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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DEBORAH D. FRAHM et al., as Trustees, etc., Plaintiffs and Appellants, v. TARI F. ROKUS, as Trustee, etc., Defendant and Respondent.	B244354 (Los Angeles County Super. Ct. No. GP015757)

APPEAL from an order of the Superior Court of Los Angeles County, Stanley Blumenfeld, Judge. Affirmed.

Oldman Cooley Sallus Birnberg & Coleman, Marshal A. Oldman, Marc L. Sallus and Justin B. Gold for Plaintiffs and Appellants.

Sacks, Glazier, Franklin & Lodise, Margaret Lodise, Benazeer Roshan and Leila B. Azari for Defendant and Respondent.

I. INTRODUCTION

Defendants, Deborah D. Frahm and Sherryl L. Lilley, appeal from the July 31, 2012 probate court order which distributed assets of the Frahm Family Trust (the trust). The probate court directed the trustees to allocate a $3.2 million payment for promissory notes to plaintiff, Tari F. Rokus. In 1993, an iteration of the family business, Reid Plastics, Inc., issued promissory notes to the settlors, Carl and Shirley Frahm (the Frahms), in exchange for a loan. In 1997, the Frahms received $3.2 million in payment to extinguish the promissory notes. Defendants contend the probate court erred by allocating the $3.2 million to plaintiff rather than having the assets split three ways under the trust's residuary clause. Plaintiff contends the probate court order was proper because the Frahms intended she receive the proceeds from the Reid Plastics, Inc. sale including the promissory note payment. We affirm the July 31, 2012 order.

II. FACTUAL BACKGROUND

A. Reid Valve Company

Ms. Frahm's father established Reid Valve Company in 1961. Ms. Frahm inherited Reid Valve Company and the Frahms took over the business in 1970. Plaintiff worked at Reid Valve Company in the 1970s during the summer. In July of 1976, she began working full-time, performing accounting, payroll and filing tasks in the company office. From 1976 to 1997, plaintiff held different jobs with Reid Valve Company, including: accounts receivable specialist; vice-president; executive vice-present; and general counsel. In February 1979, plaintiff's husband, Bruno Rokus, left his position as an investment banker to work at Reid Valve Company.

From 1979 to 1988, plaintiff and Mr. Rokus ("the Rokuses") assumed greater responsibility for the company as the Frahms' involvement declined. Reid Valve Company became successful, posting annual sales of approximately $20 million in 1988.

By 1988, the Rokuses owned 250,000 shares of Reid Valve Company and the Frahms owned 1 million shares.

On January 1, 1989, the Frahms and the Rokuses sold Reid Valve Company to Kindred Alliance, Inc. for approximately $8.5 million. The Frahms and Rokuses received $4,225,000 for their stock. In addition, they received non-compete payments valued at $3,406,400 for the Frahms and $851,200 for the Rokuses.

At the time of the sale, plaintiff was executive vice-president and general counsel. Mr. Rokus was general manager. After the sale to Kindred Alliance, Inc., Mr. Rokus remained as a board member and company president. Plaintiff worked for the "business" for approximately one year before going to the law firm Jones Day as a contract attorney. Plaintiff continued to act as a consultant to the company overseeing human resources, risk management, trademarks and patents.

Approximately two months after the 1989 sale, the company changed its name to Reid Plastics, Inc. By 1991, Reid Plastics, Inc. experienced financial problems. In 1992, the owners unsuccessfully attempted to sell Reid Plastics, Inc. to a third party. By 1993, Reid Plastics, Inc. continued its financial decline and the principal new owner, Lou Kwiker, contemplated filing a bankruptcy petition.

In 1993, the Rokuses repurchased Reid Plastics, Inc. from Mr. Kwiker. As part of the repurchase, the Rokuses gave the Frahms a 20 percent equity interest in Reid Plastics, Inc. The Rokuses retained 80 percent equity interest for themselves. In exchange, the Frahms agreed to loan $3.2 million to Reid Plastics, Inc. by returning $2,502,400 which they received for their non-compete agreements in 1989. The Frahms also deferred $904,000 in non-compete payments which they were owed. Reid Plastics, Inc. issued promissory notes to the Frahms worth $3.2 million in exchange for the loan. The proceeds of these promissory notes is the principal issue on appeal.

By 1997, the Rokuses had succeeded in returning Reid Plastics, Inc. to sound financial footing. Reid Plastics, Inc. became a profitable company with $150 to $170 million in annual sales. In 1997, the Rokuses decided to find a buyer for Reid Plastics, Inc. A company named Vestar Capital Partners agreed to purchase a controlling interest

in Reid Plastics, Inc. Vestar Capital Partners created a holding company entitled Vestar Reid LLC which purchased the Reid Plastics, Inc. stock. The stock was placed in a holding company named Reid Plastics Holdings, Inc.

Under the 1997 transaction, Vestar Reid LLC paid almost $60 million to purchase the outstanding shares in Reid Plastics Holdings, Inc. This made Vestar Reid LLC the majority owner of Reid Plastics, Inc. Mr. Frahm died prior to the close of sale. Ms. Frahm received approximately $5.8 million, about $2.6 million for her stock and $3.2 million for the promissory notes. On October 15, 1997, these amounts were deposited into the Frahms' "Active Assets Account" with Dean Witter Reynolds, Inc. The deposit of the $3.2 million is directly pertinent to the ademption issue.

B. The Frahm Family Trust

The Frahms established the trust on September 25, 1979. As noted, Mr. Frahm died on October 1, 1997. Ms. Frahm died on December 28, 2010. Plaintiff and defendants are the: Frahms' three daughters; trust co-trustees; and trust beneficiaries.

The trust has gone through several amendments and restatements. The last change occurred on June 21, 1996, when the Frahms executed the "First Amendment to the Second Restatement of Frahm Family Trust" ("1996 Amendment").

The relevant portion of the trust concerns article VI, section C, part 3, subparagraphs A and B. Subparagraph A states, "(A) Upon the death of the Surviving Spouse, the Trustee shall divide the trust estate into equal shares as follows: one share for each of the Settlors' then living children . . . ." Subparagraph B provides in part: "Notwithstanding the provisions of subparagraph (A), the share set aside for the Settlors' daughter, TARI F. ROKUS, or her issue, shall include all of the trust's interest in (a) the [Duncanville property] and (b) the stock of Reid Plastics, Inc., or any successor thereto, together with any options to acquire such stock and any promissory notes, debentures or other instruments of indebtedness issued by Reid Plastics, Inc. If some, or all, of the stock of Reid Plastics, Inc., or any successor thereto, has been sold or exchanged for

other stock or property at the time of the Surviving Spouse's death, the Trustee shall, to the extent of the amount sold, distribute to the trust set aside for the benefit of TARI F. ROKUS . . . cash or other property in an amount equal to the net sales price . . . including as part of the trust estate any note received as payment for such stock as was sold. To the extent that such stock was exchanged, the Trustee shall distribute to the trust set aside for the benefit of TARI F. ROKUS . . . the stock or other property received in such exchange. Partial or complete redemption of stock by Reid Plastics, Inc. or any successor thereto shall not be considered a sale or exchange. Provided, however, that if the value of the [Duncanville property] and the stock of Reid Plastics, Inc. exceeds one-third of the trust estate, the trust set aside for the benefit of TARI F. ROKUS shall be comprised of said properties and the balance of the trust estate shall be divided between Settlors' other children or their descendants as provided in subparagraph (A) above." The significant change in the 1996 Amendment was the addition of "any promissory notes, debentures or other instruments of indebtedness issued by Reid Plastics, Inc." to the trust.

C. The Trial

On July 13, 2011, plaintiff filed a petition pursuant to Probate Code section 17200 for an order determining distribution of trust corpus.[1] The trust estate was valued at approximately $15 million, including two real estate parcels and other investments. Plaintiff argues she was entitled to the net proceeds from both the Kindred Alliance, Inc. and Vestar Capital Partners sales. As noted, on January 1, 1989, Reid Valve Company was sold to Kindred Alliance, Inc. And in 1997, Vestar Capital Partners purchased a controlling interest in Reid Plastics, Inc. Defendants argued the proceeds were to be divided equally among the three daughters. During the week of April 2, 2012, a bench trial was held. We will detail the controlling testimony later in this opinion.

[1] All statutory references are to the Probate Code unless indicated otherwise.

D. The Probate Court's Statement Of Decision

On April 18, 2012, the probate court issued its "Findings of Fact and Conclusions of Law." On April 30, 2012, defendants filed a "Request for Statement of Decision." On May 3, 2012, defendants filed objections to the probate court's factual findings and legal conclusions.

On May 9, 2012, the probate court ruled its factual findings and legal conclusions would serve as a proposed Code of Civil Procedure section 632 statement of decision. The probate court provided defendants with the opportunity to supplement their objections by May 18, 2012, and plaintiff could respond by May 31, 2012. On May 18, 2012, defendants filed their amended objections and on May 31, 2012, plaintiff filed her response.

On July 31, 2012, the probate court issued its "Final Statement of Decision." The probate court ruled: "The Frahms expressed their clear intent that [plaintiff] receive their 20% interest in Reid Plastics, or any successor, whether the Frahms kept the stock or sold it in the future. They also carved out their interest in the promissory notes issued by Reid Plastics. The purpose of the carve out of their entire interest in Reid Plastics -- the stock and the notes -- was to recognize [the Rokuses'] contribution to the business. [¶] . . . The remaining question is the amount to be allocated to the carve out for [plaintiff]. The proceeds for the sale of the Frahms' 20% stock interest in Reid Plastics ($2.6 million) clearly fall within the scope of the carve out. In the Amended Objections and Response to the Amended Objections, the parties vigorously dispute whether the value of the promissory notes issued by Reid Plastics ($3.2 million) is subject to the carve out. The Court finds that the Frahms intended to include the value of the promissory notes in the carve out for [plaintiff]. [¶] By the time of the 1996 Amendment, the Frahms knew that they had an asset worth $3.2 million in the form of outstanding promissory notes issued by Reid Plastics. In the 1996 Amendment, the Frahms carved out for [plaintiff] not only the stock of, but also the promissory notes issued by, Reid Plastics. This provision therefore manifests a clear intent to set aside for [plaintiff] this $3.2 million asset and is

consistent with the overall intent to give [plaintiff] what the Frahms believed she and her husband had earned through their participation in the business." (Fn. omitted.)

Defendants contended because the notes were paid in 1997 before Ms. Frahm's death, they reverted to the general trust estate as having been revoked when sold. The probate court rejected the argument. Based on the trust language and extrinsic evidence, the probate court concluded the Frahms' intent was to provide plaintiff the value of the promissory notes.

On August 20, 2012, defendants filed a new trial motion, which the probate court denied on September 28, 2012. Defendants subsequently appealed.

III. DISCUSSION

A. Overview

Defendants contend the trial court erred on the following grounds: the plain language of the trust instrument does not allocate payments for the promissory notes; there was no extrinsic evidence to support plaintiff receiving the promissory note proceeds; and plaintiff testified that she was not entitled to the payments on the promissory notes which constituted a binding judicial admission. In the alternative, defendants argue the funds were revoked under the ademption doctrine. We disagree and find plaintiff is entitled to receive the promissory note payments.

B. Standards Of Review

Defendants assert the appropriate standard of review is de novo. Our Supreme Court has held: "The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein. [Citations.]" (*Burch v. George* (1994) 7 Cal.4th 246, 254; *see Tunstall v. Wells* (2006) 144 Cal.App.4th 554, 561 [same]; § 21102, subd. (a) ["The intention of the

transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."].) Our Supreme Court has explained: "Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. . . ." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866; *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888.)

The trust language does not sufficiently fully explain the Frahms' intent. The trust provides for plaintiff to receive "any promissory notes, debentures or other instruments of indebtedness issued" by Reid Plastics, Inc. It explains what should happen if the Reid Plastics, Inc. stock is sold, exchanged, or redeemed. It limits plaintiff's allocation if the Duncanville property and Reid Plastics, Inc. stock should exceed one-third of the trust estate. However, the trust instrument does not explain what should occur if the promissory notes were extinguished. This uncertainty arose not from the plain language of the trust nor from a latent ambiguity. It occurred through a subsequent action -- the payment of the promissory notes when Reid Plastics, Inc. was sold to Vestar Capital Partners.

Further, it is unclear from the trust instrument whether the Frahms intended to revoke the specific gift of the promissory notes, also known as ademption. Our Supreme Court has held: "'"Ademption of a specific legacy is the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will which prevents its passing by the will, from which an intention that the legacy should fail is presumed."' [Citations.]" (*Estate of Mason* (1965) 62 Cal.2d 213, 215; *Brown v. Labow* (2007) 157 Cal.App.4th 795, 807.)

Thus, we are required to examine extrinsic evidence to ascertain the Frahms' intent. Our Supreme Court has held: "'The court must determine the true meaning of the

instrument in the light of the evidence available. It can neither exclude extrinsic evidence relevant to that determination nor invoke such evidence to write a new or different instrument.' [Citations]." (*Estate of Russell* (1968) 69 Cal.2d 200, 210; see § 21102, subd. (c) ["Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor."]; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73 [holding extrinsic evidence is admissible to prove a meaning to which the trust instrument is reasonably susceptible].) Because the trust is silent concerning a change to the promissory notes, we must examine extrinsic evidence, if any, to ascertain the Frahms' intent. We conduct a substantial evidence review of conflicting extrinsic evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Westfour Corp. v. Cal. First Bank* (1992) 3 Cal.App.4th 1554, 1558.)

C. Findings Of Fact Concerning The Frahms' Intent

The probate court found the Frahms intended for plaintiff to receive the value of the promissory notes. The probate court relied on the testimony of Lynne Kambe, Gerry Kastner, and plaintiff. We set forth their relevant testimony.

Plaintiff testified she had a conversation with Ms. Frahm concerning estate planning in 1986 or 1987. Plaintiff and Ms. Frahm discussed the Frahms eventually leaving Reid Valve Company. According to plaintiff, Ms. Frahm said they would have a deal in which the Rokuses would pay the Frahms for their stock in the company.

In 1988, plaintiff discussed estate planning with the Frahms. Plaintiff expressed concern to her parents that they had decreased the value of the company by removing assets from it for their personal benefit. In response, Ms. Frahm retrieved a copy of the trust and pointed to a provision, stating to plaintiff, "Don't worry about it because if anything happens to us, everything from Reid will be yours." Plaintiff stated that her parents explained "everything from Reid" meant "whatever came from Reid," so "it doesn't really matter if we take things out of the company."

In 2007 or 2008, plaintiff had a conversation with Ms. Frahm about the estate. Ms. Frahm had gone to Ms. Kambe to review the trust. Ms. Frahm wanted the Rokuses to be taken care of. Ms. Frahm talked about the Duncanville property which had been sold. Ms. Frahm did not want to exclude the property from the trust. Ms. Frahm wanted to keep the trust the way it was so that everything from Reid Valve Company went to plaintiff. At one point, plaintiff testified the Frahms stated, "[I]f it weren't for you and [Mr. Rokus], we would have lost everything."

Mr. Kastner was the Frahms' accountant. Mr. Kastner recalled the Frahms wanted plaintiff to have the Reid Valve Company stock or receive the proceeds from its sale.

Ms. Kambe is the attorney who drafted the restatement of the trust and the 1996 amendment while employed at Jones Day. In 1994, Ms. Kambe had a meeting with the Frahms to make changes to the trust. These changes became the 1996 Amendment. Ms. Kambe stated one principal change was to add provisions about notes and debentures. The Frahms never told Ms. Kambe that the 1996 amendment was inaccurate or failed to express the intended distribution of their estate upon their death.

D. Ademption Issue

As noted, an ademption of a legacy is its extinction or withdrawal which is coequivalent of its revocation. Our Supreme Court has explained: "A change in the form of property subject to a specific testamentary gift will not effect an ademption in the absence of proof that the testator intended that the gift fail." (*Estate of Mason*, *supra*, 62 Cal.2d at p. 215; *Estate of Austin* (1980) 113 Cal.App.3d 167, 174.) According to the Court of Appeal for the Fifth Appellate District, "In determining whether the change is in form only, California courts have lately tended to avoid strict rules of ademption; rather they look to the inferred or probable intent of the testator under the particular circumstances." (*Id*. at p. 173; see *Estate of Zahn* (1971) 16 Cal.App.3d 106, 113.) In *Estate of Mason*, *supra*, 62 Cal.2d at page 216, our Supreme Court ruled: "[A] specific testamentary gift is adeemed regardless of the testator's intention when the specific

property has been disposed *by the testator* and cannot be traced to other property in the estate [citations], or when the *testator* has placed the proceeds of such property in a fund bequeathed to another [citation] . . . ." (*Ibid.*; *Estate of Ehrenfels* (1966) 241 Cal.App.2d 215, 227-228.)

The probate court ruled the Frahms intended for plaintiff to receive the value of the promissory notes on the following grounds: at the time of the 1996 amendment, they were aware they possessed $3.2 million in promissory notes; the addition of the term "any promissory notes, debentures or other instruments of indebtedness issued by Reid Plastics, Inc." demonstrated a clear intent to provide plaintiff the value of the notes; they believed the Rokuses were vital to the success and growth of Reid Plastics, Inc.; and the carve out gave the Rokuses what they deserved. Substantial evidence supports the probate court's factual findings. There was testimony the Frahms wanted to reward the Rokuses for their efforts in making Reid Plastics, Inc. successful. This intent was shown by including the promissory notes into plaintiff's share of the trust. These factual findings support the conclusion that the settlors did not intend ademption.

Defendants argue plaintiff failed to demonstrate tracing of the assets to the estate. (See *Estate of Mason*, *supra*, 62 Cal.2d at p. 216 ["[A] specific testamentary gift is adeemed regardless of the testator's intention when the specific property has been disposed by *the testator* and cannot be traced to other property in the estate . . . ."]; *Estate of Ehrenfels*, *supra*, 241 Cal.App.2d at p. 227-228.) The probate court could reasonably find that tracing of the assets to the estate was demonstrated when the funds were placed in the Dean Witter Reynolds, Inc. account. The probate court did not err in concluding the promissory notes were not subject to the ademption doctrine.

E. Judicial Admission

Defendants argue plaintiff admitted that she did not seek recovery of the promissory note proceeds and such constitutes a judicial admission. Defendants rely on the following rule of law: "A judicial admission is a party's unequivocal concession of

the truth of a matter, and removes the matter as an issue in the case. [Citations.] This principle has particular force when the admission hurts the conceder's case." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App.4th 34, 48; see *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456 [same].)

Defendants cite to one instance of plaintiff's testimony. The probate court asked plaintiff, "What are you specifically claiming . . . that you're entitled to under the trust agreement?" Plaintiff responded, "It would be the sale from 1989 from Reid and the sale of stock in 1997." The probate court inquired, "Are you claiming anything else with respect to that [1997] sale?" Plaintiff responded, "No." The probate court considered defendants' judicial admission argument and was unpersuaded. In its final statement of decision, the probate court stated, "The Court disagrees with this reading of [plaintiff's] testimony, for it is divorced from [plaintiff's] broader claim at trial that she is entitled to the proceeds from the Vestar *and* Kindred sales--which, she contends, would include the $3.2 million in notes and then some."

Substantial evidence supports the probate court's conclusion that plaintiff did not unequivocally concede her lack of entitlement to the $3.2 million from the payment of the promissory notes. When defendants' counsel later asked what plaintiff's claim was, the probate court stated: "Let me tell you what I'm going to take her claim to be based upon her testimony. That she's entitled to receive anything related to the sale of Reid Plastics . . . and that is pursuant to a formula in the trust agreement. Anything aside from that . . . she's not claiming that she's entitled to. Am I correct?" Plaintiff responded, "You are correct." When asked by defendants' counsel whether she was claiming entitlement to the proceeds of Reid Valve Company, plaintiff stated: "Yes. To me it's the same company." Plaintiff later testified, "[T]he trust says I'm entitled to the sale of Reid and the proceeds thereof." The $3.2 million from the promissory notes was initially derived from the Frahms' non-compete payments as part of the Reid Valve Company sale to Kindred Alliance, Inc. The Frahms later agreed to loan this money back to Reid Plastics, Inc. and received the notes. There is substantial evidence plaintiff did not

concede the $3.2 million issue. Based on its factual findings, the probate court did not err in rejecting defendants' judicial admission argument.

F. The Subparagraph B One-Third Limitation Clause Does Not Apply

Defendants argue the trust language imposes a separate limitation on plaintiff's share. Defendants contend plaintiff's share of the trust estate can only exceed one-third with the Duncanville property and Reid Plastics, Inc. stock. Defendants rely on the last sentence of subparagraph B ("one-third clause"). Defendants' construction of the one-third clause is unpersuasive.

The one-third clause limits plaintiff's share of the trust. As noted, it states in part: "Provided, however, that if the value of the [Duncanville property] and the stock of Reid Plastics, Inc. exceeds one-third of the trust estate, the trust set aside for the benefit of TARI F. ROKUS shall be comprised of said properties and the balance of the trust estate shall be divided between Settlors' other children or their descendants as provided in subparagraph (A) above." The one-third clause limits plaintiff's share of the trust estate to the Duncanville property and Reid Plastics, Inc. stock if their value exceeds one-third of the total estate. However, if the total value of the Duncanville property and Reid Plastics, Inc. stock is under one-third of the whole trust, the clause does not apply. No party argues the value of Reid Plastics, Inc. stock and the Duncanville property alone exceeds one-third of the trust estate. The one-third clause is inapplicable.

IV. CONCLUSION

The order under review is affirmed. Plaintiff, Tari F. Rokus, is awarded her appeal costs from defendants, Deborah D. Frahm and Sherryl L. Lilley.

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TURNER, P. J.

We concur:

KRIEGLER, J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.