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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SAMANTHA FAULKNER et al., Plaintiffs and Appellants, v. ALEXANDER HUGHES, Defendant and Respondent.	2d Civil No. B268680 (Super. Ct. No. BP063500) (Los Angeles County)

Samantha Faulkner and Dale Sefarian appeal from an order granting a motion for judgment on the pleadings against them and in favor of Alexander Hughes on their petitions to be appointed as successor co-trustees to the Mark Hughes Family Trust. We reverse.

BACKGROUND

Mark Hughes created a trust in 1987 and amended it many times during his lifetime. We refer collectively to the "Third Amendment to and Complete Restatement of [the] Mark

Hughes Family Trust," and its fourth, fifth, sixth, and seventh amendments as "the trust."

The trust held more than $300 million in assets when Hughes died in 2000. Hughes's minor son, Alexander,[1] was nine years old and the trust's sole noncontingent beneficiary. (*Hughes v. Klein* (Mar. 30, 2015, A138983) [nonpub.].)

Upon Hughes's death, three of his associates became co-trustees under the terms of the trust: Conrad Klein, Christopher Pair, and Jack Reynolds. In 2013, the court granted Alexander's petition to remove all three due to their breach of trust. To fill the vacancy, the court appointed Fiduciary Trust International (FTI) as interim successor trustee. Division Three of the First Appellate District of the Court of Appeal affirmed the removal order in 2015. (*Hughes v. Klein*, *supra*, A138983.)

Once the removal order became final, Alexander appointed FTI as sole permanent successor trustee. (Prob. Code,[2] § 15660, subd. (c) [appointment of trust company by consent of all beneficiaries where trust instrument does not provide practical method for filling vacancy].) Faulkner and Sefarian filed petitions challenging FTI's appointment. They asserted that paragraph 3.2.1 of the trust names them as successor co-trustees if Klein, Pair, and Reynolds become "unable or unwilling to serve."

Alexander opposed the petitions in a motion for judgment on the pleadings. He argued that paragraph 3.2.1 does

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[1] We refer to Alexander Hughes by his first name for ease of identification.

[2] All statutory references are to the Probate Code unless otherwise stated.

not apply because all three initial successor trustees were judicially removed. He reasons that (1) Klein, Pair, and Reynolds were not "unable" to serve within the meaning of the trust because that term is defined elsewhere in the trust to mean a certified physical or mental incapacity, and (2) that even if they were unable to serve, paragraph 3.2.1 does not apply because it is only triggered if one or two (but not three) of Klein, Pair, and Reynolds are unable to serve.

Paragraph 3.2.1 provides: "Conrad Klein, Christopher Pair and Jack Reynolds shall serve as Co-Trustees, or if one of them shall be unable or unwilling to serve as a Co-Trustee, then the other two of them shall serve as Co-Trustees, with the first of the following in order of preference, who is able and willing to serve as Co-Trustee, or if two of the then serving Co-Trustees shall be unable or unwilling to serve, the other Co-Trustee shall serve together with the first two individuals named below, in order of priority, who are able and willing to serve as Co-Trustees: (1) Michael Rosen; (2) Samantha Faulkner; or (3) Dale Sefarian. It is Trustor's preference for there to be three Co-Trustees, but if only two of the individuals named above shall be able and willing to serve, they shall serve as Co-Trustees. If only one of the above named nominees shall be able and willing to serve as Trustee, he or she shall serve as sole Trustee."

Paragraph 3.3 provides, "The incapacity or inability of a Trustee shall mean such Trustee's physical or mental incapacity to conduct the regular affairs of the Trust . . . . The condition of such incapacity shall be evidenced by a written certificate or statement signed by two (2) physicians (one of whom shall be such Trustee's attending physician, if any) who have examined such Trustee pursuant to a written request of

Trustor or of one or more of the adult beneficiaries of the trust estate if the nondisabled Trustor is unable to act."

The probate court found the trust does not provide a method for filling the vacancy created by removal because (1) the term "unable" as defined in paragraph 3.3 does not include judicial removal, and (2) more than two of Klein, Pair, and Reynolds were removed. Because the trust does not provide a method to fill the vacancy, it concluded Alexander's appointment of FTI was effective. (§ 15660, subds. (b) & (c).) It therefore granted Alexander's motion.

DISCUSSION

A vacancy in the office of a co-trustee is to be filled as provided in the trust instrument if the instrument "provides a practical method of appointing a trustee or names the person to fill the vacancy." (§ 15660, subd. (b).) Otherwise, the vacancy may be filled by "a trust company" that accepts the trust with consent of the noncontingent beneficiaries. (§ 15660, subd. (c).) Whether the trust provides a practical method of filling the vacancy is a question of interpretation for our independent review. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604 [independent review where interpretation does not turn on conflict or question of credibility in extrinsic evidence].)

The paramount rule of construction requires us to give effect to the decedent's intent. (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134.) We must give the words of the instrument "an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (§ 21120.) In doing so we must construe "[a]ll parts of [the] instrument . . . in relation to each other and . . . if possible, to form a consistent whole." (§ 21121.)

We must subordinate the meaning of particular words, phrases and provisions to a decedent's testamentary scheme, general intention, or dominant purpose. (*In re Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 435.)

"The words of [the] instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained." (§ 21122.) "If the meaning of any part of [the] instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (§ 21121.)

The words of paragraph 3.2.1 unambiguously name persons to fill the vacancy caused by the present circumstances. Paragraph 3.2.1 provides, "if only two of the individuals named above shall be able and willing to serve, they shall serve as Co-Trustees." Named "above" are Klein, Pair, Reynolds, Rosen, Faulkner, and Sefarian. Only two of these people (Faulkner and Sefarian) are able and willing to serve because Klein, Pair, and Reynolds were removed and Rosen is unwilling.

Our interpretation gives "unable" its ordinary meaning and gives effect to Hughes's clear intent not to have an institutional trustee. The ordinary meaning of unable is broad. For example, a named individual trustee is unable to serve if they cannot be identified or do not exist, if they die, if they become bankrupt, if they become subject to a guardianship or conservatorship, or if they are removed. (§ 15643 ["There is a vacancy in the office of trustee in any of the following circumstances . . . "].) If we adopted Alexander's narrow interpretation of "unable" (certified physical or mental incapacity), Hughes's succession plan would be ineffective in all

of these circumstances except death. The result in many such circumstances would be an institutional successor trustee. (§ 15660, subd. (c).)

But Hughes demonstrated his intent not to have an institutional trustee. Hughes's trust contemplates only individual trustees when it sets compensation in an amount "no greater than one-half (1/2) of the fee then chargeable by corporate trustees" in Los Angeles. In paragraph 3.2.1, he expressed his "preference for there to be three co-trustees," but stated that if only one of the six named individuals could serve, "he or she shall serve as sole Trustee." His trust created various roles but he filled none of them with institutions and named no institutions as successors. (E.g., paragraphs 3.2.1 [successor co-trustees, naming individuals and naming individuals to fill vacancies], 3.2.2.1 [Herbalife Stock Committee, naming individual members, and naming individuals to fill vacancies], 5.4.1 [custodian of gift to Alexander of stock, naming individuals and individual successors].) The care Hughes took in selecting these individuals is reflected in the many amendments he used to adjust the lists of names.

It is true that the word "inability" is defined narrowly elsewhere in the trust, when coupled with "incapacity," to mean only certified physical or mental incapacity. But we need not resort to that part of the instrument because the meaning of "unable" in paragraph 3.2.1 is not ambiguous or doubtful. (§ 21121.) The rules of interpretation are aids to ascertain, not frustrate, the trustor's objectives. (*Estate of Salisbury* (1978) 76 Cal.App.3d 635, 643.) If we replaced the plain word "unable" in paragraph 3.2.1 with paragraph 3.3's narrow definition of

"incapacity or inability," we would frustrate Hughes's manifest intent to name a series of carefully selected individuals to serve.

Our interpretation does not render paragraph 3.3's definition of "incapacity or inability" inoperative. (§ 21120.) Paragraph 3.3 is titled "Incapacity or Inability of a Trustee," and provides that the "incapacity or inability of a Trustee shall mean such Trustee's physical or mental incapacity" as certified by two physicians. The context of the entire trust shows the definition is designed to govern doubts about the mental or physical ability of a trustee. That purpose is unencumbered by our interpretation of paragraph 3.2.1.

The Maryland case upon which Alexander relies does not persuade us otherwise. (*Lopez v. Lopez* (Md. 1968) 243 A.2d 588, 597 [provision that son shall become trustee if wife should "die" did not provide for succession if she resigned].) Every will involves singular facts. Even our own state's precedent decisions generally are not helpful. (*Estate of Goyette* (2004) 123 Cal.App.4th 67, 71.)

If the meaning of a word is unmistakable, the intention which is expressed thereby must govern. (*In re Estate of Purcell* (1914) 167 Cal. 176, 178.) Klein, Pair, and Reynolds are unable to serve as trustees because a court has ordered them not to do so. Only two of the individuals named by Hughes are able or willing to serve. Paragraph 3.2.1 unambiguously provides that they shall serve as co-trustees.

DISPOSITION

The order is reversed. On remand, the probate court shall enter a new order granting judgment on the pleadings in favor of petitioners Faulkner and Sefarian pursuant to Code of

Civil Procedure section 438, subdivisions (b)(2) and (c)(3)(A). Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Lesley C. Green, Judge

Superior Court County of Los Angeles

Augustine, Seymour & Roshan, Roshan Wick and Benazeer Roshan, for Plaintiff and Appellant Samantha Faulkner.

Sheppard, Mullin, Richter & Hampton, Karin D. Vogel, Aaron J. Malo, Sean P. O'Connor and Randolph Godshall, for Plaintiff and Appellant Dale Sefarian.

Greenberg Traurig, Eric V. Rowen, Scott D. Bertzyk, Lisa C. McCurdy and Matthew R. Gershman, for Defendant and Respondent.