

183 of 193 DOCUMENTS

Estate of SAM GRIFFITH, Deceased. JEWEL ANN VERRET, Petitioner and Appellant,
v. CITY NATIONAL BANK, Objector and Respondent.

B133833

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR

2001 Cal. App. Unpub. LEXIS 1511

November 19, 2001, Filed

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PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, John B. McIlroy, Temporary Judge. Super. Ct. No. BP038896.

DISPOSITION: Affirmed.

COUNSEL: Laurence S. Klugman for Petitioner and Appellant.

Sullivan, Workman & Dee, Henry K. Workman, and Henry G. Bodkin, Jr., for Objector and Respondent.

JUDGES: VOGEL (C.S.), P.J. We concur: EPSTEIN, J., HASTINGS, J.

OPINIONBY: EPSTEIN

OPINION: Introduction

This appeal challenges the order of the probate court denying a petition to remove City National Bank (CNB) as trustee of a testamentary trust and to appoint in its place Santa Monica Bank (SMB). The petition claimed CNB's fees were excessive when compared to those charged by another institutional trustee. Since only six months had passed since CNB had been appointed trustee, the court found insufficient time had elapsed to make the determination and [*2] therefore denied the petition. We affirm the trial court's order, finding no abuse of discretion.

Factual and Procedural Background

The petition was submitted to the trial court based upon documentary exhibits, declarations, and testimony. That evidentiary showing established the following pertinent facts.

Sam Griffith created the testamentary trust for the benefit of his minor son Brandon who was born in 1984. n1 Brandon resides with his mother Jewel Verret who divorced Griffith in 1989. The trust is discretionary, giving the trustee power to distribute the funds necessary for Brandon's "proper care, support, maintenance and education" until he reaches majority. Its principal assets are minority interests in two limited partnerships which own and operate several hundred units of rental apartments. These two assets generate approximately \$160,000 in annual income. Griffith had earlier received these assets as a distribution from a testamentary trust created by his mother Barbara Saint Claire. For approximately 14 years, CNB had been one of the two cotrustees of the trust created by Saint Claire.

n1 Brandon will be 18 in May 2002. He will receive one-third of the trust principal at age 25, one-third of the remaining balance at age 32, and the final balance at age 37.

[*3]

In regard to his testamentary trust, Griffith designated two trustees: Thomas O'Sullivan and Claudette Andrews. He also named the two as co-executors of his estate.

Griffith died in January 1996. Through the appropriate writing, Andrews declined to serve as trustee. The executors of Griffith's estate nominated CNB to function as cotrustee with O'Sullivan.

In April 1998, Verret, as guardian ad litem for

Brandon, filed formal objections to the appointment of O'Sullivan and CNB as cotrustees and sought appointment of herself as trustee. The dispute was resolved through court-supervised mediation as follows.

On July 15, 1998, the parties agreed neither O'Sullivan nor Verret would serve as trustee and that CNB would be appointed sole trustee on condition Verret "can change the Corporate Trustee to another Corporate Trustee, subject to prior court approval, for any of the grounds set forth in *California Probate Code section 15642*.^[n2] As used in section 15642 the words 'other good cause' shall include, but not be limited to, (1) fees that are materially in excess of fees charged by another Corporate Trustee and, (2) unjustified hostility or lack [*4] of cooperation on the part of the Corporate Trustee toward Jewel Verret or Brandon."

ⁿ² *Probate Code section 15642*, subdivision (b) provides, in pertinent part: "The grounds for removal of a trustee by the court include the following: . . . [P] (5) Where the trustee's compensation is excessive under the circumstances."

On August 21, 1998, the court appointed CNB as trustee. Verret made no formal objection to that appointment.

O'Sullivan testified he had agreed to withdraw as cotrustee and to permit CNB to be the sole trustee because he "had worked with [CNB] for a number of years on the Barbara Saint Claire Trust. . . . [He] was familiar with what they did. [He] was pleased with what they did. They had 14 years' experience with these particular properties [which formed the rest of the Griffith trust]. The properties involve some 450 rental units. So even if they are limited partners, . . . there's quite a bit of review to be done, which [CNB] had done over the years. [*5] " O'Sullivan has never had any attorney-client relationship with CNB.

O'Sullivan further testified that although Verret's counsel had suggested SMB act as trustee, he was disinclined to do so for two reasons. The first reason was he was "pleased with what [CNB] had done [in the past], knowing the corporate fiduciaries in general charged the same sort of fees, and based upon the 14 years' experience with the trust assets, [he] felt that [CNB] was by far the best choice." The second was because the suggestion "had come from Jewell Verret's attorney, and Sam Griffith had told [him] very, very pointedly he wanted her [Verret] to have nothing to do with their financial affairs." O'Sullivan was concerned Griffith's wish would not be honored because "it's an unwritten rule, but generally the corporate fiduciary will use the attorney that the beneficiary of the

trust has requested."

On September 28, 1998, Verret requested CNB resign as trustee in favor of SMB. She claimed: CNB's fees "are materially in excess of the fees charged by [SMB]."

On October 15, 1998, CNB declined to resign, stating its "fees are consistent with what is charged by other corporate fiduciaries [*6] for this type of accounts."

On November 5, 1998, Verret filed a petition to remove CNB and appoint SMB as successor trustee.

At the time of the May 1999 hearing on the petition, the trust assets totaled \$860,783. The limited partnership real estate interests were worth \$760,000 and cash and "other assets" equaled \$100,783. CNB's fees are 1.2 percent of the first \$1 million of trust principal. This would result in an annual fee of \$10,449. The fees charged by four other banks were, respectively, 2 percent (Northern Trust Company), 1.25 percent (Bank of America), 1.1 percent (Wells Fargo Bank), and 1 percent (SMB). In order to obtain the Griffith Trust as a client, SMB agreed to depart from its standard charge of 1 percent. SMB would instead charge a flat fee of \$2,500 for each of the two partnership interests (\$ 5,000) and 1 percent on other trust assets (\$ 1,008) for a total per year of \$6,008. While SMB's fee would result in an annual saving of \$4,441 over the fee charged by CNB, CNB argued this saving was contingent on the trust retaining the partnership interests. That is, if the partnership interests were liquidated, the proceeds would be subject to a 1 percent [*7] fee which was not materially different from CNB's 1.2 percent fee. The court denied the petition. It found: "Insufficient time has elapsed during administration of the trust to allow the court to determine whether fees charged by [CNB] are materially in excess of fees charged by other corporate trustees in the greater Los Angeles area or are excessive under the circumstances."

This appeal by Verret follows. n3

ⁿ³ SMB Bank was subsequently acquired by U.S. Bank. On January 5, 2001, Verret moved this court "for [an] independent factual determination and to take additional evidence on appeal" to establish U.S. Bank would honor SMB's commitment to administer the trust on the basis offered earlier. The motion is hereby denied.

Discussion

Although both parties' briefs muddy the waters by arguing extraneous points, the issue raised by this appeal is very narrow: did the trial court err in denying Verret's motion

to remove CNB as trustee based upon the claim CNB's fees were materially in excess [*8] of those charged by another corporate trustee? n4 In that regard, the standard of review—which neither party has cited—is well-settled. "The removal and substitution of a trustee is largely within the discretion of the trial court. [Citations.]" (*Estate of Gilmaker* (1962) 57 Cal.2d 627, 633, 21 Cal. Rptr. 585, 371 P.2d 321.) Exercise of that discretionary power is dependent upon the particular facts of each case. (*Jones v. Stubbs* (1955) 136 Cal. App. 2d 490, 502, 288 P.2d 939.) The trial court should "not lightly exercise" its power to remove a trustee. (*Estate of Bixby* (1961) 55 Cal.2d 819, 826, 13 Cal. Rptr. 411, 362 P.2d 43.) As long as its decision "has support in the evidence," it will not be disturbed on appeal. (*Estate of Baird* (1955) 135 Cal. App. 2d 343, 350, 287 P.2d 372.)

n4 Verret's subsidiary argument that her petition should have been granted because CNB "is dissipating the assets of the Trust for its own benefit and contrary to the best interests of the Trust" need not be addressed because it was not raised in or ruled upon by the trial court.

[*9]

Contrary to what Verret seems to suggest, she does not have an automatic right to remove a trustee. By the terms of the 1998 agreement, Verret's right is subject to court approval which means she must establish to the satisfaction of the probate court that good cause for the removal exists. It therefore follows that her argument CNB "is estopped from opposing its removal" is likewise without merit. In this instance, her allegation of good cause was based on the claim CNB charged "fees that are materially in excess of fees charged by another Corporate Trustee." Consequently, the dispositive point is whether the trial court abused its discretion in implicitly finding that Verret had failed to make the required showing of good cause. We conclude it did not abuse its discretion.

For one thing, the evidence established CNB's fees were within the range charged by other corporate trustees. CNB charged 1.2 percent and four other banks charged, respectively, 2 percent, 1.25 percent, 1.1 percent, and 1 percent. In receiving that evidence, the trial court overruled Verret's objection that "what the regular fee schedule of Santa Monica Bank is, or any other bank, . . . is irrelevant [*10] and immaterial. " That objection was properly overruled because Verret too narrowly defined the issue. She incorrectly claimed the only issue is whether CNB's fees were excessive as compared to what *one* corporate trustee (SMB) would charge. Not so. For one thing, Verret's trial memorandum argued, relying upon *Probate Code section 15642*, subdivision (b)(5) (see fn. 2, *ante*),

that CNB should be removed because "its fees [were] excessive under the circumstances." This argument put in issue what other corporate trustees would charge because other trustees' fees are probative on the issue of whether CNB's fees are reasonable or excessive under the circumstances. For another thing, the fees other corporate trustees charged were relevant evidence because it helped to evaluate the credibility of Verret's claim and SMB's promise as to what SMB would charge to administer the Griffith trust. In a similar vein, it was relevant to know what SMB would have charged the trust had it not agreed to depart from its standard fee schedule.

Although SMB charged 1 percent, only 0.2 percent less than CNB, it agreed to depart from that standard charge and instead [*11] charge for each separate partnership interest, resulting in an overall fee of approximately 40 percent less than that charged by CNB. However, as CNB pointed out, the trust would lose the bulk of that saving were it to liquidate the two partnership interests and hold the proceeds in a form other than a partnership interest. Given that no evidence was produced about the possibility of such a liquidation and CNB had only been functioning as trustee for 10 weeks when Verret filed her petition to remove CNB and for six months when the hearing on the petition was conducted, we cannot say the trial court abused its discretion in finding "insufficient time has elapsed during administration of the trust to allow the court to determine whether fees charged by [CNB] are materially in excess of fees charged by other corporate trustees in the greater Los Angeles area or are excessive under the circumstances." n5

n5 In light of this analysis, there is no reason to reach CNB's arguments, only superficially raised below in its "Mandatory Trial Statement," that the trial court's denial of the petition can be upheld because of Verret's unclean hands or because Verret is estopped from seeking to remove CNB. While CNB's respondent's brief avers "it cannot be determined how or whether the trial court was influenced by the unclean hands and estoppel defenses in denying the petition for removal," the court's order denying the petition, which we have set forth above, makes clear the basis of its ruling.

[*12]

To a certain extent, Verret attempts to avoid the force of this conclusion by relying upon a document labeled "Appendix I" attached to her opening brief. It purports to show the "total excess fees" which CNB will charge until the final distribution of the trust in 2021. (See fn. 1, *ante*.) Verret's computations as to what CNB's future fees will be are based upon the assumption CNB will soon

reappraise the partnership interests to double their value, n6 thereby increasing CNB's 1.2 percent charge. Putting aside the fact these computations are based upon rank speculation, this "data" was never presented to the trial court and therefore cannot be considered on this appeal in determining whether its order was an abuse of discretion. (See, e.g., *Pulver v. Avco Financial Services (1986)* 182 Cal. App. 3d 622, 632, 227 Cal. Rptr. 491.)

n6 A document entitled "Personal Trust and Real Estate Fee Schedule" states: "It is City National Bank's policy to have all real property, property interests, partnerships and other assets which are managed by its Trust Real Estate Department, appraised on no less than a triennial

basis, the expense of which will be borne by the account."

[*13]

Disposition

The order appealed from is affirmed.

VOGEL (C.S.), P.J.

We concur:

EPSTEIN, J.

HASTINGS, J.