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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CYRIL O'REILLY,

Appellant,

v.

KEVIN O'REILLY,

Respondent.

B281375

(Los Angeles County
Super. Ct. No. 16STPB0061)

APPEAL from an order of the Superior Court of Los Angeles County. Lesley C. Green, Judge. Affirmed.

Anthony Kornarens for Appellant.

Law Office of Samuel Lovely and Samuel Lovely for
Respondent.

The main asset of the O'Reilly Family Trust is the family home. The trust permitted the trustor's widow to remain in the home as long as she wished; thereafter, the home and the rest of the assets were to be "distributed" to the trustor's three adult children. Due to a dispute among the children, one of them, who was the successor trustee, filed a petition to determine whether the trust granted him permission to sell the house. The trial court granted the trustee the relief sought, and his brother, the objecting beneficiary, appeals. We conclude, as did the probate court, that the trust unambiguously grants the trustee the right to sell the house. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

We are here concerned with the O'Reilly Family Trust, dated June 27, 1991 and restated March 7, 1996. The trust was established by the family patriarch, Patrick J. O'Reilly, who died in 2002. Patrick left a widow, Julie Norris O'Reilly, and three adult children, Kevin T. O'Reilly, Cyril J. O'Reilly, and Ann O. Skenderian.¹ Kevin was designated successor trustee, and became the trustee upon Patrick's death.

The trust provided that, upon Patrick's death, the trustee "shall hold the Settlor's residence [at address] together with its furniture and furnishings for the use of [Julie]. She shall be permitted to live in the house rent free. At such time as [Julie] dies or permanently ceases to use the home as her residence, then the home together with its furniture and furnishings shall be distributed as follows." The trust lists certain items of personal property to be distributed to each of the three children.

¹ In the interest of clarity, we refer to the family members by their first names. No disrespect is intended.

It then provides, “The rest and remainder of the residence and furniture and furnishings shall be distributed as provided for the distribution of the residue of the trust estate.” In turn, the residue provision states, “The Trustee shall distribute the residue of the trust estate to the Settlor’s children, [Ann], [Cyril], and [Kevin]. If any of the Settlor’s children are not then alive, the deceased child’s share shall be distributed to his or her issue, or if there are none to the surviving child.”

As it happens, the trust also speaks to the trustee’s power to sell trust assets. It states, “The Trustee of this trust shall have all of the powers granted to Trustees by law (including the powers granted under California Probate Code §§ 16220-16249 inclusive which shall be broadly interpreted) and by this instrument. The powers specifically listed herein are for convenience only and are not to be interpreted as restricting the powers of the Trustee. Among the powers conferred on the Trustee are the following:”

Certain powers are then enumerated, including, “2. To buy, sell, and invest trust property.”

After Patrick’s death, his widow, Julie, lived in the house for a number of years. There is a dispute as to when she “permanently cease[d] to use the home as her residence,” but it is not relevant to our disposition of this appeal. In September 2016, Julie signed a document waiving any further interest in the property. Thus, from at least that time Kevin, as the trustee, was obligated to distribute the house and furnishings according to the terms of the trust.

The three children could not agree on what to do with the house. At one point, they considered selling the house, either to a stranger or to one of the siblings themselves. Kevin agreed to

buy the house; Ann was amenable; Cyril disagreed. Later, at what was apparently Cyril's request, the siblings agreed to retain the house as a rental property, within the trust, with Kevin to continue to manage it. However, when Kevin's counsel submitted a draft memorializing that agreement to Kevin's siblings, Cyril again opposed it. By this point, Cyril distrusted Kevin. The reasons are unimportant, but arose, in part, from Cyril's belief that Julie had abandoned her interest in the house years before, and Kevin had breached the trust by using the house for Kevin's and Ann's benefit, and depriving Cyril of his fair share. There are apparently ongoing proceedings to resolve these complaints; they are not at issue on this appeal.

Kevin believed that he, as trustee, had the power to sell the house. Fearing Cyril would disrupt or derail a pending sale, he sought court intervention. In May 2016, Kevin filed a petition to determine questions of construction of the trust instrument, specifically seeking an order that he had the power to sell the house under the terms of the trust and California law.

Cyril objected to the petition, arguing that the trust's language that the house be "distributed" to the beneficiaries required that the house itself be transferred, and prevented it from being sold. Cyril also requested that, if the court found Kevin had authority to sell the house, certain restrictions should be imposed on the sale in order to guarantee a fair price and that Cyril receives his rightful share.

At the hearing on Kevin's petition, the court stated its tentative opinion that the trust provides for power of sale. Cyril agreed that the trust includes a general power of sale, but argued that the trust's provision that the house be "distributed" to the children constituted a specific provision overriding the general.

Cyril argued that if the court found the trust ambiguous, the court should consider the extrinsic evidence of the way the parties had previously construed the language of the trust. The court stated that extrinsic evidence was unnecessary; it was interpreting the document as a matter of law. The court then ruled the trust instrument granted the trustee the power to sell the property, and specifically overruled all of Cyril's other objections.

In conformity with its ruling at the hearing, the court signed a formal order authorizing the sale. Cyril filed a timely notice of appeal. A probate court order authorizing the sale of property is specifically appealable. (Prob. Code, § 1300, subd. (a).) On appeal, Cyril challenges only the order allowing sale; he does not purport to challenge the court's denial of his request for restrictions on the sale to protect his interest.

DISCUSSION

The interpretation of a trust, like any other written instrument, is a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict in such evidence. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) As extrinsic evidence is not at issue here, our review is de novo. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

Pursuant to the Probate Code, a trustee "has the following powers without the need to obtain court authorization:

"(a) The powers conferred by the trust instrument.

"(b) Except as limited in the trust instrument, the powers conferred by statute." (Prob. Code, § 16200.)

The statutory powers include “the power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.” (Prob. Code, § 16226.) These powers were not limited by the O’Reilly Family Trust. Instead, the trust specifically provided that the trustee had all the statutory powers and that they “shall be broadly interpreted.” The trust itself enumerated sale as one of the trustee’s powers.

Cyril argues that the trust contains a specific provision prohibiting sale of the house. Cyril argues that the trust language requires that the house be “distributed” to the children. He maintains the use of the word “distribute” requires a transfer of title to the children, and does not permit a sale and distribution of equivalent value.

We disagree. Probate Code section 16246 specifically governs the “Nature and value of distributions.”² It provides “The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made pro rata or non pro rata, and may be made pursuant to any written agreement providing for a non pro rata division of the aggregate value of the community property assets or quasi-community property assets, or both.” The Law Revision Commission Comment to the enactment of this section further explains, “The trustee also has the power to sell property in order to make the distribution.” We understand the statute and Law Revision Comments as recognizing that the trustee has the power to

² Probate Code section 16246 is one of the sections incorporated in the trust (i.e., sections 16220 through 16249). Neither party refers to the statute in their briefs. The parties did address the statute in oral argument.

distribute real and personal property both by direct distribution and also by way of sale and distribution of the proceeds under the terms prescribed by the trust. In other words, the use of the word “distribute” in a trust, standing alone, says nothing about the nature of the distribution. The trust before us simply identifies to whom the distribution is to be made.

At oral argument, Cyril suggested, for the first time, that the Uniform Trustees’ Powers Act section from which a portion of Probate Code section 16246 is derived would prohibit a sale that has adverse tax consequences for a beneficiary, and requests us to take judicial notice of historical real estate market changes which indicate a sale would have such consequences for Cyril. Section 3 of the Uniform Trustees’ Powers Act itemizes some 26 different powers trustees have; Probate Code section 16246 adopts the 23rd power, “to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation.” Section 3, subdivision (b) of the Uniform Trustees Powers Act provides that all 26 of the enumerated powers are limited by the following: “In the exercise of his powers including the powers granted by this Act, a trustee has a duty to act with due regard to his obligation as a fiduciary, including a duty not to exercise any power under this Act in such a way as to deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction, or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. ‘Tax’ includes, but is not limited to, any federal, state, or local income, gift, estate, or inheritance tax.” But section 3, subdivision (b) of the uniform act was not incorporated into the California Probate Code. Instead, the

remainder of section 16246 provides for pro rata and non pro rata distributions in order to enable a trustee to take into account tax effects when making distributions in kind. The only limitation adopted in California is simply that the “exercise of a power by a trustee is subject to the trustee’s fiduciary duties.” (Prob. Code, § 16202.)

Cyril raises several arguments against the plain interpretation of the trust, most of which are dependent on his underlying assumption that the trust terms requiring the residence to be “distributed” to the three children “mandated that the family residence be distributed in equal shares to [Patrick’s] three children.” As we have concluded that “distributed” means no such thing, his arguments fail.

Cyril argues that, in this particular trust, “distributed” must mean a transfer of title, because the same word is used when discussing the disposition of individual items of personal property which were likely intended to be given to each of the individual children, not sold for fair market value. Yet “distributed” is also used in the context of other distributions which were likely *not* intended to be distributions of title in equal shares. For example, the very same clauses that provide the residence “shall be distributed” as provided for the residue, and the trustee “shall distribute the residue of the trust estate to the Settlor’s children” also apply to the “remainder of the . . . furniture and furnishings.” We do not think it likely that Patrick intended each of his children to share title to each remaining chair, lamp, and coffee mug in the house. We observe, however, that we do not decide in this appeal whether the trustee’s power of sale extends to any property in the trust other than the house. We note only that Cyril’s argument that

“distributed” is restricted to a transfer in kind everywhere it appears in the trust would lead to absurd results.

Finally, we point out a rather obvious fact: acknowledging Kevin’s right to sell the property as trustee avoids a lengthy court battle which would undoubtedly lead to the same result. If Cyril is correct and the property must be transferred to the three children as tenants in common, Kevin could then seek to partition the property, which “as to concurrent interests in the property shall be as of right” (Code of Civ. Proc., § 872.710, subd. (b).) As the property at issue is a single house, it does not appear that division into three separate parcels is a viable possibility, meaning that partition will result in a sale and division of proceeds. (Code of Civ. Proc., § 872.820, subd. (b).) Cyril does not entirely disagree, although he suggests that, if the property were sold via partition, the court could construct further financial protections for him than simply allowing Kevin to control the sale. Cyril sought such further protections here; they were denied. Cyril did not appeal that determination. His arguments on appeal do not convince us he would receive additional protections under partition than those denied here. In any event, Kevin, as trustee, has a duty to administer the trust solely in the interest of the beneficiaries (Prob. Code, § 16002, subd. (a)) and to avoid conflicts of interest (Prob. Code, § 16004). Cyril will surely seek his remedies if Kevin breaches these duties.

DISPOSITION

The order is affirmed. Cyril is to pay Kevin's costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.