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The 2022

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Awards

26TH ANNUAL

CALIFORNIA LAWYER

ATTORNEYS OF THE YEAR

Billionaire's trust defeats stepdaughter's claim of oral promise

TRUST & ESTATE

Cortese v. Sherwood and Topham

**BENJAMIN K. RILEY,
SONY B. BARARI,
ROBERT H. BUNZEL AND
GABRIELLA A. WILKINS,
BARTKO ZANKEL BUNZEL
& MILLER**



PHOTO CREDIT: JANA AŠENBRENNEROVA

FROM LEFT TO RIGHT: SONY B. BARARI, BENJAMIN K. RILEY, ROBERT H. BUNZEL, GABRIELLA A. WILKINS

A sharp cross-examination, top-flight graphics and a favorable interpretation of a two-decade-old statute untested on appeal produced a victory over a probate claim that could have cost the client as much as \$300 million in assets.

"This was a top defense verdict in California last year," the winning attorney, Benjamin K. Riley of Bartko Zankel Bunzel & Miller, said.

The dispute was over a claim by the stepdaughter of the late billionaire owner of the United Artists Theatres chain he had orally promised to leave his golf course in Spain to her when he died. Christina Cortese also alleged that her stepfather, Robert Naify, promised to treat her the same as his two biological daughters in his will or trust and make her "a very wealthy woman." In fact, Naify's final \$2.3 billion trust left her nothing. In Re: Robert A. Naify Living Trust, PTR-16-299823 (S.F. Super. Ct., filed May 23, 2016).

Cortese was 13 when Naify married her mother in 1974, but he never adopted her or her sister. She lived with the family

until she was about 18, Riley said. In 1996, Naify asked Cortese and her husband to move to Spain so her husband could manage the Robert Trent Jones Sr. golf course Naify had purchased, the Marbella Golf & Country Club. Cortese took over the general manager role when the couple divorced in 2006, but Naify fired her in mid-2009, according to a June 2021 statement of decision in the case from Judge Richard B. Ulmer Jr.

Soon after her stepfather's death in 2016, she sued his trust, claiming he had breached his oral promises to her. The suit raised the question of how she could prove those alleged oral promises. Probate Code Section 21700 requires "[c]lear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity."

During a three-week court trial last spring, the question expanded. "Do you have to prove your oral promises by clear and convincing evidence and also detrimental reliance by clear and convincing evidence, or can [the

plaintiff], as argued by the other side, just prove detrimental reliance" alone, Riley said. Cortese's counsel from Holland & Knight LLP argued that under the "enforceable in equity" prong of the statute, they only needed to show Cortese relied on a promise to her detriment, he said. The respondents disagreed.

He said Naify never made any such promises, as Ulmer found. In fact, a prominent part of the trial, according to Riley, was his cross-examination of Cortese pointing out "all the inconsistencies in the record of her alleged promises."

For instance, "She never put in writing to herself, to a diary, to anyone else that these oral promises were ever made," he said.

Or, as Ulmer wrote in his decision, "The lion's share of [Cortese's] evidence was her own testimony about conversations she allegedly had alone with [Naify] — allegations he can no longer refute."

The judge held that the stepdaughter had to muster clear and convincing evidence either to prove the promises or to prove detrimental reliance. "She did not."

Riley used a special, detailed graphics presentation to show that Naify actually did make Cortese "a very wealthy woman," including giving her stock worth about \$22 million, plus nearly \$5 million from her mother's estate and other gifts. Riley said the total approached \$35 million, including tuition for her children. The judge granted costs to the defense for creating the graphics presentation.

The litigation is not over. Holland & Knight have appealed.

And there is a second case set for trial in May in which Cortese contends her mother's trust did not receive its full share of community property when she died in 1997. It raises what Riley called "a cutting-edge issue" pitting trust and estate law against family law. In Re: The Francesca P. Naify Living Trust, PTR-16-300479 (S.F. Super. Ct., filed Dec. 30, 2016).

Cortese is seeking as much as \$1 billion, Riley said. It could be "one of the largest trust cases in the United States at this point."

— DON DEBENEDICTIS