Filed 2/28/18 Dennis v. Ho CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARLENE DENNIS, Plaintiff and Respondent, v. JANEY TANG HO, Defendant and Appellant.	B277268 (Los Angeles County Super. Ct. No. BP145487)

APPEAL from an order of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Reversed in part and remanded.

SW Smyth and Andrew E. Smyth for Defendant and Appellant.

Rahn Muntz O'Grady, Scott E. Rahn and Sean D. Muntz for Plaintiff and Respondent.

Janey Tang Ho (appellant) appeals from an order of the superior court granting the petition of Jeffrey Siegel, the conservator for her mother, and ordering appellant to return funds she received from her mother and to transfer property she purchased with the funds to the conservator. We agree with the trial court that appellant was not entitled to keep the funds. However, the amount that the court ordered appellant to return is not supported by the evidence. We therefore reverse in part and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2010, Tanya Ho signed a durable power of attorney appointing her children–appellant, Lisa Tang Ho, and George Tang Ho–to serve as her attorneys-in-fact.[1] The document required all three attorneys-in-fact to act unanimously and allowed them to "[m]ake gifts from [Tanya's] assets, including debt forgiveness and gifts to my attorney-in-fact."

In November 2010, two accounts in Tanya's name at John Hancock Life Insurance Company were liquidated, and the amounts were transferred into two different accounts on which appellant and Tanya were joint owners. According to the uncontested facts in the parties' joint trial statement, one of Tanya's accounts that was liquidated contained $210,203.11, and the other contained $218,263.07, for a total of $428,466.18 that was transferred from Tanya's accounts

---

[1] Because of the common last names, we will refer to the family members by their first names.

into joint accounts with appellant. The transferred funds were contributed toward the purchase of a $650,000 property in Playa Vista, California, called the Playa Vista property. The uncontested facts further show that appellant contributed $132,500 of her own funds toward the purchase of the property.[2] According to the Buyer's Final Settlement Statement issued by the escrow company for the purchase of the property, the property was purchased with the following deposits: $17,500 from J. Ho; $40,000 from Janey Ho; $282,351.41 from an account in the names of "Janey Ho, Ning Hsi Tang Jnt, Tanya T. Ho Jnt"; and $311,500 from an account in the names of Janey Ho or Tanya Ho.[3] Title to the property was entered in appellant's name.

Lisa testified that the funds transferred from Tanya's accounts were a loan to appellant with the understanding among the three siblings that Tanya would live with appellant in the Playa Vista

---

[2] The uncontested facts state that appellant received $75,000 of income as a shareholder of a company and deposited it in a joint checking account with Tanya for the purchase of the Playa Vista property. Appellant also used $17,500 of her own funds from a Bank of America account and $40,000 of her own funds from a credit union account to purchase the property. According to this statement, therefore, appellant contributed a total of $132,500 of her own funds to the purchase of the property. The sum of $428,466.18 from Tanya's accounts and $132,500 from appellant's accounts is only $560,966.18.

[3] These deposits total $651,351.41, which is slightly more than the $650,000 purchase price, but the statement shows miscellaneous other credits and debits, such as management fees, recording charges and escrow charges.

property and appellant would care for her there. Appellant was not going to be paid for caring for their mother.

Respondent's expert reviewed the accounting documents to determine the source of the funds for the Playa Vista property. She testified that $57,500 was from appellant's own funds, $500,614.48 was from Tanya's John Hancock accounts, and she was unable to determine the source of an additional $93,000.

In 2014, Tanya was placed under conservatorship, with Siegel appointed as conservator.[4]

In October 2015, appellant received a $650,000 loan secured by a deed of trust against the Playa Vista property. Full payment of the loan was due on November 1, 2016.[5] She testified that she used part of the money to buy a $200,000 condominium in Hawaii, used $200,000 to renovate some other properties, and used the rest to pay bills and pay for her mother's care. In January 2016, a second deed of trust in the amount of $800,000 was recorded against the Playa Vista property, but the loan was never funded, and the undisputed facts state that the lender agreed to remove the second deed of trust.

On February 9, 2016, the conservator filed a petition to determine title to the Playa Vista property, to declare the property held by the

---

[4] Siegel subsequently was replaced with a new conservator, Marlene Dennis (respondent).

[5] The record does not indicate whether she paid off the loan.

conservator and to transfer that property to the conservator, and for an accounting and for damages.

The trial court granted the petition, finding that appellant's purchase of the Playa Vista property for her sole use and the two loans she obtained violated Probate Code section 4232's requirement that an attorney-in-fact "act solely in the interest of the principal and to avoid conflicts of interest." (Prob. Code, § 4232, subd. (a).)[6] The court also found that appellant violated section 4233's proscription against commingling of funds and section 5301's provision that shares in a joint tenancy account be apportioned according to the amounts contributed. The court ordered the following: (1) that appellant transfer the Playa Vista property to the conservator; (2) that appellant return to the conservatorship estate the $650,000 she received for the deed of trust; (3) that appellant provide an accounting of $1,400,000 in the funds and property taken from Tanya;[7] (4) that the funds from the deeds of trust be placed in a blocked account; (5) that any additional funds from the two deeds of trust be accounted for and the property purchased with the funds (the condominium in Hawaii) be transferred to Tanya; (6) that appellant be restrained from further encumbering the Playa Vista property; (7) that damages against appellant be deferred; and (8) that

---

[6] Unspecified statutory references are to the Probate Code.

[7] We presume that the court ordered appellant to account for $1,400,000 because of the two deeds of trust. However, the deeds of trust in the amounts of $650,000 and $800,000 would total $1,450,000.

appellant reimburse Siegel for attorney fees and costs under section 859. Appellant timely appealed.

DISCUSSION

Appellant makes several arguments. She contends that her mother was mentally competent at the time she signed the durable power of attorney. Appellant further argues that the gift provision in her mother's durable power of attorney was valid, and that the court erred by failing to consider the gift provision, which allowed gifts to be made if all three attorneys-in-fact agreed. In addition, appellant contends the trial court erred in relying on section 5301's provision that shares in a joint tenancy account be apportioned according to the amounts contributed.[8] She argues that under the version of section 5301 in effect at the time she withdrew the funds to buy the Playa Vista property in 2010, the funds became a gift to her. (See *Lee v. Yang* (2003) 111 Cal.App.4th 481, 491 (*Lee*) ["ownership of withdrawn funds which exceed the withdrawing party's net contribution passes to that party by way of gift"].) Section 5301 was revised in response to *Lee*, effective January 1, 2013, to specify that if a party makes an excess withdrawal from a joint account, the other parties to the account maintain an ownership interest in the excess withdrawal. (Legis.

---

[8] Section 5301 provides that "[a]n account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (§ 5301, subd. (a).)

Counsel's Dig., Assem. Bill No. 1624 (2011-2012 Reg. Sess.) 2012 Cal. Stats., ch. 235; Cal. Law Revision Com. com. foll. § 5301.)

"We review questions of law de novo. [Citation.] However, '[w]hen the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed.' [Citation.]" (*Estate of O'Connor* (2017) 16 Cal.App.5th 159, 163.)

I. *The Amended Version of Section 5301 Did Not Apply Here*

We begin with appellant's third contention–that the trial court erroneously relied on the amended version of section 5301. We agree with appellant that the prior version of section 5301 was in effect at the time she purchased the Playa Vista property. Nonetheless, we conclude that the evidence does not support her contention that the amount she withdrew should have been deemed a gift to her.

Lee concerned joint bank accounts owned by a man and woman who were engaged to be married. After they broke off their engagement, the woman withdrew money from the joint bank accounts and, as pertinent here, the issue was whether she was required under the California Multiple–Party Accounts Law (CAMPAL) (§ 5100 et seq.) to reimburse her former fiancé for the funds she withdrew. (*Lee*, *supra*, 111 Cal.App.4th at p. 486.) The Court of Appeal explained that, although section 5301 meant that "at any point in time the sums on deposit in an account belong to a party in proportion to his or her net contribution," (*id.* at p. 490) "[t]he section 5301 rule of proportional

ownership is not relevant to the power of a party to *withdraw* funds from an account; rather, that issue is determined by the terms of the account in question." (*Id.* at p. 489, italics added.) After examining the legislative history of CAMPAL, the court concluded that "ownership of withdrawn funds which exceed the withdrawing party's net contribution passes to that party by way of gift to the extent, but only to the extent, there is no independent legal obligation requiring the party to account for the proceeds. Whether such an obligation exists depends on the objective facts and circumstances of the transaction rather than on the transferor's subjective intent. [Citation.]" (*Id.* at pp. 491-492; see *id.* at pp. 486, 490-491.) Because there was no evidence of any restriction on the woman's right to withdraw funds from the accounts and apply them to her benefit, the court concluded that "ownership of the funds passed to her by way of gift." (*Id.* at p. 493.) Appellant relies on *Lee* to argue that the funds she withdrew from her joint bank accounts with Tanya passed to her by way of gift.

As stated above, to abrogate *Lee*, the Legislature amended section 5301 such that the statute now provides in part that "[i]f a party makes an excess withdrawal from an account, the other parties to the account shall have an ownership interest in the excess withdrawal in proportion to the net contributions of each to the amount on deposit in the account immediately following the excess withdrawal, unless there is clear and convincing evidence of a contrary agreement between the parties. [¶] . . . [¶] (f) For purposes of this section, 'excess withdrawal' means the amount of a party's withdrawal that exceeds that party's net

contribution on deposit in the account immediately preceding the withdrawal." (§ 5301, subds. (b), (f); see Legis. Counsel's Dig., Assem. Bill No. 1624 (2011-2012 Reg. Sess.) 2012 Cal. Stats., ch. 235; Cal. Law Revision Com. com. foll. § 5301.) Under the revised version, Tanya would maintain an ownership interest in the amount that appellant withdrew that exceeded her contribution.

"Absent 'an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' [Citation.] There must be '"express language or clear and unavoidable implication negativ[ing] the presumption"' of nonretroactivity. [Citations.]" (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1096; see also, e.g., *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 255 ["Generally, we may retroactively apply a new statute 'only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.'"].)

Respondent relies on *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161 (*Petropoulos*) to argue that the amendment to section 5301 applies retroactively. However, *Petropoulos* is distinguishable, as indicated by the legislative history the court examined. A Senate Rules Committee analysis of the amended statute at issue in *Petropoulos* stated that "'*This amendment is necessary to fix a mistake from a bill that was enacted last year*.' [Citation.]" (*Id.* at p. 172.) In addition, the Assembly's concurrence to the Senate amendments stated that the

amendment "'is intended to address a concern arising due to a last minute amendment to AB 960 . . . .' [Citation.]" (*Ibid.*) The Court of Appeal relied on these statements to conclude that the Legislature "intended retroactive application" of the amended statute. (*Ibid.*) The court explained that the amended version of the statute "appears to be the very one the Legislature intended to enact in the first place. The legislative history of this enactment thus clearly signals an intent that the statute be applied retroactively. [Citation.]" (*Id.* at pp. 172-173.)

By contrast, here, the legislative history acknowledged that "*Existing law* provides that rights of survivorship are eliminated for funds withdrawn by a party with a right of withdrawal during the lifetime of the party. [¶] This bill instead would eliminate those rights of survivorship with respect to funds withdrawn to the extent of the withdrawing party's net contribution to the account." (Multiple-Party Accounts–Owners and Ownership–Withdrawals, 2012 Cal. Legis. Serv., ch. 235 (Assem. Bill No. 1624), italics added.) No showing in the explanation of the current state of the law and the intended amendment suggests that the Legislature intended the changes to apply retroactively. (See *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1074 ["nothing on the 'face of the enactment'" or the legislative history indicated amendment was intended to be retroactive].)

The amended version of section 5301 thus does not apply retroactively. Nonetheless, the funds appellant withdrew from the joint accounts with Tanya did not pass to appellant by way of gift. In *Lee*, there was no restriction on the withdrawal of the funds. But here,

appellant was bound by the terms of the durable power of attorney. *Lee* explained that the withdrawn funds would pass by way of gift "only to the extent [] there is no independent legal obligation requiring the party to account for the proceeds." (*Lee*, *supra*, 111 Cal.App.4th at p. 491.) Here, there was an independent legal obligation requiring appellant to account for the funds. As explained below, we disagree with appellant that the funds became a gift to her.

II. *The Funds to Buy the Playa Vista Property Were Not a Gift*

Appellant argues that her mother intended the funds transferred from her accounts to purchase the Playa Vista property to be a gift to appellant. She contends that the gift provision in her mother's durable power of attorney was valid, and that the court erred by failing to consider the gift provision. She cites section 4128, which provides in part that a durable power of attorney "gives your agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf. This document does not give your agent the power to accept or receive any of your property, in trust or otherwise, as a gift, *unless you specifically authorize the agent to accept or receive a gift*." (§ 4128, subd. (a), italics added; see also § 4264 ["An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact: [¶] . . . [¶] (c) Make or revoke a gift of the principal's property in trust or otherwise."].)

Although the durable power of attorney allowed Tanya's attorneys-in-fact to "[m]ake gifts from [her] assets," the document further stated that "[n]o one attorney-in-fact will have full power without the consent of the other two designated attorney-in-fact(s)." Thus, any gift of Tanya's assets needed to be agreed upon by all three attorneys-in-fact. The evidence does not establish that they agreed such a gift of Tanya's funds was to be made.

Lisa testified that the three siblings decided to transfer money from their mother's John Hancock accounts to help purchase the Playa Vista Property, and that they agreed that title to the house would be in appellant's name. She testified that the money transferred from Tanya's accounts was a loan–not a gift–to allow appellant to buy a house in order for her to take care of their mother, and that appellant was not otherwise going to be paid for caring for their mother. This evidence establishes that the three siblings intended the funds to be a loan to appellant, not a gift.

The only evidence appellant offers that the funds were meant to be a gift was her own testimony. Appellant testified that she cared for her mother for a few months in 2010 and that this experience spurred appellant and her mother to decide to buy a house, because appellant's apartment was too small for the two of them. According to appellant, her mother was very happy about buying the Playa Vista property. Appellant testified that both her siblings knew that the title to the property would be in her name and that neither Lisa nor George ever asked that the title be changed or that appellant repay the loan. This evidence is not sufficient to overturn the trial court's finding.

First, in determining whether an excess withdrawal from a joint account is a gift, we examine "the objective facts and circumstances of the transaction rather than . . . the transferor's subjective intent. [Citation.]" (*Lee*, *supra*, 111 Cal.App.4th at p. 492.) Appellant's testimony regarding her mother's intent thus is irrelevant.[9]

The objective facts and circumstances indicate that Tanya signed a durable power of attorney that required her three children to act unanimously. Notwithstanding the gift provision in the power of attorney, there is no evidence that they agreed that the funds to purchase the Playa Vista property were a gift to appellant.

III. *The Evidence Does Not Support Some Aspects of the Trial Court's Order*

The trial court ordered appellant to transfer the Playa Vista property to the conservator, return the $650,000 that she received for the deed of trust, and to transfer the property purchased with the proceeds of the deeds of trust to Tanya. We conclude that, although the record supports the order requiring appellant to repay at least some of the $650,000, it does not support the remainder of the orders.

First, we address the order requiring appellant to transfer the Playa Vista property to the conservator. Other than appellant's testimony that Tanya intended the Playa Vista property to be a gift, the

---

[9] We thus need not address appellant's argument that Tanya was competent at the time she signed the durable power of attorney. Her competence was not at issue and was undisputed.

only other evidence regarding title to the property was from Lisa. Her testimony was that the three siblings agreed that title to the property was to be in appellant's name because she was to care for Tanya and was not otherwise paid. As respondent concedes, the durable power of attorney provides that if Tanya's attorney-in-fact "is acting in good faith and in [her] best interest, [her] attorney-in-fact is permitted to personally benefit or profit from transactions taken on [her] behalf." We have not found any evidence in the record that contradicts the evidence that appellant was to be given title to the property in exchange for caring for Tanya. The record therefore does not support the order that appellant transfer title to the property to the conservator.

Next, we conclude that there is not substantial evidence to support the order that appellant repay the full $650,000 that she received for the deed of trust. The uncontested facts set forth in the parties' joint trial statement indicate that, although the Playa Vista property was purchased with $428,466.18 from Tanya's two John Hancock accounts, appellant contributed $132,500 of her own funds to the purchase of the property.[10]

Although the parties did not dispute that appellant contributed $132,500 of her own funds, the Buyer's Final Settlement Statement indicates that the property was purchased with $57,500 in deposits from J. Ho or Janey Ho, and $593,851.41 from joint accounts appellant held with Tanya. Respondent's expert testified that appellant used

---

[10] This totals $560,966.18, which is $90,385.23 less than the total amount ($651,351.41) that was paid for the property as shown in the Buyer's Final Settlement Statement.

$57,500 of her own funds to purchase the Playa Vista property, and that she was unsure of the source of $93,000. The trial court did not address appellant's contribution of her own funds and so did not make any findings regarding the amount. Although we are unable to determine the amount from the record, it is clear that appellant contributed some of her own funds toward the purchase of the property. The evidence thus does not support the court's order that she return to the conservatorship estate the entire $650,000 that she received for the deed of trust. Instead, she should be given credit for the amount she contributed to purchase the Playa Vista property.

Moreover, requiring appellant to return both the $650,000 loan and the $200,000 condominium she purchased with part of the loan requires her to repay the loan twice. She should be required to either repay the money or turn over the property, not both.

To summarize, appellant should not be required to transfer the Playa Vista property to the conservator. The joint trial statement indicates that appellant contributed $132,500 toward the purchase of the property, and other evidence indicates that she contributed at least $57,500. Therefore, as to the $650,000 loan secured by the first deed of trust, appellant should be required to do one of the following: (1) either transfer the $200,000 condominium to the conservatorship estate and repay the remaining principal of the $650,000 loan, plus interest, to the estate, but be given credit for the amount of her own funds she contributed; or (2) if she is permitted to keep the $200,000 condominium, return to the estate the entire $650,000 plus interest,

again with credit for the amount she contributed to the purchase of Playa Vista. We leave it to the trial court's discretion.

DISPOSITION

The trial court's order is reversed to the extent that it orders appellant to transfer the Playa Vista property to the conservator, to repay the full $650,000 loan, and to return the property she purchased with the loan. The matter is remanded for the trial court to determine the amount appellant actually contributed out of her own funds to the purchase of the Playa Vista property and then to deduct that amount from whatever total the court orders her to repay. After determining how much appellant contributed from her own funds to purchase Playa Vista, the court further shall determine if appellant should transfer the $200,000 condominium she purchased with the proceeds of the $650,000 loan to the conservator and repay the remaining difference, or if she should keep the condominium and repay the entire $650,000 principal plus interest–again, with credit for her contribution to Playa Vista. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. MANELLA, J.