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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DIANE K. TOLHURST,
Plaintiff and Appellant,

v.

BRIAN MCALINDON,
Defendant and Respondent.

A132217

(Sonoma County
Super. Ct. No. SPR078287)

Harry McAlindon died on April 17, 2006. A will contest between Harry's¹ long-time companion, appellant Diane Tolhurst and Harry's five children, including respondent Brian McAlindon, followed. The parties, represented by counsel, entered into a written agreement settling that litigation in April 2008, and the probate estate was closed. Two years later Tolhurst made three successive and unsuccessful attempts to rescind the settlement. She appeals from the denial of her most recent efforts. We affirm.

I. BACKGROUND

Tolhurst was Harry's fiancé and lived with him from 1987. Record excerpts filed with Tolhurst's appeal reflect an acrimonious relationship between Tolhurst and Harry's children. In 2001, Brian filed a petition in the San Mateo County Superior Court seeking a conservatorship for Harry, alleging that Tolhurst had fraudulently obtained a power of attorney from Harry, at a time when Harry lacked capacity. It appears that the question

¹ Because several parties bear the same surname, we use first names where necessary to avoid confusion. No disrespect is intended.

of Harry's capacity to deal with his own affairs was then litigated between the parties over the next several years.² Harry made a will in October 2002. After Harry's death, Tolhurst petitioned for probate of the will, and on May 17, 2006, Brian filed a contest. A trial date was set for May 2, 2008. The parties, including Brian's siblings, participated in mediation and reached a settlement of the will contest, memorialized in a written settlement agreement and mutual general release (the Settlement), which included a stipulated disposition of Harry's estate. The Settlement provided for a division of cash in the estate (with Tolhurst receiving 45 percent of the net cash), and for sale of Harry's real property in 2011, with the proceeds to be divided among Tolhurst and Harry's children. Tolhurst was given the right to occupy the property rent free until April 1, 2011. The will contest was dismissed on April 30, 2008, consistent with the terms of the Settlement. The Court then granted the petition of the special administrator of the estate for preliminary distribution. The special administrator submitted a final accounting in October 2008. The final accounting and a petition for final distribution was approved by the court on November 5, 2008.

On February 11, 2010, Tolhurst filed a pro se "Petition to Overturn All Settlement Agreements" (the First Motion). She alleged that the Settlement "is based on the fraud and abuse of the wrongful conservatorship of Harry McAlindon . . . which began on June 14, 2001 in the San Mateo Court." The First Motion was denied by the court (Hon. Elaine Rushing), without prejudice, after hearing on March 10, 2010.³

On November 22, 2010, Tolhurst filed a "Motion to Revoke Settlement Agreement, to Quash the Will Contest, and to Establish Probate" (the Second Motion).

² Tolhurst attaches as part of her "Appendix to the Opening Brief" excerpts from records of conservatorship proceedings in both San Mateo and Sonoma County Superior Courts. Like most of the materials in Tolhurst's appendix, it is not at all clear that any of these documents were ever before the trial court in the instant case. To the very limited extent that we find them relevant here at all, we take judicial notice of the records of those proceedings. (Evid. Code, § 452, subd. (d).)

³ As we discuss further *post*, we are provided with only clerk's minutes of hearings in the matter, and not with transcripts of the proceedings, tentative rulings, or orders after hearing.

She again alleged that Brian was guilty of “forgery fraud and identity theft” in the various conservatorship proceedings, and contended that her former attorney had caused her to sign the Settlement “under duress.” That motion was also denied by Judge Rushing after hearing on December 28, 2010. The court found “[Tolhurst’s] reliance upon [Code of Civil Procedure⁴] section 438[, subdivision] (c), Probate Code section 259 and . . . section 2017.310[, subdivision] (a) is misplaced, as these statutes do not provide the Court with a basis for the relief requested.” The court further stated that “[Tolhurst] has failed to demonstrate new facts, law or circumstances that were not previously considered. (Section 1008[, subdivision] (a); *Garcia v. Hejmadi* (1997) 58 Cal.App.4th. 674, 692.) . . . The motion is entirely untimely, as it was filed two years and nine months after the settlement agreement was reached. Thus procedurally, the Court is without jurisdiction to ‘revoke’ or set the agreement aside.”

Undeterred, Tolhurst filed an “Application to Reconsider the Motion to Revoke the Settlement Agreement and Mutual General Release of December 28, 2010” (the Third Motion) on January 7, 2011. Tolhurst cited section 473, and again asserted that her former attorney had “authored the settlement agreement” against her will that he had coerced her into signing the Settlement while she was in poor health, with “diminished acuity” and under financial duress. That motion was denied by the court (Hon. Mark Tansil) after hearing on or about February 15, 2011. The court found: “The underlying motion was heard and denied by Judge Elaine Rushing on December 28, 2010. . . . [¶] [T]he current matter must be denied because it patently fails to state any new facts, circumstances or law. [¶] There are no grounds for reconsideration. The court will not impose sanctions at this time; however, it is noted that Tolhurst has actually filed three different, unsuccessful motions on this same subject. Further frivolous litigation could lead to sanctions.”

Tolhurst filed a notice of appeal on May 31, 2011.

⁴ All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

II. DISCUSSION

A. Appellate Jurisdiction

At the outset, we address Brian’s contention that this appeal is untimely and must be dismissed. Brian correctly notes that Tolhurst fails in the first instance to comply with California Rules of Court, rule 8.204(a)(2)(B)⁵ in that her opening brief fails to state that the judgment appealed from is final, or explain why the order appealed from is appealable. He is also correct that such a failure would justify striking the appellant’s opening brief.⁶ (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 557.) Because we believe that there is an appealable order, we elect not to do so.

This is a probate proceeding. Section 904.1, subdivision (a)(10) provides that an appeal may be taken “[f]rom an order made appealable by the provisions of the Probate Code” “It is well established that ‘[a]ppeals which may be taken from orders in probate proceedings are set forth in . . . the Probate Code, and its provisions are exclusive.’ [Citation.] ‘There is no right to appeal from any orders in probate except those specified in the Probate Code.’ [Citation.]” (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125–1126.) Appealable orders in proceedings for administration of a decedent’s estate are set forth in Probate Code section 1303.⁷

⁵ All further rule references are to the California Rules of Court, unless otherwise indicated.

⁶ Tolhurst has greatly complicated our review of this matter by her failure to comply with court rules in several respects, and by her failure to include many of the relevant pleadings and documents from the trial court record in her appendix. Her initial brief and appendices were rejected by the clerk of this court for failure to comply with rule 8.144(a)(1)(C)–(D) [organization of appendix] and rule 8.204(a)(1)(C) [lack of record citations in briefing]. We still do not have complete copies of her three motions, exhibits, any portion of the opposition briefs, any hearing transcripts, or any of the court’s probate orders approving distribution of estate assets in accordance with the Settlement. Tolhurst is not exempt from the rules because she represents herself on appeal in propria persona. “ ‘[S]uch a party is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys. [Citation.]’ [Citation.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.)

⁷ “[A] probate order’s appealability is determined not from its form, but from its legal effect. [Citations.] An order is appealable, even if not mentioned in the Probate

Belatedly, in her reply brief, Tolhurst asserts that the trial court orders denying her motions are appealable under Probate Code section 1303, subdivisions (a) and (f). Subdivision (a) of Probate Code section 1303 deals with “[g]ranting or revoking letters to a personal representative, except letters of special administration or letters of special administration with general powers.” Tolhurst fails to explain how that section might apply here. Subdivision (f), however, provides for appeal from orders “[d]etermining heirship, succession, entitlement, or the persons to whom distribution should be made.” That section would be at least arguably applicable to Tolhurst’s de facto attempts to vacate the court’s distribution orders made pursuant to the Settlement.

Tolhurst’s notice of appeal filed on May 31, 2011, purports to appeal from the December 28, 2010 order on the Second Motion and from the February 15, 2011 denial of her Third Motion for reconsideration.⁸ An order denying a motion for reconsideration (§ 1008) is not separately appealable. (*Tate v. Wilburn* (2010) 184 Cal.App.4th 150, 158–159 (*Tate*); *In re Marriage of Burgard* (1999) 72 Cal.App.4th 74.) The policy reasons for determining that denials of motions for reconsideration are not appealable are “ “to eliminate the possibilities that (1) a nonappealable order or judgment would be made appealable, (2) a party would have two appeals from the same decision, and (3) a party would obtain an unwarranted extension of time to appeal. [Citation.]” [Citation.]’ ” (*Tate*, at pp. 158–159.) An order denying a motion for reconsideration is also not among the orders made appealable by the Probate Code, and is therefore not appealable in a probate proceeding. (*Estate of Stoddart, supra*, 115 Cal.App.4th at pp. 1125–1126.) While Tolhurst also attempted to rely on section 473 in her Third Motion, the general rule allowing appeals from an order denying a statutory motion for relief under section 473 does not apply in probate, and these orders are not appealable.

Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable. [Citation.]” (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755.)

⁸ We take judicial notice of the copy in our own file. Tolhurst’s appendix does not include a copy.

(*Estate of Wilhelm* (1957) 152 Cal.App.2d 803, 805; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeals, § 207, pp. 281–282.) The February 15, 2011 order is therefore not appealable.

Brian argues that the December 28, 2010 order is likewise not appealable, since it was nothing more than a request for reconsideration of the court’s March 10, 2010 order denying the First Motion. Were Brian correct on this point, the appeal would unquestionably be untimely, and dismissal would be required. “Unless a statute or rule . . . provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, showing the date either was served; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment.” (Rule 8.104(a)(1)–(3).) The time for appeal from the March 10 order expired, at the latest, in September 2010. Timely filing is essential to an appellate court’s power to entertain an appeal. (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.)

Brian is correct that Judge Rushing cited section 1008, subdivision (a) in her December 2010 ruling, and found that Tolhurst “failed to demonstrate new facts, law or circumstances that were not previously considered.” But for reasons not readily apparent in the very limited record before us, Judge Rushing, in March 2010, also denied Tolhurst’s First Motion “without prejudice.” “ ‘The term “without prejudice” . . . means that there is no decision of the controversy on its merits, and leaves the whole subject . . . open to another application’ [Citations.]” (*Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1587, disapproved on another point in *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785, fn. 7.) Denial of a motion without prejudice impliedly invites the moving party to renew the motion at a later date, rendering section 1008 inapplicable to the denial. (*Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1015.) The December 28, 2010 order

was the final dispositive ruling and is therefore appealable. (*Estate of Miramontes-Najera, supra*, 118 Cal.App.4th at pp. 755–756.) The appeal from that order, at least so far as we can tell from this record, is timely. (Rule 8.104(a)(3).)

B. *Denial of the Second Motion*

Having determined Tolhurst’s appeal to be timely, we deny it on the merits. In the first instance, Tolhurst appears to misperceive our role as an appellate court. She reiterates her trial court arguments, apparently seeking to have us adjudicate her claims de novo. Her briefing is completely unhelpful. She articulates no standard of review and her citations to the “record” appear to be largely references to documents included in her “Appendix” that may, or may not, have been presented to the trial court. (See *Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 946 [exhibit to brief that is not part of record on appeal disregarded]; see also rule 8.204(d) [attachments to briefs must consist of materials in the record or relevant regulations, rules, statutes, or other similar citable materials].) She also seems unaware of the rule that “an appealed judgment is presumed correct, and appellant bears the burden of overcoming the presumption of correctness. [Citation.]” (*Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 649–650 (*Boyle*)). “The [appellant] must affirmatively show error by an adequate record. [Citations.] Error is never presumed. It is incumbent on the [appellant] to make it affirmatively appear that error was committed by the trial court. [Citations.] . . . All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent” [Citation.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) As a result, on appeal “the party asserting trial court error may not . . . rest on the bare assertion of error but must present argument and legal authority on each point raised. [Citation.]” (*Boyle, supra*, 137 Cal.App.4th at p. 649.) “To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]” (*In re S.C.* (2006) 138 Cal.App.4th 396, 408; see also rule 8.204(a)(1)(C).) Tolhurst does neither. We are not required to search the record on our own seeking trial court error. (*Nwosu v. Uba, supra*, 122 Cal.App.4th at p. 1246.) When an appellant raises an issue “but fails to support it

with reasoned argument and citations to authority, we treat the point as waived. [Citations.]” (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

Even if we were not to deem Tolhurst’s arguments forfeited, we would find no basis for reversal. Harry’s estate was settled in 2008. The unappealed orders for preliminary and final distribution “bind[] and [are] conclusive as to the rights of all interested persons.” (Prob. Code, § 11605; *Estate of Strader* (2003) 107 Cal.App.4th 996, 1003, fn. 6.) Generally, once the time for appealing such an order has passed, a court may only set aside or modify the order based only on its equitable jurisdiction to correct extrinsic fraud or mistake, which the moving party must demonstrate. (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 237; *Estate of Beard* (1999) 71 Cal.App.4th 753, 774 (*Beard*)). “As an incident of its function of settling the estates of deceased persons and passing upon final accounts, a court sitting in probate has continuing jurisdiction to determine any questions arising from controversies over the administration of estate property, in order to prevent fraud and waste. [Citations.]” (*Beard*, at pp. 772–773.) Moreover, a probate court has “continuing jurisdiction over the subject matter of the parties’ dispute not only as a function of its probate obligation to control the proceedings before it and thereby protect the integrity of the estate, but in order to enforce the terms of the parties’ Compromise Agreement and Original Settlement. [Citations.] ‘When parties to litigation appear before the court and advise it that the controversy has been settled and the terms thereof, courts must have the ability to enforce those agreements. This is necessary not only to control the proceedings before the court, but also to protect the interests of parties who may have materially altered their positions in reliance on the settlement.’ [Citation.]” (*Id.* at p. 773, fn. omitted.)

Claimed fraud must be “extrinsic”—i.e., some form of fraud or concealment that prevented the claimant from having a fair opportunity to appear and be heard. (*Estate of Sanders* (1985) 40 Cal.3d 607, 616–619; see *Estate of Carter* (2003) 111 Cal.App.4th 1139, 1149.) It customarily arises when one party has deliberately been kept ignorant of the proceeding or in some other way been fraudulently prevented from presenting his or her claim or defense. (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471 (*Kulchar*)). Relief

based on extrinsic mistake may be shown when the moving party demonstrates excusable neglect, hardship or other grounds for the failure to press a claim or defense, which results in an unjust order made without a fair adversary hearing. (*Ibid.*; *Beard, supra*, 71 Cal.App.4th at p. 775.)

Tolhurst claimed irregularities and misconduct in the previously consolidated conservatorship proceedings, and that Brian thus had no “standing” to file the will contest. She alleged nothing that would have prevented her from pursuing, at the time of the will contest, any of the matters she now asserts, and the “fraud” alleged by Tolhurst was, in any event, intrinsic to the probate proceedings. Her claim of “mistake” was simply that her attorney had negotiated the settlement against her wishes and that she had acquiesced under duress, due to an illness.

The standard of review applicable to the denial or grant of a motion to set aside a prior order due to extrinsic fraud or mistake has sometimes been denominated abuse of discretion (see, e.g., *Davis v. Davis* (1960) 185 Cal.App.2d 788, 792), but it is more accurately characterized as an amalgam of the substantial evidence and abuse of discretion standards. The trial court’s ruling will be upheld if it could have determined there was substantial evidence of extrinsic fraud or mistake, or, conversely, if it could have determined there was insufficient evidence of extrinsic fraud or mistake. (See, e.g., *Kulchar, supra*, 1 Cal.3d at pp. 472–474; *Beard, supra*, 71 Cal.App.4th at p. 775.)

By failing to provide a complete record and to fairly state the evidence before the trial court, Tolhurst has forfeited any substantial evidence argument. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) The trial court could reasonably conclude that the equities in this case favored “ ‘the interests of parties who may have materially altered their positions in reliance on the settlement’ ” rather than Tolhurst. (See *Beard, supra*, 71 Cal.App.4th at p. 772.)

We cannot say on this record that the trial court abused its discretion in finding that Tolhurst failed to present evidence sufficient to establish her entitlement to equitable relief.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.