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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.	B282799 (Los Angeles County Super. Ct. No. BP145487)

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

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

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

This is the second time this case is before us. In this appeal, Janey Tang Ho (appellant) appeals from an order of the superior court granting the petition of Marlene Dennis (respondent), the conservator of appellant's mother's estate, for a substituted judgment to create an estate plan. In the first appeal, we reversed the superior court's order requiring appellant to transfer certain real property to the conservator and to return $650,000 to the estate.[1] We remanded the matter for the court to reconsider whether the property should be transferred and to recalculate the amount appellant must repay the estate. In the proceeding at issue in the present appeal, the petition for substituted judgment was based largely on the value of the estate before our decision in the first appeal. Therefore, we reverse the order granting the petition and remand for reconsideration in light of current circumstances.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2010, appellant's mother, Tanya Ho (Tanya), signed a durable power of attorney appointing her three children–appellant, Lisa Tang Ho, and George Tang Ho–to serve as her attorneys-in-fact. (*Dennis I*, *supra*, 2018 Cal. App. Unpub. LEXIS 1322 at p. *1.) Tanya was placed under a conservatorship in 2014. (*Id.* at p. *3.) In February 2016, the conservator filed a petition to determine title to property in Playa Vista, California, to declare the property to be held by the

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[1] *Dennis v. Ho* (Feb. 28, 2018, No. B277268) 2018 Cal. App. Unpub. LEXIS 1322 (*Dennis I*).

conservator, and to transfer it to the conservator, and for an accounting and damages. The trial court granted the petition on the ground that appellant violated her duty as an attorney-in-fact to act in Tanya's interest when appellant purchased the Playa Vista property and obtained a loan secured by that property. (*Id.* at p. *4.) The court ordered appellant to transfer the Playa Vista property to the conservator and to pay the conservatorship estate $650,000. (*Ibid.*) We reversed the order insofar as it required appellant to transfer the Playa Vista property and remanded for the trial court to reconsider the amount appellant was required to repay to the conservatorship estate. (*Id.* at pp. *17-*18.)

Meanwhile, in October 2016, respondent filed a petition for a substituted judgment to create an estate plan and to fund Tanya's living trust. (See Gold et al., Cal. Civ. Prac. Probate and Trust Proceedings (April 2018) § 28:159 ["The provisions of Prob. Code §§ 2580 to 2586 codify the doctrine of substituted judgment, permitting a court to authorize the transfer of estate property a conservatee would have transferred had the conservatee been competent to act."].)[2] According to the petition, Tanya was non-ambulatory and non-verbal and required around-the-clock care. The petition stated that the proposed estate plan would carry out Tanya's testamentary wishes and eliminate the need for her will to go through probate proceedings, thus avoiding "the expense and delay of probate."

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[2] Unspecified statutory references will be to the Probate Code.

Appellant opposed the petition, contending that respondent did not address the pertinent considerations for a substituted judgment petition and that the facts presented were insufficient to support the petition. Appellant further challenged respondent's argument that a trust would save time and money, arguing that, under the circumstances presented here, where the parties are in litigation regarding the trust, respondent was required to present facts to establish that the trust would be less expensive than probate.

The trial court conducted a hearing on January 9, 2017, but concluded that additional evidence in the form of a "supplemental declaration or additional documentation" was required and therefore continued the hearing. Respondent filed a supplemental brief in support of the petition, listing Tanya's real estate, stating that probate fees in California would be $70,000, and asserting that the court order we addressed in the prior appeal established that appellant had committed financial abuse against Tanya. Ruling before our decision in the first appeal, the court granted the petition, authorizing respondent to create and execute the estate plan, which consisted of a will and a living trust. Appellant timely appealed.

DISCUSSION

I. *Statutory Framework*

The substituted judgment statutes (§ 2580 et seq.) provide that "[t]he probate court has discretion, circumscribed by the statutory scheme, to order a 'substituted judgment' that authorizes a conservator

on behalf of a conservatee to take necessary or desirable action to facilitate estate planning, when a reasonably prudent person in the conservatee's position would do so." (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 383 (*Murphy*).) Under section 2580, the conservator or an interested person may file a petition for an order of the probate court authorizing or requiring the conservator "to take a proposed action for the purpose of (1) benefiting the conservatee or the estate; (2) minimizing current or prospective taxes; or (3) providing gifts to persons or charities which would be likely beneficiaries of gifts from the conservatee. [Citation.]"[3] (*Id.* at pp. 395-396; § 2580, subd. (a).)

"Section 2582 provides that the court may make an order for substituted judgment only if it determines that the conservatee either is not opposed to the order or, if opposed, lacks legal capacity for the

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[3] Section 2580 provides in pertinent part: "(a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes: [¶] (1) Benefiting the conservatee or the estate. [¶] (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee. [¶] (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee. [¶] (b) The action proposed in the petition may include, but is not limited to, the following: [¶] . . . [¶] (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. . . . [¶] . . . [¶] (13) Making a will."

proposed action. It also provides that the court must determine either that the action will have no adverse effect on the estate or that the remaining estate will be adequate for the needs of the conservatee and for the support of those persons legally entitled to support, maintenance and education from the conservatee." (*Murphy*, *supra*, 164 Cal.App.4th at p. 396.) In determining whether to grant a petition, the court "shall take into consideration all the relevant circumstances, which may include, but are not limited to," 13 enumerated circumstances.[4] (§ 2583.)

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[4] The 13 circumstances are: "(a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity. [¶] (b) The past donative declarations, practices, and conduct of the conservatee. [¶] (c) The traits of the conservatee. [¶] (d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living. [¶] (e) The wishes of the conservatee. [¶] (f) Any known estate plan of the conservatee (including, but not limited to, the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated). [¶] (g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees. [¶] (h) The value, liquidity, and productiveness of the estate. [¶] (i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration. [¶] (j) Changes of tax laws and other laws which would likely have

Section 2584 states: "After hearing, the court, in its discretion, may approve, modify and approve, or disapprove the proposed action and may authorize or direct the conservator to transfer or dispose of assets or take other action as provided in the court's order." However, an evidentiary hearing is not required in all circumstances. (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 554 (*McElroy*).) Instead, "the trial court must gather the information necessary to allow it to make a rational decision in place of the conservatee. In some cases, this will mean that a full hearing is required. In other cases, circumstances such as a need to reduce tax liabilities may make it obvious that action is required. In other words, the trial court must use its discretion in evaluating the information presented to it in order to decide if the information in the petition is sufficient, or if a full contested evidentiary hearing is required." (*Ibid.*)

"If the superior court is to be able validly to substitute its judgment for that of the conservatee it must be given complete information as to all relevant circumstances. The conservator, and any

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motivated the conservatee to alter the conservatee's estate plan. [¶] (k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so. [¶] (l) Whether any beneficiary is the spouse or domestic partner of the conservatee. [¶] (m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or financial abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment." (§ 2583.)

petitioner other than the conservator, must bear the burden of informing the court fully and fairly. And in any case the superior court must on its own motion take all steps necessary to satisfy itself, as the conservatee's decisionmaking surrogate, that it has been fully and fairly informed." (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1254 (*Hart*).) The order granting the petition for substituted judgment is reviewed for abuse of discretion. (*Conservatorship of McDowell* (2004) 125 Cal.App.4th 659, 665, disapproved on other grounds in *Bernard v. Foley* (2006) 39 Cal.4th 794, 816, fn. 14.)

II. *Analysis*

Appellant contends that respondent did not set forth sufficient facts to support the petition and that the trial court abused its discretion by failing to hold an evidentiary hearing. She argues that the trial court did not consider the 13 circumstances set forth in section 2583. We conclude that the evidence is not sufficient to support the petition and therefore reverse and remand for reconsideration.[5]

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[5] In light of our conclusion, we need not consider appellant's contention that the substituted judgment violates Tanya's wishes by (1) removing appellant as executor of the will; (2) filing suit against appellant for partition of two properties and thus depriving appellant of valuable remainder interest; and (3) having the conservator or "unknown lawyers" sell a third property in order to pay attorney fees. Nor do we consider appellant's contention that the trust resulted from an agreement that included the improper payment of money between her siblings and the former trustee, Jeffrey Siegel, regarding the alleged misappropriation of estate funds by Siegel. Appellant has forfeited the second contention by failing to support it with any citation to the record.

The only evidence attached to the petition was Tanya's existing will, the proposed trust, and the proposed will.[6] After the court continued the hearing for more evidence, respondent filed a supplemental brief but did not file any declarations or other evidence. The supplemental brief listed assets belonging to the estate, including the Playa Vista property and cash of $650,000 that were the subject of the prior appeal. There were also numerous Hawaii assets listed. The brief asserted that if the California assets were subject to probate, the estate would be subject to a total of $70,000 in statutory fees under sections 10800 and 10810.

The supplemental brief's calculation of $70,000 in probate fees was based on the Playa Vista property (valued at approximately $1,550,000) and cash in the amount of $650,000.[7] However, in the prior

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(See *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 ["It is well-established that "'[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived.'"'].)

[6] Tanya's existing will appointed Tanya's brother and appellant as executors and stated that Tanya wanted to distribute all her assets in four equal parts, with one each going to her children and the remaining part to her grandchildren.

[7] Statutory fees to be paid to the personal representative and the attorney for the personal representative are calculated based on the value of the estate as follows: "(1) Four percent on the first one hundred thousand dollars ($100,000). [¶] (2) Three percent on the next one hundred thousand dollars ($100,000). [¶] (3) Two percent on the next eight hundred thousand dollars ($800,000). [¶] (4) One percent on the next nine million dollars ($9,000,000)." (§ 10800, subd.

appeal, we reversed the court's order that appellant transfer the Playa Vista property to the conservator. (*Dennis I*, *supra*, 2018 Cal. App. Unpub. LEXIS 1322 at pp. *17-*18.) In addition, we reversed the order that appellant repay the full amount of $650,000 to the estate and remanded for the court to redetermine the amount. (*Ibid.*) The supplemental brief's assertion of the amount of probate fees that would be saved accordingly is no longer accurate.[8]

The supplemental brief further asserted that the real property in Hawaii would undergo probate, requiring "additional compensation" for the executor and Hawaii counsel for the executor, but did not specify the amount. Finally, the supplemental brief relied on the trial court order we reversed in the prior appeal to assert that appellant committed financial abuse against Tanya.

The vague assertions in the petition are unlike the petition for substituted judgment in *McElroy*, which "states, in considerable detail, the actions which were proposed to be taken and the reasons for those actions. It contains a specific discussion of the factors in Probate Code sections 2582 and 2583, and their applicability to the proposed actions. . . . The tax reasons for [the specific proposal] are fully explained, and

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(a); § 10810, subd. (a).) An estate valued at $2,200,000 (property worth $1,550,000 plus $650,000 cash) would result in compensation of $35,000 each to the personal representative and the attorney.

[8] Neither party has informed us of the result of the proceedings following remand.

they are reasons which would clearly motivate a reasonably prudent person." (*McElroy*, *supra*, 104 Cal.App.4th at p. 553.)

The petition here depended in substantial part on the statutory fees required to probate an estate containing the Playa Vista property and the $650,000 that the trial court previously ordered appellant to return to the estate. Given our reversal of that order, there is insufficient evidence to support the petition. In order to substitute its judgment for that of the conservatee, the trial court must have "complete information as to all relevant circumstances." (*Hart*, *supra*, 228 Cal.App.3d at p. 1254.) The burden is on the conservator to inform the court "fully and fairly" of those circumstances. (*Ibid.*) This burden was not met here.[9]

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[9] We emphasize that we are not saying a substituted judgment is necessarily inappropriate but that the matter must be reconsidered in light of current circumstances.

DISPOSITION

The order appealed from is reversed and the matter remanded for reconsideration. The parties are to bear their own costs on appeal.

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WILLHITE, J.

We concur:

MANELLA, P. J.

MICON, J.*

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