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 REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

As Pacific Homes Foundation (the "Foundation") demonstrated in its Opening Brief, the trial court's ruling that the Turners' charitable gift to the Replacement Fund (the "Fund") lapsed cannot be sustained. The Fund exists and can accept the gift. Moreover, the gift can and will be used to help pay the cost of replacing the Claremont Manor Health Care Center (the "Center"). That is all the Turners required to effectuate their gift.

Trustee Marsha Meek Banks has not shown otherwise. Her 46-page Respondent's Brief boils down to three arguments:

1. **Banks argues**: The special investment account set up by the Foundation in 1998 to hold donations and investment income for replacing the Center was closed in 2001 when construction costs exhausted the funds held in that account. Therefore, the Fund ceased to exist. (RB 29, 33.)

The Foundation replies: The investment account was not the Fund. That account was just an investment tool. The Fund existed on the Foundation's books before the investment account was opened, while the account was open, after the account was closed, and the Fund still exists and can accept donations today.

2. **Banks argues**: The Center was replaced before the Turners died. Therefore, there is nothing left for the Fund to replace. (RB 29.)

The Foundation replies: The cost of replacing the Center has not yet been paid for. The Turners' gift can still be used to pay for the replacement cost.

3. **Banks argues**: The Turners intended that their gift be used to replace the Center and not for other Foundation projects. (RB 35.)

The Foundation replies: The gift will go to repay the cost of replacing the Center and not to any other project.

The judgment should be reversed with directions to the probate court to validate the Turners' testamentary charitable gift.

ARGUMENT

I. THE REPLACEMENT FUND STILL EXISTS AND CAN ACCEPT THE TURNERS' TESTAMENTARY GIFT.

A. The Trust Means Exactly What It Says: The Turners Intended A Gift To The Replacement Fund If The Fund Exists And Can Accept The Gift.

Banks argues that the paramount rule of interpretation is that a trust is to be construed according to the intention of the testator as expressed in the trust. (RB 24-25.)

The Foundation agrees. "[A] court cannot ignore the plain meaning of the words actually used by the trustor." (RB 26, citing *Estate of Simoncini* (1991) 229 Cal.App.3d 881, 890 ["We are not free to ignore the plain meaning of the words actually used by the testatrix in her Will"].) And the trustor's words must be viewed objectively. The trustor's intention is that expressed in the words of the trust, rather than some undeclared intention not found in the words of the trust. (*Id.* at p. 889.)

So, what does the Turners' Trust actually say? It says they intended to make a gift to the Fund, but if the Fund no longer exists or cannot accept the gift, then the gift goes to alternate beneficiaries, including Banks. (2 CT 307.)

Is there anything ambiguous about that? The *only* ambiguity is that the designation "Replacement Fund" does not exactly match the name of the account maintained by the Foundation for the purposes served by the "Replacement Fund." That account is entitled the "Claremont Care Center Campaign." (Exh. 45; 2 CT 490-497.)

There is no question that the "Claremont Care Center Campaign" account is the "Replacement Fund" that the Turners referred to. All funds donated to the "Replacement Fund" went to that account. (1 RT 207-208, 264.) Money from that account is used to help pay for construction of the new Center.

Banks counters with the argument that the Foundation "could not identify anything other than an accounting entry as the Replacement Fund – no separately identifiable fund or account with this name or purpose remained in existence after construction of the new Center." (RB 18.) But the trial court quite correctly did not buy Banks' argument. The court recognized that separate *ledger* accounts are just as real as separate *bank* accounts. (1 RT 214-215; 2 RT 288.) The court stated: "Well, be that as it may, Counsel, the court is mindful of the fact that trusts, all sorts of institutions commingle the funds but they keep separate accounts." (1 RT 228.)

B. The Replacement Fund Still Exists And Can Accept The Gift.

Banks questions whether the Fund is in fact "open and active." (RB 5-6, fn. 3.) However, she must be attributing some new meaning to those words. The account indisputably is open (1 RT 209, 263, 271; 2 CT 490-497) and there has been activity in the account at least through 2007 (1 RT 209; 2 CT 497).

Banks further asks this Court to imply that the trial court made a finding that the Fund no longer exists. (RB 45.) However, the law and the facts foreclose such an argument in this case.

First, because the trial court failed to sign a statement of decision on issues requested by the Foundation, its ruling cannot be sustained on a finding it did not actually make. (Code Civ. Proc., § 634; *Anderson v. Southern Pac. Co.* (1968) 264 Cal.App.2d 230, 234-235 ["Where findings upon an issue are requested but not made, an appellate court cannot conclude from the record that the trial court decided such issues against the complaining party"]; *In re Marriage of Stephenson* (1984) 162 Cal.App.3d 1057, 1090-1091 [same].)[1]

Second, Banks erroneously asserts that the "[t]he probate court simply could not have made the Order without finding that condition to the Bequest to the Replacement Fund – namely, that the Replacement Fund still existed – had not been satisfied." (RB 45.) The court could do so and did do so. The court found that the gift lapsed because the new Center was already built (2 RT 437), not because the Fund no longer existed.

Third, there is no evidentiary support for a finding that the Fund no longer exists. It's there in black and white, under the name the Foundation

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[1] The court stated it would issue a statement of decision: "I think we have to put a hold on these matters and do a statement of decision and I will ask Mr. Wunderlin [Banks' counsel] to do that." (2 RT 447.) "There will have to be new orders drafted and a statement of decision is necessary. Mr. Wunderlin will prepare that . . . ." (2 RT 448.) In an abundance of caution, the Foundation requested a statement of decision anyway. "MR. BARBARO: Your Honor, I would like to file my request for statement just so it is on the record. [¶] THE COURT: Very well." (2 RT 448.)

The Foundation clearly was entitled to a statement of decision (*Baron v. Baron* (1970) 9 Cal.App.3d 933, 938, fn. 2) and never got one.

used for it on its books, the "Claremont Care Center Campaign." (Exh. 45; 2 CT 490-497; 1 RT 208, 215, 264.)

Fourth, Banks erroneously equates the Fund with a separate investment account. (RB 6 ["the Replacement Fund (*i.e.*, the separate investment bank account)"].) She ignores the distinction between the Fund and the investment account. It is absolutely undisputed that Fund proceeds were at first commingled with other fund proceeds, then kept in the separate investment account when the amount became large enough to justify maintaining a separate account, and then again commingled with other fund proceeds when the money in the investment account was spent on construction and it no longer made sense to maintain a separate investment account and pay the costs associated with such an account. (1 RT 218-220, 267; 2 RT 275, 312-314.)[2]

Indeed, the separate investment account could *not* have been what the Turners meant by the Fund when they first named it as a gift recipient in 1992. (2 CT 345.) The separate investment account was not opened until 1998 (1 RT 218) and was closed in early 2001 when funds for construction of the new Center ran out (1 RT 220; 2 RT 314). Construction nevertheless went on, using borrowed funds (1 RT 220-222; 2 RT 314) and donations continued to be accepted (Exh. 45; 2 CT 490-497).

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[2] The investment account was opened to ensure that investment income on the funds intended for the new Center also would be directed to the new Center. If the funds were commingled with funds intended for other purposes, then the income on all the funds would not be credited solely for use in building the new Center. When funds in the investment account were finally exhausted, there was no point in incurring the fees and costs associated with a separate investment account. (1 RT 218-219, 246; 2 RT 312-314.) Subsequent gifts for the new Center then went into the general account, just as before the investment account was opened. (1 RT 220; 2 RT 275.)

Banks also argues that the Fund somehow ceased to exist because the original $5 million campaign goal for the new Center was reached by 1998. (RB 4, fn. 2.) But Banks misunderstands what happened. The Fund did not have $5 million in hand in 1998. Claremont Manor informed its residents that the "campaign ha[d] been highly successful in achieving its original goal of raising 5 million dollars in cash, *pledges, future charitable trusts and bequests*." (2 CT 452, emphasis added.) Pledges and future charitable trusts and bequests such as the Turners' bequest can't be spent on construction or anything else until they materialize. As Banks concedes, five million dollars had not yet materialized in 1998. (2 RT 405.)

Moreover, merely reaching the original campaign goal was not the Turners' expressed intent. The Turners amended their trust in 1999 and included their gift to the Fund. (2 CT 295, 307, 314.) If the Turners were relying on Claremont Manor's pronouncement's about the original campaign goal being reached in 1998, they would not have made any gift at all in 1999. They must have known more money was needed to construct the new Center, and that's why they made their gift.

The Turners' charitable gift should therefore be sustained.

II. THE TURNERS' GIFT WILL HELP PAY THE COST OF REPLACING THE HEALTH CARE CENTER.

Banks' alternative argument is that the Turners' gift can't be used to replace the Center because the Center has already been replaced. (RB 29.)

Banks is just playing with words. Suppose A offers to contribute to building B's house. B borrows money from a bank and builds the house. Can A then say, "Ha ha, the house is built, so no contribution"? Of course not. B was counting on A to help pay back the bank loan.

Or suppose a grandparent makes a testamentary gift to a grandchild's "college fund." By the time the grandparent dies, the grandchild has graduated college but still has substantial college loans to repay. Has the gift lapsed? Of course not. Yet that's exactly what Banks argues the Turners intended to do here – make a gift and then renege.[3]

Furthermore, there is *no* evidence that the Turners did not want their gift to help with the construction if it was not needed to assure it would be finished. That's certainly not what their Trust said. That's not even what the witnesses who were involved in drafting the Trust testified the Turners said. Their testimony was this:

- According to attorney Althouse, the Turners said "[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.)

- According to Ms. Banks, the Turners were looking forward to the construction and hoped it would be part of their living experience. (1 RT 31.)[4]

- According to Mr. Banks, the Turners "wanted the building built" (1 RT 144, 151, 162), "were thinking of the bricks and mortar" (1 RT 168), and "wanted to contribute money to the construction of the healthcare center" (1 RT 169-170).

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[3] Suppose everyone who made testamentary gifts to the Fund had the same secret intent that Banks would impute to the Turners? The Fund would have borrowed money to construct the Center sooner rather than later, with the anticipation that gifts would help pay it off, but then be stuck with debt and no gifts. In fact, there are other testamentary gifts not yet fulfilled. (1 RT 241-242.) Does Banks mean they are invalid, too?

[4] If all they cared about was their "living experience," why would they have made a *testamentary* gift?

The Foundation submits that paying for construction of the Center would naturally include paying off the debt incurred to construct the Center. Indeed, as the trial court acknowledged, the Turners knew that some construction costs would be financed. (1 CT 22 ["they were willing to help finance the construction"]; 1 RT 169-170 [Turners were willing to help finance the construction].) Furthermore, financing part of the construction through Front Porch bonds speeded up the construction process and assured the new building would be completed in time for at least Flora Turner to personally benefit from its existence.

Banks' notion that the Turners intended the gift to lapse as soon as the building went up not only defies common sense, it 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 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 Center after it was constructed.

Moreover, the fact that the remainder of the Turners' charitable annuity trust went into the Fund in 2006 after Flora's death cannot be ignored. The Turners had specified that the money be used for the new Health Care Center, and it was. (2 CT 448.)

Banks quibbles that the Foundation did not incur the construction loans, Front Porch did. (RB 7, fn. 6.) But the Foundation doesn't build buildings, Front Porch does. Money from the Foundation, and from the Fund in particular, went to Front Porch as reimbursement for the money Front Porch had already paid out for the construction. (1 RT 217-218.) The total cost of construction was $9,379,315 but donations and investment income to date totaled only $6,196,286. (1 RT 217-218.)

In fact, some of the construction money was borrowed from another Foundation fund (RASP ["Resident Assistance/Special Projects, Claremont Manor"]) that is intended to benefit Claremont Manor residents. (2 CT 448; 1 RT 243-244; 2 RT 279.) The RASP loan has not yet been paid off. When it is repaid, new contributions will go to retiring the additional $2.7 million debt incurred by Front Porch to build the new Center. (1 RT 224, 247; 2 RT 303.)[5]

In a similar vein, Banks asserts there is no evidence of any "construction loans." (RB 7, fn. 6.) Not true. She ignores the Front Porch $209 million bond issuance documentation that specifies a portion of the proceeds will be used to finance renovation and expansion at Claremont Manor, including "replace[ment of] the existing 57-bed skilled nursing facility with a new 59-bed skilled nursing facility." (2 CT 298, 386.)[6]

Finally, Banks repeatedly emphasizes that the Turners' gift was "conditional." Yes, the gift was conditional, but the condition is not the condition proffered by Banks. The condition that Banks would impute to the gift is a condition that the new Center not yet be completed. (RB 32.) This is exactly contrary to the condition found by the trial court, that the

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[5] Banks refers to the portion of the Front Porch bond obligations attributable to the new Claremont Manor Health Care Center as "minuscule." (RB 6.) Perhaps a $2.7 million debt is "minuscule" to Banks, but it is a significant financial obligation for Claremont Manor. And, even if the obligation were "minuscule," it is still an existing obligation that was incurred to build the new Center and that can be satisfied by the Turners' testamentary gift.

[6] As noted above, the Turners would have known about this borrowing for construction before they made their 1999 gift. The 1998 Claremont Manor campaign brochure stated that "[t]he funds will be raised through corporate financing as will part of the cost of the Care Center and the assisted living expansion." (2 RT 348-349; 2 CT 454.)

Turners were concerned that the new Center might never be built and their money would go to some other use. As the trial court reasoned, the Turners "put conditions on the fund getting the money if the new center was not built by the time of their deaths; if the new health center needed their money to be completed, during [sic] or after their deaths, the money was there for that purpose." (1 CT 22.) The new Center *does* need money to pay off the debt incurred to build it.

Thus, none of Banks' substantive arguments for sustaining the trial court's order holds water. We next reply to Banks' procedural arguments.

III. THE FOUNDATION HAS FAIRLY PRESENTED THE FACTS.

As respondents routinely do, Banks asserts that the Foundation's Opening Brief does not set forth all the material evidence. (RB 37.) In reality, the Foundation's brief set forth the trial court's findings and accepted most of them for purposes of this appeal. But the Foundation did challenge certain pivotal findings and fully set forth the material evidence on those points and on the points Banks was likely to argue on appeal. (AOB 3-13, 21-27.)

The Foundation was not obligated, and this Court would not want to wade through, every bit of evidence presented at trial, without regard to its materiality to the issues on appeal. What the rules require is "a summary of the significant facts. . . ." (Cal. Rules of Court, rule 8.204(a)(2)(C).) Otherwise, parties should, "when addressing aspects of the case not germane to the issues on appeal, avoid any unnecessary details." (2 Cal. Civil Appellate Practice (Cont.Ed.Bar 3d ed. 2008) § 12.28, p. 762.)

Banks struggles in vain to find some mischaracterization of the record in the Foundation's Opening Brief. Two examples should suffice:

First, Banks chastises the Foundation for "neglect[ing] to mention that (i) when the original Trust was drafted, Banks' wife was not a beneficiary of it, and (ii) when the Turners indicated they wanted to make a gift to his wife, Banks had another attorney in his law firm draft the revisions to the existing Trust and referred the Turners to an outside lawyer" for an independent review. (RB 10, fn. 11.)

In fact, the Foundation's Opening Brief explained exactly when Ms. Banks was added as a beneficiary of the Turners' estate (AOB 9, and fn. 2), that attorney Banks' associate initially drafted the trust amendment that added Ms. Banks as a beneficiary (AOB 9, fn. 3), and it was at that time that attorney Banks retained an outside attorney to independently review the Turners' estate plan (AOB 9).

Second, Banks criticizes the Foundation for stating that attorney Banks' associate, Matthew Strathman "believes he called Claremont Manor to confirm the proper designation and charitable status of the Replacement Fund" when, according to Banks, "[a]ctually, Strathman testified that he did make that call, and the billing records contain an entry reflecting that the call was made." (RB 11, fn. 12.)

In fact, Strathman did *not* testify he made the call. As the trial court concluded from his testimony, Strathman had no recollection of making the call. Just as the Foundation summarized in its Opening Brief (AOB 9, fn. 3), Strathman's testified only that he *believed* he made a call: "I believe I did" (1 RT 86), and "I believe I called them" (1 RT 90).

Why Banks makes such a fuss about these matters is a mystery. The Foundation has never suggested Banks or her husband intended to take advantage of the Turners. Whether Strathman made a call and whether someone at Claremont Manor or the Foundation told him the proper designee of the gift are red herrings. There is a Fund, kept on the

Foundation's books as the Claremont Care Center Campaign. (Exh. 45; 2 CT 490-497.)

Contrary to Banks' assertion, the Foundation's Opening Brief did not imply "that [Banks] somehow acted disingenuously by calling to find out whether the Replacement Fund still existed when she knew the new Center had been built." (RB 15, fn. 16.) Exactly the opposite. The Foundation's point was that Banks truthfully wanted to know whether the Fund still existed. She wanted to know that because she thought it mattered. And whether the Fund existed mattered only if it did *not* matter whether the new Center was already built, because the new Center *was* already built and Banks *knew* it was already built. (1 RT 119-120.) If (1) the Turners' intent was that the gift would lapse once the Center was built, and (2) the new Center was already built, then (3) why would Banks be inquiring about the existence of the Fund or anything else after the Turners died? She wouldn't. The fact that she did says it all.

Also contrary to Banks' contention, the Foundation has not "selectively identified the 'rulings' that it attacks." (RB 36, fn. 24.) Banks points to rulings two rulings.

First, she points to a ruling that the Turners did not make the Foundation the beneficiary of the bequest. But (a) the Foundation's brief does acknowledge the ruling (AOB 16), and (b) why would the Foundation "attack" that ruling? The Foundation has never contended that the Turners named the Foundation as recipient of their gift.

Second, Banks points to a ruling that the Turners named the Fund because "that 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 services." (1 CT 22.) Again, the Foundation has acknowledged that the Turners wanted their bequest to benefit the new Health Care Center, not other projects (AOB 17), but the

bottom line is that the Turners' gift *can* go to benefit the new Center by paying off the debt incurred to build it. (AOB 26-27.) That charitable gift should be sustained.

IV. BANKS IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES FROM THIS COURT.

In the conclusion to her Brief, Banks asks this Court to award attorney's fees on appeal. (RB 46.) Her request should be ignored because she makes no argument and cites no authority for this Court to award her fees on appeal. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545 [appellate court may disregard points made without argument and citation of authorities].) In any event, trustee's fees are an issue for the probate court to decide on proper notice to all interested parties. (Prob. Code, §§ 15680, et seq.)

Banks' fee request should be denied.

CONCLUSION

The trial court's order should be reversed with directions to enter a new order sustaining the Turners' charitable gift. In any event, Banks' request for attorney's fees on appeal should be denied.

Dated: July 9, 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 Reply Brief was produced using 13-point Times New Roman type style and contains 3,757 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: July 9, 2009

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