Filed 4/3/12 Frahm v. Frahm CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CHRISTOPHER FRAHM, Plaintiff and Appellant, v. MITCHEL FRAHM et al., Defendants and Respondents.	B227533 (Los Angeles County Super. Ct. No. BP104602)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marvin M. Lager. Affirmed.

Palmieri, Tyler, Wiener, Wilhelm & Waldron, Don Fisher and Elise Malia Kern for Plaintiff and Appellant.

Kurtz, Anderson and Associates Law Offices, Donald R. Kurtz and Gregory J. Anderson for Defendant and Respondent Mitchel Frahm.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marc L. Sallus and Peta-Gay Gordon for Defendant and Respondent George Applebaum.

Law Offices of Nate G. Kraut and Nate G. Kraut for Defendant and Respondent Jacqueline Frahm.

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Following a bench trial, the trial court denied a petition filed by plaintiff and appellant Christopher Frahm and sustained the objections to that petition filed by respondents George Applebaum (Applebaum), Jacqueline Frahm (Jacqueline) and Mitchel Frahm (Mitchel).[1] Appellant's petition alleged claims including breach of fiduciary duty stemming from the allocation of trust assets. The trial court granted several petitions filed by Applebaum, also relating to the administration of trust assets, and overruled appellant's objections thereto. Appellant contends the judgment should be reversed because the trial court abused its discretion in excluding evidence to rebut the presumption that certain assets were held in joint tenancy, the trust did not permit a reallocation of assets and the trustee failed to comply with his statutory and fiduciary duties.

We affirm. The trial court properly exercised its discretion to exclude evidence that was irrelevant to rebutting the form of title presumption contained in Evidence Code section 662. Moreover, substantial evidence supported the trial court's findings that the trust authorized appellant's father Louis Herman Frahm (Louis) to reallocate trust assets and that he complied with his fiduciary duties in every respect.

FACTUAL AND PROCEDURAL BACKGROUND

Trust Administration.

Louis and Sylvia Lee Frahm (Sylvia) married and had two sons, appellant and Mitchel. On October 4, 1998, Louis and Sylvia established the Living Trust of Louis Herman Frahm and Sylvia Lee Frahm (Trust) and were both settlors and trustees of the Trust. The Trust provided that upon the death of the first settlor, the trustees were to divide the trust estate—including any additions made by reason of the settlor's death—into three separate trusts, designated as the Survivor's Trust, the Marital Trust and the Exemption Trust (sometimes collectively the Sub-Trusts). The Survivor's Trust was to

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[1] We refer to individuals having the same last name by their first names for the purpose of clarity and not out of disrespect. We also note that Mitchel Frahm appears as "Mitchel" and "Mitchell" alternately throughout the record.

be comprised of "the surviving spouse's separate property that is part of the trust estate and the surviving spouse's interest in the Settlor's community estate included in or added to the trust estate in any manner, including any undistributed or accrued income on it." The Marital Trust and the Exemption Trust were to consist of the balance of the trust estate; the former was designed to qualify for the marital deduction under Internal Revenue Code section 2056, while the latter was to be comprised of a monetary amount equal to the maximum sum allowable to a trust that does not qualify for the federal estate tax marital deduction. Allocated assets were to be valued at their fair market value as determined for federal estate tax purposes.

Upon a settlor's death, the Trust gave the surviving spouse the power to amend, revoke or terminate the Survivor's Trust, but expressly withdrew those powers with respect to the Marital Trust and the Exemption Trust. The Trust required that upon the death or disability of a settlor, the surviving or non-disabled settlor must appoint an additional trustee to serve as co-trustee. Upon the death of the surviving spouse, none of the Sub-Trusts were to be amended, revoked or terminated. At that point, any remaining assets (less taxes and expenses) in the Sub-Trusts were to be distributed to a separate trust and divided into equal shares for the benefit of appellant and Mitchel.

Sylvia died on October 6, 1998. At the end of October 1998, Louis retained attorney Donald Kurtz to assist him with the administration of the Trust, including allocating assets among the Sub-Trusts. As the schedules that identified the property interests funding the Trust were blank at the time of Sylvia's death, Kurtz identified a number of tasks for which Louis was responsible as the trustee, including to segregate Sylvia's property from his, prepare a schedule of all property he and Sylvia owned at the time of her death, obtain professional appraisals and prepare federal and California estate tax returns. During the next several months, Louis and Kurtz worked together to identify and allocate assets. In accordance with the Trust requirements, Louis appointed Mitchel as his co-trustee, and Mitchel in turn delegated his powers to Louis to the extent permitted by law.

Louis finalized an asset allocation among the Sub-Trusts on September 14, 1999 (1999 Allocation). Among other items, the 1999 Allocation listed Louis's primary residence in Indian Wells (Delgado property) as an asset of the Marital Trust. Receivable lease payments from an automobile dealership (Firestone lease) were included as an asset of the Survivor's Trust. At the time Louis executed the 1999 Allocation, Kurtz had informed him that the Trust allowed him to make amendments to or reallocations of assets among the Sub-Trusts.

Louis married Jacqueline in July 2001, and together they executed the J&L Living Trust in September 2001. In early 2002, Louis retained attorney Brian Lewis to assist him with Trust administration issues. Lewis quickly determined that the 1999 Allocation was incomplete and incorrect. Among other things, he discovered inconsistencies in the way in which certain real property was actually titled versus its status on the 1999 Allocation. Kurtz acknowledged some of the inconsistencies with Lewis and indicated that the 1999 Allocation remained a work in progress. On October 4, 2002, Louis and Mitchel as trustees executed an Allocation of Assets following the Death of Sylvia Lee Frahm (2002 Allocation) that incorporated asset schedules for each of the Sub-Trusts, utilizing valuations established for federal and state estate tax purposes as of the date of Sylvia's death. Among several changes from the 1999 Allocation, the 2002 Allocation listed the Delgado property as an asset of the Survivor's Trust and the Firestone lease as an asset of the Marital Trust. By the time of the 2002 Allocation, appellant knew that Louis intended for the Delgado property to go to Jacqueline.

Beginning in November 2000, Louis exercised his right to amend the Trust, executing 11 amendments before restating it entirely in January 2006. Included among the amendments were the addition of specific bequests from the Survivor's Trust to the J&L Trust; the division of appellant's and Mitchel's share of the Survivor's Trust into multiple shares for the benefit of their children, coupled with the imposition of a distribution schedule for appellant's share; and the appointment of Applebaum as the sole successor trustee and David Couch as the subsequent successor trustee.

Louis died in November 2006.

Petitions.

In May 2007, appellant initially sought to file a Petition Pursuant to Probate Code sections 17200 and 850 for: (1) Turnover of Assets; (2) an Order for Imposition of a Constructive Trust over Trust Assets Wrongfully Transferred; (3) an Order Removing George Applebaum as the Acting Successor Trustee of the Marital Deduction and Exemption Trusts; and (4) Breach of Fiduciary Duty, together with an application that the proposed petition did not violate the Trust's "no contest" clause. In September 2007, the trial court granted appellant's application. In an unpublished opinion, *Christopher Frahm v. George Applebaum, as Trustee, etc., et al.* (Mar. 10, 2009, B204049 [nonpub. opn.]), we affirmed the trial court's order under Probate Code section 21320 that appellant's proposed petition for breach of fiduciary duty did not violate the Trust's no contest clause. Thereafter, in April 2009 appellant filed his petition (Petition), and Applebaum, Mitchel and Jacqueline filed objections to the Petition.

In January 2008, while the appeal was pending, Applebaum filed a Petition for Instructions re Temporary Trustee of the Marital and Exemption Trusts (Trustee Petition), a Petition for Instructions re Treatment of Survivor's Trust's Payment of Marital Trust's Pro-Rata Share of Estimated Estate Taxes as a Loan (Tax Petition) and a Petition for Instructions re Allocation of Trust Assets (Allocation Petition). Appellant objected to all petitions.

Trial and Judgment.

At a December 2, 2008 hearing, the trial court agreed to bifurcate the trial, setting a January 2009 date for a hearing on several motions in limine that the parties conceded would resolve a number of substantive issues in the case. At the same hearing, the trial court also ruled on Applebaum's Trustee Petition and ordered that Applebaum serve as a temporary trustee of the Marital and Exemption Trusts until a decision appointing a permanent successor trustee.

Following the January 21, 2009 hearing, the trial court made several rulings, including that "[a]ll properties held in joint tenancy by Louis Herman Frahm and Sylvia Lee Frahm on the date of Sylvia Lee Frahm's death became the separate property of

Louis Herman Frahm"; the Trust provided the date of Sylvia's death was the valuation date to be used for purposes of allocating assets among Sub-Trusts; Louis had the right to make the 2002 Allocation to correct the 1999 Allocation; there was no ambiguity in the language of the Trust concerning asset allocation and tax provisions; and the only evidentiary issue remaining for Applebaum's Allocation Petition and Tax Petition was whether under *Penny v. Wilson* (2004) 123 Cal.App.4th 596 Louis improperly allocated Trust assets among the Sub-Trusts. The trial court stayed the remaining issues in the Allocation Petition and the Tax Petition pending resolution of the appeal.

The balance of the trial on the Petition, the Allocation Petition, the Tax Petition and the Trustee Petition commenced on October 19, 2009. Each party submitted a trial brief and made an opening statement. Kurtz, Lewis, Mitchel, Applebaum, Jacqueline and appellant testified. In addition, attorney Harry Westover testified as an expert on appellant's behalf. He opined that transferring the Delgado property from the Marital Trust to the Survivor's Trust was a breach of fiduciary duty because of the absence of notice and full consideration. A breach occurred because the assets of the Marital Trust were earmarked for Louis's children upon his death, while he retained testamentary control over the assets in the Survivor's Trust. Nonetheless, he opined that no breach would have occurred if Louis had provided full consideration for the transfer by exchanging a different asset such as the Bank of America account. Also with respect to the Delgado property, Westover opined that Louis had attempted to divert the property into his own name by filing an affidavit of joint tenant upon Sylvia's death, despite the property's grant deed indicating it was held as community property. He conceded, however, that he did not know the value of the Delgado property in 2002, nor was he aware whether there had been any repairs or improvements to the property between the time of Sylvia's death and 2002.

Correspondingly, Westover testified that the transfer of the Firestone lease from the Survivor's Trust to the Marital Trust was also a breach of fiduciary duty, specifically a trustee's duty of loyalty and duty to avoid conflicts, because the lease was a "wasting asset" that had a lower value to the remainder beneficiaries at the time of transfer. On

cross-examination, however, Westover testified that he had no information regarding the value of the Firestone lease at the date of transfer to the Marital Trust, and he did not know whether any appreciation, depreciation or its characterization as a wasting asset was factored into the calculation of its value.

In forming his opinions, Westover considered the 1999 Allocation to be a final allocation that could not be revoked and reallocated. Nonetheless, he later testified that the law provided Louis with the ability to make changes to the 1999 Allocation after he signed it. He further opined that Mitchel breached his fiduciary duties as a trustee by acquiescing in and approving Louis's actions. Finally, he opined that attorney fees incurred in connection with litigating the over the safe harbor application should have been charged solely to the Survivor's Trust.

Appellant also relied on certified public accountant Cheryl Schaffer as an expert witness. On the basis of her knowledge and experience, she prepared her own correction to the 1999 Allocation. In an effort to maintain the integrity of the 1999 Allocation, she endeavored to make minimal changes to the allocation—correcting mathematical errors and backing out the joint tenancy assets. But once those changes were made, the Marital Trust and the Survivor's Trust were approximately $1 million apart. She exercised her discretion to balance the Sub-Trusts by allocating a previously omitted $560,000 Frahm Dodge note to the Marital Trust instead of the Survivor's Trust; she did not think she had discretion to move the Delgado property from the Marital Trust to the Survivor's Trust.

Jacqueline offered the testimony of certified public accountant Joseph Wheat, who testified that the 2002 Allocation properly corrected mathematical errors in the 1999 Allocation, that the 2002 Allocation included an asset that the 1999 Allocation had improperly omitted and that Schaffer's calculations included improper adjustments.

In a statement of decision filed in May 2010, the trial court resolved 22 discrete, controverted issues, ruling generally that Louis, Mitchel and Applebaum did not breach their fiduciary duties as trustees. The June 2010 judgment similarly provided: "The Trustees acted in good faith and in a manner consistent with their fiduciary duties in making the 2002 Allocation. The actions of the Trustees were reasonable and not

arbitrary or capricious." Accordingly, the trial court denied appellant's petition and sustained all objections thereto. It granted all three of Applebaum's petitions, ruling that the 2002 Allocation should be implemented, the Marital Trust owed the Survivor's Trust for its pro-rata share of estate taxes, and Applebaum would remain as trustee until the assets of the Marital and Exemption Trusts were distributed.

This appeal followed.

DISCUSSION

Appellant contends that the judgment should be reversed because the trial court abused its discretion in excluding evidence designed to rebut the presumption that Louis and Sylvia held certain real property as joint tenants, and because substantial evidence did not support the trial court's conclusion that the 2002 Allocation was neither a breach of fiduciary duty nor an act in excess of Louis's power as a trustee. We find no merit to appellant's contentions.

I. The Trial Court Properly Exercised Its Discretion to Exclude Evidence Purporting to Contradict the Manner of Title Reflected on Grant Deeds.

A. Joint Tenancy Determination.

The Trust provided that it was to be funded with the community property of the settlors, Louis and Sylvia. Upon the death of one settlor and the division of the Trust into Sub-Trusts, the Trust further provided that the Survivor's Trust "shall consist of the surviving spouse's separate property that is a part of the trust estate and the surviving spouse's interest in the Settlor's community estate included in or added to the trust estate in any manner . . . ." While the 1999 Allocation had allocated to the Marital Trust certain real property that was held in joint tenancy or as Louis's separate property, the 2002 Allocation reallocated those properties to the Survivor's Trust.

As explained in Applebaum's motion in limine to bar appellant from offering evidence to interpret unambiguous Trust provisions set for hearing on January 21, 2009, appellant contended that real properties held in joint tenancy by Louis and Sylvia should

have been treated as community property for the purpose of Sub-Trusts allocation. In connection with the motion, Applebaum sought judicial notice of six deeds for properties located in California or Nevada which provided that the properties were held either in joint tenancy by Louis and Sylvia or as Louis's separate property.

At the January 2009 hearing, the trial court determined that it could rule on the issue of whether joint tenancy properties flowed into the Trust upon Sylvia's death, reasoning that issue was not subject to any stay pending appeal of the no contest issue. Appellant argued "that in name they [the six properties] may have been in joint tenancy, but they weren't really joint-tenancy property. It's a rebuttable presumption and there's plenty of evidence that this was not joint-tenancy property but instead community property and that . . . ." At that point, the trial court asked "What did the grant deeds say?" While Applebaum emphasized that they provided for joint tenancy, appellant argued that Sylvia's estate tax return (Form 706) referred to the properties as community property assets. The trial court and appellant's counsel then engaged in the following exchange:

"THE COURT: At the date of death, the deed was in joint tenancy?

"MR. FISHER: I believe that's correct.

"THE COURT: All right. And that's recorded with the county recorder?

"MR. FISHER: Understood.

"THE COURT: And what do you have as of the date of death to the contrary?

"MR. FISHER: I'm not aware, your honor—

"THE COURT: Okay.

"MR. FISHER: —Because we haven't done—I mean, that's part of the problem that—

"THE COURT: It's not, because there is such—there is a presumption. That's why we have recordation for real property."

Later in the hearing, appellant renewed his request to put on evidence that he contended would rebut the joint-tenancy presumption, identifying as his evidence the possible existence of deeds transferring some of the joint-tenancy properties into the

Trust. The trial court found no basis to defer ruling on the matter, and at the end of the hearing "decide[d] that the joint-tenancy properties held by Louis and Sylvia at Sylvia's death became the separate property of Louis . . . ."

B. Applicable Legal Principles.

A married couple may hold real property as community property, joint tenants, or tenants in common. (Fam. Code, § 750; *Estate of Mitchell* (1999) 76 Cal.App.4th 1378, 1385.) They cannot hold property both as community property and in joint tenancy or tenancy in common, however, because spouses' joint tenancy and tenancy in common interests are deemed to be separate property. (*Estate of Mitchell, supra,* at p. 1385.) Accordingly, when one spouse dies during the marriage, ownership of any property held by the couple in joint tenancy passes to the surviving spouse by right of survivorship, assuming the joint tenancy has not otherwise been terminated. (*In re Marriage of Hilke* (1992) 4 Cal.4th 215, 220; *Estate of Mitchell, supra,* at p. 1385.)

The Family Code creates a rebuttable presumption that property held by spouses in joint tenancy is actually community property, but that presumption operates only upon the dissolution of the marriage. (Fam. Code, § 2581; *Estate of Mitchell, supra,* 76 Cal.App.4th at p. 1386; *Dorn v. Solomon* (1997) 57 Cal.App.4th 650, 652.) Likewise, the general presumption of community property in Family Code section 760 does not trump the form of title presumption. (See Fam. Code, § 760 ["Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property"].) The court in *In re Marriage of Brooks & Robinson* (2008) 169 Cal.App.4th 176, 186 explained that the act of specifying a form of ownership in the title conveyance removes such property from the Family Code presumption. (See also *Siberell v. Siberell* (1932) 214 Cal. 767, 773 [community property presumption "has no application to a case where 'a different intention is expressed in the instrument'"].) Thus, where the parties have specified a form of ownership in a grant deed, the "form of title" presumption codified in Evidence Code section 662 applies, which provides that "[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted

only by clear and convincing proof." (Evid. Code, § 662; accord, *In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291 ["absent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization"].)

The court in *Estate of Gallio* (1995) 33 Cal.App.4th 592, 596 applied the form of title presumption to property held in joint tenancy by a husband and wife upon the husband's death, explaining: "'The law on the issue before us is quite clear. For the purpose of determining the character of real property upon the death of a spouse, there is a rebuttable presumption that the character of the property is as set forth in the deed. [Citation.] . . . The burden is on the party seeking to rebut the presumption to establish that the property is held in some other way; this may be done by a showing that the character of the property was changed or affected by an agreement or common understanding between the spouses. Such agreement may be oral or written, or may be inferred from the conduct and declarations of the spouses. However, there *must* be an agreement of some sort; the presumption may *not* be overcome by testimony about the hidden intention of one spouse, undisclosed to the other spouse at the time of the conveyance. [Citations.]' [Citation.]" (See also *Estate of Blair* (1988) 199 Cal.App.3d 161, 167 ["For purposes of determining the character of real property on the death of one spouse, there is a presumption 'that the property is as described in the deed and the burden is on the party who seeks to rebut the presumption'" and "'[t]he fact that a deed was taken in joint tenancy establishes a prima facie case that the property is in fact held in joint tenancy'"].)

The form of title presumption is a rebuttable presumption that affects the burden of proof. "That is, the party asserting that title is other than as stated in the deed . . . has the burden of proving that fact by clear and convincing evidence. [Citations.] The presumption can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the deed is not what the parties intended. [Citations.] Significantly, 'the presumption cannot be overcome solely by tracing the funds used to purchase the property, nor by testimony of an intention not disclosed to the

grantee at the time of the execution of the conveyance.' [Citations.] Nor can the presumption be rebutted by evidence that title was taken in a particular manner merely to obtain a loan." (*In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 189–190.) The mere fact that property was acquired during marriage is inadequate to rebut the form of title presumption. (*Id*. at pp. 186–187.) Moreover, "[t]o overcome the form of title presumption, the evidence of a contrary agreement or understanding must be 'clear and convincing.' [Citations.] This standard requires evidence that is '"""so clear as to leave no substantial doubt" [and] "sufficiently strong to command the unhesitating assent of every reasonable mind."""'" (*Id.* at p. 190.)

C. Appellant Failed to Offer Evidence Relevant to Rebutting the Form of Title Presumption.

Appellant argues that the trial court committed prejudicial error by precluding him from offering any evidence to rebut the form of title presumption. "The trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]'" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) But "even where evidence is improperly excluded, the error is not reversible unless '"it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citation.]" [Citation.]'" (*Id.* at pp. 1431–1432; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

As a threshold matter, the record does not support appellant's characterization of the trial court's actions a refusal to permit him to offer evidence to rebut the form of title presumption provided by the grant deeds. Rather, when the trial court asked appellant's counsel what evidence he had as of the date of Sylvia's death that was contrary to the manner of title provided in the grant deeds, counsel responded that he was not "aware" of anything. These circumstances are unlike those in *Tomaier v. Tomaier* (1944) 23 Cal.2d

754, 756–757, where the appellate court held it was reversible error for the trial court summarily to exclude all evidence—including evidence that the property was purchased with community funds—designed to show that a husband and wife had intended to hold joint tenancy property as community property.

For the same reason, we do not find that this was the type of situation where an offer of proof would have been futile. (See *Tomaier v. Tomaier, supra*, 23 Cal.2d at p. 760 ["When the trial court states that it will not receive evidence, a specific offer of proof is not necessary and would be idle under the circumstances, and it therefore may be claimed that it was error to exclude such evidence"].) Nonetheless, though appellant did not make an offer of proof at the January 2009 hearing, in his opposition papers he identified certain documents that he claimed reflected the community property nature of the properties; those documents were later admitted during the trial, albeit for different purposes. He cited Louis's September 1999 declaration in which he averred "[a]ll of the property in the Trust Estate is community property"; the 1999 Allocation which allocated the six properties to the Marital Trust; and Sylvia's original Form 706 in which Louis identified the joint tenancy properties as community property.[2]

The trial court properly exercised its discretion to conclude that the evidence identified by appellant was not relevant rebuttal evidence. To overcome the form of title presumption, appellant had the burden to show by clear and convincing evidence that Louis and Sylvia, together, had an "intention, understanding or agreement" that the properties would be held as community property despite their holding legal title as joint tenants. (Evid. Code, § 662; *In re Marriage of Brooks & Robinson, supra,* 169 Cal.App.4th at pp. 189–190.) Each of the documents offered by appellant was prepared after Sylvia's death and, at best, necessarily reflected Louis's sole understanding of the character of the properties. Appellant offered nothing that tended to show during Sylvia's lifetime the parties reached an agreement or understanding that the properties

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[2] On appeal, appellant also identifies Louis and Jackie's premarital agreement as confirming the community property nature of the properties, but that agreement merely incorporates schedules from other documents.

would be held as community property. We are therefore guided by *Machado v. Machado* (1962) 58 Cal.2d 501, 505 to 506, where the court held that a husband's and wife's testimony about their independent intention not to create a joint tenancy was insufficient to overcome the form of title presumption. The court stated: "Although a joint tenancy deed is not conclusive as to the character of real property, it creates a rebuttable presumption that it is held in joint tenancy. The presumption created by the deed cannot be overcome by testimony of the hidden intentions of one of the parties, but only by evidence tending to prove a common understanding or an agreement that the character of the property was to be other than joint tenancy. Since there was no evidence of a common understanding or an agreement the presumption was not overcome. [Citations.]" (*Id.* at p. 506.)

Because appellant's proffered evidence did not reflect Louis and Sylvia's common agreement or understanding as to how the real property would be held, it was not the type of evidence sufficient to overcome the presumption accorded by Evidence Code section 662. The trial court acted within its discretion to decline to consider Louis's after-the-fact statements as rebuttal evidence and properly concluded that appellant did not meet his burden to rebut the form of title presumption.

II. Substantial Evidence Supported the Trial Court's Determination that Louis Complied with his Fiduciary Duties.

As part of the judgment the trial court ruled that "[t]he Trustees acted in good faith and in a manner consistent with their fiduciary duties in making the 2002 Allocation. The actions of the Trustees were reasonable and not arbitrary or capricious." Appellant contends that the 2002 Allocation was unauthorized, unfair and inconsistent with the intent of the Trust. The determination that a trustee has complied with his fiduciary duties and the underlying factual findings required to make such a determination are

reviewed for substantial evidence.[3] (*Penny v. Wilson, supra,* 123 Cal.App.4th at p. 603; *Briano v. Rubio* (1996) 46 Cal.App.4th 1167, 1173.) "On review for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference. [Citation.] We accept all evidence favorable to the prevailing party as true and discard contrary evidence. [Citation.]" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.)

A. Penny v. Wilson.

At the beginning of the statement of decision, the trial court outlined the issues that had been resolved at the January 2009 hearing, including that Louis had the right to correct the 1999 Allocation, and clarified that "[t]he only evidentiary issue in this case relates to the second allocation and whether under *Penny v. Wilson* (2004) 123 Cal.App.4th 596 Louis improperly allocated the Louis Herman Frahm and Sylvia Lee Frahm Living Trust's assets among its sub-trusts."

In *Penny v. Wilson, supra,* 123 Cal.App.4th at page 603, we summarized a trustee's fiduciary obligations imposed by statute: "The trustee has the duty to administer the trust according to the trust instrument. (Prob. Code, § 16000.) The trustee also must deal impartially with all beneficiaries. (§ 16003.) If a trustee is given discretionary power, the trustee must exercise his or her power reasonably. (§ 16080.) Even if a trustee is given 'sole' and 'absolute' discretion, he or she must act in accordance with fiduciary principles and must not act in bad faith or in disregard of the purposes of the trust. (§ 16081, subd. (a).)" (*Ibid*., fn. omitted.) Thus, a court may set aside a trustee's

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[3] Contrary to appellant's urging, the trial did not involve undisputed facts that are subject to independent review. Review for substantial evidence is therefore appropriate, even though we could employ a harsher standard of review to appellant's failure of proof at trial. "[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

discretionary act when the act is unreasonable, arbitrary, capricious, or in bad faith. (*Id.* at p. 606.)

There, a trust which had as its stated purpose to benefit four children equally obligated a surviving spouse to divide trust assets into a survivor's trust and a decedent's trust upon the other spouse's death. The surviving husband did not do so, instead waiting 16 years to divide the trust property but then utilizing the valuations at the time of his wife's death. As a result, he allocated to the decedent's trust a property that had declined during the 16-year period to one-third of its prior value, and allocated to the survivor's trust a property that had appreciated four-fold over the same time period. (*Penny v. Wilson, supra,* 123 Cal.App.4th at p. 604.) Before his own death, the surviving spouse had also prepared to transfer the appreciated property in the survivor's trust to a residence trust established for the benefit of one child. (*Id*. at p. 599.) Applying the governing legal principles, we concluded that by allocating the appreciated property to the survivor's trust without taking into account its enhanced value, the trustee disregarded the purpose of the trust to distribute the trust estate equally among the four children. (*Id*. at p. 607.)

In its statement of decision, the trial court distinguished *Penny v. Wilson, supra,* 123 Cal.App.4th 596 in several respects. First, the language of the Trust here gave Louis a general power over Trust assets, whereas the trust in *Penny v. Wilson, supra,* at page 605 limited the trustee's ability to exercise his power of appointment "'during any calendar year only to the extent of Five Thousand Dollars ($5,000.00) or five percent (5%) of the aggregate value of the Trust Estate, whichever amount shall be greater.'" Second, the court found that appellant had failed to offer any competent evidence to show that the value of the Trust assets had changed between the 1999 Allocation and the 2002 Allocation. Third, the trial court concluded that appellant had failed to show that Louis acted in bad faith or in disregard of the purposes of the Trust in making the 2002 Allocation. Finally, the court found ample evidence to show that the 2002 Allocation was a well-reasoned effort to correct multiple errors in the 1999 Allocation, and no evidence to suggest that the purpose of correcting the 1999 Allocation was to favor one

beneficiary over another. As discussed in more detail below, substantial evidence supported the trial court's findings.

B. Louis Acted in Accordance with His Fiduciary Duties in Making the 2002 Allocation.

1. Louis had authority to modify the 1999 Allocation.

As a threshold matter, appellant contends that Louis exceeded his authority by superseding the 1999 Allocation.[4] Citing the trial court's order from the January 2009 hearing that Louis "had the right to make a second allocation to correct the prior allocation of his joint-tenancy properties" to the Marital Trust and Exemption Trust, he argues that this ruling imposed a limitation on the scope of any reallocation. Setting aside the fact that the trial court issued its order years after Louis had already made the 2002 Allocation and thus the order could not have governed the scope of any reallocation, appellant ignores that the trial court's ruling was solely intended to limit the scope of the issues for trial. At the January 2009 hearing, the trial court confirmed that it would take evidence on the allocation issues that had not been resolved as a matter of law. In other words, the trial court ruled that Louis had the right, as a matter of law, to correct the 1999 Allocation for the purpose of removing the joint-tenancy properties. But its ruling did not confine the scope of any reallocation to those properties. Rather, it determined that it would rule on the propriety of the balance of any reallocation issues after receiving evidence at trial.

On the basis of the evidence presented at trial, the trial court found that the Trust gave Louis the power to amend or revise the 1999 Allocation. The Trust itself did not preclude Louis from making changes to any initial allocation, as it gave the surviving spouse sole discretion to determine how to allocate assets among the Sub-Trusts.

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[4] Appellant also raises this issue as a means of attempting to establish prejudice from the exclusion of evidence to rebut the form of title presumption. In short, he contends that if the properties had been shown to be held as community property, the 2002 Allocation would have been unnecessary. Because we reject appellant's assertion that Louis exceeded his power by adjusting the 1999 Allocation, we necessarily reject his prejudice argument based on that assertion.

Importantly, the 1999 Allocation predated the funding of the Trust. Moreover, Louis prepared the 1999 Allocation before Sylvia's Form 706 had been filed, meaning that the 1999 Allocation did not contain asset values consistent with the requirements of the Trust. Given these circumstances, appellant's own expert conceded that Louis had the ability to make changes to the 1999 Allocation even after he had signed it.

The trial court further found "[t]he evidence established that there was a documented and well-reasoned attempt to undo a number of allocation errors in the 1999 Allocation." Beyond the misallocation of joint-tenancy property as if it were community property, the 1999 Allocation failed to use the asset values contained in the Form 706, allocated Jacqueline's residence to Louis's children while it allocated to Jacqueline a percentage of stock ownership in the family business run by Mitchel and appellant, omitted community property assets, and contained mathematical errors. Jacqueline's expert Wheat testified about the allocation errors. He observed that the allocation schedule included six properties which were Louis's separate property, the values used in the 1999 Allocation were not the same as those used on Sylvia's Form 706, and a $560,000 note to Louis was excluded from the allocation. He also identified several mathematical errors within the 1999 Allocation, explaining that the sum of the Marital Trust was understated and the sum of the Exemption Trust was overstated. Wheat testified that the 2002 Allocation corrected the errors he identified. Even appellant's expert Schaffer conceded that the Trust provided Louis with the power to allocate assets, as Sylvia did not earmark particular assets for any particular Sub-Trust.

Accordingly, substantial evidence supported the trial court's finding that "Louis had the ability to make changes to the 1999 Allocation other than to correct for the allocation of his joint tenancy properties to the Marital Sub-trust and the Exemption Sub-trust."

2. Louis did not act unfairly in making the 2002 Allocation.

Appellant argues that even if Louis was permitted to modify the 1999 Allocation, the manner in which he did so was unfair and inequitable, and not permitted under the

standards announced in *Penny v. Wilson, supra,* 123 Cal.App.4th 589. The evidence does not support his argument.

a. Asset value.

At the time of Sylvia's death, the Trust was unfunded. When Louis first allocated assets among the Sub-Trusts, the total value of the Trust assets was $12,133,340, with $6,066,670 of those assets allocated to the Survivor's Trust, $5,882,452 allocated to the Marital Trust and $184,218 allocated to the Exemption Trust. Taking into account that several of the properties identified as Trust assets were joint tenancy properties that should have been considered Louis's separate property and adjusting asset values to correspond to those on the Form 706 estate tax return, the 2002 Allocation shifted certain assets between Sub-Trusts to provide for equivalent valuations. Indeed, appellant's expert Westover testified that it was not a breach of fiduciary duty to reallocate assets among Sub-Trusts so long as any transfer was made for fair and adequate consideration.

In the 2002 Allocation, $6,019,116 in community property assets was allocated to the Survivor's Trust, while $5,836,616 and $182,500 in assets were allocated to the Marital Trust and the Exemption Trust, respectively. The 2002 Allocation also included $1,466,443 in joint tenancy and separate property assets as part of the Survivor's Trust. Disregarding the asset values identified in the 2002 Allocation, appellant represents that after allocation the assets in the Survivor's Trust were valued at $3,398,781, while those in the Marital Trust were worth $600,000. But those values were reported by Applebaum in 2009, seven years after the 2002 Allocation. Appellant offered no evidence to show that the valuations provided in the 2002 Allocation were incorrect in any respect. Westover expressed no opinion on valuation, instead accepting the figures provided in the Form 706.

Likewise, appellant offered no evidence to support his theory that the 2002 Allocation was unfair because of the reallocation of potentially appreciating and depreciating assets. Westover did not know whether any assets had appreciated or depreciated between 1999 and 2002. Moreover, appellant offered no evidence to show that at the time of the 2002 Allocation, Louis knew the Delgado property allocated to the

Survivor's Trust would appreciate, or that the Frahm Dodge stock allocated to the Marital Trust would depreciate due to subsequent difficulties throughout the automobile industry. To the contrary, Mitchel testified that between 1998 and 2002 the Frahm Dodge business, and correspondingly its stock, had increased in value. The evidence further showed that practical considerations governed Louis's allocation: Jacqueline was living in the Delgado property, and appellant and Mitchel were running the family business. These circumstances are unlike those in *Penny v. Wilson, supra,* 123 Cal.App.4th at page 604, where the trustee allocated assets in 1997 with the full benefit of hindsight. To purportedly effect an equal allocation, he utilized the assets' asserted value as of the time of his wife's death in 1981, yet he knew that one asset had significantly depreciated and the other had significantly appreciated during the ensuing 16 years. (*Ibid*.)

We conclude substantial evidence supported the trial court's finding that appellant "failed to introduce sufficient credible evidence to meet his burden of proof to show Louis breached his fiduciary duties by allocating more valuable assets to one sub-trust over the other in the 2002 Allocation so as to . . . favor one or more beneficiaries."

b. Asset quality.

Appellant further argues that even if the 2002 Allocation on its face appeared to allocate assets of an equivalent value among the Sub-Trusts, the nature and quality of the assets allocated to the Marital Trust were inferior to that of the assets transferred to the Survivor's Trust. He contends that the reallocation of assets demonstrated that Louis acted in bad faith and in violation of the purposes of the Trust. (See *Penny v. Wilson, supra,* 123 Cal.App.4th at p. 603.)

In the 1999 Allocation, Louis allocated to the Marital Trust the Delgado property; the six properties that were ultimately determined to be joint tenancy properties outside of the Trust; Frahm Dodge stock; notes receivable, including 75 percent of a Honda lawsuit settlement (Honda settlement note); and some cash and personal property. The 2002 Allocation necessarily omitted the joint tenancy properties from the Marital Trust. Utilizing the appropriate values from the Form 706, the 2002 Allocation reallocated several assets from the Marital Trust to the Survivor's Trust, including the Delgado

property and the Honda settlement note. The 2002 Allocation allocated three assets to the Marital Trust—49 percent of the Frahm Dodge stock, the Firestone lease and one-half of a note receivable from Mitchel—the latter two of which were transferred from the Survivor's Trust.

With respect to the Frahm Dodge stock, appellant complains that the asset is a minority interest lacking corporate control and, as such, amounts to an inferior asset worth less than would appear from its monetary valuation. But appellant offered no evidence at trial to support this argument. Instead, the evidence showed that Frahm Dodge was a profitable company in 1999 and still in 2002. Lewis testified that Louis's intent in allocating the company stock to the Marital Trust was to allow the family business to pass to appellant and Mitchel and was part of a strategy designed to minimize their estate tax liability. Even appellant's expert Westover did not premise his opinion that Louis breached his fiduciary duty on the allocation of the Frahm Dodge stock, reasoning that Louis should have put the stock in the Sub-Trust in which the children running the business were the sole beneficiaries.

Appellant likewise offered insufficient evidence to show that the Firestone lease was a "wasting asset" worth less than its apparent monetary value. The Firestone lease was a long-term sub-lease by which Louis leased the land from the property owner and received income from a sub-tenant. The value of the lease was based on an appraisal prepared in connection with Sylvia's Form 706. The evidence showed that two months after the 2002 Allocation, Lewis wrote a letter to Louis in which he expressed concern about allocating the Firestone lease to the Marital Trust "because of the fact that the Firestone Lease is potentially a 'wasting' asset due to the fact that the term of the Firestone Lease expires on or about December 31, 2014" and thus the beneficiaries could claim that only one-half of the lease should have been allocated to the Marital Trust. Westover opined that the Firestone lease was necessarily worth less in 2002 than 1999 because of its "wasting" character. He opined that Louis breached his fiduciary duty to the beneficiaries by allocating this asset to the Marital Trust because of its lesser value at

the time of the 2002 Allocation, meaning that the reallocation was without full consideration.

But the evidence further showed that Lewis raised a concern because Louis had expressed his own concern about appellant potentially bringing a lawsuit, and Lewis was trying to protect himself. Lewis did not hold the opinion that allocating the Firestone lease to the Marital Trust was improper or a breach of fiduciary duty. He supported Louis's decision to keep the Firestone lease in the family as part of its business and Louis's desire for appellant and Mitchel to have access to the cash flow from the lease. Moreover, Westover conceded that in rendering his opinion he did not consider Louis's remaining life expectancy, any terms regarding the renewal of the lease or Probate Code section 16362 governing the allocation between principal and income for a liquidating asset. While he assumed that the Firestone lease had decreased in value between 1999 and 2002, he could offer no opinion as to its appreciation or depreciation in asset value during that time period. Nor did Westover know whether in valuing the Firestone lease Louis had complied with the Trust's requirement to consider appreciation and depreciation of an asset between the date of death and allocation, or whether the Form 706 appraisal factored the "wasting" nature of the lease into its final valuation.

Substantial evidence supported the trial court's finding that appellant failed to introduce sufficient evidence to meet his burden to show that Louis breached his fiduciary duty by failing to consider the nature of the Firestone lease as a wasting asset. Appellant failed to offer evidence to show that the Form 706 value of the Firestone lease did not take into account its finite duration and the evidence showed that Louis offered a good faith and reasonable purpose for allocating the Firestone lease to the Marital Trust.

Finally, appellant contends that Louis breached his fiduciary duty by reallocating the entire Honda settlement note to the Survivor's Trust, while allocating to the Marital Trust one-half of a promissory note securing a $750,000 loan that Louis made to Mitchel during the 1990's to cover his 25 percent ownership in a new dealership. The Form 706 value of the note was $750,000. Before his death, Louis told Mitchel that he intended to forgive the note at some point in the future; Louis never prepared anything in writing to

that effect. Thus, while the evidence showed that the note may have been worth nothing by the time of Louis's death in 2006, appellant offered no evidence to show that the note was worth less than the $750,000 specified on the Form 706 at the time of the 2002 Allocation.

In view of the evidence showing that the quality of the assets allocated to the Marital Trust was not of an inferior nature at the time of the 2002 Allocation, we conclude that substantial evidence supports the trial court's finding that appellant "failed to introduce sufficient credible evidence to meet his burden of proof to show that Louis breached his fiduciary duties by failing to take into consideration not just the dollar value of the assets being allocated but also the quality and nature of those assets (for example, whether the asset was a wasting asset, whether the asset being transferred was a majority or a minority share in a corporation, whether the corporation was a closely held corporation, and whether there was a market for the shares of stock being allocated)."

c. Asset preservation.

Finally, appellant raises a host of issues concerning the reallocation of the Delgado property from the Marital Trust in the 1999 Allocation to the Survivor's Trust in the 2002 Allocation, all of which essentially fall under appellant's umbrella claim that Louis breached his fiduciary duty by failing to preserve that asset for appellant's benefit. The trial court ruled appellant offered insufficient evidence to show that Louis breached his fiduciary duty in connection with the transfer of the Delgado property. Substantial evidence supported this finding.

The Delgado property was initially listed as an asset of the Marital Trust, though one of the mathematical errors in the 1999 Allocation was the failure to include the $375,764 value in the trust asset total. The value of the Delgado property was calculated on the basis of information on the Form 706, which specified an $875,000 appraised value and a $499,236 mortgage amount. By February 2002, Lewis had prepared a new allocation that reallocated the Delgado property to the Survivor's Trust. In March 2002, Louis executed a quitclaim deed transferring the Delgado property to himself as a trustee of the J&L Living Trust. The 2002 Allocation ultimately signed in October 2002

reallocated the Delgado property to the Survivor's Trust. Kurtz had advised Louis that he could make the reallocation so long as he replaced the property with an asset of equivalent value.

Appellant contends that by transferring the Delgado property from the Marital Trust and ultimately removing it from the Trust assets altogether, Louis breached his duty to preserve Trust assets. (See Prob. Code, § 16006.) Westover testified that the transfer of the Delgado property from the Marital Trust was a breach of fiduciary duty, because Louis eliminated the beneficiaries' right to live in and receive that property without notice and full consideration. The evidence showed, however, that appellant received both notice of and full consideration for the transfer. Though appellant had initially been under the impression that he would receive the Delgado property, Louis told Mitchel in March 2002 the property had not been promised to appellant. Mitchel, in turn, informed appellant that he, as co-trustee, had signed over the Delgado property to the J&L Living trust. Appellant confirmed that more than two years before Louis's death he was aware that the Delgado property would go to Jacqueline. Lewis explained that a primary residence is typically allocated to a survivor and he believed it was appropriate to allocate the property to the Survivor's Trust.

With respect to the issue of full consideration, when Louis moved the Delgado property from the Marital Trust, he intended to replace it with another asset of equal value. Kurtz advised him that there were a number of workable asset allocations that would achieve his objective. In making the 2002 Allocation, Louis shifted assets between the Survivor's Trust and the Marital and Exemption Trusts so that the allocated amounts balanced. Once the Delgado property was in the Survivor's Trust, the Trust gave Louis and Mitchel discretion to utilize the property for Louis's benefit. According to the Trust, "the Trustees shall also pay to or apply for the benefit of the surviving spouse any sums from the principal of the Survivor's Trust that the Trustees, in the Trustees' discretion, consider necessary for the surviving spouse's proper health, support, comfort, enjoyment and welfare."

Appellant argues that he did not receive full consideration because the Delgado property was undervalued in the 2002 Allocation. Both the 1999 Allocation and the 2002 Allocation employed the Form 706 value of $375,764. While appellant urges that an inference can be drawn that the Delgado property value had increased over that three-year period because home values had increased and/or the mortgage had been paid down, he offered no evidence below to support that inference. As the trial court found, appellant "offered no credible evidence to show that the assets had changed in value when they were allocated in 2002. [Appellant] asserted that the Delgado house was reallocated for less than 'full consideration.' Yet, he offered no appraisal for the Delgado house or other evidence supporting this argument." Though appellant points to an asset schedule attached to Louis and Jacqueline's July 2001 prenuptial agreement which listed the Delgado property as having a value of $1,200,000, the schedule further identified the property as the "primary residence, $875,000, net of lien." Given that it is the trial court's role to weigh and resolve conflicts in the evidence (e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 52–53), it was reasonable for the trial court to construe the schedule as inaccurately stating the Form 706 value.

Appellant finally argues that Louis's failure to preserve the Delgado property as part of the Marital Trust was inconsistent with Sylvia's intent. As explained in *Kropp v. Sterling Sav. & Loan Assn.* (1970) 9 Cal.App.3d 1033, 1044–1045, "the court 'must if possible ascertain and effectuate the intention of the trustor . . . as expressed by the language of the instrument itself.' [Citation.] '. . . [T]he guiding principle must be the intention of the settlor—his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test.' [Citation.]" Here, given that the trial court ruled there was no ambiguity in the Trust language concerning the allocation of assets among Sub-Trusts, we look to the Trust to ascertain Sylvia's intent. In the Trust, Sylvia gave Louis (and vice-versa) discretion to allocate assets among the Sub-Trusts. The Trust did not specify that any particular asset, including the Delgado property, was to be allocated to any particular Sub-Trust. Indeed, appellant's own expert Schaffer testified that "[t]here's nothing to prevent him [Louis] from putting the Delgado

property into the Survivor's Trust." The only specifications about asset allocation were that the community estate was to be divided between the Survivor's Trust on the one hand, and the Marital and Exemption Trusts on the other, and that the assets were to be valued as of the time of death. Because substantial evidence supported the conclusion that these two requirements were satisfied, the evidence likewise supported the trial court's finding that "[t]he 2002 Allocation honored the testamentary intent of the drafters of the Trust."

In sum, we conclude that substantial evidence supported the trial court's determination that Louis acted reasonably and in accordance with his fiduciary duties in making the 2002 Allocation. We agree with the trial court that there was no convincing evidence that the values used in the 2002 Allocation were incorrect or inequitable, and that the evidence showed "the 2002 Allocation resulted in a more rational disposition of assets than the 1999 Allocation."

DISPOSITION

The judgment is affirmed. Applebaum, Jacqueline and Mitchel are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ