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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KRISTA RAUSCHENBERG et
al.,

Plaintiffs and
Respondents,

v.

LAUREN RAUSCHENBERG, as
Trustee, etc.,

Defendant and Appellant.

B284418

(Los Angeles County
Super. Ct. No. BP134482)

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Reversed and remanded.

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

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

Lauren Rauschenberg appeals from an order awarding attorneys' fees and costs to her sisters, Krista and Nisa Rauschenberg,¹ who successfully petitioned the probate court to find Lauren breached her fiduciary duties as trustee of the Justice Family Trust (Trust), resulting in removal and surcharge of Lauren as trustee. The Trust was established by Lauren's mother, France Justice (Fran), and her stepfather, Paul Justice. In Lauren's first appeal, she contended the probate court erred in finding the Missouri real property owned by Fran and Paul (Missouri property) and Fran's individual retirement account (IRA) were Trust property. We affirmed the probate court's finding Lauren failed to marshal the Missouri property, but we reversed the court's order as to the IRA and imposition of a constructive trust on the proceeds from the sale of the Missouri property. (*Rauschenberg v. Rauschenberg* (Sept. 11, 2019, B277474) [nonpub. opn.] (*Rauschenberg I.*))

Because we have reversed a significant portion of the probate court's order on Krista and Nisa's petition, upon which the later order granting attorneys' fees and costs was based, we reverse the probate court's order granting attorneys' fees and costs. We remand for further proceedings in light of our opinion in *Rauschenberg I.*

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

FACTUAL AND PROCEDURAL HISTORY

A. *The Trust*²

On April 10, 2007 Fran and Paul, as trustors, and Lauren, as trustee, executed a revocable inter vivos trust agreement to establish the Trust. The Trust provided the trustors had transferred or would transfer to the trustee the property described in schedule A. Schedule A provided the Missouri property, the IRA, and other assets were principal of the Trust “even if such assets have not been formally transferred to the Trustee or this Trust”

B. *Krista and Nisa’s Petition and Probate Court’s Statement of Decision and Order*

After Fran and Paul died, Lauren distributed to Krista and Nisa their share of the Trust’s funds held in its bank account, but not any proceeds from the Missouri property or IRA. By that time Paul’s sister had sold the Missouri property; as to the IRA, in 2007 Fran had executed an agreement naming Lauren the sole beneficiary.

In 2012 Krista and Nisa filed a petition to compel a trust accounting and to remove and surcharge Lauren. On January 4, 2013 Lauren filed an accounting and petitioned for its approval. Following a trial on both petitions, on July 8, 2016 the probate court issued a final statement of decision. The probate court found the Missouri property was property of the Trust because the Trust’s terms conveyed the property into the Trust and no

² The factual and procedural background regarding the Trust and the probate court’s statement of decision and order are taken from *Rauschenberg I, supra*, B277474.

separate deed was required to effectuate the transfer. The court found Lauren had a legal duty as trustee to recover the Missouri property and to advise Paul and his sister they could not sell the property. The probate court also found Lauren was estopped from asserting Fran and Paul failed to transfer the Missouri property into the Trust given their conduct in putting the Trust together and Fran's and Paul's reasonable reliance on Lauren in executing the Trust. As to the IRA, the probate court found Fran's intent in the Trust to transfer the IRA to her three children superseded her earlier stated intent in the 2007 agreement naming Lauren as the beneficiary. Further, Lauren's failure to account for the IRA was in bad faith and a breach of her fiduciary duties.

The probate court imposed a constructive trust on the IRA fund and the proceeds from the sale of the Missouri property as remedies for Lauren's breach of trust under Missouri law. In addition, the court surcharged Lauren her profit from the IRA, ruling Krista and Nisa were entitled to the entire value of the IRA less any taxes Lauren paid on the IRA. The court ordered a hearing on the amount of surcharge for the Missouri property, the IRA, and the bank accounts. The court removed Lauren as trustee and appointed a successor trustee. In its August 18, 2016 order, the court found Krista and Nisa were prevailing parties in their action against Lauren.

C. *Krista and Nisa's Motion for Attorneys' Fees*

On September 13, 2016 Krista and Nisa filed a motion seeking \$177,311.29 in attorneys' fees and costs as the prevailing parties on their petition pursuant to Probate Code section 17211, subdivision (b), and Missouri Revised Statute section 456.10-1004. Lauren opposed the motion. After additional briefing, the probate court heard oral argument on February 14, 2017.

At the hearing, the probate court noted Missouri and California law both provided for an award of attorneys' fees, and it did not reach which state's law applied. The court stated in response to Lauren's concern about the pending appeal in *Rauschenberg I*, "The Court of Appeal can do a lot of different things. Let's just say it does something on the way of reversal for sake of argument. Whether the attorneys' fees will ultimately stand up, you're correct, we'd probably have to look at that again." In its February 14 order, the court granted the motion and ruled Lauren's "[o]pposition to the underlying petition was unreasonable and in bad faith" The court awarded \$167,770 in attorneys' fees and \$9,541.29 in costs, for a total of \$177,311.29.

Lauren timely appealed.³

³ Lauren contends the probate court did not have jurisdiction to consider Krista and Nisa's motion for attorneys' fees and costs under Probate Code section 1310, subdivision (a), which provides, subject to limited exceptions, an appeal "stays the operation and effect of the judgment or order." However, this language tracks the language of Code of Civil Procedure section 916, subdivision (a), which provides "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." The courts have interpreted section 916, subdivision (a), to confer jurisdiction on a trial court to rule on a motion for attorneys' fees following an appeal of a judgment or order. (See *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 463 ["The perfecting of defendants' appeal . . . did not automatically stay proceedings in the trial court to award fees and costs under [the anti-SLAPP statute]."]; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 168 Cal.App.3d 485, 487 [appeal from grant of defendants'

D. Rauschenberg I

In *Rauschenberg I*, we affirmed the probate court's ruling that the Missouri property was trust property because Lauren forfeited any challenge to the court's ruling she was equitably estopped from arguing the property was never transferred into the trust. (*Rauschenberg I, supra*, B277474.) With respect to the IRA, we concluded under Missouri's Nonprobate Transfers Law, the IRA passed to Lauren upon Fran's death pursuant to the terms of the beneficiary designation in the 2007 agreement. (*Rauschenberg I, supra*, B277474.) We reversed the probate court's order to the extent it found Lauren breached her fiduciary

summary judgment motion did not deprive trial court of jurisdiction to consider defendants' request for attorneys' fees and costs because costs, "though embraced in the action, [were] incidental to the merits" of the appeal]; *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140 [order granting attorneys' fees following appeal of order denying termination of spousal support "is one concerning a 'matter embraced in the action [which is] not affected by the . . . order' previously appealed from"].) Lauren relies on cases that conclude a probate court is divested of jurisdiction to decide whether to tax costs following an appeal. (See *Estate of McCormack* (1969) 2 Cal.App.3d 492, 500 [on appeal of the underlying order "the probate court lost jurisdiction of the matter and could not award costs"]; *Estate of Neilson* (1960) 181 Cal.App.2d 769, 772 ["It is improper for a probate court to exercise its discretion and award costs until the final determination of the matter before it. It should not make an award of costs where an appeal is taken."].) Neither *McCormack* nor *Neilson* addresses an award of attorneys' fees. We need not decide the jurisdictional issue because, as discussed, the probate court's order must be reversed in light of our opinion in *Rauschenberg I*.

duty as to the IRA, ordered a constructive trust on the IRA fund, and surcharged Lauren her profit from the IRA. (*Ibid.*)

DISCUSSION

In their supplemental briefing, Krista and Nisa contend we should reach the merits of the appeal and affirm the award of attorneys' fees and costs because our opinion in *Rauschenberg I* does not affect the probate court's finding Lauren was the prevailing party and acted unreasonably and in bad faith in opposing the petition. In her supplemental letter brief, Lauren contends we should summarily reverse the order granting attorneys' fees and costs because our reversal of the probate court's finding Lauren breached her fiduciary duty with respect to the IRA and imposition of a constructive trust on the Missouri property affects the award of attorneys' fees and costs. Lauren has the better argument.

The probate court found an award of attorneys' fees was appropriate under either California or Missouri law.⁴

⁴ Because we summarily reverse, we do not reach whether the probate court should have applied Missouri or California law in ruling on the motion for attorneys' fees and costs. As we noted in *Rauschenberg I*, the Trust's choice-of-law clause provision states the "validity, construction and all rights hereunder" are to be governed by Missouri law. (*Rauschenberg I, supra*, B277474.) Although in *Rauschenberg I* we applied Missouri law to the substantive questions whether Lauren breached her fiduciary duty and whether the Missouri property and IRA were property of the Trust, the choice-of-law analysis must be conducted as to each issue before the court. (*Aronson v. Advanced Cell Technology* (2011) 196 Cal.App.4th 1043, 1050 ["issue of entitlement to

Probate Code section 17211, subdivision (b), provides, “If a beneficiary contests the trustee’s account and the court determines that the trustee’s opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney’s fees, incurred to contest the account.” (See *Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1591 [“Probate Code section 17211, subdivision (b) gives the probate court discretion to award attorney fees to a trust beneficiary who ‘contests the trustee’s account,’ if the court determines the trustee’s opposition to the contest was ‘without reasonable cause and in bad faith.’”].) Missouri law provides the probate court with broad discretion to award attorneys’ fees and costs: “In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” (Mo. Rev. Stat., § 456.10-1004; see *In re Edwin Meissner Testamentary Trust* (Mo.Ct.App. 2016) 497 S.W.3d 860, 865 [“Because [testator’s grandson’s] position was directly refuted by the express language of the Will and Missouri law, we agree that justice and equity require [testator’s granddaughter] be awarded her attorneys’ fees and costs”].)

Because we have reversed one of the two principal underpinnings of the probate court’s order—that Lauren breached her fiduciary duty in failing to marshal and distribute the IRA fund—it is up to the probate court in the first instance to decide whether Lauren’s opposition to Krista and Nisa’s petition was

attorney fees under a choice-of-law analysis is thus addressed separately from analysis of substantive issues of the case”].)

“without reasonable cause and in bad faith” (applying Probate Code section 17211, subdivision (b)) or appropriate “as justice and equity may require” (under Missouri Revised Statute section 456.10-1004).⁵

DISPOSITION

We reverse the probate court’s order granting Krista and Nisa’s motion for attorneys’ fees and costs and remand to the probate court for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

⁵ In addition, although in *Rauschenberg I* we did not reach whether Missouri law required execution of a warranty deed to transfer the Missouri property into the Trust, we addressed in footnote 19 the Missouri cases that supported Lauren’s position a warranty deed was necessary to transfer Missouri real property into a trust. (*Rauschenberg I, supra*, B277474.) We also reversed the probate court’s order to the extent it ordered a constructive trust on the proceeds from the sale of the Missouri property. (*Ibid.*)

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