 120 days after January 27, 2015, or (2) 60 days after March 17, 2015, he concludes that it is barred.

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[1] Subject to exceptions not applicable here, the notice must be served not more than 60 days after the triggering event. (Prob. Code, § 16061.7, subd. (f).) Here, Antoinette did not serve the notice until more than a year after Angeline's death. It is arguable that, as a result, the notice was a nullity and did not start the 120-day period. (See *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 215-219 [notice that does not satisfy the requirements of Prob. Code, § 16061.7 does not start the limitations period; but see *Germino v. Hillyer* (2003) 107 Cal.App.4th 951, 955 [defective notice is not a nullity where the recipient was not prejudiced by the defect].) In that event, however, Antoinette's petition clearly was not time-barred.

Preliminarily, Antoinette argues that a "petition . . . pursuant to Probate Code [section] 17200 . . . is neutral, not adversarial — hence, this is not a trust contest."

"In determining whether [a petition] constitutes an action to contest [a] trust within the purview of section 16061.8, we look to the substance of that petition and its 'practical effect.' We are not bound by its label. [Citations.]" (*Estate of Stoker* (2011) 193 Cal.App.4th 236, 241.)

Probate Code section 17200 provides that "a trustee or beneficiary of a trust may petition the court . . . concerning the internal affairs of the trust or to determine the existence of the trust." (*Id.*, subd. (a).) Such a petition may be used to ask the court to determine, among other things, "questions of construction of a trust instrument" (*id.*, subd. (b)(1)) as well as "the validity of a trust provision" (*id.*, subd. (b)(3)).

"Numerous cases hold that . . . a petition seeking construction or interpretation of a will is [not] a 'contest,' although such proceedings might result in invalidation of certain of the will's provisions. [Citations.]" (*Estate of Black* (1984) 160 Cal.App.3d 582, 588.) """An action brought to construe a will is not a contest . . . , because it is obvious that the moving party does not by such means seek to set aside or annul the will, but rather to ascertain the true meaning of the testatrix and to enforce what she desired."""" (*Ibid.*)

Probate Code section 17200, however, lists a wide range of issues that the court may be asked to determine; moreover, this list "is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of

the trust." (Cal. Law Revision Com. com., reprinted at 54A pt. 1 West's Ann. Prob. Code (2011 ed.) foll. § 17200, p. 317.) A petition under Probate Code section 17200 may be filed by a trustee or by a beneficiary. (*Id*., subd. (a).) It is hard to imagine any trust contest that could *not* be brought under Probate Code section 17200. Thus, adopting Antoinette's reasoning would gut Probate Code section 16061.8.

Instead, whether a petition under Probate Code section 17200 constitutes a contest must be answered on a case-by-case basis. Here, in her petition, Antoinette alleged that she wrote out the amendment, "as a scribe," for Angeline to sign. She then asked the trial court to "confirm the amendment . . . as valid." George responded that the amendment "was not properly executed or signed by Angeline" and "is therefore invalid and a sham." This dispute concerned whether the amendment had been properly executed and whether it partially revoked the trust — classic matters at issue in a contest. It did not require the trial court to *interpret* the trust — only to decide which *version* of the trust was in effect. Admittedly, Antoinette *also* asked the trial court to interpret the amendment. Nevertheless, her petition went beyond this.

The real issue in this case, however, is not so much the meaning of "contest" as the meaning of "the trust." George assumes that here, "the trust" means the original trust, before the amendment. Thus, he argues: "[T]he terms of the Trust and the Amendment are partially 'inconsistent' and the Amendment partially revokes the terms of the [T]rust . . . ." He concludes that the "[p]etition to determine the validity of the Amendment is,

'in practical effect,' an action partially challenging and revoking the terms of the Trust . . . ." He provides no reasoning to support this assumption.

This assumption flies in the face of the overall statutory scheme. Probate Code section 16061.7 requires the trustee to give the beneficiaries notice that they have a right to receive "the terms of the trust." "The terms of the trust" include any amendments. Probate Code section 16061.8 then provides that any action to contest "the trust" must be brought within 120 days after this notice, or within 60 days after the trustee furnishes the terms of "the trust," whichever is later. The whole point of these provisions is to give the beneficiaries an opportunity to learn what the trustee is contending the trust terms are, along with a time-limited opportunity to dispute the trustee's position. It seems inescapable that "the trust" refers to those trust terms that the trustee actually furnishes.[2]

Here, Antoinette sent, along with her notice, a copy of the original trust. George may reason that this established that the original trust was "the trust" for purposes of Probate Code section 16061.8. However, while the 120 days were still running, Antoinette sent a copy of the amendment to all beneficiaries. This adopted the amendment as "the trust." At the same time, it also triggered the alternative 60-day limitation period, so that any beneficiary who wanted to contest the amendment had 60

[2] This is not a case in which the trustee served the notice but never served a copy of the terms of the trust. Thus, we need not decide what "the trust" would mean in such a case.

days in which to do so (and more, in fact, because the 120-day period was longer than the 60-day period).

We see no reason why a trustee cannot change his or her mind about the identity of the documents constituting the trust, provided the trustee does so during the 120-day period. After all, a trustee can serve the notice without serving the terms of the trust at all; the terms need only be served on request. And the beneficiaries are not prejudiced, because they are fully informed of the trustee's position, and they still have the statutory 60 days in which to contest that position.

George relies on *Straley v. Gamble* (2013) 217 Cal.App.4th 533. There, the trustor set up a trust and deliberately did not name her son Steven as a beneficiary. (*Id*. at p. 535.) According to Steven, however, she later executed an amendment making him the sole beneficiary. After her death, the successor trustee served notice pursuant to Probate Code section 16061.7, together with a copy of the original trust. Within the 120 days, Steven *filed* a petition to determine the validity of the amendment; however, he did not *serve* it until after the 120 days had run. The successor trustee took the position that the amendment was invalid. (*Straley*, *supra*, at p. 536.)

The trial court ruled that Steven's petition was time-barred under Probate Code section 16061.8. (*Straley v. Gamble*, *supra*, 217 Cal.App.4th at p. 536.) The appellate court reversed, holding that Probate Code section 16061.8 merely required the petition to be filed, rather than served, within the 120 days. (*Straley*, *supra*, at pp. 537-538.)

According to George, *Straley* stands for the proposition that a petition to determine the validity of an amendment to a trust necessarily constitutes an action to contest the trust. Not so. In *Straley*, the trial court had ruled that the petition was time-barred under Probate Code section 16061.8; once the appellate court decided that it was not, it had to reverse, without any need to determine whether Probate Code section 16061.8 applied at all. Accordingly, nobody was claiming that Steven's petition was *not* an action to contest the trust. "'"'"[I]t is axiomatic that cases are not authority for propositions not considered.'"'" [Citations.]" (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 641.)

In any event, *Straley* is perfectly consistent with our approach. There, the trustee adopted the original trust by sending a copy of it to the beneficiaries; Steven's petition asserting the validity of the amendment was therefore an action to contest the trust. Here, however, it was Antoinette, as trustee, who adopted the amendment by sending a copy of it to the beneficiaries. Her petition asserting the validity of the amendment therefore was not an action to contest the trust.

Parenthetically, we express no opinion on a case in which the trustee serves *only* the original trust and, even though a purported amendment exists, never serves it — whether accidentally or deliberately, and whether in good faith or in bad faith. These facts conceivably might change the analysis and could raise issues that are not presented here, including breach of fiduciary duty and misrepresentation.

We therefore agree with the trial court that Antoinette's petition was not an action to contest the trust within the meaning of Probate Code section 16061.8.

III

DISPOSITION

The order appealed from is affirmed. Antoinette is awarded costs on appeal against George.

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RAMIREZ
P. J.

We concur:

CODRINGTON
J.

FIELDS
J.