Filed 9/11/19 Rauschenberg v. Rauschenberg CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KRISTA RAUSCHENBERG et al., Plaintiffs and Respondents, v. LAUREN RAUSCHENBERG, as Trustee, etc., Defendant and Appellant.	B277474 (Los Angeles County Super. Ct. No. BP134482)

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed in part; reversed in part and remanded.

Wershow & Cole and Jonathan A. Wershow for Defendant and Appellant.

Fuller & Fuller, Bruce P. Fuller and Joshua Maldonado for Plaintiffs and Respondents.

Lauren Rauschenberg appeals from an order adjudicating ownership of trust property, finding Lauren breached her fiduciary duties, and removing her as trustee of an inter vivos trust, the Justice Family Trust (Trust). The Trust was established by Lauren's mother, France Justice (Fran),[1] and her stepfather, Paul Justice. The Trust named Lauren and her sisters, Krista Rauschenberg and Nisa Rauschenberg, as beneficiaries. The probate court removed Lauren as trustee following a trial on Krista and Nisa's petition to remove and surcharge the trustee. Lauren contends the probate court erred in finding the Missouri real property owned by Fran and Paul and Fran's individual retirement account (IRA) are Trust property.

We reverse the probate court's order to the extent it finds Lauren breached her fiduciary duty as to the IRA, ordered a constructive trust on the IRA fund and proceeds from the sale of the Missouri property, and surcharged Lauren her profit from the IRA. In all other respects, we affirm the probate court's order and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

Fran had three children from her first marriage with Fred Rauschenberg—Nisa, Lauren, and Krista.[2] Shortly after Fred died in 1975, Fran married Thomas Kamph. They divorced in or about 1985. In 1991 Fran married Paul. Fran and Paul lived

---

[1] We refer to the family members by their first names to avoid confusion.

[2] Our summary of the facts is based on the testimony at trial and the probate court's findings in its final statement of decision.

together in a home they owned at 475 Columbus Road, Forsyth, Missouri (Missouri property).

In 2006 Fran had kidney vasculitis, but she later recovered from the illness. In March 2007 Fran was diagnosed with pancreatic cancer. Paul suffered from dementia.

On April 2, 2007 Fran executed an IRA adoption agreement naming Lauren as sole beneficiary of Fran's AG Edwards IRA account.[3] Fran signed the designation in front of Lauren, and Paul signed as the spouse. Lauren testified Fran said "she wanted [Lauren] to have it." According to Lauren, Krista and Nisa were estranged from Fran. Lauren denied telling her then-husband, Jeffrey Slott (Jeff),[4] in early 2009 that Fran had intended to leave her IRA of almost $350,000 to all three daughters equally, and that Lauren convinced Fran to leave the entire amount to her with a promise that Lauren would share it with Krista and Nisa. Jeff testified that in 2003 Fran told him she intended to leave her IRA to her three daughters, but Fran reconsidered her original plan and later gave the IRA to Lauren. Nisa testified that when she visited Fran at her home for three or four days in April 2007, a week before Fran passed away, Fran told her she wanted Nisa, Lauren, and Krista to share equally in Fran's estate.[5] Krista testified Fran held an IRA in excess of

---

[3] The probate court's statement of decision cites to many trial exhibits that are not included in the appellate record. We rely on the facts set forth in the statement of decision to the extent the cited documents are not in the record.

[4] Lauren and Jeff were married in 2003 and began divorce proceedings in 2009; the divorce was finalized in 2011.

[5] Aside from this visit, Nisa did not visit Fran after Fran's marriage to Paul, and was estranged from Fran for many years. Nisa testified Lauren knew what assets Fran had because

$300,000 from Fred's pension with May Company. According to Krista, Fran said Krista, Lauren, and Nisa would share the IRA when Fran died.

On April 4, 2007 Fran and Paul added Lauren as a signatory to their U.S. Bank checking account. They also added Lauren as a signatory to their checking and savings accounts at Ozark Mountain Bank.

A. *Establishment of the Inter Vivos Trust*

On April 10, 2007 Fran and Paul, as trustors, and Lauren, as trustee,[6] executed a revocable inter vivos trust agreement to establish the Trust.[7] Fran and Paul's Missouri attorney had

---

Lauren had been "very close" to Fran for "a very, very long time" and was privy to information unknown to Krista and Nisa.

[6] Lauren is a real estate broker and a nonpracticing attorney licensed in California who lives in Los Angeles County.

[7] Lauren testified she brought the wills and the Trust to the hospital, where Fran and Paul signed the documents on April 10, 2007. In a 2009 declaration in Lauren and Jeff's divorce case, Jeff stated that in early 2009 Lauren admitted she forged Fran's signature on Fran's will and the Trust while Fran was in a coma at the hospital. At trial, Jeff denied Lauren forged Fran's signature on the will or Trust. Jeff stated he was extremely angry and devastated at the time he signed the declarations in the divorce case. Pat Bouldin, Paul's sister, stated in her declaration she was by Fran's bedside at the hospital on April 10, 2007, and Fran was put into a medically induced coma and was unconscious that day. Krista testified Fran was in and out of consciousness and was unable to carry on a conversation. Lauren denied Fran was in a coma on April 10, 2007. Two witnesses to the signing, Fran's friends Sandra and Duane English, stated in

drafted their wills and the Trust documents some time earlier. Because the documents were old and torn, Jeff had them retyped and gave them to Lauren to bring to the hospital. Article VIII of the Trust contains a choice-of-law clause: "This Trust has been accepted by the Trustee in the State of Missouri and its validity, construction and all rights hereunder shall be governed by the laws of that State."

Article I of the Trust provides, "The Trustor has transferred and delivered or will transfer and deliver to the Trustee, without consideration, the property described in Schedule 'A' attached hereto, the contents of which are incorporated herein by this reference. Also, the Trustor may hereafter designate the Trustee as beneficiary under any pension, profit sharing or other forms of employee benefit plans in which the Trustor has a beneficial or assignable interest. Additional property, real or personal, or any interest therein, acceptable to the Trustee, may be transferred to this Trust by the Trustor or any other person. The Trustee acknowledges receipt of some or all of the property or title to the property described in Schedule 'A,' and agrees to hold, manage and distribute the property described in Schedule 'A,' and all other property hereafter received, as hereinafter provided." The Trust identified Fran and Paul collectively as "Trustor." Article V, paragraph 5.08 requires the trustee to perform an accounting annually "or at other reasonable intervals as determined by the Trustee, to the beneficiaries of the Trust."

Schedule A of the Trust provides in relevant part, "1. All real estate now owned or hereafter acquired, wherever situated

---

their declarations Fran executed the documents on April 10, 2007.

and whether or not title reflects the name of the Trustee or this Trust so long as Trustor's name is reflected on the title thereof including, but not limited to that certain family residence located at 475 Columbus Road, Forsyth, Missouri 65653 and that certain parcel of land owned by Trustor adjacent to the above-described family residence. [¶] . . . [¶] 4. All stocks, bonds, bank accounts, investment accounts, deposits, cash, retirement accounts, IRA accounts, savings accounts, checking accounts, pension accounts, social security benefits, health insurance proceeds and benefits and all intangible rights of any nature whatsoever whether or not the foregoing assets are in the name of the Trustor, the Trustee or this Trust." Schedule A provides further in paragraph 6 that "[a]ll of the property described in Items 1 through 5 above are princip[al] of this Trust even if such assets have not been formally transferred to the Trustee or this Trust and regardless of whether the Trust has been funded with such assets."

The Trust became irrevocable upon the death of either trustor: "From and after the death of the first Trustor to die, this Trust may not be amended or revoked by any person." (Trust, art. II, ¶ 2.02.) Article III, paragraph 3.02.5 provides for distribution of the Trust assets to the beneficiaries: "Upon the death of the first Trustor this Trust shall immediately thereupon become irrevocable, and the Trustee shall as soon thereafter as reasonably practical distribute all trust principal and undistributed income equally to the Trustor's beneficiaries whereupon the Trust shall terminate. The Trustor's beneficiaries are . . . Lauren Rauschenberg-Slott, Nisa Rauschenberg and Krista Rauschenberg. All trust principal and undistributed income shall be distributed to the beneficiaries after deducting all expenses associated with administration of the Trust. Within the sole and exclusive discretion of the Trustee, the Trustee may

apply so much of the principal and/or undistributed income of the Trust to the health needs, care, living expenses and maintenance of the surviving Trustor to the extent such needs are not otherwise covered by insurance, Medicare, family support or other similar resources. . . ."[8]

Fran died two days later on April 12, 2007.[9] Lauren and Krista attended the memorial service in Missouri that was held two days later. Nisa did not attend. Of Fran's three daughters, only Lauren attended the funeral held a few days later in Alabama.

---

[8] Article V, paragraph 5.14 of the Trust contains a no contest provision: "In the event that any person contests any provision of this Trust, the enforceability of this Trust, the interpretation of this Trust, the validity of this Trust or any of its provisions or otherwise attempts to change the terms of this Trust or remove the Trustee, on any grounds whatsoever, whether informally or by the initiation of legal proceedings, all such persons, whether or not a beneficiary of this Trust, shall receive one dollar ($1.00) in full satisfaction of such claim or contest and shall not receive any other distribution from this Trust." The probate court rejected without prejudice Lauren's contention Krista and Nisa breached the no contest clause because the contention was not previously pleaded by Lauren. On appeal, Lauren does not challenge the probate court's finding the issue was forfeited.

[9] On April 10, 2007 Fran had also executed a will conveying all of her property to Lauren "if she survives me for ten (10) days, and if she does not, to Lauren . . . , Trustee of the Justice Family Trust to be held[,] administered and distributed in accordance with the terms of said trust." Lauren does not challenge the probate court's finding that Fran and Paul each executed wills making a pour-over gift of their estates to Lauren as trustee of the Trust.

B. *Events After Fran's Death*

A few weeks after Fran's death, Paul moved to live with his sister Evelyn Caillier in Newport Beach, California because he was suffering from dementia and was unable to live on his own. Lauren testified she attempted to have Paul take the necessary steps to transfer the Missouri property into the Trust because he was on the title to the property. Lauren consulted with three Missouri estate planning attorneys, Chauncey Parks,[10] Thomas Motley, and a third unnamed attorney, concerning the Trust assets. On May 12 or 13, 2007 Lauren consulted with Parks, who told her the only Trust assets were the U.S. Bank and Ozark Mountain Bank accounts. According to Lauren, Parks stated the Missouri property was not Trust property because it was required to have been in the Trust when Fran died, or Paul as the trustor must sign an assignment of trust to transfer the Missouri property to the Trust. Both Parks and Motley told Lauren she needed Paul's cooperation to put the Missouri property into the Trust because Paul was the trustor. Lauren testified all three Missouri attorneys told her any property placed into the Trust had to be transferred by a written instrument, such as an assignment or declaration.

After speaking with Parks, Lauren contacted Paul and asked if he wanted to assign the Missouri property to the Trust. Paul indicated he did not. Paul never signed a deed or assignment to transfer the Missouri property to Lauren as trustee. Neither did Lauren bring an action to recover the Missouri property for the Trust.

---

[10] Jeff testified Parks was the Missouri attorney who drafted the wills and Trust.

In June or July 2007 Paul granted Caillier his power of attorney, and he told Lauren he wanted Caillier to serve as trustee of the Trust. Paul instructed Lauren to transfer control of the U.S. Bank account to Caillier but to keep the money in the Ozark Mountain Bank accounts in case he needed it. During a visit in June or July 2007, Lauren gave Caillier the checkbook and check register for the U.S. Bank account.

On June 13, 2008 the lawyer for Caillier, as attorney-in-fact for Paul, sent a letter requesting Lauren provide an accounting of all assets in her possession belonging to Fran to which Paul might have a right as the surviving spouse, including the Missouri property, the IRA, and the bank accounts. By letter dated August 12, 2008, Lauren's counsel responded that Lauren, as trustee, was "holding funds for Paul as long as necessary" and would not distribute them to the beneficiaries, in case Paul needed the money. Lauren testified Caillier sold the Missouri property in 2008, although the record does not show the disposition of the sale proceeds.[11]

---

[11] The Missouri property was in the names of both Fran and Paul. The probate court noted no deed was presented to show how Fran and Paul held title to the Missouri property, but "allegedly" they held title as tenants by the entirety. "In Missouri a conveyance of real property to a husband and wife as co-grantees is presumed to create a tenancy by the entirety if there are no limiting words in the operative clauses of the deed." (*Ronollo v. Jacobs* (Mo. 1989) 775 S.W.2d 121, 123; accord, *Davidson v. Eubanks* (1945) 354 Mo. 301, 306-307 [189 S.W.2d 295, 297-298].) Where property is held as tenants by the entirety, "[n]either spouse owns an undivided half interest in entirety property; the whole entirety estate is vested and held in each spouse and the whole continues in the survivor." (*Ronollo*, at p. 123.) Therefore, following Fran's death, Paul had the right

Paul died on or about January 11, 2012. On January 17 Lauren, as trustee, sent letters to Krista and Nisa and distributed to each of them $24,036.14, which was one-third of the Trust's funds held in Chase Bank.[12] Lauren testified she did not distribute the proceeds of the bank account until after Paul's death because Paul instructed her not to do anything with the money in case he needed it.

C. *Petition for Accounting, Removal, and Surcharge of Trustee*

On May 2, 2012 Krista and Nisa filed a petition to compel a trust accounting and to remove and surcharge Lauren, as trustee. The petition alleged Krista and Nisa, through counsel, requested on February 21, 2012 that Lauren provide an accounting of trust assets. Lauren had not rendered an accounting to Krista and Nisa as beneficiaries. The petition alleged Lauren converted Trust assets for her own use and benefit, and it requested the probate court order Lauren to return the assets. The petition sought an accounting of the trust by Lauren, removal of Lauren as trustee, surcharge and double damages against Lauren for bad faith and wrongful taking of Trust property, and attorneys' fees.

D. *Lauren's Petition for Approval of First and Final Account*

On January 4, 2013 Lauren filed a first and final account and report of trustee and petition for approval of her accounting.

---

to control conveyance of the Missouri property as long as he continued to hold title to the property.

[12] In late April 2007 Lauren transferred money from the Ozark Mountain Bank accounts to a City National Bank account. Later she transferred the money to the Chase Bank trust account.

The petition stated only the funds in the Ozark Mountain Bank were transferred to the Trust. Lauren's accounting showed that at the time of Fran's death the Trust had $87,165.17 in the Ozark Mountain Bank account.

E. *Statement of Decision and Order*

On July 8, 2016 the probate court issued a final statement of decision following an eight-day trial on Krista and Nisa's petition and their objections to Lauren's petition for approval of her accounting. The court concluded Fran and Paul executed the Trust, finding Lauren's testimony that Fran signed the trust more believable than the conflicting accounts that Fran was in a coma and relying on the testimony of Sandra and Duane English, whom the court found were the only disinterested witnesses to Fran's execution of the documents. The court ruled under Missouri law, no declaration or deed was necessary to transfer the Missouri property into the Trust. Rather, under Missouri Revised Statutes[13] section 456.4-401, a declaration was "merely an alternative if there is not a transfer under the Trust." The court reasoned no declaration from Paul was required because schedule A of the Trust transferred the Missouri property into the Trust. The court rejected Lauren's contention Fran and Paul did not transfer the Missouri property into the Trust because there was no deed or legal description included in schedule A. The court acknowledged conveyance of real property may be

[13] Further undesignated statutory references are to the Missouri Revised Statutes, current through the 100th General Assembly.

made by a deed executed under section 442.020.[14] But the court concluded a separate deed was not required in this case because the Trust's terms conveyed the Missouri property into the Trust. Moreover, although a conveyance of real property must include a legal description under section 59.330, subdivision 2,[15] the lack of a legal description in schedule A of the Trust did not affect the validity of the Trust. The court found Lauren had a legal duty as trustee to recover the Missouri property and advise Caillier and Paul that the Missouri property was part of the Trust and could not be sold by Caillier, as attorney-in-fact for Paul.

As another basis for its ruling, the probate court found Lauren was estopped from asserting Fran and Paul failed to transfer the Missouri property into the Trust because Lauren "and her husband (at her request) were the ones who put the Trust together for them when [Fran] was about to die in the hospital (and Paul suffered from some level of dementia), [and

---

[14] Section 442.020 states, "Conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

[15] Section 59.330, subdivision 2 provides in relevant part, "2. All deeds, mortgages, conveyances, deeds of trust, [or] assignments . . . must contain a legal description of the lands affected. All deeds, except deeds of easement or right-of-way conveying any lands or tenements must contain a mailing address of one of the grantees named in the instrument. The recorder of deeds shall not record such instrument absent such address or legal description; provided, however, that the statutory constructive notice or the validity of the instrument shall not be affected by the absence of the address or the absence of the legal description."

Lauren] and her husband are both lawyers on whom settlors would have and did reasonably rely, and it would be unfair to now allow Lauren to contend otherwise."

The court also rejected Lauren's argument that Fran gave her the IRA prior to the establishment of the Trust, and therefore it was not Trust property. The court determined Fran's intent in the Trust superseded her earlier stated intent expressed in the IRA adoption agreement. The court explained, "A more rational explanation, that reconciles both documents with one another, is that [Fran] made Lauren the sole beneficiary where there was then no trust and she wanted Lauren to hold the money for her sisters." In addition, "Even if Lauren believed that the IRA was hers, which the Court does not accept, as trustee consistent with her fiduciary duties to the beneficiaries . . . , including to marshal and administer Trust property (and the IRA again was identified in the Trust as Trust property) she had a conflict of interest, which she should have appreciated as a lawyer, whereby she should have at a minimum sought a court order that determined what rights, if any, she had to that money as an individual. She did not do so." The court concluded Lauren's failure to seek a court order or otherwise account for the IRA was in bad faith and a breach of her fiduciary duties.

The court found Krista and Nisa established Lauren breached her fiduciary duties under Missouri law. The court observed, "Lauren offered no evidence other than her own and Jeff's testimony that she took the actions she did as a result of legal advice from a lawyer in Missouri. Even if she did receive advice, it appears to have been minimal. There are no bills for such advice. There are no written opinions of lawyers. Even assuming she did receive advice, it appears to have been wrong advice. More significantly, reliance on counsel is not a defense to

breach of fiduciary duty (even if it may defeat a claim for punitive damages) in any event." The court imposed a constructive trust on the IRA fund and the proceeds from the sale of the Missouri property as remedies for Lauren's breach of trust under Missouri law. In addition, the court surcharged Lauren her profit from the IRA, ruling Krista and Nisa were entitled to the entire value of the IRA less any taxes Lauren paid on the IRA. Further, the court sustained Krista and Nisa's objection to Lauren's account, and ordered a hearing on the amount of surcharge for the Missouri property, the IRA, and the bank accounts. The court removed Lauren as trustee and appointed Jeffrey Marvan, an experienced attorney, as successor trustee.[16]

On August 18, 2016 the court entered an order finding the Missouri property, IRA, U.S. Bank account, and Ozark Mountain Bank account were trust property. The court found Lauren breached her fiduciary duties, and it set a hearing for a surcharge trial to determine damages. The court found Krista and Nisa were prevailing parties in their action against Lauren. The order removed Lauren as trustee and appointed Marvan as successor trustee.

Lauren filed a timely notice of appeal.[17]

---

[16] The court did not find either Krista or Nisa was a suitable successor trustee because of their false testimony.

[17] The August 18, 2016 order, removing Lauren as trustee, is an appealable order. (Code of Civ. Proc. § 904.1, subd. (a)(10) ["[a]n appeal . . . may be taken . . . [¶] . . . (10) [f]rom an order made appealable by the Probate Code . . ."]; Prob. Code, § 1300, subd. (g) [in probate proceedings, appeal may be taken from any order "[s]urcharging, removing, or discharging a fiduciary"]; see Prob. Code, § 1304, subd. (a) [any final order under Prob. Code,

DISCUSSION

A. *Standard of Review*

The interpretation of a will or trust instrument presents a question of law unless interpretation turns on a "conflict or question of credibility in the relevant extrinsic evidence." (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604; accord, *Burch v. George* (1994) 7 Cal.4th 246, 254.) "The paramount rule in construing the trust is to determine the trustor's intent from the whole of the instrument and in accordance with applicable law." (*Estate of O'Connor* (2018) 26 Cal.App.5th 871, 878; accord, *Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.)

The interpretation of a statute is an issue of law, which we review de novo. (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1118; accord, *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089.) "Our primary task 'in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.]' [Citation.] We construe the statute's words in context, harmonizing statutory provisions to avoid absurd results. [Citation.] If the statutory text is susceptible to more than one reasonable construction, we may consider extrinsic aids such as legislative history to facilitate our interpretative analysis." (*California Building Industry Assn. v. State Water Resources*

---

§ 17200, which provides in subd. (b)(10) for removal of a trustee, is appealable].)

Control Bd. (2018) 4 Cal.5th 1032, 1041; accord, *United Riggers & Erectors, Inc.*, at p. 1089.)

We review a probate court's finding of breach of fiduciary duty under the substantial evidence standard. (*Orange Catholic Foundation v. Arvizu* (2018) 28 Cal.App.5th 283, 292 ["We review the trial court's findings of fact [in determining whether trustee breached duties], including its factual findings on witness credibility and whether [the trustee] acted reasonably and in good faith, under the substantial evidence standard of review."]; *Williamson v. Brooks* (2017) 7 Cal.App.5th 1294, 1299 [reviewing findings of fact that cotrustees did not breach fiduciary duties for substantial evidence].) "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.] '[I]t is not our role to reweigh the evidence, redetermine the credibility of witnesses, or resolve conflicts in the testimony, and we will not disturb the judgment if there is evidence to support it.'" (*Williamson*, at pp. 1299-1300; accord, *Orange Catholic Foundation*, at p. 292.)

We review the probate court's decision to remove a trustee for breach of trust for an abuse of discretion. (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633 ["The removal and substitution of a trustee is largely within the discretion of the trial court."]; *Trolan v. Trolan* (2019) 31 Cal.App.5th 939, 957; *Orange Catholic Foundation v. Arvizu, supra*, 28 Cal.App.5th at p. 292.) "'An abuse of discretion occurs only if the reviewing court, considering the applicable law and all of the relevant circumstances, concludes that the trial court's decision exceeds the bounds of reason and results in a miscarriage of justice.'" (*Orange Catholic*

Foundation, at p. 292; accord, *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 911.)

B. *Missouri Law Applies Under the Trust's Choice-of-law Clause*

The choice-of-law clause in article VIII of the Trust provides, "This Trust has been accepted by the Trustee in the State of Missouri and its validity, construction and all rights hereunder shall be governed by the laws of that State." This clause is enforceable because Fran and Paul were residents of Missouri, the Trust was executed in Missouri, and Missouri law does not conflict with a California fundamental policy. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 916-917 [choice-of-law clause is enforceable if "'the chosen state has a substantial relationship to the parties or their transaction,'" or there is "'other reasonable basis for the parties' choice of law,'" and there is no conflict with a fundamental policy of California]; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 466 [same].) Like the probate court, we apply Missouri law pursuant to the Trust's choice-of-law clause.

C. *Lauren Is Equitably Estopped from Arguing the Missouri Property Was Not Transferred into the Trust*

The probate court ruled that under Missouri law, Fran and Paul transferred the Missouri property pursuant to the Trust's terms, notwithstanding the lack of a deed or declaration transferring the property into the Trust. Lauren contends Fran and Paul were required under Missouri law to execute a warranty deed to transfer the Missouri property into the Trust. Thus, because Fran and Paul never executed a deed, the Missouri property was not trust property. In response, Krista and Nisa

argue Lauren should be equitably estopped from asserting Fran and Paul failed to place the Missouri property into the Trust because, as found by the probate court, Lauren "and her husband (at her request) were the ones who put the Trust together for them when [Fran] was about to die in the hospital (and Paul suffered from some level of dementia), [and Lauren] and her husband are both lawyers on whom settlors would have and did reasonably rely, and it would be unfair to now allow Lauren to contend otherwise."

Because equitable estoppel was one of multiple bases for the probate court's ruling that the Missouri property was trust property, Lauren has forfeited any challenge to the court's finding by not addressing the issue on appeal.[18] (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived."]; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136 [appellant forfeited challenge to issue not raised on appeal].)

---

[18] Lauren did not address equitable estoppel in her opening brief and did not file a reply brief. Under Missouri law there are three elements required for equitable estoppel: "'(1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act.'" (*American Eagle Waste Industries, LLC v. St. Louis County* (Mo. 2012) 379 S.W.3d 813, 827-828; accord, *Charter Communications Operating, LLC v. SATMAP Inc.* (Mo.Ct.App. 2018) 569 S.W.3d 493, 509.)

Because Lauren is equitably estopped from asserting the Missouri property was not part of the Trust, we do not reach the underlying question whether Missouri law requires execution of a warranty deed to transfer property into a trust.[19]

---

[19] The probate court relied in part on dicta in *Rouner v. Wise* (Mo. 2014) 446 S.W.3d 242, 246, footnote 2, that the trust at issue in the case did not convey the decedent's real property to himself as trustee "because it does not describe any item of property with sufficient particularity to serve as a deed." The probate court noted the language in the footnote assumed "there can be an assignment of real property by way of conveyance other than by deed where a document may '*serve as a deed*'— as here." However, *Rouner* involved a trustee purporting to convey property to himself as the trustee, which is specifically allowed by declaration under Missouri law. (See § 456.4-401 ["A trust may be created by: [¶] . . . [¶] (2) [a] declaration by the owner of property that the owner holds identifiable property as trustee . . . ."].) Other Missouri cases cited by Lauren involving the transfer of real property into a trust that consider whether a warranty deed was delivered to the trustee—but not addressing the trust's terms purporting to transfer that property into the trust—suggest by their reasoning that a warranty deed is required to effectuate transfer of real property into the trust. (See *Hoefer v. Musser* (Mo.Ct.App. 2013) 417 S.W.3d 330, 338 [farm identified as trust property in recorded trust was transferred to trust by delivery and acceptance of warranty deed even though the deed was not recorded]; *Newton v. Wimsatt* (Mo.Ct.App. 1990) 791 S.W.2d 823, 829 [decedent's execution of warranty deed to herself as trustee at the time of execution of trust document effectively transferred property into trust, noting the decedent "executed the necessary warranty deed to place the real estate in the inter vivos trust simultaneously with the execution of the trust instrument"].)

D. *The IRA Is Not Trust Property*

The probate court ruled the IRA was trust property because Fran's intent in the Trust to give the IRA to Krista, Lauren, and Nisa superseded her earlier stated intent in the IRA adoption agreement, which designated Lauren as the sole beneficiary. Lauren contends the IRA passed to her upon Fran's death under the terms of the beneficiary designation. We agree.[20]

Under Missouri law, an IRA is subject to the Nonprobate Transfers Law. (See § 461.001 [terms of individual retirement plans providing for payment of money upon death of decedent are "deemed to be nontestamentary"].) "The Nonprobate Transfers Law generally allows persons to transfer property at death outside of probate proceedings through another person or entity, without some of the formalities required for wills." (*Ivie v. Smith* (Mo. 2014) 439 S.W.3d 189, 203.) Transfer of an IRA "is a matter of agreement between the owner and the transferring entity, under such rules, terms and conditions as the owner and the transferring entity may agree . . . ." (§ 461.012, subd. 1.) "A beneficiary designation, under a written instrument or law, that authorizes a transfer of property pursuant to a written designation of beneficiary, transfers the right to receive the property to the designated beneficiary who survives, effective on death of the owner, if the beneficiary designation is executed and delivered in proper form to the transferring entity prior to the death of the owner." (§ 461.021.) Where the owner makes a beneficiary designation, "[o]n death of the owner, property passes by operation of law to the beneficiary." (§ 461.031, subd. 3.) "A

---

[20] Krista and Nisa do not contend, nor did the probate court find, the doctrine of equitable estoppel applies to bar Lauren from contending the IRA is not trust property.

revocation or change in a beneficiary designation shall comply with the terms of the governing instrument, the rules of the transferring entity and the applicable law." (§ 461.033, subd. 3.)

On April 2, 2007 Fran, with Paul's consent, executed an IRA adoption agreement and designated Lauren as the beneficiary of her AG Edwards IRA account. There is no evidence Fran revoked or changed the IRA beneficiary designation prior to her death. Absent a change in the beneficiary designation, the Trust's inclusion on schedule A of all "IRA accounts" as assets of the Trust was not effective to transfer the IRA to the Trust because upon Fran's death, the IRA passed by operation of law to Lauren. (§ 461.031, subd. 3.) Further, an IRA beneficiary designation must be "executed and delivered in proper form to the transferring entity prior to the death of the owner." (§ 461.021.) The only IRA beneficiary designation executed by Fran and delivered to AG Edwards prior to her death named Lauren as the sole beneficiary of the IRA. Accordingly, the IRA is not trust property under Missouri law notwithstanding contrary language in the Trust.

E. *Substantial Evidence Supports the Probate Court's Conclusion Lauren Breached Her Fiduciary Duty with Respect to the Missouri Property and Failure To Provide an Accounting*

"'To prevail on a breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) a breach of that fiduciary duty; (3) causation; and (4) harm.'" (*Wilma G. James Trust v. James* (Mo.Ct.App. 2016) 487 S.W.3d 37, 48; accord, *Robert T. McLean Irrevocable Trust v. Ponder* (Mo.Ct.App. 2013) 418 S.W.3d 482, 490.) The element of harm is satisfied if there is depletion of trust assets. (*Robert T. McLean Irrevocable Trust*, at

pp. 490-491.) "Trustees have a duty to administer a trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with applicable law. § 456.8-801. The trustee is bound to uphold the validity of a trust, preserve the trust assets, and carry out completely the grantor's intent. [Citation.] In general, the presumption is that a trustee administers the trust in good faith and the burden of proving the contrary is on the party questioning the trustee's actions and seeking to establish a breach of trust." (*Brown v. Brown* (Mo.Ct.App. 2017) 530 S.W.3d 35, 41, fn. omitted; accord, *Barnett v. Rogers* (Mo.Ct.App. 2013) 400 S.W.3d 38, 49.) However, "'[w]here a trustee has an individual interest in a transaction involving a trust asset, a trustee bears the burden of proving that his actions were proper and all doubts are resolved against him.'" (*Barnett*, at p. 49.)

The probate court found Lauren breached her fiduciary duty by failing to marshal the Missouri property and IRA as trust property; to account for the U.S. Bank account; and to trace where the Ozark Mountain Bank account funds went prior to distribution. Lauren does not challenge the probate court's finding she breached her fiduciary duty by failing to keep adequate records of trust property (§ 456.8-810, subd. 1) and to provide a report to Krista and Nisa (§ 456.8-813). Thus, she has forfeited any challenge to this basis of the probate court's finding she breached her fiduciary duty. (*Tiernan v. Trustees of Cal. State University & Colleges, supra*, 33 Cal.3d at p. 216, fn. 4; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority, supra*, 19 Cal.App.5th at p. 1136.)

As to the Missouri property, the probate court concluded that because the property was trust property, Lauren breached

her fiduciary duty "to recover such property from whomever did have possession or control where it was part of the Trust." Further, the court noted that while Caillier, "as power of attorney for Paul, may have ultimately sold the house[, this] does not mean she or Paul had the right to do so or that Lauren had no responsibility to advise them that the property, at least according to the Trust, was made part of the Trust." As discussed, Lauren is equitably estopped from arguing the Missouri property was not property of the Trust.

Under section 456.8-812, "[a] trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee." Thus, Lauren had an obligation to marshal the assets of the trust, including by compelling Paul to transfer the Missouri property into the Trust. Although Paul refused to transfer the property after Fran died, Lauren could have, as noted by the probate court, advised Caillier the Missouri property was trust property (to prevent its sale), or sought an order from the probate court determining whether the property was trust property and, if so, ordering Paul to effectuate the transfer.

The probate court found that "reliance on counsel is not a defense to breach of fiduciary duty (even if it may defeat a claim for punitive damages) in any event." Lauren contends the probate court erred in concluding she breached her fiduciary duty because she relied on the advice of three attorneys, who stated the Missouri property was not the property of the trust. Lauren testified she consulted with three Missouri estate planning attorneys—Parks, Motley, and a third unnamed attorney—concerning the Trust assets. According to Lauren, all three Missouri attorneys told her any property placed into the Trust

had to be transferred by a written instrument, such as an assignment or declaration. However she did not provide any evidence she consulted with the attorneys on this issue or the advice they provided, for example, testimony from the attorneys, an attorney opinion letter, or attorney billing records. Under Missouri law, reliance on the legal advice of counsel can constitute evidence of good faith. (*Bates v. Hamilton* (1898) 144 Mo. 1, 16 [45 S.W. 641] ["where trustees exercise proper diligence and precaution and act upon the advice of counsel, they are not liable for losses occurring from matters as to which it is doubtful what the true law is"]; *Estate of Alexander* (Mo.Ct.App. 2005) 171 S.W.3d 794, 796 [no just cause to remove personal representative of estate, who as trustee and acting on advice of counsel, transferred decedent's funds into the invalid trust]; *Scott v. Crider* (Mo.Ct.App. 1925) 272 S.W. 1010, 1013 [administratrix acted in good faith by settling litigation against estate upon advice of counsel].)

But Lauren ignores the probate court's finding that she obtained minimal legal advice, if any, from a Missouri attorney. The court found, "Lauren offered no evidence other than her own and Jeff's testimony that she took the actions she did as a result of legal advice from a lawyer in Missouri. Even if she did receive advice, it appears to have been minimal. There are no bills for such advice. There are no written opinions of lawyers."[21] The court discredited Lauren's and Jeff's testimony that Lauren took

---

[21] Lauren's accounting shows in November 1, 2008 she paid $1,000 in attorneys' fees (but did not identify the attorney), and $500 to Motley in attorneys' fees on March 31, 2009. She received a refund of attorneys' fees of $800 on March 18, 2009. None of the documents indicates the nature of the work.

no action to compel Paul to deliver the Missouri property to her as trustee because of advice from Missouri attorneys. Instead, the court found she did not obtain legal advice, or if she did, it was minimal. The court's factual finding that Lauren did not act reasonably and in good faith as trustee is supported by substantial evidence.

Lauren also contends the probate court erred in imposing a constructive trust on the proceeds from the sale of the Missouri property as a remedy for Lauren's breach of trust under Missouri law.[22] We agree. "'A court of equity may impose or declare a constructive trust to provide a remedy in cases where one who has acquired property under such circumstances as make it inequitable for him to retain it by making him or her a trustee for the person or persons injured thereby.'" (*Ralls County Mutual Ins. Co. v. RCS Bank* (Mo.Ct.App. 2010) 314 S.W.3d 792, 795; accord, *Brown v. Brown* (Mo.Ct.App. 2005) 152 S.W.3d 911, 916.) "'A constructive trust is a device employed by a court of equity to provide a remedy in cases of actual or constructive fraud or unjust enrichment.'" (*Taylor-McDonald v. Taylor* (Mo.Ct.App. 2008) 245 S.W.3d 867, 881; accord, *John R. Boyce Family Trust v. Snyder* (Mo.Ct.App. 2004) 128 S.W.3d 630, 638.) A constructive trust requires the existence of a specific property or fund constituting a res upon which the trust might be imposed. (*Ralls County Mutual Ins. Co.*, at p. 795 ["'the very essence of the remedy of a constructive trust is the identification of specific

---

[22] Lauren asserts the probate court lacked subject jurisdiction to impose a constructive trust on the Missouri property or affect its title. But we do not reach the jurisdictional challenge because the court did not impose a constructive trust on the Missouri property or make an order affecting its title.

property or funds as the res upon which the trust may be attached'"]; *John R. Boyce Family Trust*, at p. 639 ["in the absence of any allegation of the existence of specific property or fund constituting the res upon which the trust might be imposed, [the] petition failed to invoke equity jurisdiction"].)

Here, the court cannot impose a constructive trust on the proceeds from the sale of the Missouri property because nonparties Paul and Caillier received the proceeds. Moreover, there is no identifiable property or fund to which the proceeds from the sale of the Missouri property could be traced. (See *John R. Boyce Family Trust v. Snyder, supra*, 128 S.W.3d at p. 638 [trial court erred in imposing constructive trust on proceeds of sale of store where plaintiffs "did not establish that any such identifiable property or fund existed to which the proceeds from the sale of the . . . store could be traced"].) Although the probate court erred by imposing a constructive trust on the proceeds from the sale of the Missouri property, the court can determine on remand what amount, if any, to surcharge Lauren at the surcharge hearing for failing to marshal the Missouri property as a trust asset.

As to the IRA, Lauren did not breach her fiduciary duty by failing to transfer the AG Edwards IRA into the Trust given the controlling IRA designation of Lauren as the beneficiary. The probate court found Fran's intent was that the Trust would supersede the statement of her intent in the IRA adoption agreement, which was executed eight days before the Trust. However, Fran did not consummate her intent as stated in the Trust by changing the beneficiary designation on the IRA. We are aware of no authority that required Lauren to transfer an IRA into the Trust absent a change in the beneficiary designation.

Indeed, in the parallel circumstances of an IRA governed by the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.; ERISA), the IRA's beneficiary designation controls over the grantor's intent as expressed in another legal document. In *Meritt v. Wachter* (Mo.Ct.App. 2014) 428 S.W.3d 738, 740, the decedent designated his then-wife as the sole beneficiary of his rollover Fidelity IRA. As part of the divorce, the property settlement agreement awarded the IRA to the decedent as his sole and separate property. (*Ibid.*) At the time of the decedent's death 11 years later, the former wife remained the sole beneficiary of the IRA. (*Ibid.*) The probate court ordered Fidelity to change the beneficiary designation on the IRA from the former wife to the decedent's estate. (*Id.* at p. 741.) Relying on ERISA preemption (which was not disputed by the parties), the court concluded the Supreme Court's holding in *Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 146, controlled, under which the IRA proceeds should have been distributed to the former wife as the designated beneficiary pursuant to ERISA. (*Meritt v. Wachter*, at pp. 741-742, 746.) The court explained, "*Egelhoff* requires that the funds be disbursed to the named beneficiary and *Egelhoff* makes no suggestion that a court is entitled to conduct a parallel inquiry into the decedent's intent." (*Id.* at p. 744.) Similarly, although ERISA does not appear to apply here,[23] because Missouri law provides the beneficiary designation controlled distribution of the IRA proceeds, the probate court erred in finding Lauren breached her fiduciary duty

---

[23] There is insufficient evidence in the record to determine whether Fran's IRA is subject to ERISA preemption.

by failing to distribute the IRA proceeds equally among her and her sisters.[24]

To the extent Lauren is challenging the probate court's removal of her as trustee, the probate court did not abuse its

---

[24] Krista and Nisa also contend the probate court correctly found Lauren breached her fiduciary duty as trustee by failing "at minimum [to seek] a court order that determined what rights, if any, she had to [the IRA] as an individual" in light of Fran designating Lauren as the IRA beneficiary only eight days before providing all IRA's were to be divided equally among the beneficiaries to the Trust. But Krista and Nisa do not provide any authority (nor did the probate court) for the obligation of a trustee who is an attorney to seek court approval to accept distribution of an asset for which the trustee was legally designated as the beneficiary. Further, had Lauren sought a court order, on appeal we would have found, as we do here, that the IRA was not property of the Trust. Krista and Nisa also point to section 456.8-802, subdivision 4, cited by the probate court, which provides that "[a] transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary." The probate court found "Lauren had significant influence over her mother—where [Fran] was ill and then in the hospital—and she has gained an advantage; namely, the account. Petitioners have a right to void that transaction where Lauren has not shown that this was fair to Petitioners." The flaw in this reasoning is that the IRA designation was made prior to the existence of the Trust. Further, section 456.8-802, subdivision 4 applies where a trustee exercises undue influence over the beneficiary, but here the probate court found Lauren had undue influence over Fran, not Lauren's sisters.

discretion. The court found Lauren breached her fiduciary duty by failing to marshal the Missouri property, to account for the U.S. Bank account, and to trace where the Ozark Mountain Bank account funds went prior to distribution. Lauren's breach of fiduciary duty supports the order removing her as trustee. We express no opinion on the court's appointment of Marvan as successor trustee because Lauren does not challenge the substitution of trustee.

DISPOSITION

We reverse the probate court's order to the extent it finds Lauren breached her fiduciary duty as to the IRA, ordered a constructive trust on the IRA fund and proceeds from the sale of the Missouri property, and surcharged Lauren her profit from the IRA. In all other respects, we affirm the probate court's order and remand for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J. STONE, J.*

---

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