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8 Attorney for Plaintiff
9 FELICIA SMITH

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LATHYRUS

In re TRUST OF ALBERT GREEN.

Case No.

FELICIA SMITH,

PLAINTIFF'S TRIAL BRIEF

Plaintiff,

v.

CHARLOTTE GREEN, individually and
as trustee of the Albert Green Living Trust,

Defendant.

_____/

INTRODUCTION

Defendant's designation of herself as successor beneficiary under her father's living trust is invalid. Under the only acceptable interpretations of Probate Code § 4264, an attorney-in-fact may not designate herself a beneficiary or give herself a gift in trust without the principal's specific authorization. Nor may she act in a manner not solely for the principal's benefit, or use a trust mechanism to escape the limitations placed on her.

FACTS

On December 2, 2___, decedent Albert Green executed a will leaving his estate in equal shares to his four children: plaintiff and petitioner Felicia Smith, defendant and

1 objector Charlotte Green, Helen Green, and Janice Green. The will named plaintiff
2 executor. On December 12, 2___, decedent signed a stationery-store form durable
3 general power of attorney appointing defendant as holder of the power. Paragraph (f) of
4 that document grants the power holder the authority to “create, amend, supplement, and
5 terminate any trust”

6 On February 19, 2___, defendant executed a living trust on the decedent’s behalf.
7 That document called for distribution to each child in equal shares as successor
8 beneficiaries on the decedent’s death. ¶ VI.A.3. It also granted defendant a life estate in
9 real property in Fullerton with the remainder distributed to the decedent’s grandchildren.
10 ¶ VI.A.4. That same day, defendant funded the trust by executing a quit-claim deed of
11 the real property to the trust.

12 On the day defendant executed the trust, the decedent was in a coma and clearly in
13 a fatal decline. In fact, he died the next day—February 20, 2___. Plaintiff petitioned to
14 probate the 2___ will; defendant filed an objection.

15
16 **ARGUMENT**

17 **1. Felicia has standing to seek declaratory relief and imposition of a constructive**
18 **trust.**

19 Felicia is both an intestate heir and a named beneficiary under decedent’s
20 December 2, 2___ will. “The heirs or devisees may themselves, or jointly with the
21 personal representative, maintain an action for possession of property or to quiet title to
22 property against any person except the personal representative.” Prob. Code § 9654.

23 In *Olson v. Toy* (1996) 46 Cal.App.4th 818, an heir at law and a will beneficiary
24 filed an action for declaratory relief and imposition of a constructive trust against the
25 trustee of the decedent’s living trust (who was also the decedent’s personal
26 representative) seeking a declaration that the trust was invalid and unenforceable because
27 the decedent executed the trust without the requisite mental capacity and under undue
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1 influence. The trial court sustained a demurrer to the complaint without leave to amend
2 on the ground that the plaintiffs lacked standing. The appellate court reversed. It held
3 that the plaintiffs' action for a constructive trust was an action for possession of property
4 as contemplated by Probate Code § 9654. *Id.* at 823. The appellate court concluded that
5 the action was not barred by the fact that the defendant was the decedent's personal
6 representative because she was sued in her capacity as trustee, not in her capacity as
7 personal representative (*id.* at 824), and that it was an action for "possession" even
8 though the property would first go to the personal representative for administration
9 because a personal representative does not take title but merely holds property for
10 distribution to the heirs or devisees. *Id.* at 825. The court also concluded that the
11 plaintiffs had standing to seek declaratory relief. *Id.* at 824-825.

12 Here, Felicia is both an heir at law and a beneficiary of decedent's will. Like the
13 plaintiffs in *Olson*, she has standing to assert the instant claims for declaratory relief and
14 imposition of a constructive trust against Charlotte, the trustee of decedent's living trust.¹
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16 **2. Defendant had no authority to designate herself as beneficiary of a life estate**
17 **under the trust.**

18 Under the Power of Attorney Law,

19 A power of attorney may not be construed to grant authority to an attorney-in-
20 fact to perform any of the following acts unless expressly authorized in the
21 power of attorney:

- 22 (a) Create, modify, or revoke a trust. . . .
23 (c) Make or revoke a gift of the principal's property in trust or otherwise.

24
25 ¹ The declaratory relief statute, Code of Civil Procedure § 1060, was amended effective
26 January 1, 1995, to provide that an action for declaratory relief may no longer be maintained by a
27 person who seeks a declaration of his or her rights under a will or trust. Thus, Karen has no
28 standing to seek declaratory relief as a beneficiary of decedent's will, but she also sues in her
capacity as an heir at law (the will has not yet been admitted to probate). In the latter capacity, she
has standing under § 1060 to seek "a declaration of . . . her rights or duties with respect to another,
or in respect to, in, over or upon property."

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(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death

Prob. Code § 4264.

Here, the power of attorney authorized defendant to create a trust. But it did not authorize her to grant herself a gift of the life estate in the house, create the life estate in the house, or to designate herself as a beneficiary under the trust.

Subdivision (f) must apply to the designation of a beneficiary under a trust. One can be a beneficiary of a contract, an insurance policy, a will, or a trust. See BLACK'S LAW DICTIONARY (6th ed. 1990), at 157. By its express terms, subdivision (f) regulates both the designation of beneficiaries under contract rights and the designation of other types of beneficiaries. Since a power holder never has the authority to make, amend, or revoke a will, subdivision (f) cannot regulate the designation of testamentary beneficiaries. Prob. Code § 4265(a). It therefore must regulate beneficiaries under trusts.

Of course, the creation of a trust necessarily involves the designation of a beneficiary. Prob. Code § 15205(a). The statute is thus internally inconsistent in that it allows a decedent to create a trust but not to designate a beneficiary. When interpreting a statute, the court must, if at all possible, give effect to every word, phrase, sentence, and part of a statute in furtherance of the legislative purpose. *Phelps v. Sostad* (1997) 16 Cal.4th 23, 32. But in this case, the court cannot hold that the subdivision (a) authorization of creating a trust implicitly includes subdivision (f)'s designation of a beneficiary. That construction would leave subdivision (f) meaningless. On the other hand, prohibiting designation of a beneficiary without express authorization contradicts subdivision (a)'s authorization of creation of a trust.

Statutes must be construed with reference to the entire statutory scheme of which they are a part, so as to harmonize them in conformity with legislative intent. *Orange Unified School District v. Rancho Santiago Community College District* (1997) 54

1 Cal.App.4th 750, 757. In seeking the legislative intent, courts should consider not only
2 the words used but the object in view, the evils to be remedied, the legislative history, and
3 the public policy. *Ibid.* The only interpretation that will give the statute any meaning
4 prohibits the power holder from making a specific designation without express
5 authorization. The power holder may create a trust but may not designate a beneficiary
6 other than the principal. This interpretation conforms with § 4264's general purpose of
7 allowing the principal to determine the power holder's authority appropriate under the
8 circumstances while prohibiting the latter from abusing her position to strip the principal
9 of his assets. See Prob. Code § 4264(g) (power holder may not make loan to himself
10 without express authorization). Under this interpretation, the power holder may create a
11 trust that designates the principal himself as beneficiary without express authorization.
12 But plaintiff could not have made a trust naming herself, or any person other than the
13 decedent, as beneficiary without express authorization to do so.

14 Finally, when two portions of a statute, each passed simultaneously, are
15 irreconcilably inconsistent, the provision positioned later in the statute controls the earlier
16 provision. *Russell v. Stanford University Hospital* (1997) 15 Cal.4th 783, 789. This rule
17 of construction applies to internally inconsistent provisions within each section as well as
18 to inconsistent sections. See *People v. Moroney* (1944) 24 Cal.2d 638, 640-641, 645.
19 Subdivision (f), which appears later than subdivision (a) in the statute, controls over it.
20 As a result, defendant could not have designated beneficiaries without express
21 authorization, even though she was expressly authorized to write a trust.

22 Subdivision (c) contradicts subdivision (a) for the same reason. One of a trust's
23 main purposes is to make a testamentary gift without involving the probate courts. Yet
24 subdivision (c) specifically prohibits making a gift in trust without express approval. It is
25 doubtful that the Legislature would have specifically prohibited making gifts in trust
26 without express authority if that authority were a necessary part of the general authority to
27 create a trust. Such an interpretation would render subdivision (c) meaningless. Thus
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1 both subdivision (a) and subdivision (c) have meaning only if subdivision (c) requires
2 specific authorization for the gift, not just the general authorization inherent in making a
3 trust. To the extent that subdivisions (a) and (c) cannot be reconciled, the court must
4 apply (c), which is positioned later in the statute. Even if the decedent had desired that
5 the plaintiff make a gift to herself, she did not have the authority to do so if he had not
6 complied with the statute's formalities. *Estate of Hutson* (1997) 51 Cal.App.4th 1721,
7 1727.

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9 **3. Because defendant did not write the trust in the decedent's interest, it is**
10 **invalid.**

11 An attorney in fact has a duty to act solely in the principal's interest and to avoid
12 conflicts of interest. Prob. Code § 4232(a). This provision restates an agent's general
13 duty of loyalty under Civil Code § 2322(c). A principal may always set aside a
14 transaction the agent concludes with himself, even with no actual fraud, undue advantage,
15 or injury to the principal. *Burke v. Bours* (1891) 92 Cal. 108, 113, 115; *Sands v. Eagle*
16 *Oil & Refining Co.* (1948) 83 Cal.App.2d 312, 320. Subdivision (b) of Probate Code
17 § 4232 modifies this rule by providing that the power holder does not violate the duty of
18 loyalty solely because he or she also benefits from acting for the principal; has conflicting
19 interests in relation to the principal's property, care, or affairs; or acts in an inconsistent
20 manner regarding the respective interests of the principal and the attorney in fact.

21 This provision appears to allow a business partner or other person who holds
22 property in common with the principal to manage the property without concern for
23 liability for self-dealing in the absence of fraud. CALIFORNIA DURABLE POWERS OF
24 ATTORNEY (CEB 1999) §§ 1.11, at 10. It also allows the power-holder to buy the
25 principal's property, keeping it in the family while providing the principal with cash. *Id.*,
26 § 3.46, at 82-83. It does not allow the power holder, without express authorization, to
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1 give herself the decedent's property. Thus the personal representative may set aside the
2 transaction defendant engaged in with herself.

3 Even if subdivision (b) allowed self-dealing in the abstract, it would not do so in
4 this case. Subdivision (a)'s overriding principle that the power holder act at all times in
5 the decedent's interest remains. When plaintiff created the trust, decedent was in a coma
6 and clearly approaching death. He could not have benefitted from the creation of a trust,
7 and defendant did not write the trust in his interest but in her own. By creating this trust
8 the day before he died, defendant sought to do indirectly what she could not do directly by
9 making a gift of the property or by leaving it to herself as a testamentary disposition.

10 *Regents of the University of California v. City of Los Angeles* (1979) 100 Cal.App.3d 547,
11 550.

12
13 **CONCLUSION**

14 Although defendant had the abstract authority to create a trust, she had no
15 authority either to designate herself as beneficiary or to create a gift for herself in trust
16 without express authorization to do so. Nor did she act solely in the decedent's interest
17 by executing this trust the day before his anticipated death. This court should therefore
18 find the trust provision leaving the real property to defendant invalid and allow it to pass
19 either under the will or by intestate succession.

20 Dated: May ____, 2____

Respectfully submitted,

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23 Attorney for Plaintiff
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