Filed 3/18/10 Banks v. Pacific Homes Foundation CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE 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.

E047364

(Super.Ct.No. RPRRS02996)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed with directions.

Greines, Martin, Stein & Richland, Marc J. Poster; Palermo, Barbaro, Chinen & Pitzer and Philip Barbaro, Jr. for Defendant and Appellant.

Ward & Ward, Alexandra S. Ward; Allard, Shelton & O'Connor and Gary C. Wunderlin for Plaintiff and Respondent.

I. INTRODUCTION

Willard and Flora Turner lived at Claremont Manor, a retirement community operated by Pacific Homes, a nonprofit public benefit corporation.[1] Claremont Manor had a health care center that needed to be replaced with a modern facility. Pacific Homes Foundation (the Foundation), the fundraising arm of Pacific Homes, created a fundraising campaign for that purpose. In February 1999, the Turners executed a revocable trust that provided for the distribution of 40 percent of the trust estate "to the CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND." However, "[i]f . . . 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 [trust] estate, then this forty percent (40%) shall be distributed ratably among" certain other specified beneficiaries.

Willard Turner died in 1999. Construction began on the new health care center in 2000 and was completed in 2001. Flora Turner died on December 8, 2005. At the time of her death, a portion of the debt attributable to the construction of the health care center remained unpaid and an account used for receiving contributions and bequests for construction of the health care center was still open and being used to repay the debt.

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[1] In 1999, Pacific Homes and two other entities merged to form The Internext Group, a nonprofit benefit corporation. The Internext Group subsequently changed its name to Front Porch Communities and Services. For ease of reference, we will refer to these entities collectively as Pacific Homes.

Marsha Meek Banks was the Turners' accountant and is the trustee of the Turners' trust. She is married to James Banks, the attorney whose firm prepared the Turners' trust documents. She is also one of the contingent beneficiaries who would benefit if the bequest to the Claremont Manor Health Care Center Replacement Fund fails. We will hereafter refer to Ms. Banks as petitioner.[2]

Following Flora Turner's death, petitioner made inquiries to determine whether the Claremont Manor Health Care Center Replacement Fund still existed. When the responses to her inquiries did not resolve her questions, she filed a petition in the superior court for instructions as to how to distribute the 40 percent share of the trust conditionally bequeathed to the Claremont Manor Health Care Center Replacement Fund. The Foundation filed a response to the petition, requesting the court to instruct petitioner to distribute the 40 percent share to it as the owner of the Claremont Manor Health Care Center Replacement Fund.

Following a bench trial, the court construed the conditional bequest such that it would be given effect only if the new health care center was not built by the time of the Turners' deaths. Based on this interpretation, the court found the conditional request

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[2] At oral argument, Ms. Banks's counsel requested that Ms. Banks be referred to as petitioner, not plaintiff. To conform to the California Style Manual, Ms. Banks is referred to as "plaintiff" in the title, or caption, of this opinion. (See Cal. Style Manual (4th ed. 2000) § 6:47 [in matters of trust administration, "the lower court designations of 'Petitioner' and 'Respondent' are changed to 'Plaintiff' and 'Defendant'"].) However, because we attribute no legal significance to the different labels in this case, we will accommodate the request and refer to Ms. Banks as "petitioner" in the body of the opinion.

lapsed or failed because the new health care center had been built, and instructed the petitioner to distribute the subject 40 percent share to the surviving named contingent beneficiaries, including petitioner. The Foundation appealed.

We construe the language at the center of this dispute as a bequest to the Foundation in trust for the payment of the expenses of construction of a new Claremont Manor health care center. Because we hold that such expenses include the repayment of loans incurred for such construction, we reverse the trial court's order.

II. SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. *Factual Background*

Petitioner performed tax and accounting services for the Turners since 1978. At some point, she referred the Turners to her husband, James Banks, an estate planning attorney. In 1990, Mr. Banks, or other attorneys in his office, prepared a revocable trust, which the Turners executed. The trust document did not mention Claremont Manor.

In 1992, the Turners moved to Claremont Manor retirement community. Claremont Manor is operated by Pacific Homes. The retirement community includes independent living apartments, assisted living accommodations, and a skilled nursing facility known as the Claremont Manor Health Care Center.

The Foundation is a nonprofit public benefit corporation whose purpose is to provide charitable support for retirement communities operated by Pacific Homes.[3]

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[3] According to its articles of incorporation, the Foundation is engaged "in the solicitation, receipt, investment and administration of property, and from time to time by

[footnote continued on next page]

In the early 1990's, residents of Claremont Manor expressed interest in replacing the community's health care center. The Foundation responded by creating a fundraising campaign for a new health care center. Dr. John Skelly, the executive director of the Foundation, gave the fundraising project the title, "the new Claremont Manor Care Center Campaign." According to Skelly, Claremont Manor residents referred to it as "a replacement fund." In correspondence, Skelly referred to the campaign at different times as the "Claremont Manor Health Care Center Replacement Fund," the "new Claremont Manor Health Care Center Campaign," the "new Claremont Manor Skilled Nursing Center," or the "new Claremont Manor Health Care Center." The Foundation set a goal of raising $5 million for the new center.

"Claremont Manor" is a fictitious business name used by Pacific Homes. Donations for the health care center campaign were made by check payable to the Foundation, with the donor designating in some manner (such as by a notation on the check) that the funds were to be used for the new health care center. According to the Foundation's accountant, if someone wrote a check payable to the Claremont Manor Health Care Center Replacement Fund, the donor would have been asked to write a new check payable to the Foundation.

Initially, donations for the new health care center were deposited into the Foundation's general investment account. To ensure that money contributed for the new

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disbursing such property and the income therefrom to or for the benefit of the retirement and skilled nursing facilities operated by . . . Pacific Homes."

health care center was used for the construction of the new center, the Foundation created a separate ledger account in the Foundation's books. This account was labeled the "Claremont Care Center Campaign" and assigned account No. 32.33612.

In November 1992, the Turners amended their revocable trust to provide an unconditional gift to be distributed upon their death of 15 percent of their trust estate to the "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND." The amendment was prepared by Attorney James Banks or other attorneys in his law firm. The name—Claremont Manor Health Care Center Replacement Fund—was given to Mr. Banks by Flora Turner. Flora Turner concurrently executed a codicil to her will that included a bequest to the same "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND."

Among other methods for contributing money for the new health care center, the Foundation promoted the creation of charitable remainder annuity trusts. In June 1997, the Turners established such a trust in the principal amount of $50,000. The Foundation is the trustee and the sole charitable remainderman of the trust. The Turners did not have the trust document reviewed by counsel. In connection with this trust, they were provided with a form on which they could designate the purpose for which the funds could be used. The choices on the form were: "Resident Assistance, Claremont Manor," "Resident Assistance/Special Projects, Claremont Manor," "New Health Care Center," and "Other, Claremont Manor." The last choice is followed by a space for writing in instructions for use of the funds. The Turners placed their initials in the space for "New

Health Care Center." According to the Foundation's accountant, funds so designated could be used only for construction of the new health care center.

By 1998, the fund for the construction of the health care center had more than $4 million in assets. In that year, the Foundation opened a separate investment bank account for funds donated for the new health care center and transferred the funds that had been designated in ledger account No. 32.33612 to the new bank account. The Foundation was the owner of the separate account. The account was opened so that income earned on the donated funds would be used for the construction of the health care center.

That same year, the Foundation proposed to expand the project to include expansion of assisted living accommodations and other improvements. In a brochure for the project, the Foundation stated that it had achieved the original goal of raising $5 million for the new health care center, including "pledges, future charitable trusts and bequests." For the expanded project, the Foundation sought to raise an additional $2 million over an 18- to 24-month period. Contributors could designate whether they wanted funds to be used for the health care center or the expanded assisted living accommodations. The Foundation did not succeed in raising the additional amount.

In late 1998 or early 1999, the Turners met with Mr. Banks to revise their estate plan. They told Mr. Banks they wanted to retain the bequest to the Claremont Manor Health Care Center Replacement Fund because, according to Mr. Banks, "[t]hey wanted the building built." The Turners, he said, "were thinking of the bricks and mortar." When asked about the condition placed on the bequest regarding the existence of the

Claremont Manor Health Care Center Replacement Fund and its ability to accept funds, Mr. Banks stated that the Turners "wanted to have this building built and they didn't want anything beyond that . . . ."

Mr. Banks assigned the task of drafting a second amendment of the Turners' revocable trust to another attorney in his firm, Matthew Strathman. Mr. Strathman prepared this document, which we will refer to as the Second Amended Trust. The Second Amended Trust document includes an article EIGHT.D., which is the focus of the dispute in this case. This article provides for the distribution of assets defined as the "Recombined Trust" following the death of the last surviving spouse. Paragraph 1 of article EIGHT.D. provides: "Forty percent (40%) of the residue of the Recombined Trust estate shall be distributed to the CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND. If, at the time of the distributions called for in Article EIGHT.D, 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 described in" other provisions in article EIGHT.D.

Mr. Banks testified that when one of his clients wanted to make a bequest to a charitable organization, it was his firm's practice to contact the organization to make certain the name of the entity and to ensure that the entity was a charitable organization within the meaning of section 501(c)(3) of the Internal Revenue Code. Mr. Strathman

testified at trial that he called Claremont Manor for this purpose. However, he could not recall this conversation.

Petitioner is among the "other Distributees" who would receive a greater share of the assets if the gift to the Claremont Manor Health Care Center Replacement Fund failed. Because Mr. Banks is married to petitioner, Mr. Banks retained Attorney Charles Althouse to perform an independent review of the estate plan. Mr. Althouse interviewed the Turners, who told him that 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," and "they wanted to assist in that building and that construction." In a memorandum regarding his meeting with the Turners, Mr. Althouse noted that the "40% [of the Turners' $2 million estate] going to Claremont Manor would equate to $800,000 which was exactly what they wanted."

The Turners executed the Second Amended Trust on February 12, 1999. Willard Turner died two weeks later.

In May 1999, Flora Turner asked petitioner to be trustee of the trust. Petitioner accepted. Around the same time, Flora Turner executed a Third Amendment to the trust. She did not alter the bequest to the Claremont Manor Health Care Center Replacement Fund.

Construction on the new health care center began in early 2000 and was completed by the middle of 2001. The total cost of the construction was approximately $9.4 million. Approximately $6.2 million had been raised through donations for the new health care

center.[4] These funds, which were used to pay for the construction, were exhausted by early 2001. Most of the additional funds needed to pay for the construction consisted of a portion of the proceeds from the sale of bonds by Pacific Homes.[5] In addition, the Foundation borrowed $200,000 from another of the Foundation's charitable funds known as the Resident Assistance/Special Projects (RASP) fund.

Flora Turner was hospitalized after breaking her hip in May 2000. Following surgery, she lived in the old Claremont Health Care Center. She moved into the new health care center after it was completed in July 2001. She lived there until her death in December 2005.

In February 2001, after all the money in the segregated investment account was used to pay for construction costs, that account was closed to avoid the fees and costs associated with the account. Thereafter, contributions received for the health care center were again deposited into the Foundation's general account and the amount was entered in the Foundation's books under ledger account No. 32.33612. Following Flora Turner's death, the Foundation received the final distribution check from the Turners' 1997 charitable remainder annuity trust. The check, in the amount of $26,917.09, was recorded in the Foundation's books under the account No. 32.33612 for the Claremont

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[4] Approximately $2.2 million of this amount was investment income earned on donations. This amount also included approximately $737,000 donated by the Foundation.

[5] The bond sale raised $209.5 million for a variety of specified purposes, including the construction of the new Claremont Manor Health Care Center.

Care Center Campaign. The money was used to repay a portion of the $200,000 loan from the RASP fund. A printout of transactions in that ledger account shows approximately $200,000 in credits to the account between March 2001 and March 2007, most of which occurred prior to 2003. According to the Foundation's accountant, this account was in existence at the time of trial and still receives gifts for the construction of the new health care center.

Following Flora Turner's death in December 2005, petitioner reviewed the trust documents and questioned whether the Claremont Manor Health Care Center Replacement Fund was still in existence. She made inquiries by telephone to people at Claremont Manor and the Foundation, but did not receive a satisfactory answer. In January 2006, she received a letter from Keith Church, an executive with the Foundation. Mr. Church wrote: "This will serve to confirm that the Claremont Manor [Health] Care Center Replacement Fund is still in existence and appears on our general ledger under account number 32.33612. While we have not actively solicited donations to this fund in recent years, we have continued to receive deferred gifts to the fund in the form of planned gift residue and bequests, even as recently as last year." (Italics omitted.)

Petitioner was not convinced. The existence of a general ledger account number, she explained, could indicate an inactive account that was never deleted from the accounting system; it did not necessarily mean that the Claremont Manor Health Care Center Replacement Fund existed.

In June 2006, petitioner petitioned the superior court for instructions as to the distribution of the 40 percent share of the trust estate to be given to the Claremont Manor Health Care Center Replacement Fund.[6] The Foundation filed a response in which it requested that the 40 percent share be distributed to it on behalf of the Claremont Manor Health Care Center Replacement Fund.

At the time of trial, the amount owed on the bond indebtedness attributable to the construction of the new health care center was approximately $2.7 million.[7] In addition, the Claremont Care Center Campaign fund still owed approximately $30,000 to the RASP fund. The Foundation's accountant testified that if the Foundation received the funds from the Turners' bequest, the money would be placed in the Foundation's general

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[6] The petition was filed pursuant to Probate Code section 9611, subdivision (a), which provides, in relevant part: "In all cases where no other procedure is provided by statute, upon petition of the personal representative, the court may authorize and instruct the personal representative, or approve and confirm the acts of the personal representative, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith."

Because petitioner filed the petition in her capacity as the successor trustee of the Turners' trust, not as a "personal representative," Probate Code section 9611 appears to be unavailable to her. (See *Estate of Webb* (1969) 269 Cal.App.2d 172, 174; Ross et al., Cal. Practice Guide: Probate (The Rutter Group 2009) ¶ 14:277, p. 14-60 (rev. #1, 2008).) However, the relief she requested is available pursuant to Probate Code section 17200, under which a trustee of a trust may petition the court for instructions and to determine questions concerning the construction of a trust instrument. (See Prob. Code, § 17200, subd. (b)(1), (6).)

[7] The Foundation's accountant derived this figure by first calculating the percentage of the bond proceeds that were obtained to pay for the remaining construction costs. He then applied this percentage (1.519 percent) to the balance owed on the bonds at the time of trial to arrive at $2,746,352.

fund and reflected in ledger account No. 32.33612 for the Claremont Care Center Campaign; the Foundation would transfer funds to pay the remaining balance due to the RASP fund and then transfer the remaining money to Pacific Homes with a donor restriction that the money go toward paying off the debt associated with the construction of the new health care center. In this way, the accountant concluded, the funds received from the Turners would be applied to the construction of the new health care center.

B. *The Trial Court's Findings and Ruling*

Following a bench trial, the court announced its finding that the "intent of the Trustors was to contribute to the building of the CLAREMONT MANOR HEALTH CARE CENTER. That once it was built[,] their specific gift sati[s]fied the purpose of the trust gift."

The Foundation requested a statement of decision. The court directed counsel for petitioner to prepare a statement of decision. Although service of a proposed statement of decision is acknowledged by the Foundation when it filed written objections to a proposed statement of decision, neither a proposed nor a final statement of decision is included in our record.[8]

In its opening brief on appeal, the Foundation points out that a trial court's failure to issue a statement of decision when there has been a timely request to do so ordinarily

[8] Although the trial court's register of actions indicates that on November 4, 2008, petitioner's counsel was directed to "resubmit the Statement of Decision in [its] original form to the Court for [signature]," it does not appear that this was done. Nor does the register of actions disclose that any statement of decision was ever filed.

requires reversal. (See, e.g., *Social Service Union v. County of Monterey* (1989) 208 Cal.App.3d 676, 681.) However, the Foundation indicates that it is not asserting this failure as a ground for reversal because "the court did state its decision orally and in a minute order, so it is clear what its statement of decision would have been." The Foundation then refers us to the trial court's findings and conclusions of law set forth in the trial court's docket sheet. These findings and conclusions are:

"1. [¶] Turners knew of the identity of Pacific Homes Foundation from their dealings with the annuity in favor of the same in 1997 and could have inserted that name into the trust as the beneficiary but quite apparently chose not to.

"2. [¶] There was talk at that time (1999) that cash and pledges had reached a goal, but that the cost of the new health care center was much greater and quite possibly Turner's felt that there might not be a new health center ever constructed.

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

"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.

"5. [¶] The Turners engaged in no conversations with Attorneys Banks, Althouse, or Strathman about what would happen to their trust gift to the fund if the new health center was built during their lifetimes and there was debt still owing on any specific project. By the time of the 1999-2nd Trust Amendment, 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.

"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.

"7. [¶] In the case in chief, 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.

"8. [¶] The residue of the Turner Trust shall be distributed to the remaining beneficiaries as provided in the trust instrument."

In November 2008, the court issued an order instructing petitioner to, among other acts, distribute the subject 40 percent share of the Turners' residual trust estate to the surviving individual beneficiaries. This appeal followed.

III. DISCUSSION

A. *Applicable Rules of Construction*

"In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker." (*Estate of Gump* (1940) 16 Cal.2d 535, 548; see also *Estate of Russell* (1968) 69 Cal.2d 200, 213 (*Russell*).) In ascertaining the maker's intent, courts employ an objective test: the intention to be determined is that which is actually expressed in the language of the instrument, not some undeclared intention that may have been in the maker's mind. (*Estate of Simoncini* (1991) 229 Cal.App.3d 881, 888-890; Prob. Code, § 21102, subd. (a).) However, this does not preclude the court from examining "the instrument in the light of the circumstances surrounding[] its execution so as to ascertain what the parties meant by the words used." (*Russell, supra,* at pp. 208-209.) If, in light of the evidence of such circumstances, the words used by the maker are reasonably susceptible of different meanings, extrinsic evidence is admissible to show what the maker meant. (*Id.* at p. 212; *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1132-1133.) On the other hand, if the words are not reasonably susceptible of different meanings, there is no uncertainty arising from the document and evidence proffered to show an intention different that that expressed by the words is inadmissible. (*Russell,*

supra, at p. 212.) Extrinsic evidence may not "'give [the writing] a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.]" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 (*Parsons*).)

B. *Standards of Review*

"[I]t is 'a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.'" (*Estate of Dodge* (1971) 6 Cal.3d 311, 318; *Russell, supra,* 69 Cal.2d at p. 212.) When extrinsic evidence is admitted to interpret ambiguous language and the evidence concerning the maker's intent is in conflict, we will defer to the trial court's findings as long as it is supported by substantial evidence. (*Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407 [Fourth Dist., Div. Two]; *Estate of Kaila, supra,* 94 Cal.App.4th at pp. 1133-1134, fn. 6.) We are not, however, bound by inferences drawn by the trial court from uncontradicted evidence or by any determination made upon incompetent evidence. (*Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126, 134; *Russell, supra,* at p. 213.) If the evidence is not in conflict, construction of the instrument is a question of law and we will independently review the writing. (*Parsons, supra,* 62 Cal.2d at p. 865; *Estate of Kaila, supra,* at pp. 1133-1134, fn. 6.)

Petitioner contends that evidence conflicted "on several critical points," and specifies two: "(a) whether the Replacement Fund consisted of the separate investment bank account that was closed before Flora's death or the ledger account number that

remains on [the Foundation's] books, and (b) whether the Turners intended that the Bequest to the Replacement Fund be used to pay down debt incurred in connection with the construction of the new Center if that Center had been built and all 'replacement funds' had been spent by the time they both died."

As to the first point of alleged conflict, the evidence is undisputed as to facts concerning the initial creation of the ledger account for the new health care center campaign, the opening of the separate bank account in 1998, the closing of that bank account in 2001, and the subsequent use of the ledger account for the receipt of contributions for the new health care center. Petitioner contends the closing of the separate bank account in 2001 effectively terminated the fund; the Foundation argues that the closing of the bank account had no effect on the existence of the fund, which continued to exist under ledger account No. 32.33612. The asserted conflict, however, is not a conflict in the *evidence*—it is undisputed that the separate bank account closed in 2001 and the ledger account remains open—but a dispute as to how the conditional bequest operates in light of such evidence. The resolution of this dispute is a judicial function which we determine independently. (See *Parsons, supra,* 62 Cal.2d at p. 865.)

The other purported conflict in the evidence identified by petitioner concerns the ultimate issue of the Turners' intent with respect to the subject bequest. However, the evidence bearing upon that intent—from the evidence of the circumstances surrounding the making of the document to the language of the trust document itself—are not materially in dispute. Indeed, the trial court did not identify any conflict in the evidence

or expressly make any findings based upon the credibility of one witness over another. Accordingly, we review this fundamental issue de novo. (See *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.)

C. *Discussion*

The Turners bequeathed 40 percent of their residual trust assets to the "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND," unless this fund "is no longer in existence or is otherwise unable to accept" the bequest. According to petitioner, the Claremont Manor Health Care Center Replacement Fund means the money "contained in the separate investment bank account"; once this account was depleted and the new health care center was built in 2001, the fund ceased to exist and the gift lapsed. The Foundation, on the other hand, contends that the bequest refers to the fund created by the Foundation under the name Claremont Care Center Campaign and assigned ledger account No. 32.33612, which remains open to receive charitable gifts and bequests to pay for the construction of the health care center.

Initially, we note there is no evidence that the name of the fund set forth in the Second Amended Trust—the Claremont Manor Health Care Center Replacement Fund—is the name of any distinct legal entity or organization capable of accepting a gift.[9] Even the name "Claremont Manor" is merely a fictitious business name used by Pacific Homes. However, it is well-established that "'a gift will not be permitted to fail because

[9] Probate Code section 6102 provides that a disposition of property by will be made "to any person, including but not limited to" an individual, a corporation, an unincorporated association, and various political entities.

of misnomer, misdescription, or ambiguity of description.'" (*Estate of Tarrant* (1951) 38 Cal.2d 42, 49; *Estate of Steinman* (1939) 35 Cal.App.2d 95, 102-103; *Estate of Brehm* (1931) 116 Cal.App. 206, 208.) This is particularly true when it appears, as it does here, that the makers intended to make a charitable gift. (See *Estate of Tarrant, supra,* at pp. 46, 49; *Estate of McDole* (1932) 215 Cal. 328, 332-333; *Estate of Moore* (1961) 190 Cal.App.2d 833, 838.) Before determining what entity, if any, should properly receive the gift, we first attempt to ascertain the meaning of the words used in the Second Amended Trust.

The undisputed evidence of the circumstances surrounding the making of the Turners' trust documents reveals the following: the Turners lived at Claremont Manor; Claremont Manor residents expressed their desire for a new health care center; the Foundation responded by creating a fundraising campaign for a new health care center; this response included the creation, ownership, and management of a fund, evidenced by an internal ledger account, which the Foundation titled the "Claremont Care Center Campaign"; this account was used to account for donations for a new health care center and was described by the director of the Foundation at times as the "Claremont Manor Health Care Center Replacement Fund" and at other times with similar words; Claremont Manor residents referred to that account as the "replacement fund"; and the Turners provided their estate planning counsel with the name "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND." Such evidence permits only one reasonable construction of the reference in the Second Amended Trust to the Claremont

Manor Health Care Center Replacement Fund: the words refer to the fund created, owned, and managed by the Foundation for the new Claremont Manor Health Care Center.[10] Indeed, there is no suggestion in the evidence that the Turners were referring to any other account or fund. The "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND" is thus one and the same as the fund designated by the Foundation as the "Claremont Care Center Campaign" fund.

As just noted, the Foundation initially accounted for the money donated for the new health care center by using an internal ledger account, which was assigned account No. 32.33612.[11] It subsequently transferred the money evidenced by that ledger account to a separate bank account owned by the Foundation. The creation of this bank account and the transfer of money into that account, we believe, has no bearing on the meaning of

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[10] There appears to be no dispute as to the meaning of the word "fund" as it appears in the Second Amended Trust. Petitioner, citing to Webster's dictionary, defines that term in this context as "'a sum of money or other resources whose principal or interest is set apart for a specific objective.'" The Foundation does not disagree with this definition and there is nothing in the record to suggest that the Turners intended the word to have a different meaning. Our references to the Foundation's "fund" have the same meaning.

[11] Arguably, the Foundation's use of a ledger account to manage the donations did not sufficiently set the donations apart from the Foundation's general account to constitute a "fund." Indeed, petitioner argues that "the ledger account number is not a 'fund,' it is simply a label." We disagree. Although the donations for the new health care center were initially commingled in the Foundation's general bank account, the use of a separate ledger account to manage and account for the donations sufficiently sets such moneys apart from the Foundation's other moneys to constitute a "fund." (See, e.g., *Cavoretto v. City of Richmond* (1969) 270 Cal.App.2d 726, 728 [pension fund moneys commingled with city's funds in general bank account maintained by separate ledger accounts as "a bookkeeping device"].)

the "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND." The bank account did not exist when the Turners first instructed their estate planning lawyer to create the gift to that fund. When the Second Amended Trust was executed, the Turners retained the same language they had used when the only fund they could have been referring to was the fund evidenced by the Foundation's ledger account. There is no evidence that they intended the words "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND," as used in the Second Amended Trust, to have a meaning different from the same words used in the prior version of their trust. Indeed, there is no evidence that the Turners were ever aware that a separate bank account was created for the fund. The fund referenced in the Second Amended Trust, we conclude, refers to the same fund created and maintained by the Foundation for the new health care center regardless of whether that fund was evidenced by a ledger account or a separate bank account.

Because the subject fund is not synonymous with the bank account created in 1998, it follows that the closing of the bank account did not necessarily cause the fund to cease to exist. The money remaining in the bank account, as well as new donations and testamentary gifts for the health care center, were thereafter accounted for by using the Foundation's ledger account No. 32.33612. Just as the transfer of the money reflected in ledger account No. 32.33612 to the separate bank account in 1998 did not *create* the fund, the closing of the bank account in 2001 and the transfer of the money in that

account back to ledger account No. 32.33612 did not *terminate* the fund. Thus, these events did not cause the fund to be "no longer in existence" for purposes of the bequest.

The Foundation points out that ledger account No. 32.33612 indisputably remains open and, therefore, the fund still "exists." The Foundation argues that 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." To the extent the Foundation contends that the fund exists as long as it keeps ledger account No. 32.33612 open, we reject that interpretation. If all expenses associated with the construction of the new health care center have been paid and ledger account No. 32.33612 remained open only because no one had deleted it from the organization's computerized accounting system, it seems to us that the fund no longer exists in any meaningful sense. As set forth above, a "fund," in the sense it is used here, refers to money that is "set apart for a specific objective or activity." (Webster's 3d New Internat. Dict. (1993) p. 921.) Here, the specific objective that defines the subject fund is, as the trial court found, to finance the construction of the new Claremont Manor Health Care Center.

The question regarding the fund's existence, therefore, is whether there remains any expense associated with constructing the new health care center to be paid out of the fund. As petitioner points out, the building itself has been built; the contractors, laborers, and materialmen have all been paid. The Foundation asserts, however, that paying for construction of the new center "would naturally include paying off the debt incurred to construct the [health care center]." We agree with the Foundation. The contractors,

laborers, and materialmen have been paid only because money was borrowed to pay them. The sale of bonds to pay for the construction effectively shifted the construction costs into the future to be paid out of anticipated donations, bequests, and distributions from charitable remainder annuity trusts. The repayment of the borrowed money is thus no less a cost of the construction than the payment of other expenses associated with building the new health care center.

So long as the debt incurred to pay the remaining construction costs remains unpaid, the objective of the fund—and therefore the fund itself—still exists. According to the Foundation's accountant, there is approximately $2.7 million of debt associated with the construction of the health care center still outstanding. There was no contrary evidence.[12] To the extent the value of the Turners' gift does not exceed the amount needed to retire such debt, the Turners' charitable gift to the fund did not lapse and should be given effect.

[12] Petitioner argues that the Foundation's evidence on this point was not credible and that the idea of a debt attributable to the construction of the health care center is "a fiction." Indeed, a discrete construction loan was not taken out for the health care center. Instead, the funds needed to cover the shortfall in donations were obtained from the sale of bonds, the proceeds of which were designated for a variety of purposes, including, specifically, the construction of the health care center. However, regardless of the form of the debt, in substance, money was borrowed for the health care center's construction and the money must be repaid. According to the accountant, the portion of the outstanding debt attributable to the construction of the health care center was, as of the date of his testimony, $2,746,352. No alternative calculation was offered by petitioner and there is nothing in the record to suggest that the accountant's credibility on this point was in doubt. Accordingly, we reject petitioner's argument that the debt attributable to the health care center is a fiction.

Petitioner argues that the bequest should be construed, as the trial court construed it, to mean that the fund referred to in the Second Amended Trust ceased to exist, and the gift therefore failed, once the new health care center was constructed. Under this construction, the provision in the Second Amended Trust that reads, "If . . . the CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND is no longer in existence or is otherwise unable to accept this [40 percent share of the trust estate], then this [40 percent share of the trust estate] shall be distributed ratably among the other Distributees . . . ," is construed to read, "If . . . *a new Claremont Manor Health Care Center has been built*, then this [40 percent share of the trust estate] shall be distributed ratably among the other Distributees . . . ." For the reasons that follow, we reject this construction. 7

First, even if the language of the proviso is ambiguous in some respects, it is not reasonably susceptible of the proffered construction. The words refer to the state of existence of a fund: if the fund exists and can accept the gift, then the gift succeeds; if the fund does not exist or is not able to accept the gift, then it fails. Although the precise meaning of "CLAREMONT MANOR HEALTH CARE CENTER REPLACEMENT FUND" is subject to different reasonable interpretations (e.g., the fund evidenced by the ledger account number or the fund evidenced by the separate bank account), its "existence" cannot reasonably be construed to mean the absence of a completed health care center building; therefore, the construction of the building cannot reasonably be equated with the nonexistence of the specified fund.

Second, if the Turners had intended to condition the gift upon the lack of a completed health care center, they could have easily expressed this intention in the Second Amended Trust, but did not do so. They could have, as the trial court stated, "put conditions on the fund getting the money *if the new health center was not built by the time of their deaths* . . . ." (Italics added.) The Turners had the assistance of Attorney Banks and his associates, who could have, and presumably would have, indicated such a condition with language such as, "if the new Claremont Manor Health Care Center has not been built," or "provided that construction of a new health care center is not completed." Nevertheless, although petitioner's husband, Attorney Banks, testified that the Turners "were thinking of the bricks and mortar" and "wanted the building built," the Turners (with the aid of Attorney Banks's firm) chose to expressly condition the gift upon the existence of the specified *fund*, not upon the incomplete construction of "the building." Even if Attorney Banks's testimony could be viewed as suggesting that the Turners intended the gift to lapse once the new health care center was built, such extrinsic evidence cannot give the document a meaning to which it is not reasonably susceptible. (*Parsons, supra,* 62 Cal.2d at p. 865; see also *Russell, supra,* 69 Cal.2d at p. 209 [court cannot invoke extrinsic evidence to write a new or different instrument].) As set forth above, the existence of the specified fund cannot reasonably be construed to mean the nonexistence of the building.

Third, even if the language of the proviso was ambiguous and was reasonably susceptible of the proffered construction, any doubts as to its meaning should be resolved

in favor of the interpretation that would accomplish the Turners' charitable purpose. (See, e.g., *Estate of Tarrant, supra,* 38 Cal.2d at p. 46; *Estate of Moore, supra,* 190 Cal.App.2d at p. 839.) There is no dispute in this case that the gift, if made, will be put to a charitable use. Construing the provision so that the fund's existence continues so long as the construction debt remains will allow the gift to be given effect; if we construe it as petitioner desires, the gift fails. Although we do not believe the subject language is ambiguous as to whether the proviso refers to the existence of the fund or the lack of a building, any ambiguity should be resolved in favor of giving effect to the gift.

Fourth, the construction sought by petitioner could discourage the use of financing for the construction for charitable projects. If charitable gifts and bequests designated for the construction of a building are construed to fail once the building has been built even though construction loans remain unpaid, the charity might be inclined to forego the use of loans to finance construction. Instead, the charity might postpone such construction until it received enough from donations, bequests, and trust distributions to pay for the construction without the use of loans. This would result in delaying the construction, which should not, as a policy matter, be encouraged.

For the foregoing reasons, we reject the construction proffered by petitioner and construe the language of the subject gift to mean that the gift shall be made so long as the fund created by the Foundation to fund the construction of the new health care center continues to serve that objective. Funding such construction includes the repayment of debt incurred to finance the construction.

As we indicated above, the Claremont Manor Health Care Center Replacement Fund, as we have construed the phrase, is not a legal entity and cannot accept a bequest. Because that fund is owned and controlled by the Foundation, the Foundation is the entity to which the gift must be made if it is to be made at all. As the trial court stated, however, the Turners did not wish the Foundation to be able to use the money without restriction; the money was to be used only for the construction of the health care center. The solution used by courts in similar circumstances is to specify that the gift be made to the recipient in trust to be administered for the purpose intended by the makers. (See, e.g., *Estate of Tarrant, supra,* 38 Cal.2d at p. 49; *Estate of McDole, supra*, 215 Cal. at pp. 332-333; *Estate of Clippinger* (1946) 75 Cal.App.2d 426, 434.) The gift, therefore, must be made to the Foundation in trust for the payment of expenses associated with the construction of the health care center, including the repayment of debt incurred for such construction.

Petitioner contends that if the gift is distributed to the Foundation in this manner, neither she nor the court can be assured that the money will be used for the designated purpose. The trial court, however, has the "discretion [to] make any orders and take any other action necessary or proper to dispose of the matters presented by the petition . . . ." (Prob. Code, § 17206.) We are confident that the court can make any appropriate orders and take whatever other actions are necessary to ensure that the gift is used in accordance with the Turners' intent as we have construed it.

IV. DISPOSITION

The order appealed from is reversed. The court is directed to enter a new order instructing petitioner to distribute the subject share of the Turners' trust estate to the Foundation in trust for the payment of expenses associated with the construction of the health care center, including the repayment of debt incurred for such construction, to the extent such expenses remain unpaid. The court shall make such further orders and take such further actions as are consistent with the views expressed in this opinion.

The Foundation shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ramirez
P.J.

We concur:

/s/ McKinster
J.

/s/ Richli
J.