

SUPREME COURT
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No. S251574
(Court of Appeal No. F076395)
(Tuolumne County Super. Ct. PR11414)

Deputy

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

JOAN MAURI BAREFOOT,
Appellant,

v.

JANA SUSAN JENNINGS and SHANA LEE WREN,
Respondents

After a Decision By the Court of Appeal,
Fifth Appellate District

**AMICUS CURIAE BRIEF OF THE VENTURA COUNTY BAR
ASSOCIATION – PROBATE AND ESTATE PLANNING SECTION, THE
SAN FERNANDO VALLEY BAR ASSOCIATION – TRUSTS AND
ESTATES SECTION, AND THE ORANGE COUNTY BAR
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INTERESTS OF AMICI

The Probate and Estate Planning Section of the Ventura County Bar Association, the Trusts and Estates Section of the San Fernando Valley Bar Association, and the Trusts and Estates Section of the Orange County Bar Association have a combined membership of several hundred attorneys, many of whom are California Board Certified Specialists in Estate Planning, Trust and Probate Law, and most of whom have heretofore filed petitions in probate court over the past three decades challenging the validity of trust instruments under Probate Code §17200 (“PC §17200”) on behalf of beneficiaries who were named in prior versions of the trust document or others who would take as “beneficiaries” if the challenged trust instrument were found to be invalid. If the decision of the court of appeal below is allowed to stand, their clients would have no viable avenue of relief under the Probate Code when lack of capacity, undue influence and/or financial elder abuse of a trustor occurs and removes or excludes them as a named “beneficiary” in the last signed trust document.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal applied an unnecessarily restrictive definition of “beneficiary” under PC §24 to limit persons with standing under PC §17200 to bring actions to construe the trust instrument (PC §17200(b)(1)), to determine the validity of a trust provision (PC §17200(b)(3)) or to ascertain beneficiaries of the trust and to whom trust property should pass or be delivered (PC §17200(b)(4)). By eliminating standing to persons who could become beneficiaries under the final terms of a trust BEFORE those terms have actually been determined, the decision runs contrary to the provisions of PC §§16061.7 and 21360 *et seq.*, and case law designed to expose, correct, and prevent fraud and elder abuse. These provisions, however, were never considered by the court in rendering its ill-conceived decision.

DISCUSSION¹

Both the trial court and the Fifth District Court of Appeal (collectively the “*Barefoot* Court”) failed to understand, address or

¹ The facts of this case are fully described in Appellant’s “Opening Brief on the Merits” filed herein on January 10, 2019.

reconcile the following five (5) critical problems with their decision:

- 1) **The *Barefoot* Court Failed to Consider the Impact of an Overly Narrow Definition of “Beneficiary” and Probate Code §16061.7 such that its Holding is Inconsistent with the Purposes of that Section**

The *Barefoot* Court’s limited discussion of the term “beneficiary” only under PC §§24² and 17200³ overlooked the provisions of PC §16061.7⁴. Probate Code §16061.7 requires notice be given to heirs of the decedent/trustor, as well as beneficiaries and trustees named in trust documents, of the irrevocability of the trust and/or of the death of the trustor, and provides a specific warning to those persons in that notice that they “cannot bring an action to contest the trust more than 120

² Probate Code §24 was a new statute added in 1983 and amended in 1987 to expand the definition to apply to other donative transfers in addition to wills and trusts. It remains unchanged since then.

³ Probate Code §17200 was added in 1986, generally continuing former Probate Code §1138.1 and superseding former Probate Code §1120. It has been amended since 1986 generally to add specific types of relief that may be brought under PC §17200(b) even though the terms thereof note that the list of matters in subsections (1) through (23) is not intended to be an exclusive list of such proceedings.

⁴ Probate Code §16061.7 was a completely new statute added by statutes in 1997 and effective January 1, 1998.

days from the date of the notification” (Emphasis added.)

Under the holding in *Barefoot*, however, the very persons to whom statutory notice must be given of the right to bring an action to contest the trust for a limited period of time, will now “lack standing” to contest that trust under PC §17200 unless they are specifically (and likely inadvertently) still named as a “beneficiary”.

When the Legislature added requirements that the trustee notify heirs as well as beneficiaries of the settlor’s death, and set a 120-day time limit for contests after service of notification (PC §§16061.5, 16061.7 and 16061.8), the Legislature could not have intended that heirs who were not specifically named as “beneficiaries” lacked standing to challenge the very documents for which they were given notice and permitted to act.

2) The *Barefoot* Court Failed to Reconcile its Use of a Restrictive Definition of “Beneficiary” Against Legal Commentator’s Insights into Standing for Trust Litigation Matters

The *Barefoot* Court also failed to consider the very specific language in James A. Barringer & Noel M. Lawrence, 2 CEB California Trust and Probate Litigation, Chapter 20 Trust Contests, §20.6 Standing, where the authors note: “Those who

would gain a pecuniary benefit from invalidating the trust ***should have standing*** to bring a trust contest. ... Under most circumstances, the contestants are the beneficiaries of an earlier estate plan or the heirs at law.” (*Id.* at 20-6.) (Emphasis added.) Clearly, previously designated beneficiaries of a trust instrument have always been recognized as interested persons in the devolution of a trustor’s assets who have standing to challenge in the probate court the validity of one or more versions of the trust document whether or not he/she was designated as a beneficiary under the purportedly “final” trust instrument. See also *Olson v. Toy* (1996) 46 Cal.App.4th 818, 824-25 (The fact that plaintiffs were not “interested under” the trust instrument does not prevent them from maintaining an action for declaratory relief as to the validity of the trust. Validity of the trust directly affects plaintiffs' legal rights to property under decedent's will.).

3) The *Barefoot* Court Failed to Recognize the Harmful Public Policy Effects Created by Employing an Unnecessarily Narrow Definition of “Beneficiary”

From a public policy standpoint, the current decision in *Barefoot* is harmful. For example, if a child or caregiver persuades an aging trustor to change the trust for their benefit at the last minute, by undue influence or other wrongful act

(including forgery), thus excluding previously designated or favored beneficiaries, under the current *Barefoot* decision the prior beneficiaries are left with no remedy in the probate court to set aside those otherwise invalid amendment(s).

Furthermore, the argument has been advanced by those supporting the appellate court's opinion that the defrauded beneficiaries can simply "provide the information about undue influence or other wrongful acts" to the very trustee who perpetrated the fraud who, "armed" with that evidence, would then "seek to undo their own wrongs." That argument is simply nonsensical. Unless those former beneficiaries who have been defrauded or the heirs to whom the trust assets would devolve by testate or intestate proceedings after the trust provisions are invalidated can bring their claims to the probate court as is intended in PC §§16061.5, 16061.7 and 16061.8, no one else will have the requisite interest to pursue justice.

Thus, unless the trust administration happens to otherwise be before the probate court (which is highly unlikely), only an unusually pro-active probate court could remove the trustee on its own authority under *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, which would then possibly allow the fraud to be

uncovered and prosecuted. Of course, how would the probate court even know to do so if not for a petition filed by the *de facto* disinherited beneficiary or heir?⁵

4) The *Barefoot* Court Failed to Recognize Its Overly Narrow Definition of “Beneficiary” Leaves No One With Standing to Set Aside Gifts to Prohibited Transferees Under Probate Code Sections 21360 *et seq.*

The *Barefoot* Court also failed to consider the impact of its narrow definition of “beneficiary” under PC §§21360 *et seq.*, which would leave no one with standing to set aside gifts and transfers that the Legislature has declared to be invalid and presumptively the product of undue influence. Probate Code §21380, in particular, creates a presumption of undue influence (that can only be overcome in certain instances by clear and convincing evidence) as to donative transfers in trusts or outright to disqualified persons such as drafters of instruments, fiduciaries and care custodians. Yet again, if only those

⁵ Similarly, having been excluded under the last version of the trust and, therefore, “able” to proceed in the civil court with an action for intentional interference with right to inherit under *Beckwith v. Dahl* (2012) 204 Cal.App.4th 1039 is an unsatisfactory solution. Civil courts are ill-prepared to deal with issues regarding a trust and its creation and/or amendment that PC §17000 fully anticipated would reside solely within the probate court.

disqualified persons are named as beneficiaries, the overly narrow definition of “beneficiary” decreed in the *Barefoot* decision leaves no one with standing to set aside those gifts to the presumptively disqualified individuals – except the very persons who committed the fraud! The *Barefoot* holding thus promotes the opportunity for unbridled fraud of our elders who were supposed to be protected by those very provisions of the Probate Code.

5) The Definition of “Beneficiary” Under Probate Code Section 24 Can, in Fact, Be Reconciled with the *Barefoot* Court’s Concern About Standing

The *Barefoot* Court’s confusion with the definition of PC §24 and the purported limitation that only a “trustee” or “beneficiary” is authorized to bring a petition under PC §17200 is understandable⁶, but can be easily explained in the context of the multitude of proceedings that can be filed under PC §17200. In a proceeding where the validity of the trust instrument is at issue (such as under PC §17200(b)(1), (3) or (4)), then the definition of

⁶ Unfortunately, it appears from a review of the briefs and appellate record that *Barefoot* was argued at both the trial and appellate court levels by civil litigators generally unfamiliar with the nature of probate proceedings or the intricacies of the Probate Code.

who is or who is not a “beneficiary” cannot be determined until the court actually adjudicates which version or provisions of the trust instrument are valid and control (PC §17200(b)(3)), what those provisions mean (PC §17200(b)(1)), and who the beneficiaries actually are under the valid version(s) of the trust (PC §17200(b)(4)). Until that determination is finally made, anyone who is a purported “beneficiary” under the final version, any “beneficiary” under a prior version that is asserted to be valid, and any heir or “beneficiary” of the trustor’s estate where all prior versions of the trust could be determined to be invalid, should have standing as a “beneficiary” under the definition provided in PC §24 to bring a petition to contest the meaning, validity, and/or ascertainment of beneficiaries of the trust instrument because each of them *could become* a “beneficiary.”

Once the probate court determines the final, valid terms of the trust agreement at issue or the terms of the final version of a trust agreement are not timely challenged by those who might become a “beneficiary” under a prior or different version, **then** only those persons who are “trustees” or “beneficiaries” under the final terms of the trust instrument have standing to bring a

petition for any other relief under PC §17200(b), including subsections (2) and (5) through (23), inclusive.

In *Barefoot*, however, both the trial court and the appellate court simply failed to recognize that, by challenging the terms of the purported last version of the trustor's trust, the term "beneficiary" had yet to be finally determined. Essentially, the *Barefoot* Court put the cart before the horse.

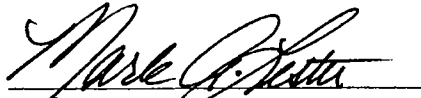
CONCLUSION

Clearly, the *Barefoot* Court failed to consider the import of adopting such an unnecessarily limited definition of "beneficiary", especially when that narrowed definition is applied throughout the rest of the Probate Code. If faced with a petition filed under Probate Code §§17200(b)(1), (3) or (4) as was the case below, the court should recognize that the term "beneficiary" for purposes of standing cannot actually be determined until the court has adjudicated the ultimate, operative provisions of the trust instrument. Conversely, where the terms of the trust agreement are not in dispute, the term "beneficiary" is similarly not in dispute and only those who are either a beneficiary or trustee may bring a petition under PC §17200. The very real and actual public harm caused by affirming the *Barefoot* Court's decision is

that fraud and unchecked financial abuse of California's elders will be unleashed because the *Barefoot* Court's wrong and narrow definition of "beneficiary" will leave no one with standing to protect those who cannot protect themselves.

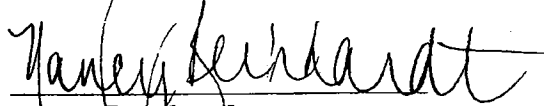
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief, exclusive of the Table of Contents and Table of Authorities, consists of 2,174 words as counted by the Microsoft Word program used to generate the document.

Date: May 31, 2019

JONES & LESTER, LLP



Mark A. Lester

PROOF OF SERVICE

I am employed in the county of Ventura, state of California. I am over the age of 18 and not a party to the within action. My business address is Jones & Lester, LLP, 300 E. Esplanade Drive, Suite 1200, Oxnard, CA 93036. My electronic service address is gmedina@joneslester.com.

On May 31, 2019, I served the foregoing **AMICUS CURIAE BRIEF OF THE VENTURA COUNTY BAR ASSOCIATION – PROBATE AND ESTATE PLANNING SECTION, THE SAN FERNANDO VALLEY BAR ASSOCIATION – TRUSTS AND ESTATES SECTION, AND THE ORANGE COUNTY BAR ASSOCIATION – TRUSTS AND ESTATES SECTION** as follows:

ELECTRONICALLY : E-Service in this action on all parties listed on the service list with TrueFiling in compliance with rule 8.71(c), California Rules of Court:

See attached electronic service list

by depositing a true copy or copies thereof in a sealed envelope with postage paid thereon, addressed as set forth on the attached service list.

by placing copies in sealed envelopes, addressed as set forth on the attached service list, for collection and mailing on this date following ordinary business practices at my place of business. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, under which the correspondence would be deposited with the United States Postal Service this date, with postage paid thereon, in the ordinary course of business:

See attached service list by mail

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed May 31, 2019, at Oxnard, California.

Gracie Medina

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Service List

Barefoot v. Jennings

Supreme Court Case No. S251574 / Court of Appeal Case No.
F076395 / TCSC PR11414

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