

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 EIGHT

MARLENE GOLD-GAMBLE,

B289981

Plaintiff, Cross-defendant and  
Appellant,

(Los Angeles County  
Super. Ct. No. BP158735)

v.

JOSEPH D. GAMBLE et al., as  
Trustees, etc.,

Defendants, Cross-complainants  
and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Bass & Benabou and Ronald B. Bass for Plaintiff, Cross-defendant and Appellant.

Oldman, Cooley, Sallus, Birnberg, Coleman & Gold, Mary-Felicia Apanius, and Marc L. Sallus for Defendants, Cross-complainants and Respondents.

---

This is a dispute between decedent Thomas (Tom) F. Gamble's second wife, appellant Marlene Gold-Gamble, and his children, respondents Joseph D. Gamble, Margaret A. Gamble, and Eileen T. Dupont, over trust documents. The first trust documents were executed during Tom's first marriage to the children's mother. The last trust documents were executed in the weeks before Tom's death after 20 years of marriage to his second wife, Marlene.

Marlene claimed the last trust documents, which disinherited her, were void due to undue influence and elder abuse. The children countered that Marlene was in wrongful possession of assets belonging to the first trust. The probate court found no undue influence, which Marlene does not challenge on appeal. The court also found that Tom failed to allocate one half of the trust estate to his children upon his first wife's death, and consequently Marlene owed the children trust assets of \$653,446. We affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. The 1983 Gamble Family Trust**

In July 1983, Tom and his first wife, Mary L. Gamble, created the 1983 Gamble Family Trust (the 1983 trust). The trust provided that upon the death of the first trustor, trust assets would be divided into three subtrusts: the credit trust, the marital trust, and the survivor's trust. The survivor's trust consisted of the surviving trustor's separate property, and their one-half interest in the community estate. The marital trust was comprised of the funds necessary to pay the taxes imposed upon the deceased trustor's death. The remainder of the estate would be placed in the credit trust.

After the death of the first trustor, the surviving trustor was entitled to the income and principal of the survivor's trust, without any restrictions. The survivor was also entitled to all income of the marital trust, and to receive trust principal for support and maintenance in their accustomed manner of living. The survivor was also entitled to the income of the credit trust necessary for the survivor's support and maintenance, and if that was insufficient, to any principal necessary for the survivor's support and maintenance in the survivor's accustomed manner of living.

The surviving trustor retained a general power to direct distribution of the assets of the survivor's trust in accordance with his or her will. However, the credit and marital trusts were distributable in equal shares for the survivor's children then living, and were irrevocable upon the death of one of the trustors.

Mary died in November 1983. She was survived by Tom and their four children, Thomas, Margaret, Joseph and Eileen. At the time of her death, the 1983 trust assets consisted of several real estate investments, a home in Rancho Palos Verdes, Tom's air conditioning and heating business, and various securities and cash accounts.

Following Mary's death, Tom failed to establish the subtrusts contemplated by the 1983 trust.

## **2. Tom's Marriage to Marlene Gold**

Tom met Marlene in 1991, and they married in May 1994. Before their marriage, Tom told Marlene about the 1983 trust, that it was for the benefit of his children, and that he was "not going to touch [it]. . . ." When they met, Tom was living in the Palos Verdes home. Soon after they started dating, Tom moved into Marlene's rental, a condo in Long Beach. In 1997, they

bought the unit next door and lived there together, taking title as joint tenants. At the time of trial, Marlene still lived in the unit.

When Tom and Marlene were married, Tom still owned the real properties that were assets of the trust, and owned and operated his business. Marlene worked for a home health agency from the date of marriage until 2000, and again from 2001 until 2002. She did not own any real estate at the time they were married. During their marriage, Tom and Marlene “lived comfortably.” Marlene testified that their monthly living expenses were between \$3,000 and \$4,000 per month.

According to Marlene, she and Tom each contributed to the down payment for the condo, although Tom contributed more than she did. For the first seven years, she paid part of the mortgage. It was understood she was to pay half the mortgage, but she paid less than half. Tom paid off the mortgage early, using \$172,364.36 from funds obtained by refinancing the Palos Verdes home. Marlene did not contribute to pay off the loan.

Tom sold most of the real estate assets of the trust between 2003 and 2006, including the Palos Verdes home and the properties on Manchester and 144th Street, as well as his business.

Tom was diagnosed with cancer in 2009, and again in 2013. By the time of his second diagnosis, he was 88 years old and had stage 4 cancer.

During the summer of 2014, Tom and some of his children consulted with Tom’s estate planning attorney, Larry Nakahara, who had drafted the 1983 trust. It became clear that Tom had not administered the 1983 trust according to its terms, and that it would not function as Tom and his first wife had intended. He had never established the subtrusts, and properties were sold

without placing the proceeds in trust. Tom had also transferred a number of his assets to Marlene (to shield them due to a pending lawsuit). He wanted Mr. Nakahara's help to have these assets returned to him.

After this meeting, Tom told Marlene that money was missing from the trust. He asked her to return stocks and bonds, and she agreed, but she never returned them. Tom's daughter Margaret confronted Marlene about the missing money, and demanded that she return it. Tom's children told Marlene that they were taking over Tom's finances, and Tom allowed the children to take financial records.

### **3. The Thomas F. Gamble 2014 Trust and Amendment**

In September 2014, Tom and the children had further meetings with Mr. Nakahara. Tom told Mr. Nakahara that he wanted Marlene to have a life estate in their condo, and that the children would receive his 50 percent interest in the condo upon Marlene's death. Tom executed a deed transferring title to the condo from Thomas F. Gamble, a married man, to Thomas F. Gamble, a married man as his sole and separate property, to sever the joint tenancy with Marlene.

Tom also told Mr. Nakahara that he wanted to leave annuities and cash totaling \$500,000 to Marlene. Mr. Nakahara cautioned that doing so would violate the 1983 trust because these funds "were from Mary Gamble's share of the trust property." Mr. Nakahara warned that the children could sue Tom for breach of the trust, but Tom responded that he did not care. He wanted to provide for Marlene's care.

On September 24, 2014, Tom executed the Thomas F. Gamble 2014 Trust, and a deed transferring the condo to this trust. According to Schedule A of the trust, the following assets

were Tom's separate property: an undivided half interest in the Long Beach condo, an investment property on South San Pedro Street, and any stocks, bonds, and accounts in Tom's name. The trust created a life estate for Marlene in the condo. The residue of the trust property was to be distributed to three of Tom's children in equal shares; Tom had disinherited one of his sons. The trust "made no provisions . . . for [Marlene] because [Tom] has previously made *inter vivos* transfers of property to her for her financial security." The trust was revocable during Tom's lifetime.

During the fall of 2014, Tom and Mr. Nakahara continued to ask Marlene to return assets belonging to the 1983 trust. Marlene was uncooperative, and refused to return the assets until Tom guaranteed her an irrevocable life estate. This caused Tom to make further changes to his estate plan, including an amendment that revoked Marlene's life estate, and left all trust assets to three of Tom and Mary's children.

Schedule A of the amended and restated trust identified additional separate property of Tom's, including various stocks, bonds, and annuities, and a Ford Motor Company Interest Advantage Account.

#### **4. Tom's Hospitalization and Death**

On October 14, 2014, Tom fell and hit his head. According to Marlene, Tom told her not to call 911. Tom was eventually taken to the hospital and admitted. He was discharged to a skilled nursing facility at Marlene's insistence. Tom's roommate at the skilled nursing facility testified that Marlene was "agitated" and "aggressive." He overheard discussions between them about money. Tom commenced dissolution proceedings against Marlene, filing a petition for legal separation. Tom spent

the remainder of his days in the hospital, or the skilled nursing facility, until his death on November 18, 2014.

**5. Marlene's Testimony About Finances**

Marlene testified that she and Tom purchased stocks in joint tenancy, and had a joint account at Ford that she still possessed. According to Marlene, Tom told her to keep the money in the Ford account, although she knew there was money of Tom's in the account. In 2011 and 2012, they purchased two annuities of \$100,000 each, with Marlene as owner and Tom as beneficiary.

After Tom's death, Marlene's trust became the beneficiary of the annuities. Regarding the Ford account, Marlene testified that in 2007, a check for \$250,000 was written from the account and deposited into Marlene's money market account which she shared with her daughter, because Tom was worried about a potential worker's compensation claim.

Marlene testified to additional deposits to her accounts, including a 2009 deposit of \$228,245, and a 2012 investment of \$110,500. The Ford account ultimately became an asset of Marlene's individual trust. As of August 31, 2014, the balance in the Ford account had grown to \$265,906.91.

Marlene testified that trust assets were gifts from Tom, notwithstanding her deposition testimony that she never received gifts from Tom exceeding \$500 in value.

**6. Expert Testimony Regarding Trust Assets**

Accountant Kerry Welch testified about what happened to the 1983 trust assets, including the home in Rancho Palos Verdes and the properties on Manchester Avenue, South San Pedro Street, and 144th Street. The sale of the Palos Verdes home in 2003 produced net proceeds of approximately \$500,000, which

were deposited into two Bank of the West accounts in Tom's name. The Manchester Avenue property was also sold in 2003, producing a promissory note of \$80,000, and cash of \$18,417.38. The property on 144th Street was sold in 2006, producing a promissory note for \$40,000, and \$8,926.10 in cash. None of the proceeds of these sales was placed into the 1983 trust. At the time of trial, the South San Pedro property had not been sold, and was generating rents. Based on this evidence, Ms. Welch opined that Tom did not subdivide the 1983 trust assets after Mary's death in accordance with the trust.

Based upon tax returns and Tom's social security earnings statement, Ms. Welch opined that Tom's earned income during his marriage to Marlene was a \$65,000 cumulative loss. Ms. Welch opined that Marlene earned income of approximately \$200,000 between 1994 and 2002, but that she earned no income thereafter.

Attorney Kenneth Feinfield testified as an expert in trusts and estates. He testified that the property Tom brought to his marriage to Marlene was his separate property, and that assets transferred to Marlene were not transmuted into community property. Mr. Feinfield did not find any documentary evidence that Tom intended to transmute trust assets.

## **7. Procedural History**

In January 2015, Marlene filed a verified petition alleging undue influence and elder abuse, seeking to invalidate Tom's 2014 trust and disinherit his children. In March 2015, respondents filed their petition for instructions pursuant to Probate Code section 17200, requesting findings that Tom failed to divide the assets of the 1983 trust after Mary's death, and an order from the court "retroactively allocat[ing] one-half of the



1983 Trust's assets to the Marital Trust . . . ." The petition also sought findings that Tom produced no community property during his marriage to Marlene, and that his separate property was not transmuted during the marriage.

The parties filed a joint trial statement on September 1, 2017. In the statement, respondents asked the court to award them over \$3 million. Marlene did not object that she lacked notice respondents were seeking damages.

Trial was held from September 11 through September 19, 2017. At the close of evidence, respondents filed an addendum to their trial brief reducing their damages claim to \$427,005.50, representing half of the proceeds of the sale of trust assets, including the investment properties, the Palos Verdes home, and Tom's business, plus \$226,440 in prejudgment interest, for a total award of \$653,446.

For the first time, Marlene objected on the grounds that respondents' petition did not request money damages and was not brought pursuant to Probate Code section 850.

Respondents moved to amend the petition according to proof. The court granted the motion.

The court ruled against Marlene on both petitions, and awarded damages of \$653,446 as requested by respondents. Marlene requested a statement of decision and the court directed respondents to prepare a proposed statement of decision. A proposed statement of decision was filed, and Marlene filed objections. Concurrently with her objections to the proposed statement of decision, Marlene filed a motion to reopen proceedings to augment the expert witness list and permit further expert discovery. The motion was denied as untimely.

The final statement of decision was filed on January 11, 2018. The statement of decision included findings that at the time of Tom's marriage to Marlene, Tom's real properties and business were his separate property. However, over time, Tom put his assets into joint ownership with Marlene, or into her name alone, and that one-half of Tom's assets belonged to Mary. The court accepted the opinions of respondents' experts, and concluded that the proceeds of the sale of the Palos Verdes home, the Manchester property, and the 144th Street property should have been included as assets of the 1983 trust, as Tom's separate property. The court also concluded that Tom and Marlene's relatively modest lifestyle, and Tom's overall circumstances would not have required that Tom invade the principal of either of the irrevocable trusts, if Tom had made the transfers required by the 1983 trust. The court also found that no community property was created by Tom during the marriage, and that there was no transmutation of Tom's separate property when he married Marlene. In reaching its conclusions, the probate court found that Marlene's testimony was not credible.

Judgment was entered on March 7, 2018.

Marlene filed motions for a new trial and to vacate judgment which the court denied.

Marlene filed a timely notice of appeal.

## **DISCUSSION**

### **1. Probate Code section 17200 Damages**

Marlene contends the court had no authority under Probate Code section 17200 to enter a judgment for damages against her, because section 17200 does not allow damages, and because she is a stranger to the 1983 trust. She also contends that, to the extent the court allowed respondents to amend the petition to

state a claim under section 850, respondents were required to prove conversion, and to trace specific, identifiable assets to Marlene's possession. None of these arguments has any merit.

Respondents brought their petition for instructions under Probate Code section 17200. The petition requested that the court "retroactively allocate one-half of the 1983 Trust's assets to the Marital Trust. . . ." The petition alleged that various real properties were assets of the 1983 trust, that those assets were used to purchase Tom and Marlene's condo, and the proceeds of the sale of other trust assets were deposited into accounts over which Marlene was in possession and control. The petition alleged Marlene wrongfully refused to restore assets to the 1983 trust that belonged to the trust. These allegations were sufficient to put Marlene on notice that respondents were seeking damages. (*Fleischmann v. Lotito* (1936) 6 Cal.2d 365, 367.)

Probate Code section 17200 grants broad powers to the court over the administration of trusts. It provides that "a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust." (*Id.*, subd. (a).) "Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings" to "compell[] redress of a breach of the trust by *any available remedy*." (*Id.*, subd. (b)(12), italics added; see also *Estate of Bowles* (2008) 169 Cal.App.4th 684, 688, 692 [actions may be brought against third parties in wrongful possession of trust assets].)

And, while it is true that "proceedings concerning the transfer of trust property shall be conducted pursuant to . . . Section 850" of the Probate Code, the trial court permitted amendment of the petition to state a claim under section 850.

(§ 17200.1; see also *Mota v. Superior Court* (2007) 156 Cal.App.4th 351, 356.)<sup>1</sup> Marlene acknowledges the court had authority to award damages under section 850, but argues the evidence at trial did not support an award of damages under section 850 because respondents failed to prove that Marlene had possession of any specific trust assets. She contends respondents were required to prove she converted trust assets and specifically trace converted assets to Marlene.

Probate Code section 850 provides in pertinent part, “The trustee or any interested person” may petition the court for an order “[w]here the trustee has a claim to real or personal property, title to or possession of which is held by another.” (*Id.*, subd. (a)(3)(B).) Section 850 does not require proof of conversion or evidence tracing specific identifiable assets to Marlene.

Respondents produced substantial evidence that Marlene was in possession of assets belonging to the 1983 trust. They proved Tom used funds from the refinancing of the Palos Verdes home to purchase the condo, and that funds from the sale of other properties were placed into accounts over which Marlene had control. “Our authority begins and ends with a determination of whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, which will support the judgment.” (*Estate of Beard* (1999) 71 Cal.App.4th 753, 779.)

## **2. Factual Premises Underlying the Judgment**

Marlene asserts many other claims, that: there is no evidence to support the court’s implied finding that she had no assets when she married Tom; the court erred in characterizing

---

<sup>1</sup> These authorities were not discussed in the parties’ briefs, and were brought to the attention of the court for the first time at oral argument.

Mary's trust assets as Tom's separate property; the court wrongly concluded no community property was generated in the marriage; the court erred in allowing expert testimony about the law of property transmutation and in concluding Tom did not transmute his separate property into community property; the court wrongly found Tom and Marlene lived a modest lifestyle and concluded Tom did not invade the res of the trust; the court improperly shifted the burden of proof to Marlene to show what happened to the missing trust proceeds; Marlene cannot be liable for what is essentially a surcharge case against Tom; and the court erred in denying her motion to reopen evidence. These arguments have no merit. We briefly address each in turn.

There was evidence Marlene did not own any real estate at the time of marriage, and she earned modest wages only during the early years of the marriage. There was evidence Tom told Mr. Nakahara in September 2014 that Marlene had "no money" when he married her. The trial court could reasonably conclude Marlene had no assets when she married Tom.

The characterization of the trust property as Tom's separate property is of no consequence; the court's finding that Marlene was wrongfully in possession of property that should have been transferred to the trust after Mary's death in 1983 is the relevant finding that supports the judgment.

As for the finding there was no community income during marriage, despite the testimony of Ms. Welch that Marlene earned \$200,000 between 1994 and 2002 (and nothing between 2003 and Tom's death in 2014), we can discern no possible prejudice. The damages awarded were clearly traceable to assets that Tom brought to the marriage, which should have been transferred to the trust in 1983.

Likewise, we are not persuaded there was any prejudicial error in relying on Mr. Feinfield's testimony that Tom did not transmute his separate property to community property. Even if the court had stricken Mr. Feinfield's testimony, the testimony of Ms. Welch tracing the proceeds of the sale of trust assets that were in Marlene's possession is substantial evidence supporting the judgment.

The court also reasonably concluded Tom did not need to invade trust principal due to his relatively modest lifestyle. The very fact that large sums of money, traceable to the sale of trust assets (and to no other source), were on hand and in the possession of Marlene supports the trial court's conclusion.

The court did not place the burden of proof on Marlene to establish she did not possess trust assets. The burden clearly rested with respondents, who produced substantial evidence that Marlene was in possession of trust assets.

This case was not a surcharge case under Probate Code section 16420, seeking monetary damages for breach of the trust by the trustee. (*Id.*, subd. (a)(3).) Respondents did not seek to impose liability upon Marlene for Tom's misconduct; they simply sought to recover trust assets that were in her possession pursuant to sections 17200 and 850.

Marlene sought to reopen evidence so she could prove an offset to respondents' surcharge case. Because we have concluded this was not a surcharge case, there is no possible prejudice from denial of the motion.

**DISPOSITION**

The judgment is affirmed. Respondents may recover their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.