NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUMMER TOMPKINS WALKER, Plaintiff and Appellant, v. DEBRA B. RYKER and KRISTINE MCDIVITT TOMPKINS, as Trustees, etc., Defendants and Respondents.	B285872 Los Angeles County Super. Ct. No. 16STPB01417

APPEAL from a judgment of the Superior Court of Los Angeles County, Lesley C. Green, Judge. Affirmed.

White & Case, Michael E. Kavoukjian, Bryan A. Merryman, Matthew P. Lewis and Earle Miller for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Adam F. Streisand, Valerie E. Alter and Meghan K. McCormick for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Summer Tompkins Walker (Summer) appeals the summary judgment entered by the probate court in favor of the co-trustees of the Douglas R. Tompkins Revocable Trust (the trust). Summer's father, Douglas R. Tompkins (Tompkins), founded The North Face and Esprit apparel lines and, prior to his death, placed his considerable assets in the trust. The trust provides that upon Tompkins's death, Summer is only to receive selected items of Tompkins's personal property.

Summer filed a petition in the probate court seeking to bypass the express terms of the trust and instead apply forced heirship laws applicable in Chile (Tomkins's alleged domicile) under which she would, apparently, be entitled to a significant portion of Tompkins's assets. The trustees moved for summary judgment arguing Probate Code section 21103[1] and the choice-of-law provision of the trust preclude the application of Chilean law. In response, Summer asserted, as a general proposition, the law of a decedent's domicile governs the distribution of a decedent's estate and California should, as a matter of comity, recognize the applicability of Chilean law in this matter. The court ruled in favor of the trustees, noting the trust contained a clear choice-of-law provision selecting California law to govern the trust and that section 21103 provides such a provision is valid and enforceable unless it violates public policy.

On appeal, Summer contends mainly the application of California law in this matter violates California's public policy in

---

[1] All undesignated statutory references are to the Probate Code.

favor of comity—a discretionary doctrine that permits a California court to enforce a judgment from or apply the law of a foreign jurisdiction under limited circumstances. We conclude, as the court below did, that comity does not override this state's strong public policy in favor of freedom of testation. Accordingly, we affirm the judgment in favor of the trustees.

FACTS AND PROCEDURAL BACKGROUND

Only a few undisputed facts are necessary to understand the issues relevant to this appeal.

Tompkins is survived by his wife Kristine and two daughters from a previous marriage, only one of whom (Summer) is involved in the present proceedings. During the last 20 years of his life, Tompkins reportedly spent most of his time in South America, particularly in Chile and Argentina, implementing conservation-related projects.

In 1994, Tompkins created a revocable inter vivos trust and transferred all his assets into it. Tompkins and Debra B. Ryker were the co-trustees of the trust until Tompkins died in 2015, at which time his wife Kristine became a co-trustee. Ryker has managed the trust, including its investments, accounts, assets and expenditures, since the trust's creation in 1994. Ryker lives and works in California, as do the four employees of the trust. The trust's primary bank and investments accounts are held by financial institutions in California. The trust's significant additional assets consist of the stock of a California corporation and membership interests in two Delaware limited liability companies. Ryker manages the Delaware entities from California.

Tompkins amended the trust several times and executed the operative trust documents, the 2012 Amendment and

Restatement of the Douglas R. Tompkins Revocable Trust, dated November 16, 1994, in March 2012. And as before, the 2012 trust documents indicate Tomkins transferred all his property (financial assets, real property, and personal property) to the trust. The 2012 iteration of the trust contains several provisions relevant to these proceedings.

Regarding the law to be applied, the trust provides:

- "This Trust Agreement shall be construed in accordance with the laws of the State of California." (the choice-of-law provision)

And regarding Tompkins's children, the trust provides:

- "The Trustor has two (2) adult children of a prior marriage now living, whose names are [redacted] and SUMMER TOMPKINS WALKER ("SUMMER"). The Trustor has no other children and no living issue of a deceased child."
- "If KRIS survives the Trustor, the Trustee shall distribute all of the Trustor's Amish quilts and fine artwork (including paintings, sculptures, tapestries, and mixed media artwork) to KRIS.

"The Trustee shall distribute the remaining items of the Trustor's tangible personal property (including (i) all clothing, jewelry, furniture and furnishings, and articles of a personal nature, and (ii) any Amish quilts and fine artwork not otherwise selected to be received by KRIS) in equal shares to the Trustor's children and issue then surviving, by right of representation, as they may agree. ..."

- "The Trustor has intentionally and with full knowledge made no provision for any person, whether claiming to be an heir of the Trustor or not, except as specifically provided in this Trust Agreement."

Approximately six months after Tompkins died, Summer filed a petition in the Los Angeles Superior Court under section 17200[2] asking the court to determine the validity of the trust and its choice-of-law provision. Specifically, Summer alleged Tompkins lived in South America (Argentina and/or Chile) at the time of his death and asserted forced heirship laws (which would provide her with a greater portion of Tompkins's assets than was afforded by the trust) applicable in those countries should be applied to remove a portion of Tompkins's assets from the trust and distribute them to her.

The trustees moved for summary judgment, arguing section 21103,[3] together with the choice-of-law provision of the trust, requires the application of California law to construe the trust. In response, Summer asserted that, as a general proposition, the laws of a decedent's domicile govern the distribution of a

---

[2] Section 17200 authorizes a trustee or a trust beneficiary to petition the probate court concerning the internal affairs of a trust and to determine, as relevant here, questions concerning the construction of a trust instrument and the validity of trust provisions. (§ 17200, subd. (b)(1) & (3).)

[3] Section 21103 provides: "The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6."

decedent's estate and that California should, as a matter of comity, recognize the applicability of Chilean law in this matter. She argued further that triable issues of material fact existed concerning Tompkins's domicile, thereby precluding summary judgment. The court was not persuaded by Summer's policy argument and ruled in favor of the trustees, noting that the trust contained a clear choice-of-law provision selecting California law to govern the trust, and that section 21103 provides that such a provision is valid and enforceable unless it violates public policy. The court subsequently entered judgment in favor of the trustees and Summer timely appeals.

DISCUSSION

Summer contends the court erred in granting the trustee's motion for summary judgment because disputed issues of material fact exist regarding (a) Tompkins's domicile at the time of his death, (b) whether Tompkins intended to evade Chilean law through the trust, and (c) whether the terms of the trust violate Chilean law. We conclude these factual issues are not material to the resolution of the motion for summary judgment.

1. Standard of Review

1.1. Summary Judgment

The applicable standard of review is well established. "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) As such, the summary judgment statute (Code Civ. Proc., § 437c), "provides a particularly suitable means to test the sufficiency of the

plaintiff's prima facie case and/or of the defendant's [defense]." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that "material facts" are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, reversed on other grounds by *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490; see *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.)

The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) A defendant moving for summary judgment must " 'show[ ] that one or more elements of the cause of action ... cannot be established' by the plaintiff." (*Id.* at p. 853 [quoting Code Civ. Proc., § 437c, subd. (o)(2)].) A defendant meets its burden by presenting affirmative evidence that negates an essential element of plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Alternatively, a defendant meets its burden by submitting evidence "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" supporting an essential element of its claim. (*Aguilar*, at p. 855.)

On appeal from summary judgment, we review the record de novo and independently determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Guz, supra,* 24 Cal.4th at p. 334.) We resolve any evidentiary doubts or ambiguities in favor of the party opposing summary judgment. (*Saelzler,* at p. 768.)

In performing an independent review of the granting of summary judgment, we conduct the same procedure employed by the trial court. We examine (1) the pleadings to determine the elements of the claim, (2) the motion to determine if it establishes facts justifying judgment in the moving party's favor, and (3) the opposition—assuming movant has met its initial burden—to decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 629–630.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Ibid.*)

1.2. Particular Issues

"The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein. [Citations.]" (*Burch v. George* (1994) 7 Cal.4th 246, 254, abrogated on another point as recognized in *Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1339.) Here, no extrinsic evidence was offered regarding the interpretation of the trust and, therefore, the interpretation of the trust is a question of law.

The proper construction of provisions of the Probate Code is also subject to our independent review on appeal. (*Estate of Rossi, supra*, 138 Cal.App.4th at p. 1336.)

2. California law governs the trust.

The trustees argue here, as they did in their summary judgment motion, that the trust should be construed in accordance with California law because Tompkins specified in the

trust that California law applies and the choice-of-law provision is enforceable under section 21103. We agree.

As a general matter, a California court applies California law unless a party demonstrates that a choice-of-law provision or public policy requires the court to apply another state's laws. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 919.) In the specific context of probate matters, the Legislature has expressly recognized that a person may choose, and California courts will generally apply, the law of *any* state to govern the post-death distribution of his or her assets. Section 21103 states "[t]he meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6." This statutory provision applies to trusts. (§ 21101.)

In addition to these choice-of-law principles, we are guided by well-established precedent regarding testamentary intent. 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; *Brown v. Labow* (2007) 157 Cal.App.4th 795, 812; § 21102 ["The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument"].) The paramount rule in construing such an instrument is to determine intent from the instrument itself and in accordance with applicable law. (E.g., *Moxley v. Title Ins. & Trust Co.* (1946)

27 Cal.2d 457, 465 [quoting the United States Supreme Court as noting " '[t]here is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid' "].) The Legislature formally recognized these principles by adopting section 21102, which provides that "[t]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (§ 21102, subd. (a).)

Here, the trust language contains a clear choice-of-law provision: "This Trust Agreement shall be construed in accordance with the laws of the State of California." In light of the plain meaning of Tompkins's choice-of-law provision, the statutes just discussed, and our obligation to determine and effectuate Tompkins's wishes, we have no difficulty concluding, as the court did below, that Tompkins intended California law to apply here and that California law recognizes his right to so choose.

3. Summer's arguments are without merit.

Summer asserts several arguments in support of her contention that if Tompkins was domiciled in Chile at the time of his death—a fact she contends is, at a minimum, disputed—then the trust's choice-of-law provision should be disregarded and Chilean law should be applied. None of her arguments has merit.

3.1. Section 21103 is not ambiguous.

Summer's first contention is that section 21103 is subject to two possible interpretations. "(1) it does not apply when a trustor selects *California* law to govern a trust because California law is presumably not contrary to California public policy and therefore

the statute, with its public policy exception, makes no sense when California law is selected; or (2) it *does* apply when a trustor selects California law, but depending on the circumstances, the application of California law can violate California public policy." In either case, she urges, a determination of Tompkins's domicile is required in order to assess whether enforcing the trust's choice-of-law provision violates public policy.

We first consider—and reject—Summer's assumption that section 21103 is ambiguous. When interpreting a statute, "we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning. [Citation.] If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919.) "We construe the words of a statute in context, and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.)

Section 21103 states, as pertinent here, "The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, [or] to any other public policy of this state applicable to the disposition ... ." Although Summer does not explicitly identify the language she contends is ambiguous, she asserts, "The statute makes sense only if it applies when a trustor chooses the law of another state—such as when a New

York resident who retires to California chooses New York law to govern a trust administered in California but holding property in New York. Otherwise, when California law is chosen the entire exceptions section of the statute (beginning with the word "unless") would be meaningless; and rendering statutory language meaningless would violate cardinal rules of statutory construction."

In effect, Summer would have us alter the first part of section 21103 to read, "The meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state [other than California] selected by the transferor in the instrument ... ." The plain language of the statute is not reasonably subject to this interpretation.

Moreover, although we may, in some circumstances, disregard the literal meaning of the words of a statute in order to avoid absurd results (see, e.g., *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6), in this case disregarding the literal meaning of the words of the statute and inserting additional language would *lead to* absurd results. Under Summer's rewritten version of the statute, if a trustor selects the law of any state other than California in a choice-of-law provision, the selected state's law would be applied without further inquiry. But if a trustor selects California law—the law of the forum—our courts would effectively disregard both the choice-of-law provision in the trust and the general rule that California courts apply California law, and instead conduct a searching factual inquiry in an effort to determine what state's (or, in this case, country's) law should be applied.

We conclude section 21103 means what it says: a trustor may select the law of any state—including California. And our

courts will apply the trustor's selected law unless it compromises the rights of the surviving spouse to community and quasi-community property—a point not at issue in the present case—or violates any other public policy of this state applicable to the disposition.

3.2. Tompkins's omission of his children from his estate plan does not offend the public policy of this state.

Having determined section 21103 is not ambiguous and applies here, we now consider whether, as Summer urges, the trust—and more particularly Tompkins's decision not to give Summer any assets of significant value upon his death—"is contrary ... to any other public policy of this state applicable to the disposition ... ." (§ 21103.) We conclude it is not.

As the trustees point out, California courts have long recognized the right of a parent to disinherit his or her children. " 'The right to dispose of property in contemplation of death is as old as the right to acquire and possess property, and the laws of all civilized countries recognize and protect this right.' (*Estate of Morey* (1905) 147 Cal. 495, 505.) It has been said that the right to make a testamentary disposition of property is fundamental, is most solemnly assured by law, and does not depend upon its judicious use. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 373.) Nevertheless, the testamentary disposition of property is a matter within the plenary control of the Legislature. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 10.) And the right has been restricted by legislative and social controls. (*Estate of Fritschi, supra,* at p. 373.)" (*Estate of Della Sala* (1999) 73 Cal.App.4th 463, 467–468 (*Della Sala*).)

We find some indication of the relevant public policy concerns in the Probate Code's provisions regarding children not provided for by a parent's will. As the court in *Della Sala* explained, "[i]n our omitted children statutes, the Legislature has attempted to balance the possibility of inadvertent disinheritance against the freedom of testamentary disposition of property with respect to the paramount concern of carrying out the testator's intent." (*Della Sala, supra*, 73 Cal.App.4th at p. 468, fn. omitted.) Former section 90, enacted in 1931, presumed that a testator's omission of a child from a will was inadvertent: " 'When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.' " (*Ibid.*)

The Legislature subsequently eliminated that presumption and enacted new statutes presuming that the omission of a child from a will is intentional unless the child was born or adopted after the execution of the will. (See *Estate of Mowry* (2003) 107 Cal.App.4th 338, 341.) Our courts have recognized that the Probate Code, specifically sections 21620 and 21621, reflect the Legislature's view that " ' "When the omission [of a child] is not based upon such a mistaken belief [that the child is dead or does not yet exist], it is more likely than not that the omission was intentional." ' " (*Id.* at p. 343.) And in its current form, the Probate Code reflects the Legislature's view that the best way to

balance the testator's freedom to dispose of his or her property against a child's right to inherit a parent's estate is to presume that when a parent omits the child from his or her will, it is intentional.

The current state of the Probate Code's provisions regarding children omitted from wills indicates how the Legislature balances two competing policies: a testator's right to freely dispose of his or her property, and a nondependent child's right to receive a portion of a parent's assets upon his or her death. In light of the Legislature's modification of the omitted child provisions relating to wills, it decided to favor freedom of testation over a presumption that a child is entitled to inherit a portion of a parent's estate. We see no reason to think the Legislature's view would be different where a parent uses a trust instrument to distribute assets following his or her death. Accordingly, we conclude Tompkins's failure to provide Summer with a portion of his estate at his death does not violate this state's public policy.

3.3. Principles of comity do not require the application of Chilean law.

Summer also asserts Tompkins created the trust to evade Chilean law and that enforcing the trust would violate California's public policy in favor of comity. More particularly, Summer contends *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126 (*Tenneco*) "mandates reversal of the trial court's judgment." We disagree.

"Comity is based on the concept of interstate courtesy, by which a forum state will permit application of a foreign law in the interest of promoting justice or out of respect for the laws and institutions of a foreign state. (*Estate of Lund* (1945) 26 Cal.2d

472, 489.) However, a well established exception to the rule of comity precludes application of foreign laws that are contrary to the public policy of the forum state." (*Tenneco, supra,* 39 Cal.3d at p. 141 (dis. opn. of Mosk, J.).)

In *Tenneco*, the plaintiff (Wong) operated a farm in Mexico despite the fact that Mexican law prohibited him, as an American citizen, from doing so. (*Tenneco, supra,* 39 Cal.3d at p. 131.) To facilitate the illegal operation, Wong used several Mexican "front men" to run the farming operation. (*Id.* at p. 132.) In addition, Wong entered into a series of marketing agreements with a produce broker (Tenneco) to sell the farm's produce. (*Id.* at p. 131.) After Wong's financial situation reached a crisis point and the "front men" were being pressured by the Mexican government, Tenneco severed its relationship with Wong and began sending the proceeds from the sale of the produce directly to the "front men." (*Id.* at p. 132.) Wong subsequently sued Tenneco for breach of contract. (*Ibid.*) Although the jury largely found in Wong's favor, the trial court ruled Wong was barred from recovery under the doctrine of unclean hands because the entire transaction was illegal under Mexican law. (*Id.* at p. 133.)

The Supreme Court, agreeing with the trial court, concluded the doctrine of comity should be applied to bar Wong's recovery. (*Tenneco, supra,* 39 Cal.3d at pp. 134–135.) The Court observed that the contract at issue was part of Wong's purposeful scheme to violate Mexican law and that by bringing an action against Tenneco in California, Wong was attempting to enforce an illegal contract. (*Ibid.*) The court emphasized that under the doctrine of comity, a contract made with a view of violating the laws of another country, though not otherwise obnoxious to the law of the forum, will not be enforced because enforcement of an

illegal contract is against public policy. (*Ibid.*) "This principle is simply the logical extension of the well-settled rule that the courts will not aid a party whose claim for relief rests on an illegal transaction." (*Ibid.*)

Summer's assertion that *Tenneco* controls the outcome of this case rests on her claim that Tompkins's trust is an illegal contract under Chilean law. Throughout her brief, she insinuates that Tompkins structured his affairs in order to "evade Chilean law." The evidence Summer submitted in support of her opposition to the trustees' motion for summary judgment, however, merely explains how a decedent's estate would be distributed under Chilean law, all things being equal. But nothing Summer submitted below establishes, or even suggests, that Tompkins's trust is *illegal* under Chilean law. The use of corporations and trusts is a commonplace, and perfectly legitimate, means of avoiding taxation in this country and it appears their use is a recommended means of avoiding forced heirship laws applicable in other jurisdictions. (See, e.g., McLearen, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims* (2011) 3 Est. Plan. & Cmty. Prop. L.J. 323, 339–341.)

In any event, we are hard-pressed to imagine a reason that, as a matter of public policy, Chile would be concerned about Summer's inheritance or lack thereof as she is neither a citizen nor a resident of Chile and the record on appeal contains no evidence that she has any connection with Chile. We therefore conclude principles of comity do not outweigh Tompkins's clear directives and California's public policy in favor of freedom of testation.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.