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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DIANE POLONSKY as Trustee, etc.,

Plaintiff and Respondent.

v.

AUREA NIKKI POLONSKY,

Defendant and Respondent;

BARRY POLONSKY,

Objector and Appellant.

B290480 c/w B293958

(Los Angeles County  
Super. Ct. No. BP159377)

APPEALS from orders of the Superior Court of Los Angeles  
County, Barbara R. Johnson and Clifford Klein, Judges.  
Affirmed.

Law Office of Steven W. O'Reilly and Steven W. O'Reilly for  
Objector and Appellant.

Moore & Associates, Kevin J. Moore and Debby S. Doitch;  
Owens & Gach Ray, Rob Owens and Linda Gach Ray for Plaintiff  
and Respondent and Defendant and Respondent.

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In these consolidated appeals, Barry Polonsky (Barry) appeals (1) an order approving a settlement agreement between Diane Polonsky (Diane), successor trustee of the Rita Polonsky Family Bypass Trust (the Rita Trust), and Aurea Nikki Polonsky (Nikki), and (2) an order approving the payment of \$295,000 in attorney fees to Diane, in accordance with the settlement agreement.<sup>1 2 3</sup>

We perceive no error in the approval of either the settlement agreement or the fee request, and therefore affirm both orders.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

Rita Polonsky (Rita) and Seymour Polonsky (Seymour), now deceased, had two sons, Barry and Harold. Rita passed away in 1986, and the Rita Trust was funded upon the settlement of her estate. The Rita Trust, with Seymour as trustee, held a one-half undivided interest in the family home on San Ysidro

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<sup>1</sup> The orders are appealable. (Prob. Code, § 1300.)

<sup>2</sup> We refer to the members of the Polonsky family by their first names for purpose of clarity, not out of any disrespect. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 990, fn. 1.)

<sup>3</sup> Although Barry's brother, Harold Polonsky (Harold), is listed as an appellant on the opening brief, Harold did not file a notice of appeal, nor did he join in Barry's notices of appeal. Accordingly, Barry is the sole appellant in this matter.

Drive in Beverly Hills (the Property), then valued at \$300,000, for the benefit of Barry and Harold; Seymour owned the other 50 percent of the Property.

Seymour subsequently remarried, and with his new wife, Nikki, established a new trust (the Seymour Trust).

In November 2013, Seymour, as trustee of the Rita Trust, executed a grant deed conveying to himself the Rita Trust's 50 percent interest in the Property, making him the 100 percent owner of the Property. Seymour believed that upon his death, his sons would not benefit by each owning a 25 percent interest in the Property. Therefore, he planned to exchange his sons' interest in the Property for cash, which would fund a newly formed trust, the Polonsky Family Trust (Family Trust), that he created for his sons' benefit. In order to compensate Barry and Harold, as beneficiaries, for the transfer of their one-half interest in the Property, then worth about \$1,495,000, Seymour intended to fund the Family Trust with approximately \$373,750 for each son, for a total of \$747,500, which was one-half of the appraised value of the Property in 2013 when the Family Trust was formed. However, Seymour funded the Family Trust with only an initial \$100,000. He died in February 2014, without having contributed any additional sums to the Family Trust.<sup>4</sup>

Seymour's death resulted in a vacancy in the office of the trustee of the Rita Trust. In January 2015, Diane, Barry's former wife, petitioned to have herself appointed as trustee of the Rita

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<sup>4</sup> During the course of the litigation Nikki made additional contributions to the Family Trust, and ultimately it contained about \$400,000.

Trust, asserting that Barry was missing and Harold was deceased.<sup>5</sup> The petition was granted in June 2015.

Diane then filed a petition pursuant to Probate Code section 850 seeking the restoration of the 50 percent interest in the Property to the Rita Trust. Diane alleged that Seymour breached his fiduciary duty by transferring Barry's and Harold's interest from the Rita Trust to himself individually, and then into the Seymour Trust, and that Seymour's second wife, Nikki, now held the entire interest in the Property.

Nikki, in turn, contended that Seymour had the right to do what he did under the power of appointment contained in the Rita Trust.

Two years later, following extensive litigation, Diane and Nikki reached a settlement, subject to court approval.

The terms of the settlement included the following:

Nikki would pay to Diane, as trustee of the Rita Trust, the sum of \$400,000, to be allocated to Barry's share of the Rita Trust. Of that sum, \$295,000 would be allocated to Diane's attorney fees. Nikki would be entitled to use the funds in the Family Trust and/or an annuity purchased in connection therewith to fund the settlement payment.

In addition, Nikki would deliver to Diane a promissory note, secured by a deed of trust on the Property, in the sum of \$250,000, also allocated to Barry's share of the Rita Trust. The note would pay interest only of \$250 per month for 60 months, at which time the note was to be paid in full.

As for Harold, Nikki was to deliver to a trust for Harold's benefit a 15 percent interest in the Property by grant deed as to a

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<sup>5</sup> It later was discovered that Harold was alive.

tenancy in common without right of partition, with the objective of not jeopardizing Harold's entitlement to public benefits.

On May 4, 2017, Diane and Nikki jointly petitioned for approval of the settlement agreement.

Barry, represented by counsel, filed an objection to the petition for approval of the settlement. Barry stated he had been homeless since 2014, that the settlement agreement was based on the mistaken assumption that he was deceased, and that the settlement agreement, if approved, "would unfairly force Nikki . . . to pay [his] inheritance to Diane with the knowledge that he was alive."

In response, Nikki stated that at the time the settlement agreement was reached, the parties believed Barry was deceased or missing as he had not been heard from since April 2014, and now that Barry had resurfaced, she would abide by the court's decision regarding the settlement agreement.

As for Diane, she stated the court should overrule the objection and approve the settlement as being in the best interest of all parties. Diane denied that the settlement agreement would unfairly force Nikki to pay Barry's inheritance to her. Rather, "a review of the Settlement Agreement evidences that protections were in place and bargained for to ensure Barry's allocated share of the recovery would be held for his benefit." Additionally, "but for the settlement agreement, Barry does not have any inheritance," because the Family Trust that was established for Barry and Harold in lieu of the Rita Trust assets that were allegedly wrongfully taken constituted less than a third of the total value of the settlement agreement recovery, and was blocked by an annuity that was payable to Nikki.

The matter came on for hearing on January 31, 2018. The witnesses included Diane, Barry, and Mark Straface, an attorney who drafted the Family Trust for the benefit of Barry and Harold. Notwithstanding Barry's written objection to the approval of the settlement, Barry testified at the hearing that he was in favor of the settlement agreement being approved.

After hearing the matter, the trial court approved the settlement except for the provision for payment of \$295,000 in attorney fees to Diane's counsel; the trial court ruled that the issue of attorney fees was to be submitted to the court as a request for fees. The trial court ruled, *inter alia*: "Barry's main contention is that Diane as Trustee fraudulently concealed the settlement agreement in order to obtain his inheritance. This assertion is without merit. Diane entered into settlement negotiations after Barry had gone missing for approximately 3 years and before it became clear . . . that Barry had been located. Even assuming that Diane purposefully failed to inform the court that Barry was no longer missing until he showed up at the hearing to approve the settlement, Diane's status as Trustee was in effect at the time of the settlement negotiations. Moreover, Barry's assertion that the settlement would unfairly 'force Nikki to pay Barry's inheritance to Diane' is indeed the result Barry through Diane was seeking—to have his inheritance restored to him. Diane's petition and resulting settlement is the benefit to the estate; i.e., Barry gets equivalent monetary sums paid to him whereas before he had nothing due to his father's actions. [¶] Just because Barry was not present during the settlement negotiations does not mean he cannot be bound by its terms if reasonable."

On May 11, 2018, Barry filed a timely notice of appeal from the March 12, 2018 order partially approving the settlement agreement.

Thereafter, Diane filed a petition for an order approving trustee's attorney fees in the amount of \$295,000 in accordance with the settlement agreement. Diane asserted the total recovery on behalf of the Rita Trust and its beneficiaries was \$905,000, including the \$400,000 payment to Diane as trustee, the \$250,000 promissory note and interest thereon in the amount of \$15,000, as well as transfer of a 15 percent interest in the Property (valued at \$240,000 based on the Property's appraised value of \$1.6 million) for Harold's benefit.

In opposition, Barry argued that Diane's litigation had not conferred a benefit on the Rita Trust, particularly in view of the amount of attorney fees that Diane had incurred.

On September 12, 2018, after taking the matter under submission, the trial court granted Diane's request and found the \$295,000 specified in the settlement agreement was reasonable. The trial court noted that Barry "did not contest the reasonableness of these fees, and . . . did not present any evidence challenging the amount as unreasonable. The court finds that the trust did benefit from legal representation, including Barry . . . who will likely receive \$365,000 as a result of the agreement, rather than a joint discretionary share of a \$100,000 annuity."

Barry filed a timely notice of appeal from the September 12, 2018 order. The two appeals were consolidated.

## CONTENTIONS

Barry contends the trial court erred in approving the settlement agreement because the evidence established that his trust fund, i.e., the Family Trust, was used to settle the case, and the trial court erred in approving the payment of \$295,000 in trustee's attorney fees to Diane because the litigation did not benefit the trust.

## DISCUSSION

### I.

#### **Barry's appeal from the order approving the settlement agreement.**

1. *Policy favoring approval of settlement agreements; standard of appellate review.*

It is settled that public policy "has long supported pretrial settlements. 'Not only will such agreements, when there is no fraud, be sustained by the courts, but they are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation.'" (*Gopal v. Yoshikawa* (1983) 147 Cal.App.3d 128, 130, quoting *McClure v. McClure* (1893) 100 Cal. 339, 343.) The policy favoring settlements extends to probate actions, bearing in mind "the interest of the preservation of family ties, the adjustment of equities, and avoiding nonproductive waste of the assets of the estate." (*Estate of Schuster* (1984) 163 Cal.App.3d 337, 342.)

A probate court's approval of a settlement is reviewed for an abuse of discretion. (*Estate of Green* (1956) 145 Cal.App.2d 25, 28.) When applying this standard of review, the trial court's "findings of fact are reviewed for substantial evidence, . . . and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th



706, 711–712, fns. omitted.) “In probate cases, as in other cases, a reviewing court must resolve all conflicts in the evidence in favor of the judgment or order under appeal.” (*Estate of Wilson* (1953) 116 Cal.App.2d 523, 531.) “[A] reviewing court will only interfere with a trial court’s exercise of discretion where it finds that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could have reasonably reached the challenged result. [Citation.]” (*Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340.) “The burden is on the complaining party to establish abuse of discretion. [Citations.] The showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citations.]” (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682.)

Further, this court “review[s] the probate court’s ruling, not its reasons, and [we] affirm if the ruling is correct albeit the reasons are not; we also resolve any ambiguities in favor of affirmance. (See, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [‘A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.’]; *Munoz v. Olin* (1979) 24 Cal.3d 629, 635–636.)” (*Blech v. Blech* (2018) 25 Cal.App.5th 989, 999.)

2. *Barry fails to establish that the trial court abused its discretion in approving the settlement agreement.*

a. *Appellate waiver due to the inadequacy of Barry's opening brief.*

Pursuant to the California Rules of Court, each brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (Cal. Rules of Court, rule 8.204(a)(1)(C).) Moreover, “an attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent. [Citation.] Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it ‘are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done the error is deemed waived.’ [Citations.]’ (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, italics omitted.)

Here, Barry's opening brief challenges the sufficiency of the evidence to support the trial court's ruling, but the brief contains only minimal citations to the reporter's transcript of the evidentiary hearing on the motion for approval of the settlement agreement. Thus, Barry has not properly briefed his challenge to the sufficiency of the evidence to support the trial court's ruling.

Further, it is settled that “ ‘ “[a]ppellate briefs must provide argument and legal authority for the positions taken. ‘When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.’ ” [Citation.] “We are not bound to develop

appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.” ’ (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)” (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1322–1323, fn. 5.)

Here, apart from supplying citations for the standard of review, Barry’s opening brief is devoid of citation to legal authority. Therefore, Barry has failed to present a cogent legal argument to support his assertion of reversible error.

However, even assuming the state of the briefing does not result in appellate waiver, as discussed below, Barry’s contention the trial court erred in approving the settlement agreement is meritless.

b. *At the hearing on the petition, Barry testified that he supported approval of the settlement agreement.*

Although Barry contends on appeal that the trial court erred in approving the settlement agreement, at the evidentiary hearing below Barry expressed his support for the agreement. The record includes the following colloquy:

“Q. BY MS. DOITCH: SO MR. POLONSKY, . . . DO YOU SUPPORT DENYING A SETTLEMENT AGREEMENT THAT WOULD KEEP YOU FROM RECEIVING MONEY?

“A. REPEAT THAT AGAIN.

“Q. WOULD YOU AGREE TO THE COURT DENYING A SETTLEMENT AGREEMENT THAT WOULD HAVE PROVIDED MONEY FOR YOU, OR WOULD YOU ASK THE COURT TO GRANT A SETTLEMENT AGREEMENT THAT PROVIDES YOU WITH MONEY?

“A. THE LATTER.

“Q. YOU [WOULD] LIKE THEM TO GRANT THE SETTLEMENT THAT PROVIDES YOU WITH MONEY?

“A. YES.

On appeal, Barry does not address the impact, if any, of this testimony on his contention that the trial court abused its discretion in approving the settlement agreement. However, Barry’s support for the settlement agreement is a factor that the court could take into account in ruling on the matter.

*c. No abuse of discretion in approval of settlement agreement.*

Turning to the merits, the record reflects that in November 2013, at the time Seymour established the Family Trust to compensate his sons for their 50 percent in the Property that previously had been held in the Rita Trust, the house was appraised at \$1,495,000. Accordingly, Barry’s 25 percent interest in the Property was worth \$373,750. The settlement agreement, even after the reduction for attorney fees, basically provided him with equivalent value. As indicated, the settlement agreement had two components: (1) a \$400,000 payment allocated to Barry’s share of the Rita Trust, of which \$295,000 was to be allocated to the attorney fees incurred by Diane as trustee of the Rita Trust, resulting in a net amount of \$105,000 for Barry; and (2) a \$250,000 promissory note, plus \$15,000 in interest thereon, for a net amount of \$265,000. Thus, the net \$370,000 that would be allocated to Barry’s share of the Rita Trust pursuant to the settlement agreement was nearly equivalent to Barry’s \$373,750 interest in the real property that Seymour had transferred out of the Rita Trust, and likewise was nearly identical to the dollar amount that Barry would have received had his father fully funded the Family Trust.

Barry appears to concede the point. Later in the opening brief, in the section addressing the issue of attorney fees, Barry states: “After three years of litigating, Diane . . . settled for the property she was trying to recover.” Given the outcome of the litigation, the trial court’s approval of the settlement agreement does not appear to be unreasonable.

Barry’s basic objection to the settlement agreement is that it allows Nikki “to use the funds in the [Family Trust] and/or the annuity purchased in connection therewith to fund [the \$400,000] settlement payment.” Given Barry’s failure to provide authority for his contentions, it is difficult to understand Barry’s argument as to why the trial court’s order should be reversed. To the extent Barry contends that Seymour improperly removed Barry’s 25 percent interest in the Property from the Rita Trust and then failed to fund the Family Trust to compensate Barry for his interest in the Property, the settlement agreement resolved the matter—the settlement agreement restored to the Rita Trust the sum of \$370,000 to be allocated to Barry’s share of the Rita Trust.

In sum, we perceive no abuse of discretion in the trial court’s approval of the settlement agreement.

## II.

**Barry’s appeal from the order approving the payment of \$295,000 for attorney fees incurred by Diane as trustee of the Rita Trust.**

Attorneys hired by a trustee to aid the trust are entitled to reasonable fees paid from the trust assets. (*Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1333.) The fee award must be reasonable in amount, reasonably necessary to the conduct of the litigation, and also reasonable and appropriate for the benefit of the trust. (*Estate of Moore* (2015) 240 Cal.App.4th 1101, 1105.)

We review the trial court's fee award for an abuse of discretion. (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 268–269.)

Barry does not contend that the \$295,000 fee award was excessive. In a one-paragraph argument, he simply contends the trial court erred in awarding attorney fees because the litigation did not “result in a benefit to the trust.” The argument is unavailing. Before the onset of litigation, Barry's interest in the Property had been transferred out of the Rita Trust, and the newly created Family Trust contained only \$100,000 that was funded by Seymour before his death, of which Barry's share was only \$50,000. At the conclusion of the litigation, \$370,000 will have been restored to the Rita Trust for Barry's benefit. Thus, the litigation most certainly resulted in a benefit to the Rita Trust, and thus, to Barry.

**DISPOSITION**

The order approving the settlement agreement, and the order approving the payment of attorney fees, are affirmed. Respondents shall recover their costs on appeal.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.