

(ENDORSED)
FILED

FEB 24 2020

Clerk of the Court
Superior Court of GA County of Santa Clara
BY J. Morriss DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

In re the
THE TABATA LIVING TRUST dated
October 24, 1986, as amended

Lead Case No. 16PR178371

For Consolidated Matters:
Case No. 16CV298516
Case No. 16CV298424

**ORDER GRANTING IN PART AND
DENYING IN PART TRUSTEES'
SUPPLEMENT TO PETITION FOR
ORDER SETTLING ACCOUNT**

In April 2019, the parties in the above-captioned matter appeared for trial on the Petition for Order Settling Account, Approving Acts of Trustees, for Instructions, and for Partial Distribution (Initial Accounting Petition), filed July 22, 2016, and the Supplement to the Accounting Petition, filed August 23, 2016, by Trustees George and Jean Neyama, and the Petition for Removal and Replacement of Trustees (Removal Petition), filed December 18, 2017, by Objector Kathy Sugishita. Although the court took the matter under submission after the parties' filing of written closing arguments and responses, the parties thereafter stipulated to vacate submission as to the Removal Petition and the Supplement to the Accounting Petition, pending a renewed exploration of settlement following the court's October 18, 2019

1 announcement of its tentative decision to deny the Accounting Petition. In the course of
2 settlement negotiations, the Neyamas on November 18, 2019, filed a Petition for Order Settling
3 Revised and Final Account (Revised Accounting Petition), which effectively superseded the
4 Initial Accounting Petition that had been a principal subject of the parties' protracted litigation.¹
5 What remains is the Neyamas' Supplement to the Accounting Petition, in which the Neyamas
6 seek to disinherit both Kathy² and Tim by application of the no-contest provision of both the
7 Fifth and Sixth Amendments to the Trust. The court grants the Neyamas' request as to Kathy
8 Sugishita and denies it without prejudice as to Tim.

9 DISCUSSION

10 As is pertinent here, Trustees seek an order deeming both Kathy and Tim to have
11 predeceased the Tabatas by application of the no-contest provision of the Tabata Living Trust
12 dated October 24, 1986, as amended (Trust). " 'Although no contest clauses are valid and
13 favored by the public policies of discouraging litigation and giving effect to the testator's intent,
14 they are also disfavored by the policy against forfeitures and therefore are strictly construed and
15 may not extend beyond what plainly was the testator's intent.' [Citation.]" (*Betts v. City National*
16 *Bank* (2007) 156 Cal.App.4th 222, 232.)

17 Under Article XIII of the Trust, "[i]f any beneficiary of this Trust shall contest in any
18 court any of the provisions of this instrument, or the validity of the Living Trust, then the
19 beneficial interest herein of any such person shall thereupon terminate, and the portions of the
20 income and principal of the Trust Estate otherwise provided to be paid to such beneficiary shall
21 instead be paid and distributed as though such person had died without issue before becoming
22 entitled to receive income or any portion of the principal of the Trust Estate." The First and

23
24 ¹ Asset allocation changes voluntarily undertaken by the Neyamas in the Revised
25 Accounting Petition rendered moot the court's October 18, 2019 tentative decision, so the court
26 respectfully declines the Neyamas' unsolicited Proposed Statement of Decision. The court at an
27 unrelated hearing on November 25, 2019, also reserved ruling on the Removal Petition pending
notice to the beneficiaries and potential objectors of the Revised Accounting Petition and the
February 27, 2020 hearing thereon.

28 ² In view of the shared surname of certain of the parties, the court will resort to given
names for ease of reference. No disrespect is intended.

1 Second Amendments to the Declaration of Trust omit any further no-contest provision. The
2 Third Amendment to the Declaration of Trust, executed by Janet Tabata after Flyer Tabata's
3 death, likewise omits any additional no-contest provision. The Fifth and Sixth Amendments to
4 the Declaration of Trust, provide: "If any beneficiary under this document or the document it
5 amends singly or in conjunction with any other person or persons files a direct contest without
6 probable cause that alleges the invalidity of (a) this document, the document it amends, or any of
7 their terms or (b) any will or codicil of the Settlor or any of their terms, which is in existence on
8 the date this document is executed, then the right of that beneficiary to take any interest given to
9 the beneficiary by this document or the document it amends shall be void, and any interest to
10 which the beneficiary would have been entitled shall pass as if the beneficiary had predeceased
11 the Settlor without descendants. As used in this section the terms 'direct contest' and 'probable
12 cause' shall have the meanings given in California Probate Code Sections 21310 and 21311, or
13 any successor statute."³

14 I. "Direct Contest"

15 A "direct contest" under Probate Code section 21310 "means a contest that alleges the
16 invalidity of a protected instrument or one or more of its terms, based on one or more of the
17 following grounds: [¶] (1) Forgery. [¶] (2) Lack of due execution. [¶] (3) Lack of capacity. [¶]
18 (4) Menace, duress, fraud, or undue influence." (Prob. Code, § 21310, subd. (b).) A "[p]rotected
19 instrument" includes "the instrument that contains the no-contest clause." (Prob. Code, § 21310,
20 subds. (b) and (e)(1).) "Instrument," in turn, is defined as a "writing that designates a beneficiary
21 or makes a donative transfer of property." (Prob. Code, § 45.) An amendment to a trust can be
22 an instrument under this definition. (See, e.g., *Aviles v. Swearingen* (2017) 16 Cal.App.5th 485
23 (*Aviles*.) The Fifth and Sixth Amendments are not, strictly speaking, "instruments" within the
24 meaning of Probate Code section 45 in its present iteration, because they serve only to identify
25 successor trustees, not beneficiaries or the eventual disposition of trust assets. It is also true that
26

27 ³ The Fourth Amendment to the Trust includes the same no-contest language as the Fifth
28 and Sixth Amendments, but Kathy Sugishita does not challenge any provision of this
amendment.

1 “[t]he court must strictly construe a no contest clause because it works a forfeiture and may not
2 be extended beyond its plainly intended function.” (*Aviles, supra*, 16 Cal.App.5th at p. 490.)
3 But in the Fifth and Sixth Amendments, the “plainly intended function” of the no-contest
4 provision’s first clause is explicitly to forestall a contest to “this document” – not merely
5 statutorily defined “instruments” – the Fifth and Sixth Amendments themselves. Kathy’s belated
6 effort to obtain cancellation of these amendments is therefore a direct contest.

7 II. Probable Cause

8 “[P]robable cause exists if, at the time of filing a contest, the facts known to the
9 contestant would cause a reasonable person to believe that there is a reasonable likelihood that
10 the requested relief will be granted after an opportunity for further investigation or discovery.”
11 (Prob. Code, § 21311, subd. (b).) “The former standard referred only to the contestant’s factual
12 contentions. By contrast, subdivision (b) refers to the granting of relief, which requires not only
13 the proof of factual contentions but also a legally sufficient ground for the requested relief.” (Cal.
14 Law Revision Com. Com., 54A West’s Ann. Prob. Code (2008 ed.) foll. § 21311.) The court
15 find that probable cause is defeated both by Kathy’s forfeiture of her right to contest the Fifth
16 and Sixth Amendments and by her voluntary relinquishment of that known right. The forfeiture
17 occurred when Kathy failed to file her contest within the 120 days required by Probate Code
18 section 16061.8; the waiver was entered when Kathy represented to the Neyamas that she would
19 not challenge their appointment as successor trustees – despite her expressed reservations as to
20 the propriety of that appointment – in conjunction with a request for compensation which she
21 thereafter received.

22 To the extent Kathy relies upon the availability of evidence potentially underlying her
23 claim of elder abuse to satisfy the probable cause standard, nothing in the record of the noticed
24 hearings at which application of the no-contest clause was to be considered would permit the
25 court to conclude, as Kathy has argued, that the limitations period applicable for a complaint for
26 damages under the Elder Abuse and Dependent Adult Civil Protection Act operates to extend the
27 120-day period under Probate Code section 16061.8. The four-year limitations period for
28 financial elder abuse claims under the elder abuse statute applies only to “[a]n action for

1 *damages* pursuant to Sections 15657.5 and 15657.6...” (Welf. & Inst. Code, § 15657.7, italics
2 added.)

3 III. Tim Sugishita

4 The Neyamas’ conviction that Tim and Kathy have operated in concert is understandable
5 in view of the marital relationship and the alignment of their interests. Their conviction,
6 however honestly achieved or even correct, is unsupported by the record. To extend the
7 application of the no-contest clause based solely on what may be intuitively sound incredulity in
8 the face of a studied posture of nonchalance performed by a beneficiary or his counsel would,
9 absent record evidence, violate the clear public policy mandating narrow application of such
10 forfeiture provisions. (See, e.g., *Aviles, supra*, 16 Cal.App.5th at p. 490.) Rhetorically lumping
11 the spouses together or correctly identifying their shared interests does not, without more, make
12 Tim legally responsible for Kathy’s litigation or her litigation tactics. The court therefore denies
13 finds the Neyamas’ request to deem Tim Sugishita to have violated the no-contest clause.

14 It is so ordered.

15
16 Dated: February 24, 2020

Cynthia C. Lie

CYNTHIA C. LIE
Judge of the Superior Court