Filed 3/17/16 Estate of the Shott Trust CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Estate of THE JACQUELYNE N. SHOTT TRUST, Deceased.	B260897
ALEX PAUL SHOTT, Petitioner and Appellant, v. DIANE SHOTT, as Trustee, etc., Objector and Respondent.	(Los Angeles County Super. Ct. No. KP015044)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Cunningham III, Judge. Affirmed in part; reversed in part.

Law Offices of Doonan & Doonan and D. Scott Doonan for Petitioner and Appellant.

Law Offices of William E. Windham and William E. Windham for Objector and Respondent.

* * * * * *

Decedent Jacquelyne N. Shott's estate planning involved a codicil leaving her home and bank accounts to one of her sons, petitioner Alex Paul Shott.[1] The primary question we must address is whether that codicil constituted a valid exercise of the "power of appointment" Jacquelyne reserved for herself in her trust agreement. Alex filed the underlying petition to determine the answer to this question, among others. The trial court held the codicil did not constitute a valid exercise of the power of appointment. We disagree and reverse in part and affirm in part.

FACTS AND PROCEDURE

1. Petition

Alex filed the petition in November 2012 against Diane Shott as trustee of The Jacquelyne N. Shott Trust (the trust) and Edwin Shott. For our purposes, the dispute centered mostly on real property located on Lanny Avenue in La Puente, California (the Lanny property). The petition alleged as follows.

In December 2000, Jacquelyne executed the trust agreement. At the same time, she executed a quitclaim deed transferring her interest in the Lanny property to the trust. Alex had lived in the Lanny property for over 30 years, including 25 years during which he cared for Jacquelyne. In March 2008, Jacquelyne executed a handwritten "codicil to [her] last will and testament" bequeathing the Lanny property to Alex (the March 2008 codicil).

Jacquelyne died in December 2010. Pursuant to the trust agreement, Jacquelyne's daughter-in-law, Diane, became successor trustee of the trust. The first cause of action for breach of trust and conspiracy to breach the trust alleged Diane had breached various duties under the Probate Code as trustee.[2] She made distributions from the trust to her husband, Edwin Shott, and children, attempted to negotiate a "buy out" agreement

---

[1] Because the parties share a surname we will use their first names for the sake of clarity.

[2] Undesignated statutory references are to the Probate Code.

between Edwin and Alex with respect to the Lanny property, and failed to pay expenses of the trust in excess of $23,000 to the detriment of Alex. The second cause of action for accounting alleged Diane had intentionally failed to render an annual accounting to the beneficiaries of the trust, including Alex. The third cause of action for declaratory relief alleged Diane had refused to transfer the Lanny property to Alex because of her and Edwin's claim to the property, in breach of fiduciary obligations as trustee. Thus, Alex was seeking a judicial declaration that the March 2008 codicil was a valid and enforceable exercise of Jacquelyne's power of appointment and an order for Diane to transfer the Lanny property to Alex. Among other things, Alex also sought injunctive relief prohibiting Diane from evicting him from the Lanny property, damages, an order removing Diane as trustee, and an order appointing Alex as trustee.

2. Trial

The bench trial took place over the course of two days in July 2014. The parties adduced the following pertinent evidence.

Jacquelyne's sons are Alex and Edwin. Diane is married to Edwin. Jacquelyne executed the trust in December 2000. The trust named Jacquelyne both trustor and original trustee. It named Diane the first successor trustee, Alex the second successor trustee, and Edwin the third successor trustee.

Regarding amendments to the trust, section III.A. of the trust agreement stated: "The Trustor may alter, or amend, any provisions of this Trust agreement. [¶] Any revocation, alteration, or amendment shall be in writing, executed by the propounding Trustor, and notarized."

The trust agreement, section VI.A., entitled "Power of Appointment," stated: "The Trustor shall have the power to appoint the principal, and any undistributed income of the Trust Estate, or any part thereof, to the Trustor, to the Trustor's estate, or to any other person or persons. Such power of appointment shall be exercised only by means of written directions, executed by the Trustor, and delivered to the Trustee, during the lifetime of the Trustor. If the Trustor executes and delivers more than one such written

direction to the Trustee, the last one shall control, unless, by its context, the Trustor clearly indicates otherwise."

Upon Jacquelyne's death, the trust provided: "[T]his trust shall terminate. The Trustee shall then distribute the Trust Estate in accordance with, and to the extent provided by, the Trustor's exercise of his or her power of appointment if any. Any part of the Trust Estate to which the Trustor shall not have exercised his or her power of appointment shall be administered by the Trustee in accordance with the provisions set forth in the Article entitled 'Administration on Death of Trustor.'" (Capitalization omitted.) Section VII.A., the article entitled "Administration on Death of Trustor" (capitalization omitted), provided that upon Jacquelyne's death, "after paying or reserving for all amounts payable as provided in this Trust agreement," the trustee should apportion the trust estate as follows: $10,000 to Jacquelyne's granddaughter, Cassandra Shott; $10,000 to her other granddaughter, Kadee Shott; and "one full share" of the remaining trust estate to each of Jacquelyne's then-living children.

Jacquelyne executed a "Last Will and Testament" on the same day she executed the trust in December 2000. The will named Diane first executor, Alex second executor, and Edwin third executor. The will bequeathed Jacquelyne's personal property, such as household goods, furniture, and jewelry, in equal parts to her children living at her death. It directed that the residue of her estate be added to the trust and be distributed as provided for in the trust.

Jacquelyne also executed the quitclaim deed on the same date as the trust and the will in December 2000. It quitclaimed the Lanny property to herself as trustee of the trust. She recorded the quitclaim deed on June 26, 2001.

The handwritten March 2008 codicil was not the first codicil to the will. Jacquelyne executed the first codicil on June 26, 2001 (June 2001 codicil), the same date she recorded the quitclaim deed transferring the Lanny property to the trust. The handwritten June 2001 codicil bequeathed the Lanny property to Alex "to live in it as long as he wants." It further provided that, when Alex sold the property, he should keep half the proceeds, and the other half would go to Edwin and Diane. The June 2001

codicil mentioned a debt Edwin and Diane owed Jacquelyne. It stated: "As Edwin and Diane owe me ([the] Estate) over $30,000, they are to . . . divide the $30,000 the following [*sic*]—Alex Shott $10,000, Cassandra Shott $10,000, Kadee Shott $10,000."

The March 2008 codicil stated: "I Jacquelyne N. Shott, a resident of Riverside County, State of California, declare this to be the second codicil to my Last Will and Test[a]ment dated December 02, 2000[.] [¶] I hereby beque[a]th my Home at 827 Lanny Ave., La Puente, California to my son Alex Paul Shott. I also bequeath all Bank and Savings Accounts to Alex Paul Shott." The codicil identified the accounts as a "Bank of America, Valinda Branch, West Covina, California" account and an American Century Investments account.

According to the summary of account prepared for Diane after Jacquelyne's death, the trust assets consisted of two things: the Lanny property and a checking account at Bank of America containing $28,214.00. The Bank of America account was in the name "Jacquelyne N. Shott Living Trust." Checks Jacquelyne wrote from the account displayed an address for the "Valinda" branch in West Covina. The schedule of disbursements for the estate showed Diane had made $10,000 distributions to Cassandra and Kadee (Jacquelyne's granddaughters but also Diane's daughters) and a $3,000 distribution to Edwin.

Alex has been a maintenance mechanic since 1974. Alex began living with Jacquelyne at the Lanny property in 1981. That was the year that Alex and Edwin's father died. Jacquelyne had multiple sclerosis. Around November 2005, Jacquelyne moved to an assisted living facility because her health needs became too much for Alex to handle alone.

Around September 2007, Diane and Jacquelyne had a verbal confrontation that Alex witnessed. Alex, Diane, and Edwin were visiting Jacquelyne for her birthday. Jacquelyne mentioned that Diane and Edwin had not repaid a $30,000 loan from Jacquelyne. Diane "leap[t] out of the chair she was sitting in," began pointing at Jacquelyne, and told her in a "loud voice" that they had repaid her. Jacquelyne appeared to be hurt, and Alex asked Diane and Edwin to leave.

Alex was not present when Jacquelyne executed the March 2008 codicil. He did not discover the March 2008 codicil until after Jacquelyne's death, when he contacted counsel because Diane had served him with an unlawful detainer lawsuit to vacate the Lanny property. Diane saw the March 2008 codicil for the first time after Jacquelyne died as well. Both Alex and Diane identified the handwriting and signatures in the June 2001 and March 2008 codicils as Jacquelyne's. There was no dispute that the trust, the will, the June 2001 codicil, and the March 2008 codicil were authentic.

3. Statement of Decision

Alex argued in closing that the March 2008 codicil bequeathing the Lanny property to him constituted an exercise of the power of appointment under the trust. Diane and Edwin argued that it was not a valid exercise of the power of appointment because it did not comply with the provisions for amending the trust—it was not notarized. They asserted that because the Lanny property was a trust asset, and Jacquelyne was acting as trustor, the March 2008 codicil was a change to the trust and the terms for amending the trust governed it.

In its statement of decision, the court agreed with Diane and Edwin. It held that the March 2008 codicil did *not* constitute a valid exercise of the power of appointment. It found the trust agreement together with the quitclaim deed effectively created an inter vivos trust in relation to the Lanny property; Jacquelyne passed legal title to the property to the trust when she executed the quitclaim deed. It also found the Bank of America account was part of the trust estate (and in fact, the trust estate consisted of only the Lanny property and the Bank of America account). The terms of the trust provided that, when Jacquelyne passed, the trust estate would terminate and the trustee would apportion any remaining estate among Jacquelyne's then living children. The trust also contained express provisions for revoking, altering, or amending the trust during Jacquelyne's lifetime by written, notarized instrument, and provided for a power of appointment exercisable by written instrument. But the March 2008 codicil failed to follow the negotiated procedures for amendment or modification. It was not notarized.

The court further held that Alex was not entitled to judicial relief from the formalities required by the trust agreement. Section 631 allowed judicial relief from donor-imposed requirements that exceeded what the law required in a power of appointment instrument. The March 2008 codicil referenced the will of Jacquelyne, but did not reference the trust at all, and it was not notarized. Along with the legal effect of initially transferring the Lanny property to the trust, these circumstances defeated a request for judicial relief from formalities.

As to the allegations of breach of trust, the court found in Alex's favor. The court held Diane had committed malfeasance as trustee by not paying certain trust expenses that Alex had personally paid. Alex was seeking reimbursement for expenses in the amount of $30,500.28 plus interest. It was undisputed that Jacquelyne's will provided for the payment of debts and taxes. The expenses Alex paid consisted of funeral expenses, advanced fees to the trust attorney, payment for an appraisal of the Lanny property, and payment of an invoice from Jacquelyne's assisted living facility. Citing sections 19001 and 11420, the court discussed the order of priority for payment of debts.[3] It held "[u]nequivocally, these debts take priority before the distribution of any Trust assets." The court found that, despite knowing of these trust debts, Diane failed to pay them and instead made $10,000 distributions to Cassandra and Kadee and a $3,000 distribution to Edwin. Paying these distributions before settling the priority debts of the trust constituted a breach of trust for which Alex deserved compensatory damages. The trust had to reimburse Alex for the trust expenses, and this reimbursement would come from the Lanny property sale proceeds.

---

[3] Section 19001 discusses the property subject to the claims of creditors and to the expenses of administration of the trust estate. (§ 19001, subd. (a).) It also incorporates the priority provisions set forth in section 11420. (§ 19001, subd. (b).) Section 11420 describes the following order of priority for debts: expenses of administration; obligations secured by a mortgage, deed of trust, or other lien; funeral expenses; expenses of last illness; family allowance; wage claims; and general debts. (§ 11420, subd. (a).)

As a separate category of compensatory damages, Alex sought $23,000 for the distributions to the granddaughters and Edwin. The court found he was not entitled to damages for the $20,000 distributed to the granddaughters. It noted section VII of the trust provided for distributions of $10,000 to the granddaughters, and "while such gifts were improper unless taken from what remained after payment of estate debts, if there is equity in the sales proceeds [from the Lanny property] then the payment to the daughters was not necessarily in bad faith." The court found "that the gift to the daughters shall be deducted from the sales proceeds of the Lanny Avenue Property."[4]

Unlike the distributions to the granddaughters, the court found the trust did not authorize a specific bequest of $3,000 to Edwin, so this distribution constituted a "second and separate breach of trust" by Diane. But in lieu of Edwin's disgorging $3,000 back to the estate, the court ordered Alex to receive an extra $1,500 from the Lanny property sale proceeds, on top of his equal share.

Because the court determined that the Lanny property remained an asset of the trust, the court ordered Alex to vacate the property so Diane could sell it to the highest bidder and distribute the proceeds to the beneficiaries under the trust, including Alex. The court did not remove Diane as trustee.

The court entered judgment consistent with its statement of decision, and Alex timely appealed.

---

[4] We interpret this statement to mean that the court thought the gifts to the granddaughters *should have been* deducted from the Lanny property sale proceeds, not that they "shall be" deducted from the proceeds in the future. There was no indication the granddaughters had disgorged the $10,000 distributions back to the estate. To say their gifts "shall be" deducted from the proceeds in the future would result in a double gift to them, under these facts. Consistent with our interpretation of the statement of decision, the judgment does *not* state the gifts shall be deducted from the Lanny property sale proceeds. It merely states: "The court denies Petitioner's request for Diane to pay the entire sum of $23,000.00 for the reasons set forth in the Final Statement of Decision, incorporated herein by this reference."

DISCUSSION

Alex contends the court erred when it determined the March 2008 codicil did not constitute a valid exercise of the power of appointment. The essential facts are undisputed here. This is a matter of interpreting the trust instrument and the March 2008 codicil. The interpretation of such documents presents a question of law. We are not bound by the lower court's interpretation and thus independently interpret the documents. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) Having done so, we agree with Alex that the March 2008 codicil constituted a valid exercise of the power of appointment, which requires us to reverse some parts of the judgment and affirm other parts.

1. The March 2008 Codicil As a Valid Exercise of the Power of Appointment

In the context of powers of appointment, the "donor" is the person who creates the power of appointment. (§ 610, subd. (e).) The "donee" is the person to whom the donor gives the power of appointment. (§ 610, subd. (d).) "A power of appointment is a power given by the donor of property to the donee, which enables the donee to designate the appointees or persons who are to take the property at some future time." (*Estate of Daily* (1982) 130 Cal.App.3d 993, 998.) In this case, Jacquelyne was both the donor and the donee of the power of appointment because she created the power as trustor and reserved it for herself to exercise.

As one leading treatise describes it, "[a] power of appointment provides the flexibility of altering the disposition of some or all of the property held in trust. In this manner, the settlor can empower the settlor, a beneficiary, a trustee or other third parties to make future dispositions of trust assets, allowing the powerholder to take into account events and changes that have occurred since the execution of the trust when determining

if and how to exercise the power."[5] (7 Bogert et al., The Law of Trusts and Trustees (3d ed. 2014) Trusts and Conflict of Laws Problems, § 299, p. 83, fns. omitted.)

Jacquelyne's trust was the "creating instrument" in this context, or "the deed, will, trust, or other writing or document that creates or reserves the power of appointment." (§ 610, subd. (c).) "[I]f the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements." (§ 630, subd. (a).) Further, "[i]f the creating instrument expressly directs that a power of appointment be exercised by an instrument that makes a specific reference to the power or to the instrument that created the power, the power can be exercised only by an instrument containing the required reference." (§ 632.)

Here, the trust stated that the trustor (Jacquelyne) had the power to appoint the principal of the trust or any undistributed income to any person, and the trustor could exercise the power only by "means of written directions, executed by the Trustor, and delivered to the Trustee, during the lifetime of the Trustor." The trust did *not* expressly direct that the written directions specifically reference the power of appointment, nor did the trust expressly direct that the written directions specifically reference the trust itself. The power of appointment provision is clear in these respects.

The March 2008 codicil complied with the power of appointment provision in the trust—that is, it complied with the trust's "requirements as to the manner, time, and conditions of the exercise of a power of appointment." (§ 630, subd. (a).) The March 2008 codicil constituted "written directions" executed by Jacquelyne as to who should take the Lanny property and the funds in the Bank of America account at a future time. There is no dispute that Jacquelyne delivered the written directions during her lifetime to

---

[5] Settlor is another word for the trustor. (1 Bogert & Hess, The Law of Trusts and Trustees (3d ed. 2007) The Settlor and His Intention, § 41, p. 439.) Powerholder is another word for the donee, the person who may exercise the power of appointment. (7 Bogert et al., The Law of Trusts and Trustees, *supra*, § 299, p. 83, fn. 1.)

the trustee (also her) when she executed the instrument. There is also no dispute that the Lanny property and the Bank of America account constituted principal of the trust or that Jacquelyne, as trustor, could exercise the power of appointment over these assets. The trust did not require Jacquelyne to reference the power of appointment or the trust itself in her written directions.

Under the Probate Code, the exercise of the power of appointment required only "a manifestation of the donee's intent to exercise the power." (§ 640, subd. (a).) The March 2008 codicil clearly manifested this intent. Circumstances manifesting the donee's intent to exercise a power of appointment include, without limitation, that (1) the "donee purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power" of appointment, or (2) the "donee makes a disposition that, when considered with reference to the property owned and the circumstances existing at the time of the disposition, manifests the donee's understanding that the donee was disposing of the appointive property." (§ 640, subd. (b).) The March 2008 codicil unambiguously stated Jacquelyne was bequeathing the Lanny property and the Bank of America account to Alex. Because the trust owned the Lanny property and bank account, Jacquelyne as an individual would have had no power to dispose of them in this manner *except* by virtue of the trustor's power of appointment. Her intent that the property be distributed to Alex was clear, and as a lay person, she may be forgiven for not specifically referencing the power of appointment or the trust, when the terms of the trust did not expressly require either reference.

The trial court interpreted the power of appointment provision otherwise. Its statement of decision held: "[T]he Shott Trust expressly provided, 'Such power of appointment shall be exercised ***only by means of written directions***, executed by the Trustor, and delivered to the Trustee, ***during the lifetime*** of the Trustor.' [Citation.] The Court interprets that language as requiring an instrument which makes specific reference to the power [of appointment] or to the instrument that created the power to exercise the appointment. (Prob. Code, § 632.)" We cannot agree. The language of the provision is clear, including the language that the trial court emphasized, and nowhere does this

language expressly direct a reference to the power of appointment or the trust. Section 632 requires these references only if the trust "expressly directs" that they be present.

Furthermore, Diane and Edwin's argument—adopted by the trial court—that an appointment had to comply with the trust's terms for amending the trust lacks merit. The provision for amending the trust was in an entirely different article than the power of appointment provision. An exercise of the power of appointment was not an amendment of the trust, but a carrying out of its already existing terms. The trust as originally drafted created the power of appointment, allowing the trustor to appoint trust principal to any person she wished at some later date. Upon Jacquelyne's death, the successor trustee was to distribute the trust estate *first* in accordance with any power of appointment Jacquelyne exercised, and *then* to the extent any of the trust estate was not subject to the power of appointment, the successor trustee would distribute it consistent with the trust's article for "administration on death of trustor." (Capitalization and underscoring omitted.) Thus, written directions that some or all of the trust estate should go to Alex did not require amending the trust. Such directions merely carried out the existing terms of the trust setting forth the power of appointment. And as a result, the separate requirement that amendments to the trust had to be notarized did not, on its face, apply to instruments exercising the power of appointment. If Jacquelyne as trustor wanted appointments to be notarized, she could have easily inserted such a requirement into the relevant provision by saying, for example, "Such power of appointment shall be exercised only by means of written directions *that shall be notarized*." She did not do so.[6]

---

[6] The court determined that the March 2008 codicil did not comply with the trust's formal requirements for exercising the power and also that Alex was not entitled to judicial relief from the formalities under section 631. Section 631 comes into play when an appointment does not satisfy the formal requirements "as to the manner, time, and conditions of the exercise of a power of appointment." (§ 630, subd. (a).) This section allows the court to excuse compliance with the formal requirements and determine an appointment is nevertheless effective under certain circumstances, such as when "[t]he appointment approximates the manner of appointment prescribed by the donor." (§ 631,

Moreover, the fact that Jacquelyne cast the written directions as a codicil does not change our analysis. "Written directions" is a broad term that surely encompasses the codicil. The trust did not prohibit exercising the power of appointment via a will codicil. Even if the trust stated specifically that the power of appointment was exercisable by an inter vivos instrument—which it did not—the power could have been exercised just as well by a will. (§ 630, subd. (b) ["Unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will."].) ". . . California permits the use of a written will in exercising a power of appointment unless the trust instrument specifically forbids it." (*Rosenauer v. Title Ins. & Trust Co.* (1973) 30 Cal.App.3d 300, 304.)

Although the March 2008 codicil is clear in setting forth Jacquelyne's intent, and we need not resort to extrinsic evidence, we nonetheless observe that extrinsic evidence supports our interpretation. Jacquelyne evinced an intent for Alex to have the Lanny property from the beginning. When she recorded the quitclaim deed transferring the Lanny property to the trust, she simultaneously executed the June 2001 codicil, which appointed the property to Alex for as long as he wanted to live in it. He was to share half the proceeds with Diane and Edwin only when he decided to sell it. The March 2008 codicil changed that appointment only in that he no longer had to share the proceeds if he sold the property. There was no dispute that each of the codicils was authentic or that they were in Jacquelyne's handwriting and contained her signature. Diane and Edwin did not argue that Alex unduly influenced Jacquelyne or that she lacked capacity when she executed either codicil, nor is there evidence in the record substantiating such theories. Alex was not present when Jacquelyne executed the March 2008 codicil and did not even know it existed until after Jacquelyne's death. And while Alex was not required to justify

---

subd. (a)(1).) Because we have determined that the March 2008 codicil satisfied the trust's requirements for exercise, we need not consider judicial relief from the formalities under section 631.

Jacquelyne's appointment of the Lanny property to him, the record supplies some justification. Jacquelyne suffered from multiple sclerosis, and when her husband died, Alex lived with and cared for her from 1981 to around 2005 (in addition to his working as a maintenance mechanic). There was nothing unnatural about leaving her home to the child who lived there and cared for her for so long.

Lastly, Diane and Edwin argued below that the March 2008 codicil was not valid because it left Edwin as a "pretermitted heir" and it did not "meet the statutory requirements that any transfer of real property must be notarized." Both positions lack merit.

A so-called pretermitted heir is a child omitted from a testamentary instrument. "An omitted child statute (also called a *pretermitted heir* statute) has the effect of revoking a testator's will to the extent that the statute preserves an interest in the testator's estate for a child not provided for in the will." (14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 280, p. 364.) But California's pertinent pretermitted heir statutes protect only (1) children "born or adopted *after* the execution of all of the decedent's testamentary instruments," (2) children whom the decedent erroneously believed to be dead when the decedent executed the testamentary instruments, or (3) children of whose birth the decedent was unaware when the decedent executed the testamentary instruments. (§§ 21620, italics added, 21622.) Edwin does not fall into any of these categories. He was born to Jacquelyne before she executed the testamentary instruments at issue, and there is no evidence that she believed him dead when she executed the instruments.

The notion that the March 2008 codicil was a transfer of real property requiring notarization is equally unavailing. First, the March 2008 codicil did not effect a present transfer of title from the trust to Alex. The appointment was testamentary in character and provided for the disposition of the property when the trust terminated in the future. Second, even assuming the instrument conveyed title to the property, a transfer of real property generally is still valid and effective between the parties when unacknowledged by a notary. (*Williston v. Yuba City* (1934) 1 Cal.App.2d 166, 170-171; *Gonzales v.*

Gonzales (1968) 267 Cal.App.2d 428, 436.) The purpose of a notary's acknowledgment is evidentiary in character. It is required for the parties to record the instrument, but not to effect a transfer. (Civ. Code, § 1217; *Williston v. Yuba City, supra*, at p. 171; 3 Miller & Starr, Cal. Real Estate (4th ed. 2015) § 8:40, p. 8-115.) And "[a]n unrecorded instrument is valid as between the parties thereto and those who have notice thereof." (Civ. Code, § 1217.) In other words, the lack of a notary's acknowledgement would not by itself invalidate the transfer as between grantor and grantee.

In sum, the March 2008 codicil represented a valid exercise of the power of appointment under the trust. The trustee should have distributed the trust assets accordingly. Therefore, we reverse the judgment to the extent that it holds the March 2008 codicil "does not constitute a valid exercise of the power of appointment." Likewise, we reverse the order that Alex vacate the Lanny property so that Diane may sell it to the highest bidder.

2. Breach of Trust and Source of Damages on Remand

Our holding on the March 2008 codicil requires us to address other parts of the judgment relating to the breach of trust, Alex's damages, and proceedings on remand.

Diane has not challenged on cross-appeal the finding that she committed malfeasance as trustee in not paying trust expenses. We therefore affirm that part of the judgment. The award of damages to reimburse Alex for trust expenses in the amount $30,500.28 plus interest is also affirmed.

Alex has not challenged on appeal the court's holding that the trust's debts took priority before *any* distribution of trust assets, which would necessarily include any distribution in accordance with the power of appointment. We will not disturb that holding because he has not shown error. Alex's briefing suggests Diane should have distributed *all* of the Lanny property and the Bank of America account to him, but that is wrong. If Diane was dutybound to pay the trust expenses of administration and debts before doing that, he should have received only what remained of those assets after settling expenses and debts.

If there were no trust assets besides these two things that Jacquelyne appointed to Alex—and it appears there were not—there was nothing left to make the distributions to the granddaughters and Edwin. Only those parts of the trust estate over which Jacquelyne did *not* exercise her power of appointment were to be apportioned to the granddaughters, and then to Alex and Edwin in equal shares. Thus, it is possible the granddaughters and Edwin should not have received those distributions at all, and all three distributions constituted a breach of trust. Accordingly, the judgment is reversed to the extent it finds the granddaughters and Edwin were ultimately entitled to their distributions. The order denying Alex's request "for Diane to pay the entire sum of $23,000.00" is also reversed because the court based it on the premise that the $23,000 distributions merely occurred in the wrong order.

On remand, the court should determine whether the distributions to the granddaughters and Edwin constituted a breach of trust by Diane, given the validity of the March 2008 codicil and its priority over the other distributions identified in section VII of the trust. If these distributions did constitute a breach of trust, the court should determine what additional damages, if any, Alex is entitled to for the breach.

Also on remand, the court should conduct further proceedings on the source of damages, keeping in mind that the March 2008 codicil was a valid exercise of the power of appointment, and Alex was entitled to whatever remained of the Bank of America account and the Lanny property after settling trust expenses and debts. Alex needs to be compensated for the trust expenses he paid ($30,500.28 plus interest). The court must determine the source for those compensatory damages, whether that be disgorgement of the $23,000 distributed to the others, payment from Diane personally, or something else. But the source cannot be the property in the March 2008 codicil that Diane should have distributed to him after paying expenses and debts.

DISPOSITION

The judgment is reversed in part and affirmed in part. The judgment is reversed to the extent it (1) found the March 2008 codicil did not constitute a valid exercise of the power of appointment, (2) ordered Alex to vacate the Lanny property and Diane to sell it

to the highest bidder, (3) found the granddaughters and Edwin were ultimately entitled to the $23,000 in distributions, and (4) denied Alex's request "for Diane to pay the entire sum of $23,000.00." The judgment is otherwise affirmed. The court shall enter a revised judgment consistent with the views expressed in this opinion and, in doing so, should conduct any further proceedings it deems necessary to determine (1) whether Diane committed breach of trust in distributing $23,000 to the granddaughters and Edwin; (2) if these distributions constituted a breach, what damages, if any, Alex is entitled to for these additional breaches of trust; and (3) the appropriate source of compensatory damages payable to Alex. Alex shall recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.