S202210

In the

Supreme Court

of the

State of California

ANNEMARIE DONKIN et al.,

Plaintiffs and Respondents,

v.

RODNEY E. DONKIN, JR., et al., as Trustees, etc.,

Defendants and Appellants.

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. B228704
SUPERIOR COURT OF LOS ANGELES · HON. REVA GOETZ · NO. BP109463

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

In this Brief, respondents address specific contentions made by appellants in their Answer Brief ("AB"), but do not reply to issues extensively briefed in the Opening Brief ("OB"). Any failure of respondents to address any contention, argument, point, allegation or citation to the record, or any subpart of any such component of the Answer Brief, or the failure to argue the issue extensively, does not constitute an abandonment, concession or waiver of the issue by respondents, but rather reflects their view that the issue was briefed adequately in their Opening Brief.

INTRODUCTION

The gravamen of respondents' petition which was found by the trial to not be a contest of the Trust is that appellants have refused to distribute those portions of the Trust that should have been distributed and have undertaken various actions as trustees, such as failing to sell trust properties advantageously between 2005 and 2008 and presenting inaccurate and misleading accounts, for the purpose of maintaining a high level of compensation for themselves and thereby have failed to administer the Trust solely in the interests of the beneficiaries, as the law requires them to do.

Appellants' response in their Brief consists almost exclusively of the gainsaying of the points raised by respondents in their Petition for Review and Opening Brief. Appellants argue that, contrary to the plain language of the Trust documents, the surviving Trustor retained control over the assets allocated to the Decedent's Trust and, further, that by simply refusing to formalize those allocations, they could delay indefinitely the obligation to distribute the decedent's portions; they imply that provisions for "Extraordinary Distributions" and "Handicapped Beneficiaries" also justify their refusal to honor their mandatory obligations under the Trust documents to create and distribute individual shares to the beneficiaries (primarily, respondents), even though there were no "extraordinary" distributions made, nor "handicapped" beneficiaries involved; that provisions in the Trust which encourage industriousness and thrift by the beneficiaries override mandatory provisions for distribution; that the Decedent's Trust remains burdened with debts that have not been paid or provided for and, as such, cannot be distributed, when they could have settled all financial obligations by simply liquidating properties sufficient to satisfy same while the real-estate market was strong during the first three (3) years of their administration; and, finally, that their failure to properly administer the trust is justified by what they consider the unbridled discretion vested in them by the Trustors, which shields them from inquiry into even into

actions which are clearly a violation of their fiduciary duties. Appellants also contend that the Court of Appeal did not have jurisdiction to rule on the issue of whether merely bringing the §21320 Application violated the arbitration clause of the Trust, despite the fact that appellants tendered that issue to both courts. Respondents will address each of these arguments, briefly, in turn.

ARGUMENT

1. THE DECEDENT'S TRUST BECAME IRREVOCABLE UPON THE FIRST DEATH AND APPELLANTS HAVE BREACH THEIR FIDUCIARY DUTIES IN FAILING TO DISTRIBUTE SAME

Commencing on page 32 of the Answer Brief, appellants reassert their position that the Survivor had the power to, intended to and did alter the provision of the Trust as they apply to the distribution of the Decedent's Trust. *McIndoe v. Olivos*, (4th Dist., 1985)132 Cal. App. 4th 483, cited by respondents (OB, p.23), but not by appellants (AB, pp. 30, 37 and 46), on this point is informative on this subject. As in that case, the trustors here created an extensive plan to minimize estate taxes by the allocations to the identical sub-trusts, which have the effect of eliminating taxation of the combined estate; however, in the minds of appellants, the tax considerations were of no moment to the Trustors, their primary intention being to vest appellants with unbridled discretion

and shielding them from any enforceable obligations to respondents.

The original trust document, as republished in the amendments, indicates no less than four (4) times that the trust(s) for the decedent became irrevocable on the first death (AA pp. 63, 89, 95 and 97). The legal effect of the death of the first trustor under the Donkin trust is identical to that in *Bradley v. Gilbert*, (2nd Dist. 2009) 172 Cal. App. 4th 1058, 1061: "The Trust provided that when the first spouse died, the [Marital] and [Decedent's] Trusts would become immediately irrevocable and nonamendable.." The holding of the Court of Appeal that the trust(s) became irrevocable only upon the death of both spouses is simply wrong, both as a matter of the terms of the Trust and as a matter of law.

Appellants contend that because the surviving Trustor failed to make a formal allocation to the Decedent's Trust during her lifetime, it failed to come into existence and was subject to her control and amendment. Not only is this contrary to common sense, the legal principal concept that no one can benefit from their own breach of duty and the holding in *Bradley*, it flies in the face of the express language of the Trust:

"Upon the death of either Settlor the Trustee *shall* divide the Trust Estate into two (2) separate shares. ... Decedent's Marital Share *shall* consist of one-half (½) interest in the Community Property of the Trust

Estate, one-half (½) interest in the quasi-community property of the deceased spouse included in the Trust Estate and the Separate Property of the Decedent Settlor. Decedent/s Marital Share *shall* be divided into Decedent's Trust "B" and Trust "C". Upon creation of such Trust shares, Decedent's Trust "B" and Trust "C" *are* irrevocable." (emphasis added) AA p. 89. The obligation to divide the original trust estate into "Survivor's" and "Decedent's" shares was mandatory and, if no formal allocation was made by the Survivor, appellants cannot escape their obligation to recognize the trust estate as having been so divided, as the law considers as done that which should have been done,

Respondents' arguments regarding the requirements of Federal law to secure the tax-savings effect of the Trust's allocations to the various sub-trusts (AB p.36) merely reinforces the plain language of the trust documents: the trust(s) comprising the "Marital Share" were irrevocable as of the first death and not subject to the control of the Survivor thereafter. If the Court must consider the "whole" trust instrument to determine the trustors' intent (*Sharlin v. Superior Court*, (4TH Dist. 1992) 9 Cal. App. 4th, 162, 168; AB, p.31), it must find that the Trustors intended that the tax-savings provisions of the Trust were an integral part of their distribution scheme and not merely surplusage, as appellants contend.

The provisions of the trust document, as it read at the death of the decedent, required distribution of the Decedent's Trust at the death of the Survivor. AA p.103 Commencing on page 6 of their Brief, appellants expend a substantial number of words explaining how the agreement conditioned distribution of that Trust upon various factors, but their accounts and reports included in the Respondents' Appendix ("RA" pp.60 et seq. and 364 et seq.) demonstrate that this argument is specious, as appellants have never indicated any fact or circumstance rendering those provisions relevant to distribution. Appellants have consistently indicated only that respondents have no right to distribution pursuant to the terms of the 2004 ("Second") Amendment executed by the Survivor more than two (2) years after the Decedent's Trust became irrevocable.

Appellants argue, absurdly, that an action to compel a trustee to do that which he is required by the trust to do is a contest and cite *Cook v. Cook*, (2nd Dist. 2009) 177 Cal. App. 4th 1436, 1440, for the proposition that seeking to compel a distribution in conflict with the provision of the trust is a contest (AB p.44)[1] Respondents do not argue with this

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1 Appellants also take issue with respondents' challenging the application of the "frivolous" standard of *Estate of Ferber*, (4th Dist. 1998) 66 Cal. App. 4th 244 (AB p.45); respondents submit that former §21305 and current §21311 eliminated the frivolous standard espoused in that case as the basis for a violation of a no-contest clause.

statement of the law; *a fortiori*, seeking to compel a distribution mandated by the trust must not be a contest. "[A] beneficiary should be able to question the actions of a faithless fiduciary without being subject to the restrictions of [a no-contest] clause." *Bradley, supra*, 172 Cal. App. 4th at 1071, OB p. 21. The failure of appellants to distribute the Decedent's Trust is a breach of their fiduciary obligations and this action to compel them to make distribution and/or for their removal cannot be a contest.

2. THE SURVIVOR DID NOT MANIFEST AN INTENTION TO FORCE RESPONDENTS TO AN ELECTION BETWEEN THE BENEFITS PROVIDED BY THE DECEDENT AND THOSE OF THE SECOND AMENDMENT.

Respondents briefed this matter extensively commencing on page 21 of their Opening Brief. Again, a trustor declaring that all of the property of the trust is his separate property, as in *Burch v. George*, (1994) 7 Cal 4th 246, a statement that is directly adverse to claims of the spouse that some or all of the property is community property, is far different from an ambiguous statement that a surviving trustor amends and then republishes a trust which limits her power to amend to the Survivor's portions only. AA p.89. Contrary to appellants' assertions (AB p. 34), respondents contend that the surviving trustor acknowledged

that her power to amend the Trust was limited by the terms of the original trust agreement which she incorporated by reference. *Weinberger v. Morris*, (2nd Dist. 2010) 188 Cal. App. 4th 1016, is not relevant to the discussion, as it involved a single-trustor trust which does not invoke the marriage-dependent tax-saving provisions of the Donkin Trust and which did not divide into separate trusts, some revocable and some irrevocable, with distribution dependent on the death of a surviving spouse. The *Weinberger* trust remained fully revocable by its terms until the death of the trustor and involved solely the question of who the beneficiary was[2]; it simply has no relevance to the instant case.

3. APPELLANTS TENDERED THE QUESTION OF THE EFFECT OF THE ARBITRATION CLAUSE TO THE TRIAL COURT.

Commencing on page 60 of the Answer Brief, appellants argue that the Court of Appeal did not have jurisdiction to rule that merely filing the §21320 Application did not violate the arbitration clause, arguing that they excluded that question from the purview of that Court by the language in the Notice of Appeal. However, they did tender that

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2 That trust conditioned entitlement to distribution upon survival; where the named beneficiary/trustee failed to distribute the property to herself during her lifetime, same passed to the contingent beneficiary named in the trust and not to her heirs. 188 Cal. App. 3d at 1021.

issue to the trial court in paragraph 6 of their Response to the Application (AA pp, 51, 56); therefore, their appeal from the Order entered by that Court on "September 20, 2010"[3] includes that issue, as the Order recites,

> The Court, *having read and considered the Application and the Response thereto*, having reviewed the documents presented in support thereof, including the Trust Agreement and the Amendments thereto, having heard and considered all evidence submitted by the parties in support of and in opposition to said Application, now determines the Application as follows:
>
> IT IS ORDERED, ADJUDGED AND DECREED that the matters raised in the proposed Petition do NOT constitute a contest under the terms of the no-contest clause(s) of the subject Trust. (emphasis added) AA p. 256-257.

Further, appellants raised this issue in their initial Brief in the Court of Appeal (p.28). Therefore, that issue was presented to the trial court and is squarely before this Court in this proceeding. Further, the remedy for a failure to arbitrate is an order compelling arbitration, not disinheritance.

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3 The Order was actually entered on September 17, 2010.

4. §3 OF THE PROBATE CODE PROVIDES THAT THE "OLD" LAW APPLIES TO PARTS OF THIS CASE AND THE "NEW" LAW TO OTHERS.

Again, respondents briefed the question of which law applies to this case in their Opening Brief. OB p. 28 et seq. The transitional rules of §3 clearly envision that the "old" law would apply to actions brought before the repeal date and that the "new" law would apply to actions brought thereafter, even in the same case, except in unusual circumstances. The Court of Appeal created a blanket rule which would make all trusts executed before 2010 subject to the "old" law - this was error.

5. *BRADLEY* SQUARELY ADDRESSES THE SITUATION IN THIS CASE.

Appellants understandably misstate the holding in *Bradley, supra*, on page 57 of the Answer Brief. In that case, a successor trustee sought, as here, to challenge the allocations to the decedent's and QTIP (marital) trusts made by his predecessor which were underfunded in derogation of the formula stated in the trust agreement and in such a way as to benefit a specific beneficiary. The Second District Court of Appeal there upheld the order of the trial court that the proposed challenge to the allocations made by the former trustee were not a contest, despite a no-contest clause which specifically prohibited any action which "objects in any manner to any action ... taken or proposed to be taken ...

by the Trustee" (172 Cal. App. 4th at 1064), ruling that claims of fiduciary misconduct, in particular those challenging the exercise of a fiduciary power, can never be barred by a no-contest clause. *Id.* at 1069-1072.[4]

Appellants attempt to distinguish the claims in *Bradley* with those of the instant case; that attempt is unavailing. While in *Bradley* the applicant-petitioner was the successor trustee, it was his status as a beneficiary that was under attack via the no-contest clause, as the inquiry into the allocation of property among the trusts stood to benefit him in that capacity. In appellants' view, a beneficiary must sit still for all kinds of misconduct by a trustee where a no-contest clause is included in the trust - that is simply not the law.

6. THE BALANCE OF APPELLANTS' ARGUMENTS WILT UNDER SCRUTINY.

Appellants throw out several arguments in the balance of their brief which are simplistic and are supported by little or no authority. For example, appellants argue that this "is not a fiduciary abuse case" (AB p.43), when the statements contained on the face of their own reports (RA pp.60 et seq. and 364 et seq.) indicate numerous breaches

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4 If the "old" law applies, §21305 insulates respondents from the ambit of the no-contest clause(s).

of fiduciary obligation and *Bradley* indicates in strong words that there is a substantial public policy of allowing beneficiaries to act to protect their interests in the face of fiduciary misconduct. Appellants also refer to "facts," when this case remains at the pleading stage, with the only "facts" being those that appear on the face of the trust documents and the reports; the sole inquiry under the law is whether the claims of respondents seek to alter, or enforce, the provisions of the Trust and the law. It should also be noted that none of the cases cited by either party directly involve an action to compel a fiduciary to perform the duties required by the governing instrument. The logical conclusion to be drawn that such an action can never be a contest and no trustee other than those in this case would have the temerity to attempt to deflect such claims with the threat of disinheritance.

Respondents' research failed to disclose a single case of "beneficiary abuse" (AB p. 46). This Court must ask itself which party is favored by the balance of power in a fiduciary relationship: is it not the fiduciary with access to the assets of the trust, including those belonging equitably to the beneficiary, for his defense and the ability to wrongfully keep the trust estate just beyond the legal reach of the intended recipient without legal action?

Appellants have repeatedly refused to perform their obligations for the benefit of respondents, benefitting themselves and related parties

instead in ways that are not allowed by law. It is hard to conceive of a more clear-cut violation of fiduciary duties, as disclosed by their own reports, except in a case of straight theft of trust assets.[5]

Appellants go to great lengths to avoid the public-policy analysis, with good reason. As stated in *Bradley*,

> We discern that it was the paramount legislative intent to limit the breadth and scope of "no contest" clauses by the passage of section 21305 when performance of fiduciary obligations are involved and by declaring a public policy, to remove any forfeiture considerations when a fiduciary duty is being challenged.

172 Cal. App. 4th at 1072.

While respondents extensively briefed why the blanket application of the "old" law stated in the decision of the Court of Appeal in this matter violates the statutory scheme, the outcome of this case should be the same regardless of which law is applied. If the "old" law applies, respondents' claims are not subject to the no-contest clause(s) by virtue

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5 Appellants have refused to provide respondents with any reports and accounts after that ordered by the trial court covering the period ending in February, 2010. There are now two (2) other reports due, which appellants have refused to provide based upon their determination that respondents are no longer beneficiaries due to their filing the Application. Respondents have no idea what the current status of the Trust is or even if it still exists.

of former §21305; if the new law applies, their claims do not fall within those prohibited under §21311.

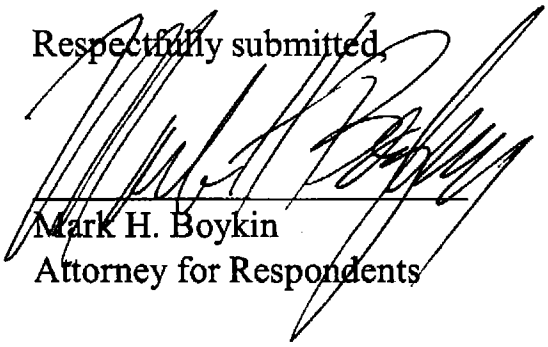
7. CONCLUSION

There is a strong public policy in this State that favors the rights of beneficiaries to challenge the actions of fiduciaries. Respondents have demonstrated, both in the Petition for Review and in the Opening Brief, that the decisions of the various courts of appeal, including divisions within the Second District, are far from consistent in protecting this public policy. *Bradley* clearly states this public policy and makes note of the fact that there has been no decision from this Court delineating that policy or its limits. This case provides a clear opportunity for the Court to do so.

Beneficiaries are entitled to have a trust administered according to its terms and respondents seek nothing more or less. The legislature made it clear, under both the "old" and "new" law, that beneficiaries were to be free to bring such challenges except in very limited circumstances. This Court is requested to issue a decision which supports this legislated and judicially-recognized public policy and prevent fiduciaries from defeating justice in the manner attempted by appellants herein.

Dated: October 12, 2012

Respectfully submitted,



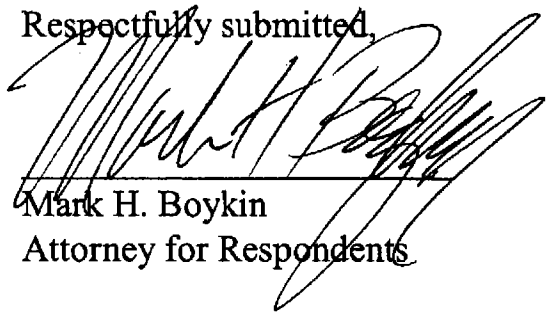
Mark H. Boykin
Attorney for Respondents

CERTIFICATE OF COMPLIANCE

Counsel for Petitioners-Respondents hereby certifies that, pursuant to Rule 8.520(c)(1) of the California Rules of Court, the attached **REPLY BRIEF ON THE MERITS** is produced using at least 13-point Roman type, including footnotes, and contains 3,127 words, which is less than the total number of words permitted, as determined by WordPerfect, the program used to create this Brief.

Dated: October 12, 2012

Respectfully submitted,



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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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