

4th Civ. No. E047364

COURT OF APPEAL – STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARSHA MEEK BANKS, as Successor Trustee
and Individually, etc.,

Plaintiff and Respondent,

v.

PACIFIC HOMES FOUNDATION,

Defendant and Appellant.

Appeal from the San Bernardino Superior Court
Honorable Frank Gafkowski, Jr., Judge Presiding
Case No. RPRRS02996

APPELLANT’S OPENING BRIEF

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**Court of Appeal
State of California
Fourth Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: E047364

Case Name: Marsha Meek Banks v. Pacific Homes Foundation

Please check the applicable box:

[] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Marsha Meek Banks	Trust beneficiary, successor trustee
Pacific Homes Foundation	Charitable foundation for the support of Claremont Manor
Keith Brandt, Calvin Cooper, Grant Heimbecker	Trust beneficiaries
Front Porch Communities and Services	Owner of Claremont Manor and its Health Care Center

Signature of Attorney/Party Submitting Form

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INTRODUCTION

This appeal is about a charitable bequest that has been invalidated by the probate court.

Through a testamentary trust, Willard and Flora Turner, residents of the Claremont Manor retirement community, left more than \$800,000 to what they called the Claremont Manor Health Care Center Replacement Fund. The Health Care Center is a skilled nursing facility for the residents of the Claremont Manor campus. When the Turners executed their trust, a new Center was in the planning stages and was soon thereafter built using funds from charitable contributions and construction loans.

The Turners specified that if, at the time of testamentary distribution, the Fund no longer existed or could not accept the bequest, then the bequest should be distributed ratably among other named beneficiaries. One of those other beneficiaries is the trust's successor trustee, Marsha Meek Banks, the Turners' accountant, whose husband, a lawyer, drafted the trust.

After both Turners died, Ms. Banks questioned whether the Fund still existed, and she petitioned the probate court for instructions. A court trial left no doubt that a fund, although misnamed by the Turners in their trust, still existed and could use the bequest to benefit the Health Care Center. That should have been the end of the matter, and the court should have followed the trust's plain terms and instructed Ms. Banks to distribute the bequest to the fund.

Instead, the court ruled the bequest was no longer valid. Based on the testimony of Ms. Banks, her husband, and others who were involved in drafting the trust, the court concluded that the Turners intended that the bequest was effective only as long as the new Claremont Manor Health Care Center remained unbuilt, whether or not the building had been paid for. Despite the fact that a fund still exists for the Health Care Center's

benefit and the fact that substantial debt had been incurred to complete the Health Care Center and remains unsatisfied, the court ruled that because construction of the Health Care Center had been completed by the time the Turners died (Flora Turner had the benefit of residing in the new facility in her last years), the charitable bequest lapsed as soon as the Center was built and the \$800,000 charitable bequest should be distributed to Ms. Banks and other individuals instead.

Pacific Homes Foundation is the non-profit public benefit corporation that maintains the fund and provides charitable support for Claremont Manor and the Health Care Center. The Foundation appeals the court's order instructing Ms. Banks.

As the Foundation will explain, the court's interpretation and invalidation of the Turners' charitable bequest is factually and legally unsupported. While there was some confusion as to the proper designation of the "Replacement Fund" (the fund was and is maintained on the Foundation's books as the Claremont Care Center Campaign), there is no confusion that the fund still exists and can provide charitable support for the Health Care Center. That's what the Turners' trust provided in plain terms, and that's what should be followed.

Moreover, substantial debt was incurred so that the Center could be built sooner rather than later and remains unpaid. It is illogical to conclude that the Turners only wanted to contribute to the cost of the Health Care Center's construction before it was built, but not after, especially since theirs was a testamentary bequest that might not be distributed for years after they executed the trust. The trust neither said nor implied anything of the sort. A charitable bequest should not be nullified on such an unnatural and cramped reading of the donors' expressed intent.

STATEMENT OF FACTS

A. Cast Of Characters.

Claremont Manor is a 15-acre retirement community in Claremont, California, with 225 independent living residences, 25 assisted living accommodations, and a 59-bed skilled nursing facility known as the **Claremont Manor Health Care Center**. (1 RT 236-237.)

Pacific Homes was the non-profit public benefit corporation that originally owned and operated Claremont Manor and other retirement communities. (1 RT 202-204.)

Pacific Homes Foundation (“Foundation”) is a non-profit public benefit corporation whose sole purpose is to provide charitable support for retirement communities originally operated by Pacific Homes, including Claremont Manor. (Exh. 28; 2 CT 414.)

The Internext Group (“Internext”), a non-profit benefit corporation for charitable purposes, was formed in 1995 to support the activities of Pacific Homes and California Lutheran Homes, another non-profit corporation that operated retirement communities. (Exh. 30; 2 CT 423.) In 1997, Internext added FACT Retirement Services, another operator of retirement communities, as an object of its charitable support. (2 CT 427.)

In 1999, Internext became the owner and operator of Pacific Homes, California Lutheran Homes and FACT Retirement Services. (2 CT 429; 1 RT 202-204.)

Internext changed its name to **Front Porch Communities and Services** (“Front Porch”) in 2002. (1 RT 203, 232.) Front Porch continues to own and operate Claremont Manor and other retirement communities (see Exh. X; 2 CT 503), and the Foundation continues its

charitable support for Claremont Manor and the Health Care Center. (1 RT 204-206.)

Flora and Willard Turner, a childless couple, moved to Claremont Manor in 1992 and resided there the rest of their lives. Willard died in 1999. Flora died in 2005. (1 RT 26, 31, 36, 119-120.) It is their trust that is the subject of this proceeding.

Marsha Meek Banks was the Turners' accountant and is successor trustee of their testamentary trust. (1 RT 25-29.)

James Banks, Marsha Meek Banks's husband, is an attorney. His law firm drafted many of the Turners' estate plan documents. (1 RT 136-137.)

Charles Althouse is an attorney. He prepared one of the Turners' earlier estate plan documents and independently reviewed one of the later documents prepared by James Banks's law firm. (1 RT 65-68.)

Matthew Strathman is an attorney. He worked for James Banks and helped prepare the document that is the subject of this probate proceeding, the Turners' 1999 Second Amendment to their trust. (1 RT 77-78.)

Roy Haugen is a Front Porch employee. He is also chief financial officer of the Foundation. (1 RT 200-201.)

Martha Tamburrano was executive director of Claremont Manor from 1991 to 2001. (1 RT 236.)

Dr. John Skelly, a Presbyterian Minister, was executive director and later president of the Foundation. He retired in 1999. (2 RT 328-329.)

B. Background.

In August 1990, before moving to Claremont Manor, the Turners executed a revocable lifetime trust, naming themselves as co-trustees. (Exh. 1; 2 CT 271, 274.) The trust was prepared by attorney James Banks. (1 RT 136-137.) The Turners granted their accountant, Marsha Meek Banks (Mr. Banks's wife), the power to nominate a successor trustee in case both co-trustees died or were unable to serve. (2 CT 274.) The trust provided that on the death of the last surviving spouse, the residue of the trust estate should be apportioned among two charitable entities, the San Antonio Hospital Foundation and a Presbyterian Church in New York, and various individuals. If the individuals were already deceased, then their portion of the estate would go to the San Antonio Hospital Foundation. (2 CT 284-285.)

C. The Campaign For A New Claremont Manor Health Care Center.

In the early 1990's, there was discussion about building a new skilled nursing facility to replace the deteriorating Claremont Manor Health Care Center. (1 RT 31, 211; 2 RT 329-331.) Residents wanted to raise money for it. (1 RT 213.)

Dr. John Skelly, Pacific Homes Foundation's executive director, obtained authority from the Foundation's board to begin a campaign to raise contributions for the new facility. (2 RT 329-331.) The Foundation set up a general ledger account for donations. A substantial amount had been collected by 1995. That year the Foundation changed computer systems and a ledger account was designated for the Claremont Care Center Campaign. (1 RT 225-226.) That account was assigned account number

32.33612 on the Foundation's books. (Exh. 45; 2 CT 491.) The account still exists today. (1 RT 271.)

D. The Campaign Is Only Partially Successful.

Roy Haugen, the Foundation's chief financial officer, testified that as the Foundation began receiving donations, "The way we would request [donations] would be to Pacific Homes Foundation with a designation for the new care center or wording to that effect." (1 RT 213.) Nevertheless, donations came in a variety of names. (*Ibid.*)

In thanking donors over the years between 1991 and 1999, Dr. Skelly used different terms to describe the campaign. (2 RT 333-334.) He sometimes referred to the campaign as the Claremont Manor Health Care Center Replacement Fund. (Exh. 37; 2 CT 467, 469, 472.) Other times he referred to it as the Claremont Manor Health Care Center Campaign. (2 CT 473, 474, 475.) And other times he thanked donors for gifts to the Foundation, noting that the gifts had been designated for the new Claremont Manor Skilled Nursing Center (2 CT 470, 471) or the new Claremont Manor Health Care Center (2 CT 468).

The Health Care Center campaign had an original goal of \$5 million in contributions, pledges, and anticipated bequests. (2 CT 465.) By 1998, the goal had increased. As a campaign brochure stated: "This campaign has been highly successful in achieving its original goal of raising 5 million dollars in cash, pledges, future charitable trusts and bequests." (2 CT 452.)

"Recognizing that our current capacity does not meet the need on the campus at the present time, it was proposed the ongoing Care Center campaign be expanded to include raising funds for the expansion of our Assisted Living accommodations." (2 CT 453.) "However, to ensure the inclusion of the assisted living expansion in the overall plan, we must raise

2 million dollars cash over the next 18-24 months through further contributions” (2 CT 454.) “The New Era at the Manor actually involves much more – new roads, a wellness center, additional independent living quarters, additional parking, and a new landscape appearance. The funds will be raised through corporate financing as will part of the cost of the Care Center and the assisted living expansion.” (*Ibid.*)

Dr. Skelly was frustrated that the anticipated costs of the campaign had increased. He retired from the Foundation in 1999. (2 RT 344-348.) The goal of an additional \$1 to \$2 million, as stated in the brochure, was not reached. (2 RT 350.)

E. The Turners’ Bequest To The “Claremont Manor Health Care Center Replacement Fund.”

Meanwhile, as Ms. Banks testified, the Turners were looking forward to construction of the new Health Care Center and hoped it would be part of their living experience. (1 RT 31.) Accordingly, early on in the replacement campaign, the Turners included gifts to the new Health Care Center in their estate plans. In November 1992, Mr. Banks prepared a First Amendment to the Turners’ trust. (Exh. 2; 2 CT 292.) The amendment added the Claremont Manor Health Care Center Replacement Fund as a beneficiary and named the Replacement Fund as alternate beneficiary for

several individual beneficiaries in case those individuals pre-deceased the Turners. (2 CT 292-293.)¹

In June 1997, the Turners also purchased a charitable remainder annuity which they funded with \$50,000. (Exh. 34; 2 CT 434, 446.) The annuity income was payable to the Turners during their lifetimes, and on the death of the last survivor, the remainder was payable to Pacific Homes Foundation (2 CT 436) to be used for the “New Health Care Center” (Exh. 35; 2 CT 448).

In February 1999, the Turners again amended their trust. This Second Amendment was a complete restatement of the trust for tax purposes. (2 CT 295.) Ms. Banks was named as successor trustee in case both co-trustees died or could not serve. (2 CT 298.) In the language that is the focus of this probate proceeding, the Second Amendment provided that within one year of the death of the last surviving spouse, forty percent of the trust estate

shall be distributed to the CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND. If, at the time of the distributions . . . , the CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND is no longer in existence or is otherwise unable to accept this forty percent (40%) of the residue of the Recombined Trust estate, then this forty percent (40%) shall be distributed ratably among the other Distributees

(2 CT 307, original capitalization.)

¹ Flora Turner’s November 1992 handwritten notes for a “Codicil/Amendment” expressly identified the Claremont Manor Health Care Replacement Fund as a beneficiary. (Exh. 8; 2 CT 343; 1 RT 31-32.)

The other trust distributees were individuals, including Ms. Banks, who in any event was to receive fifteen percent of the residue. (2 CT 307-308.) If any of those individuals were deceased at the time of distribution, then that individual's share would be distributed ratably among the other beneficiaries. (2 CT 307-308.) San Antonio Hospital Foundation and the Presbyterian Church were no longer named as beneficiaries.²

² In August 1990, Flora Turner also executed a will. (Exh. 5; 2 CT 330.) She left all of her estate to the Trust. If that gift failed, then she left it all to Willard. And if Willard predeceased her, then she divided her estate among San Antonio Hospital Foundation (30%), a Presbyterian Church in New York (15%), and various individuals. (2 CT 332-334.) Shortly thereafter, Flora executed a handwritten codicil in which she directed that if Willard did not survive her, various items of jewelry were to be gifted to specified persons. (Exh. 6; 2 CT 339.) In August 1992, she executed another handwritten codicil in which she reallocated her jewelry gifts among various contingent beneficiaries, including Ms. Banks. (Exh. 7; 2 CT 341.) Finally, in November 1992, she executed a Third Codicil that, among other changes, added a contingent gift of a fifteen percent share to Claremont Manor Health Care Center Replacement Fund. (Exh. 9; 2 CT 345.)

Mr. Banks also prepared the Second Amendment. (1 RT 78-79, 98-100.)³ He retained attorney Charles Althouse to perform an independent review of the estate plan. (1 RT 66-68; Exh. 19; 2 CT 374.) According to Althouse, with regard to the gift to Claremont Manor Healthcare Center Replacement Fund, the Turners told him “[t]hey wanted to assist the Claremont Manor in a building project that was under way or was going to be under way for the building of a healthcare facility.” (1 RT 68-69.) In his written memorandum to Mr. Banks, Althouse stated: “The 40% going to Claremont Manor would equate to \$800,000 which was exactly what they wanted.” (Exh. 18; 2 CT 372; 1 RT 70.)

F. Willard Turner Dies; The New Health Care Center Is Built With Borrowed Funds.

Willard Turner died shortly after the Second Amendment was executed. (1 RT 36.) In May 1999, Flora Turner executed a Third Amendment to the trust, deleting one gift to one individual and redistributing that gift ratably among the other individual distributees. (2 CT 327.) Flora did not change her gift to the Health Care Center Replacement Fund. She did resign as trustee and was replaced by Ms. Banks as successor trustee. (1 RT 38-41.)

To complete the campaign and construct the new health care center, additional funding was obtained through financing. By this time, Internext

³ Matthew Strathman, the attorney who worked for Mr. Banks, interviewed the Turners and initially drafted the Second Amendment. He believes he called Claremont Manor to confirm the proper designation and charitable status of the Replacement Fund, as Mr. Banks had instructed him to do, but Strathman cannot recall the conversation. (1 RT 77, 86-88, 90, 103; Exh. 11; 2 CT 352.)

had been formed from a merger of Pacific Homes and operators of other retirement communities. In 1999, Internext sold \$209,500,000 in bonds, to be repaid over thirty years, to generate funds for various projects, including replacement of the Claremont Manor skilled nursing facility. (Exh. 21; 2 CT 378, 386.)⁴

Construction started on the new Health Care Center in late 1999 or early 2000 and was completed in mid-2001. (1 RT 217-218.) Claremont Manor residents were kept informed of the Center's planning and actual construction. (1 RT 239-240.)

⁴ According to bond documentation, approximately \$19,000,000 of bond proceeds and \$4,500,000 in gifts from Claremont residents was to be used to demolish 17 existing independent living units, construct 31 new independent living units, construct 19 additional units for the assisted living facility and replace the existing 57-bed skilled nursing facility with a new 59-bed skilled nursing facility. (2 CT 386.)

According to Mr. Haugen, total construction costs were \$9,379,315. Donations and investment income to that time totaled \$6,196,286. (1 RT 218.)⁵ In addition, to pay for the construction, a \$200,000 loan was procured from another of the Foundation's sixty charitable funds, known as RASP, the "Resident Assistance/Special Projects, Claremont Manor" (1 RT 243; 2 RT 279; 2 CT 448)⁶ and the Foundation donated another \$737,000 (2 RT 367-368).

⁵ Haugen calculates donations of \$6,196,000, being equal to the amount transferred out to Front Porch to pay construction costs. He also calculates the balance due on bonds for construction of the healthcare center at 1.519% of the \$209.5 million financing, or \$2,746,352. (1 RT 255; 2 RT 318-319.) In a prior declaration, Haugen said gifts were \$4,799,000, and \$4,240,000 was still owing. Haugen testified those calculations were made on incomplete information. (1 RT 260-261.) But whatever the exact numbers, the evidence was consistent that donations fell far short of actual construction costs.

⁶ The RASP is a separate general ledger account on the Foundation's books. (1 RT 244.) Today, a little over \$30,000 remains due to the RASP on the \$200,000 loan. (1 RT 267.) Until the RASP loan is paid off, the Foundation will not transfer new replacement campaign contributions to Front Porch. Once the RASP loan is paid off, as new contributions come in, the Foundation board will be requested to authorize transfer of the funds to Front Porch with a donor restriction that they be used to retire Front Porch's debt associated with the new Health Care Center. (2 RT 303, 373-376.)

G. Flora Turner Benefits From The New Health Care Center.

Flora Turner broke her hip in May 2000 and was unable to walk after that. (1 RT 106-108). For a time she resided in the Claremont Manor's old skilled nursing facility. When the new skilled nursing facility was completed in July 2001, she moved there. She resided at the Health Care Center until she died, on December 8, 2005. (1 RT 38-41, 119-120.)

H. Flora Turner Dies; Ms. Banks Questions Whether The Replacement Fund Still Exists; It Does.

After Flora Turner died, Ms. Banks, who knew the new Care Center had been built, nevertheless called the Foundation to find out if the Replacement Fund still existed.⁷ In January 2006, Foundation Executive Keith Church wrote Ms. Banks: "This will serve to confirm that the Claremont Manor Care Center Replacement Fund is still in existence and appears on our general ledger under account number 32.33612." (Exh. 20; 2 CT 376, emphasis omitted; 1 RT 49.)

Also in January 2006, a final distribution of \$26,917.09 was made from the Turners' charitable annuity to the Foundation for the New Health Care Center at Claremont Manor. (Exh. 27; 2 CT 411.)

As noted above, the actual name of general ledger account number 32.33612 on the Foundation's books was, and is, Claremont Care Center

⁷ Ms. Banks testified that she reached a Donna Shaw at the Foundation. Shaw told Ms. Banks that she wasn't sure if the Replacement Fund still existed, but that if it did not, they could still use donations for upgrading the telephone system and to buy supplies. Shaw referred Ms. Banks to Keith Church for an answer to her question. (1 RT 48.)

Campaign. (Exh. 45; 2 CT 491.) That is the account into which charitable donations for the Care Center have been, and still are, deposited, and the account from which payments have been, and still are, made to Front Porch to reimburse Front Porch for documented expenses relating to Care Center construction costs. For example, the 2006 distribution from the Turners' annuity was recorded to that account. (2 CT 497; 1 RT 226-227.)

The general ledger account was a bookkeeping device. (2 RT 288.)

As permitted by law, the Foundation kept separate ledger accounts for each of its sixty charitable funds but ordinarily commingled cash from all funds in its general bank and investment accounts. (1 RT 215.)

The Foundation made an exception to its practice of commingling donations to its sixty charitable funds when contributions for the Claremont Care Center Campaign reached significant numbers. In 1998, the Foundation opened an investment account just for these contributions and for the income they generated. (1 RT 218-219, 246.) This was necessary to ensure the designated use of the contributions, because under generally accepted accounting principles, income on restricted gifts is not restricted. (2 RT 312.) Roughly \$4 million in cash went into this segregated investment account. (1 RT 219; 2 RT 312.) In addition, non-cash contributions such as stocks and bonds were transferred to that account to be sure that when they were liquidated, all of those gains would be credited to the Claremont Care Center Campaign. (1 RT 219.) The investment account was closed in early 2001 because all funds were depleted by construction costs. (1 RT 219-220, 246-247, 267; 2 RT 309, 314.) The remaining construction costs were paid out of loans. (1 RT 220-221; 2 RT 314.) Thereafter, gifts for the Campaign were commingled in the Foundation's general bank account as before. (1 RT 220; 2 RT 275.)

The general ledger account for the Claremont Care Center Campaign remains open and active. (1 RT 271; Exh. 45; 2 CT 491.)

STATEMENT OF THE CASE

A. Ms. Banks's Petition For Instructions.

In June 2006, Ms. Banks petitioned the probate court for instructions. (1 CT 28.) She alleged that she was in doubt whether forty percent of the trust estate should be distributed to the Claremont Manor Health Care Center Replacement Fund or ratably among other residuary beneficiaries. She acknowledged she was in a conflict between two groups of beneficiaries and may be alleged to have bias since she is a member of one of those groups. (1 CT 29.)

The Foundation responded that the Replacement Fund is still in existence and able to accept the gift. (1 CT 67-68, 72, 74-76.)

B. Ms. Banks's First Account.

In proceedings on Ms. Banks's first account and report to the court regarding the trust, she reported the property on hand, at original carrying value, plus income and gains minus disbursements and losses, was \$2,248,690.57. (1 CT 83-86, 112.) She again requested that the court decide the existence of the Replacement Fund and the Turners' intent with respect to the Fund. (1 CT 124.)

By stipulation of the parties, the court approved preliminary distributions totaling over \$700,000 to beneficiaries other than Ms. Banks. (1 CT 129, 131-132.)

C. The Court Trial.

The court (Hon. Frank Gafkowski, Jr.) conducted a trial over three days. (1 RT 1, 135; 2 RT 274.) The court heard testimony from Ms. Banks (1 RT 25, 104), Mr. Althouse (1 RT 65), Mr. Strathman (1 RT 76), Mr. Banks (1 RT 136), Mr. Haugen (1 RT 200; 2 RT 275), Ms. Tamburrano (1 RT 236) and Dr. Skelly (2 RT 328). All trial exhibits admitted in evidence are included in the Clerk's Transcript. (2 CT 270-505.)

D. The Court's Ruling.

Although the Foundation requested a statement of decision (1 CT 214)⁸ and although the court stated it would issue one and directed Ms. Banks to prepare one (1 CT 217; 2 RT 448), the court apparently never signed either of the two statements of decision Ms. Banks proposed. The superior court record contains neither of the proposed statements of decision nor any statement of decision signed by Judge Gafkowski. (1 CT 25-27; 2 CT 269.)

Ordinarily, a trial court's failure to issue a statement of decision is reversible error. (*Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681; *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130-1131.) Here, however, the court did state its decision orally and in a minute order, so it is clear what its

⁸ The request for a statement of decision posed these specific issues for decision: (1) What was the relationship between the Foundation and the Health Center? (2) Who was the intended recipient of the gift to the Replacement Fund? (3) Was the intended recipient still in existence when Flora Turner died? (4) Was the intended recipient able to accept the gift? (5) Was the gift intended to help pay for construction of the Health Care Center? And (6) Why did the gift lapse? (1 CT 214.)

statement of decision would have been. The court decided that the bequest to the Replacement Fund lapsed, not because the Fund did not exist (it clearly does exist), but because the Health Care Center was built before the Turners died. The court stated what it thought the Turners had in mind:

“I think what the Turners had in mind was once the health center was built, that gift was satisfied.”

(2 RT 437.)

“I don’t really think they gave any thought to the fact that once the building was built they would have a need to support it by paying off a mortgage or paying off a bond indenture, and I think for that reason there was no further fund in their mind and the gift lapses.”

(*Ibid.*)

“I think their concern was that the fund would continue to exist, the building would never be built, and that was their pray to the horribles [*sic*] and the reason for the condition.”

(2 RT 438.)

The court then expanded on the reasons for its ruling in a minute order issued the next day, September 3, 2008. (1 CT 21.)⁹ The court made several more attempts to divine what the Turners were thinking:

1. The Turners knew about the Foundation and could have inserted that name into the trust as a beneficiary and chose not to do so.

(*Ibid.*)

2. “There was talk at the time (1999) that cash and pledges had reached a goal, but that the cost of the new health care center was much

⁹ The minute order is not repeated separately in the clerk’s transcript, but it is quoted in full in the docket. (1 CT 21-24.)

greater and quite possibly Turner's [*sic*] felt that there might not be a new health center ever constructed." (*Ibid.*)

3. There was talk about getting help from Pacific Homes Foundations/Internext Group to assure the construction, but the Turners chose not to give the trust residue to the Foundation "with the thought that the money might never go toward a new health center." (*Ibid.*)

4. "The Turners wanted the new health center built and that was that; they were willing to help finance the construction and they used the fund name commonly being used by others in the fund raising efforts for their residue gift, but they were not going to give it to Pacific Homes Foundation with no assurance of a new health center; thus, they put conditions on the fund getting the money if the new health center was not built by the time of their deaths; if the new health center needed their money to be completed, during or after their deaths, the money was there for that purpose." (1 CT 21-22.)

5. The Turners did not tell their attorneys about what would happen if the new health center was built during their lifetimes and there was debt still owing on any specific project. There was talk about a large bond issue overriding all proposed improvements, including the new health care center but no discussion about allocating specific gifts to specific proposed improvements covered by the bonds. (1 CT 22.)

6. "The Turners' gift to the Claremont Manor Health Care Center Replacement Fund was as close as they could come to assure themselves that their residue would go to a new health care center, not the Pacific Homes Foundation and possibly other purposes." (1 CT 22.)

7. "[T]he new health center was completed at least four years before the survivor's death; the residue gift was no longer necessary to assure the construction of a new health care center, for it had been built;

and, the gift would serve no further intended purpose and thus, fails or lapses.” (1 CT 22.)

On November 13, 2008, the court signed its Order Instructing Successor Trustee. (1 CT 238.) The court overruled all of the Foundation’s objections and allegations and instructed Ms. Banks to distribute the forty percent of trust residue designated for The Claremont Manor Health Care Center Replacement Fund according to the Turners’ alternative disposition to other beneficiaries, including Ms. Banks. (1 CT 240.) Finally, the court ordered the Foundation to pay Ms. Banks’ court costs. (1 CT 241.)

The court also authorized a preliminary distribution of \$303,573.95 to Ms. Banks. (1 CT 252-253.)

E. The Foundation’s Appeal; Statement Of Appealability.

The superior court’s November 13, 2008 Order Instructing Successor Trustee is an appealable order. (Prob. Code, § 1300, subd. (c) [order instructing a fiduciary].)

Notice of entry of the order was served on November 18, 2008. (1 CT 244, 250.) The Foundation filed timely notice of appeal from the order on December 18, 2008. (2 CT 259; Cal. Rules of Court, rule 8.104(a)(2) [within 60 days of service of notice of entry].)

LEGAL ARGUMENT

II. STANDARDS OF REVIEW: SUBSTANTIAL EVIDENCE REVIEW FOR THE UNDERLYING FACTS; DE NOVO REVIEW FOR INTERPRETATION OF THE TRUST.

The interpretation of a written instrument, even though it involves questions of fact, is a judicial function to be exercised according to canons of interpretation so that the instrument's purpose may be given effect. (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.) An appellate court construes an instrument de novo if (a) the trial court's construction is based solely upon the terms of the written instrument without the aid of evidence, (b) where there is no conflict in the evidence, or (c) a determination has been made upon incompetent evidence. (*Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)

“Thus, ‘it is only when the foundational extrinsic evidence is in conflict that the appellate court gives weight to anything other than its de novo interpretation. . . .’” (*Estate of Breeden* (1989) 208 Cal.App.3d 981, 987, quoting *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891.)

Where, as here, “it appears that the probate court erred as a matter of law in its adjudication of the determinative issue – the nature of the testamentary gifts – and in such circumstances its findings contrary to the undisputed facts have no binding force.” (*Estate of Tarrant* (1951) 38 Cal.2d 42, 51; *Estate of Hicks* (1970) 3 Cal.App.3d 312, 317 [“Based largely upon Mr. Baer’s testimony as to the habits of the decedent, particularly his habit of making notes on matters to be discussed with Mr.

Baer, the trial court drew the inference, and thereupon made its finding, that the codicil was not executed with testamentary intent. We respectfully disagree”].)

**III. THE FUNDAMENTAL RULES OF INTERPRETATION:
GIVE WORDS THEIR ORDINARY MEANING AND
LIBERALLY CONSTRUE CHARITABLE GIFTS TO
UPHOLD THEIR VALIDITY.**

The same rules for interpretation of written instruments in general apply to trusts in particular. (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449.)

Two particular principles of interpretation apply here:

a. “We give the words of the instrument their ‘ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained.’” (*Ibid.* quoting Prob. Code, § 21122.)

b. “We start with the principle that gifts to charity are highly favored and will be liberally construed to uphold their validity whenever possible.” (*Estate of Lamb* (1971) 19 Cal.App.3d 859, 865; accord, *Estate of Clementi* (2008) 166 Cal.App.4th 375, 385 [“The general policy of this state is that gifts to charities are highly favored, and a charitable disposition in a will must be liberally construed to uphold its validity”]; *Estate of McNeill* (1964) 230 Cal.App.2d 449, 452 [the law favors gifts for charitable purposes].) Accordingly, “in case of doubt a gift must be interpreted in favor of a charity.” (*Estate of Loring* (1946) 29 Cal.2d 423, 435.)

IV. THE TURNERS' CHARITABLE BEQUEST TO THE CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND DID NOT LAPSE MERELY BECAUSE THE NEW CENTER WAS BUILT BEFORE THE TURNERS DIED; THE REPLACEMENT FUND STILL EXISTS, CONSTRUCTION LOANS HAVE NOT BEEN REPAID, AND THE CENTER CAN STILL BENEFIT FROM THE BEQUEST.

The Turners made a charitable bequest to the Claremont Manor Health Care Center Replacement Fund. Their only stated condition was that the "Fund" be in existence and able to accept their bequest at the time of distribution. (1 CT 45, ¶ EIGHT.D.1.) As the evidence shows, the Fund does exist (under the name of the Claremont Care Center Campaign)¹⁰ and can accept the bequest. (1 RT 271; Exh. 45; 2 CT 491.) The trial court did not find otherwise, nor could it have found otherwise. On its face, therefore, the gift is valid.

This should be the end of the matter, and the bequest should be distributed to the Foundation for the benefit of the Claremont Manor Health Care Center.

Yet the trial court ruled otherwise based on its attempts to read the Turners' minds. The gist of the court's ruling is this:

- "There was talk at the time (1999) that cash and pledges had reached a goal, but that the cost of the new health care center was much

¹⁰ "[I]t is well established law in this state that 'a gift will not be permitted to fail because of misnomer, misdescription, or ambiguity of description.'" (*Estate of Tarrant, supra*, 38 Cal.2d at p. 49, quoting *Estate of Steinman* (1939) 35 Cal.App.2d 95, 102.)

greater and quite possibly Turner's [*sic*] felt that there might not be a new health center ever constructed." (1 CT 21.)

- "The Turners wanted the new health center built and that was that; they were willing to help finance the construction and they used the fund name commonly being used by others in the fund raising efforts for their residue gift, but they were not going to give it to Pacific Homes Foundation with no assurance of a new health center; thus, they put conditions on the fund getting the money if the new health center was not built by the time of their deaths; if the new health center needed their money to be completed, during or after their deaths, the money was there for that purpose." (1 CT 21-22.)

- And, "the new health center was completed at least four years before the survivor's death; the residue gift was no longer necessary to assure the construction of a new health care center, for it had been built; and the gift would serve no further intended purpose and thus, fails or lapses. (1 CT 22.)

The law and the facts do not support either the trial court's reasoning or its conclusion. The question is what did the Turners say in their trust, not what the court imagines was on their minds. And even what the court imagines lacks evidentiary support.

For starters, what the Turners "quite possibly felt" (1 CT 21) is unsupported speculation. Possibilities are not evidence. (See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776, emphasis omitted ["A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant"] (quoting Prosser & Keeton, *Torts* (5th ed. 1984) § 41, p. 269)].)

And “[s]peculation or conjecture alone is not substantial evidence.” (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Myerchin v. Family Benefits, Inc (2008) 162 Cal.App.4th 1526, 1537 [same]; Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 490 [evidence insufficient where it “amount[s] to little more than guesswork”]; Baker v. Gourley (2000) 81 Cal.App.4th 1167, 1168 [possibility that event happened is insufficient to support a reasonable inference that it did happen]; California Shoppers, Inc v. Royal Globe Ins. Co. (1985) 175 Cal.App.3d 1, 45, citation omitted [“It is axiomatic that ‘an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work’”].) This rule against speculation goes for an inference of intent as well as any other. (White v. State of California (1971) 21 Cal.App.3d 738, 759, emphasis omitted [“there was no substantial evidence in support of the trial court’s critical finding of fact as to the county surveyor’s intent”].)

Moreover, no substantial evidence supports the court’s pivotal conclusion that the Turners’ gift was intended only to “assure the construction of a new health care center.” (1 CT 22, emphasis added.) The trust terms say nothing about limiting the gift to “assuring” the Center’s construction. It is a gift to the Replacement Fund, plain and simple. The word “assure” is not there nor can it be imputed to be there. None of the witnesses who spoke to the Turners at the time the trust was drafted testified that the Turners wanted to limit the gift to “assuring” the Center’s construction, much less that the Turners were afraid the Center would never be built. To the contrary, the Turners never broached the subject. The testimony was the following:

- According to attorney Althouse, the Turners said “they wanted to assist the Claremont Manor in a building project that was under

way or was going to be under way for the building of a healthcare facility.” (1 RT 68-69.)¹¹

- According to Ms. Banks, the Turners were looking forward to the construction and hoped it would be part of their living experience. (It was.) (1 RT 31.)

- According to Mr. Banks, as he put it in various ways, the Turners said “[t]hey wanted the building built” (1 RT 144, 151, 162), “they were thinking of the bricks and mortar” (1 RT 168), and “[t]hey wanted to contribute money to the construction of the healthcare center” (1 RT 169-170).

Paying for construction of the building would naturally include paying off the debt incurred to construct the building. Indeed, as the court acknowledged, the Turners knew that some construction costs would be financed. (1 CT 22 [“they were willing to help finance the construction”].)

Furthermore, financing part of the construction speeded up the construction process and assured it would be completed in time for at least Flora Turner to benefit from its prompt construction.

The notion that the Turners intended the gift to lapse as soon as the building went up also lacks any evidentiary support. Construction had been planned and was scheduled to begin shortly after the Turners re-wrote their trust and named the Replacement Fund as the largest single recipient of their trust estate. (1 RT 217-218, 239-240.) It does not follow, nor is it even a sensible conclusion, that the Turners would have had no interest in helping pay for the new Health Care Center after it was constructed, especially since theirs was a testamentary bequest that might not be

¹¹ In his written memorandum to Mr. Banks, Althouse stated the Turners’ intent even more broadly: “The 40% going to Claremont Manor would equate to \$800,000 which was exactly what they wanted.” (Exh. 18; 2 CT 372; 1 RT 70.)

distributed for years thereafter. They wanted to take advantage of the new facility if they could. There is no evidence they wanted a free ride once it was built; their trust says nothing of the sort.

Significantly, when Flora Turner died, neither Ms. Banks, who was the Turners' accountant, friend and successor trustee, nor Ms. Banks's husband, who was the Turners' trust lawyer, acted as if mere completion of the Care Center meant the bequest had lapsed. Instead, Ms. Banks inquired whether the Replacement Fund still existed. What difference would that make if completion of the building were all that mattered?

Ms. Banks had other arguments why the gift should be deemed to have lapsed. None of these holds any water.

First, Ms. Banks argued that the Turners had no general interest in charitable giving. That was demonstrably wrong. In previous iterations of their trust, the Turners named the San Antonio Hospital Foundation and a Presbyterian Church in New York as beneficiaries. (2 CT 284-285.) They also named Pacific Homes Foundation, for the benefit of the Health Care Center, as residual beneficiary of their charitable annuity trust. (2 CT 434, 436.)

Second, Ms. Banks argued that the Replacement Fund no longer exists. This argument was based on the fact that, for a time, the Foundation maintained a separate bank account for Health Care Center contributions and investment income but then closed the bank account when funds ran out. (1 RT 218-219, 246; 2 RT 312.) However, as the trial court recognized, as long as a charitable foundation maintains separate ledger accounts for each of its funds, it does not matter whether the funds are physically commingled in a single bank account or physically segregated in separate bank accounts. (1 RT 228.) The Claremont Care Center Campaign *ledger* account has existed at least since 1995, and still exists today, to record contributions. (1 RT 226, 271.) A *bank* account (in

one form or another) has always existed, and still exists today, in which to deposit those contributions. The Foundation continues to accept charitable contributions for that campaign and anticipates that there are future contributions waiting to be fulfilled by Claremont Manor residents in the form of charitable bequests. (1 RT 241-242.) The separate *bank* account was closed not because no more contributions were needed or expected, but because construction costs had drained the bank account. (2 RT 313-314.) The *ledger* account was always there and still is there. (Exh. 45; 2 CT 491.)

Third, Ms. Banks has relied on *Estate of Klinkner* (1978) 85 Cal.App.3d 942, for the proposition that the Turners' charitable intent should be disregarded because they named individuals, not charities, as contingent beneficiaries if their Health Care Center bequest lapsed. In *Klinkner*, the donor left a bequest to a particular church in the impoverished part of the town where he grew up. (*Id.* at p. 945.) By the time the donor died, however, the church had closed. The court ruled that the bequest had lapsed and should not go to some other church in some other place in light of the fact that the donor named contingent beneficiaries, including other charities, in case the named church no longer existed. (*Id.* at pp. 945-946.)

The obvious difference between *Klinkner* and this case is that, unlike the church, the Health Care Center and a charitable fund to support the Center, still exist. To nullify the Turners' bequest would defeat rather than further their expressed charitable intent.

Finally, Ms. Banks argued that the Turners had no intent to give money to the Foundation in general, but only to benefit the Health Care Center. But the Turners' bequest *can* go to benefit the Health Care Center. Among other things, it can help pay off debt incurred to build the Center.

There is no good reason to invalidate the Turners' charitable bequest. If it is possible to do so (and it is possible), the plain terms of the Turners' charitable bequest should be fulfilled.

CONCLUSION

The order instructing the successor trustee should be reversed with directions to enter a new order determining that the Turners' bequest to the Claremont Manor Health Care Center has not lapsed and should be distributed to the Pacific Homes Foundation for the benefit of the Claremont Manor Health Care Center.

Dated: April 8, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Appellant's Opening Brief was produced using 13-point Times New Roman type style and contains 7,186 words not including the tables of contents and authorities, caption page, Certificate of Interested Entities or Persons, or this Certification page, as counted by the word processing program used to generate it.

Dated: April 8, 2009

LLP

GREINES, MARTIN, STEIN & RICHLAND

By _____
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