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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

Estate of RAYMOND L. TERRY,
Deceased.

SEAN TERRY,
Petitioner and Appellant,

v.

TASHA PRESTON,
Objector and Respondent.

A132910

(Contra Costa County
Super. Ct. No. MSP0900945)

In connection with a dispute over whether the trial court should remove respondent Tasha Preston as cotrustee of a trust that was created by her deceased husband, she presented to the trial court a holographic will that she claimed was the controlling testamentary instrument. Appellant Sean Terry, the deceased’s son, claimed that respondent’s action violated the no contest provision of the applicable trust, but the trial court disagreed. On appeal, appellant contends that the trial court misapplied Probate Code section 21311,¹ which provides that a no contest clause is enforceable against a direct contest brought without probable cause. We disagree and affirm.

¹ All statutory references are to the Probate Code unless otherwise indicated.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

This dispute arises out of the handling of the estate of Raymond L. Terry. Respondent Preston was the deceased's wife, and appellant Sean is the deceased's son by a previous marriage.²

On July 11, 2000, Raymond executed (1) the Raymond L. Terry Revocable Trust and (2) the Last Will of Raymond L. Terry (hereafter trust and pour-over will). Raymond was named the trustee of the trust. Upon his death, respondent, appellant, and appellant's sister, Katherine Terry, were named as successor cotrustees.³ Respondent was to receive payment of income from trust assets during her lifetime, with distribution to appellant and Katherine upon respondent's death. Both the trust and the pour-over will contain no contest clauses.⁴

The record contains evidence that Raymond wrote and executed a holographic will on November 2, 2001, slightly more than a year after executing the trust and pour-over

² To avoid confusion, we sometimes refer to members of the Terry family by their first names.

³ Katherine was a party below, but is not a party on appeal. Although we sometimes refer to the arguments that appellant made in the trial court, we note that appellant and Katherine were represented by the same law firm and took identical positions below.

⁴ The no contest clause of the trust provides: "If any beneficiary under this instrument . . . directly or indirectly contests this instrument, any amendment to this instrument, or the will of the settlor in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or the will of the settlor, or seeks to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlor, then the right of that person to take any interest given to him or her by this instrument or any amendment to this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without descendants." The no contest clause of the pour-over will similarly provides: "If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me without issue."

will. The handwritten document (hereafter “holographic will”) states, in full: “This is my Last Will [and] Testament. [¶] I, Raymond L. Terry, leave everything I own, no matter how titled, to my wife, Tasha Preston. [¶] Signed on November 2, 2001, in Courtland California. [¶] [Signature].” The document states that it was witnessed by Deborah A. Miller, who also signed it.

Respondent later testified at a deposition that she was present when Raymond wrote and signed the holographic will. According to respondent, Raymond told her that she could use the holographic will in the event that she “had any trouble with the trust,” and Raymond called the holographic will respondent’s “secret weapon.”

Raymond died on January 18, 2002.

On October 22, 2009, appellant filed a petition for an order (1) removing respondent as a cotrustee or, in the alternative, suspending respondent’s powers as a cotrustee, and (2) appointing and instructing a temporary trustee. He alleged that although he, respondent, and Katherine were named successor cotrustees of the trust, Raymond’s brother in fact took over Raymond’s financial affairs, and acted as the trust’s de facto trustee, from the time of Raymond’s death until November 2007. Appellant further alleged that respondent thereafter was uncooperative, and failed to communicate with appellant and Katherine regarding opening a bank account in the name of the trust, in which to deposit trust income. Specifically, respondent failed to respond to a letter Katherine wrote to her on January 17, 2008.

Respondent filed an opposition to the petition on January 29, 2010, and requested that she be permitted to continue serving as cotrustee.

Respondent testified at her deposition that she showed the holographic will to her attorneys after the dispute arose over trying to remove her as cotrustee. On February 10, 2010, respondent filed a document titled Supplemental Respondent Tasha Preston’s Opposition to Petition for Order (1) Removing Cotrustee or, Alternatively, Suspending the Powers of Cotrustee; and, (2) Appointing and Instructing Temporary Trustee” (hereafter supplemental opposition). (Solid capitalization replaced by initial capitalization.) The first heading of the supplemental opposition states: “Petitioner

Submits Decedent's Holographic Will Which Respondent Believes Controls." (Solid capitalization replaced by initial capitalization.) Respondent requested that the court determine the validity of the document, and declare it to be valid and controlling.

On March 11, 2010, respondent filed both (1) a petition requesting that appellant and Katherine be removed as cotrustees, and (2) an additional opposition to appellant's original petition to have her removed as cotrustee. Neither document filed on March 11 mentioned the holographic will, and instead requested that respondent continue to serve as cotrustee of the trust.

Nearly a year after first submitting the holographic will to the trial court, respondent filed a declaration with the court on December 29, 2010. In her declaration, she stated that it was her understanding that the opposition she filed on March 11, 2010, superseded the supplemental opposition. She also declared that it was her intent to withdraw or dismiss the supplemental opposition. The trial court thus never ruled on the validity of the holographic will.

Respondent was suspended as cotrustee of the trust in January 2011, pending trials on the two petitions for removal of cotrustees.

Appellant and Katherine thereafter filed the petition that is the subject of this appeal. On March 17, 2011, they requested instructions regarding the no contest clause, pursuant to section 17200. They argued that respondent violated the no contest clauses of the trust and pour-over will, because her supplemental opposition was a pleading alleging the invalidity of a will or trust, which amounted to a direct contest. (§ 21310, subds. (a), (b)(5).) Appellant and Katherine further argued that respondent's direct contest was brought without probable cause (§ 21311, subd. (a)(1)). Respondent opposed the request for instructions, arguing that (1) filing the supplemental opposition was not a will contest under section 21310, and (2) if the supplemental opposition was considered a contest, she had probable cause to initiate it.

Following a hearing, the trial court denied the petition requesting instructions. The court concluded that respondent engaged in a direct contest (§ 21310, subds. (a), (b)(5)) when she filed the supplemental opposition. The trial court observed that it was

unclear whether respondent's subsequent withdrawal of the supplemental opposition "nullified" the effect of the original filing. The court also concluded that it need not decide the issue, because the supplemental opposition was supported by probable cause, and therefore the no contest clauses in the trust and pour-over will were unenforceable (§ 21311, subd. (a)(1)). This timely appeal followed.⁵

II. DISCUSSION

A. *Legal Framework.*

A no contest clause "essentially acts as a disinheritance device, i.e., if a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument." (*Burch v. George* (1994) 7 Cal.4th 246, 265.) "In essence, a no contest clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument." (*Id.* at p. 254.)

In 2007, the Legislature directed the Law Revision Commission (Commission) to prepare a report to consider the advantages and disadvantages of no contest clauses. (*Revision of No Contest Clause Statute* (Jan. 2008) 37 Cal. Law Revision Com. Rep. (2007) pp. 359-360, 363 (Commission Report).) The Commission concluded that the prior law was overly complex and unpredictable in its operation, which led to overreliance on the declaratory relief procedure. (Commission Report at p. 381.)

The Commission recommended several changes to the law, some of which are relevant here. Former section 21306, subdivision (a), provided that a no contest clause was unenforceable against a beneficiary to the extent that the beneficiary brought a contest alleging revocation (or other matters not relevant here) "with reasonable cause."

⁵ A review of the register of actions reveals that after the trial court ruled on the request for instructions, the parties dropped the trial dates for their original petitions to remove one another as cotrustees, apparently pending the resolution of their dispute over the no contest clause.

(Stats. 2000, ch. 17, § 6.) “Reasonable cause” was defined by statute “to mean that the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery.” (Former § 21306, subd. (b); Stats. 2000, ch. 17, § 6.) One court interpreted that standard to involve a determination of whether a reasonable person would have concluded that the contest was legally tenable. (*Estate of Gonzalez* (2002) 102 Cal.App.4th 1296, 1305; see also *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 857-858 [interpreting Code Civ. Proc., § 1038]; Commission Report at p. 398.) The Commission noted that the existing law focused “only on the likelihood that the contestant’s ‘factual contention’ ” would be proven, and concluded that such a standard was “too forgiving.” (Commission Report at pp. 397-398.) The Commission recommended imposing a higher standard that would “deter more than just a frivolous contest,” and proposed a standard of “probable cause,” which would depend “not only on the proof of facts, but [also] on the proof of facts that are sufficient to establish a legally sufficient ground for the requested relief.” (*Ibid.*)

In response to the Commission Report, the Legislature in 2008 made several major changes to the provisions of the Probate Code relating to no contest clauses, including the addition of the “probable cause” standard to the determination of whether a direct contest violates a no contest clause. (Stats. 2008, ch. 174, § 2, adding § 21310 et seq.; § 21311, subds. (a)(1), (b); *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 600-601, fn. 2; 14 Witkin, Summary of Cal. Law (10th ed., 2012 Supp.) Wills and Probate, § 560A, pp. 80-82.) The new scheme became effective January 1, 2010, and applies to instruments that became irrevocable on or after January 1, 2001. (§ 21315; *Johnson* at pp. 600-601, fn. 2.) The trust in this matter provides that it shall become irrevocable upon Raymond’s death. The parties do not dispute that the new statutory scheme applies to this matter, because the trust became irrevocable upon Raymond’s death in January 2002.

B. Initiation of a Direct Contest.

Appellant agrees with the trial court that, by filing the supplemental opposition, respondent initiated a direct contest of the trust. “ ‘Whether there has been a “contest” within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used.’ [Citations.]” (*Burch v. George, supra*, 7 Cal.4th at pp. 254-255.)

Section 21310, subdivision (a), defines a contest as “a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.” A direct contest is defined as “a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on,” among other things, “[r]evocation of a will pursuant to Section 6120 [or] revocation of a trust pursuant to Section 15401.” (§ 21310, subd. (b)(5).) Section 6120, subdivision (a), in turn, provides that a will is revoked by “[a] subsequent will which revokes the prior will or part expressly or by inconsistency.” Section 15401, subdivision (a)(1), provides that a trust that is revocable by the settlor may be revoked in whole or in part “[b]y compliance with any method of revocation provided in the trust instrument.” The trust here provides that “[a]ny amendment, revocation, or termination of any trust created by this instrument shall be made by written instrument signed by the settlor and delivered to the trustee.”

In her supplemental opposition, respondent asked the trial court to “determine the validity of the Holographic Will,” and to “declare the holographic will as valid and the controlling document.” The trial court concluded that she thus engaged in a direct contest, because the supplemental opposition was a pleading filed with the court that alleged that the holographic will revoked the trust and pour-over will. (§§ 6120, subd. (a), 15401, subd. (a)(1), 21310, subs. (a), (b)(5).) The trial court also noted that, under common law, respondent’s withdrawal of the supplemental opposition would not have reversed the effect of its initial filing. (*Estate of Hite* (1909) 155 Cal. 436, 442 [party who files contest but withdraws it before rendering of a judicial determination cannot “be heard to declare, ‘I have not contested.’ ”]; accord, *Estate of Fuller* (1956) 143 Cal.App.2d 820, 826-827.) The court further observed that it was unclear whether

the enactment of the Probate Code superseded the common law, and that the Legislature may have intended to allow a withdrawal of a contest without prejudice before decision, as is generally permitted for motions in civil actions. (Cf. § 21313 [common law governs enforcement of no contest clause to extent Probate Code does not apply].)

The trial court did not decide the issue, however, because it went on to conclude that, even if respondent's withdrawal of the supplemental opposition did not nullify the effect of its initial filing, her direct contest was supported by probable cause and thus did not trigger the relevant no contest clauses (§ 21311, subd. (a)(1)). We agree with respondent that this court likewise need not address the effect of respondent's withdrawal of the supplemental opposition, as we conclude that her contest was supported by probable cause.

C. Trial Court Employed Correct Standard.

We must first address appellant's argument that the trial court used an incorrect standard when making its probable cause determination. As set forth above, a no contest clause shall be enforced against a direct contest that is brought without probable cause. (§ 21311, subd. (a)(1).) For purposes of the statute, "probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (§ 21311, subd. (b).) The comment to section 21311 states that the term " 'reasonable likelihood' " has been interpreted to mean "more than merely possible, but less than 'more probable than not,' " as set forth in *People v. Proctor* (1992) 4 Cal.4th 499, 523 [construing Pen. Code, § 1033, subd. (a), standard for granting change of venue] and *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 653, footnote 4 [construing Pen. Code, § 938.1 standard for sealing grand jury transcripts]. (Cal. Law Revision Com. coms., 54A, pt. 2 West's Ann. Prob. Code (2011 ed.) foll. § 21311, pp. 209-210.)

In its order denying the petition for instructions regarding the no contest clause, the trial court here specifically quoted the probable cause standard set forth in section 21311, subdivision (b). It thereafter provided a detailed and thoughtful analysis

of the standard, which we quote at length: “Although the concept of probable cause is supported by a substantial jurisprudential legacy, the level of evidence required to meet that standard is not subject to quantification. (See for example *Illinois v. Gates* (1983) 462 U.S. 213, 232.) A comparison with other legal standards confirms the imprecision inherent in probable cause analysis. The Legislature arguably could have turned to Evidence Code section 115, with its reference to the standards of proof beyond a reasonable doubt, proof by clear and convincing evidence, and proof by a preponderance of the evidence. But by not doing so, the Legislature, as a reasonable inference, intended to allow a party to initiate a contest without running afoul of a no contest clause on a showing amounting to less than is required under even a preponderance standard. Thus, [appellant’s] *outcome-directed focus, with its emphasis on whether respondent ultimately could have been successful, is not necessarily controlling.* [¶] Instead, it may be that respondent ultimately would not have been successful under her approach. But she did not have to be assured of such success. She had only to have a belief, from a reasonable person’s perspective, of a reasonable likelihood of success.” (Italics added.) The trial court later stated: “Ultimately, if pursued to conclusion, any probate of the holographic will may not have provided relief for respondent. But as noted, an assurance of ultimate success is not the standard. Less is required for probable cause. Respondent met that lesser standard.”

Appellant focuses on the italicized portion of the court’s order, above, and claims that the court’s criticism of his “ ‘outcome-directed focus’ ” was inconsistent with the Probate Code’s requirement that a contestant have a reasonable belief that there is a “reasonable likelihood that the *requested relief will be granted,*” a specific reference to the potential outcome of a contest. (§ 21311, subd. (b), italics added.) We agree with respondent that the trial court correctly articulated the appropriate standard. The trial court took into consideration whether respondent could have reasonably believed that she would achieve a successful outcome, but simply rejected appellant’s argument that respondent’s ultimate success had to be *assured* in order to be supported by probable cause.

The trial court’s conclusion that the “reasonable likelihood” of success standard set forth in section 21311, subdivision (b) is less than a preponderance of the evidence standard is consistent with the cases cited by the Commission following the statute. The Supreme Court stated in *People v. Proctor*, *supra*, 4 Cal.4th 499, that “ ‘reasonable likelihood’ ” means “ ‘something less than “more probable than not.” ’ ” (*Id.* at p. 523, italics added.) “More probable than not” is synonymous with the preponderance of the evidence standard (CACI No. 200), meaning that the trial court was correct that the “reasonable likelihood” standard falls below proof by a preponderance.⁶

Appellant emphasizes that the probable cause standard in section 21311 is higher than the “reasonable cause” standard for contests set forth in former section 21306, subdivision (a), and that the existence of probable cause should be determined objectively, as a matter of law. (*Estate of Gonzalez*, *supra*, 102 Cal.App.4th at p. 1305.) We agree. There is no indication, however, that the trial court applied the previous, lesser standard. (Cf. *Alvarez v. Superior Court*, *supra*, 154 Cal.App.4th at p. 657 [remand where trial court applied wrong standard, and it was unclear whether result would have been the same had correct standard been applied].) We proceed therefore to the question of whether the trial court correctly concluded that respondent’s contest was brought with probable cause, and thus did not trigger the no contest clauses in the trust or pour-over will. (§ 21311, subd. (b).)

⁶ At the hearing below, the trial court observed that probable cause amounts to less than a preponderance of the evidence, then stated: “So you don’t, even as a reasonable person, have to believe that you could win. You need some lesser showing. So do you [respondent] meet that? Yes.” Appellant argues that this statement is inconsistent with the probable cause standard in section 21311. We construe the trial court’s comments as an accurate statement that a showing of probable cause is less than that of a preponderance of the evidence. To the extent that the comments were ambiguous and arguably inconsistent with the correct statement of the law in the court’s final order, we need not attempt to understand them, because “a judge’s comments in oral argument may never be used to impeach the final order, however valuable to illustrate the court’s theory they might be under some circumstances.” (*Jespersen v. Zubiante-Beauchamp* (2003) 114 Cal.App.4th 624, 633.)

D. Contest Supported by Probable Cause.

Appellant argues that respondent's supplemental opposition lacked probable cause for three independent reasons. First, there were multiple statute of limitations periods that may have applied to the supplemental opposition, any of which would have barred the direct contest: (1) section 16061.8, which provides that no person upon whom notification by the trustee is served may bring an action to contest the trust more than 120 days from the date of notification, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered during that 120-day period, whichever is later, (2) section 16460, which provides that a trust beneficiary must commence a claim against a trustee within three years from the time the basis of a claim is adequately disclosed to the beneficiary, and (3) section 1000, which provides that the limitations periods of the Code of Civil Procedure, the longest of which is four years (Code Civ. Proc., § 343) apply if the Probate Code does not provide an applicable rule. Second, the holographic will was "obviously invalid," because extrinsic evidence revealed that Raymond lacked testamentary intent when he executed the document. Third, the direct contest was barred by the doctrine of laches, because respondent unreasonably delayed bringing the action without satisfactory explanation. We review de novo the trial court's determination of whether there was a "reasonable likelihood" of success. (*People v. Proctor, supra*, 4 Cal.4th at pp. 523-524.)

1. Statute of limitations

As for appellant's statute of limitations argument, the trial court, in denying the petition for instructions, accepted the argument that the statute of limitations barred an effort to use the holographic will to support respondent's efforts to prevent her removal as cotrustee. The court concluded, however, that this did not end its inquiry, because respondent might reasonably have concluded that filing the supplemental opposition was the equivalent of the filing of a petition for probate, an effort that would not have been barred by any statute of limitations period. (§ 8000, subd. (a)(1) [interested person may commence probate of decedent's will at any time after decedent's death]; *Estate of Hume* (1918) 179 Cal. 338, 345-346.) It did not matter that the supplemental opposition was

not captioned as a petition for probate, the trial court reasoned, because the absence of such a caption “would not necessarily have precluded a court from considering it as such.”

In his opening brief, appellant acknowledges that the statute of limitations does not bar the filing of a petition for probate, but argues that the trial court erred in concluding that the supplemental opposition could be construed as a petition for probate. He contends that respondent argued that the supplemental opposition could be construed as a petition for probate only after realizing that her actions may have triggered the no contest clause. Citing the register of actions, he also contends that respondent did not treat the supplemental opposition as a petition for probate, and claims that construing the opposition as such “prejudiced” him. As respondent points out, however, there is authority to support the trial court’s conclusion that the supplemental opposition could have been construed as a petition for probate, because “ ‘[t]he label given a petition, action or other pleading is not determinative; rather, the true nature of a petition or cause of action is based on the facts alleged and remedy sought in that pleading.’ ” (*People v. Picklesimer* (2010) 48 Cal.4th 330, 340.) Appellant counters that the supplemental opposition did not satisfy all the requirements of a petition for probate set forth in section 8002 (such as specifying the date and place of decedent’s death, as well as the character and estimated value of the property in the estate), meaning that it did not allege facts sufficient to support a petition for probate. (Cf. *Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 511 [petition alleged facts sufficient to be construed as petition for writ of mandamus, instead of petition for habeas corpus].) Appellant also notes that no hearing was held on a petition for probate within 30 days, as mandated by section 8003.

We agree with the trial court that the holographic will was “awkwardly presented.” The supplemental opposition did, however, request the affirmative relief that the trial court determine the validity of the holographic will, and declare it the “controlling document.” We therefore find that the trial court was not precluded from construing it as a petition for probate, which would not have been barred by the statute of

limitations.⁷ Respondent’s approach would not necessarily have been successful, but it would not have been “ ‘illogical’ ” to treat the supplemental opposition as a petition for probate.

Appellant contends that any such petition nonetheless would have failed because of Raymond’s lack of testamentary intent and because of the doctrine of laches.

2. Testamentary intent

In order to be admitted to probate as a will, an instrument must appear to have been executed with testamentary intent. (*Estate of Williams* (2007) 155 Cal.App.4th 197, 211, 214 [no particular words necessary to show testamentary intent; must appear only that maker intended by instrument to dispose of property after death].) Appellant argues that Raymond’s extrinsic statements regarding the holographic will showed he lacked testamentary intent, as they indicated that he did not intend the document to be used to finally dispose of his property immediately upon his death. (Cf. *ibid.*; *Estate of Wong* (1995) 40 Cal.App.4th 1198, 1205 [possible to resort to extrinsic evidence where “it is not completely clear that the document evidences testamentary intent”].) This issue was not addressed in any meaningful way in the trial court. The parties’ arguments below focused primarily on whether the filing of the supplemental opposition was a direct

⁷ Candidly acknowledging that the argument had not been raised previously in this litigation, appellant’s counsel contended at oral argument in this court that, even if the supplemental opposition was construed as a petition for probate, the 120-day limitations period set forth in section 16061.8 (regarding trust contests) still applied, based on the holding of *Estate of Stoker* (2011) 193 Cal.App.4th 236. *Stoker* held that parties sufficiently contested a trust for purposes of section 16061.8 by filing a holographic will within the 120-day limitations period. (*Stoker* at p. 241.) Appellant’s counsel reasoned at oral argument in this case that under *Stoker*, the submission of the holographic will to probate was *also* a trust contest, which was clearly barred by the applicable limitations period. This court ordinarily need not consider points raised for the first time in a reply brief (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 351), and such abstention is even more appropriate here, where the issue was not even mentioned in the reply brief but only at oral argument. (*People v. Thompson* (2010) 49 Cal.4th 79, 110, fn. 13 [improper to raise issue not mentioned in appellate briefs for first time at oral argument]; *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1326, fn. 10 [party forfeits contention not made in briefs but raised for first time at oral argument].)

contest, whether such a filing was barred by the applicable statutes of limitations, and whether respondent's delay in presenting the holographic will was reasonable. The parties only briefly addressed whether respondent had provided sufficient evidence that the holographic will complied with the Probate Code (§ 6111), and apparently did not analyze whether Raymond had the requisite testamentary intent when he executed it. The trial court likewise did not address the issue of testamentary intent in its order denying appellant's petition for instructions.

Assuming arguendo that appellant sufficiently raised the issue of the holographic will's validity below in order to raise this issue on appeal (cf. *Hussey-Head v. World Savings & Loan Assn.* (2003) 111 Cal.App.4th 773, 783, fn. 7), we agree with respondent that the holographic will was not “ ‘obviously invalid’ ” (boldface and initial capitals omitted) for lack of testamentary intent, as appellant claims. The document specifically states that it is Raymond's “Last Will [and] Testament,” and that Raymond leaves “everything I own, no matter how titled, to my wife,” clear statements of intent to dispose of his property after his death. (*Estate of Williams, supra*, 155 Cal.App.4th at p. 211.)

Even if the holographic will did not clearly evidence testamentary intent, thus permitting consideration of Raymond's extrinsic statements (*Estate of Wong, supra*, 40 Cal.App.4th at p. 1205), it does not necessarily follow that the holographic will was invalid. Appellant argues that Raymond's statements that the holographic will was to be used only in a contingent situation (i.e., as a “secret weapon”) voided the requisite testamentary intent. However, he directs this court to no authority to support his position. He relies on the general proposition that a will “take[s] effect at the instant the testator dies,” citing *Estate of Saueressig* (2006) 38 Cal.4th 1045, 1056. However, *Saueressig* addressed whether the Probate Code permits postdeath attestation of a will, not whether a testator's extrinsic statements about the supposed contingent nature of a testamentary instrument negates the testator's testamentary intent. Given the apparent lack of legal authority addressing the unique factual scenario presented here, it is less than “obvious[.]” that the holographic will would have been ruled invalid. (Cf. *Estate of Gonzalez, supra*, 102 Cal.App.4th at pp. 1300, 1304, 1309 [because “ ‘robust’ ” evidence presented that

son submitted for probate will he had procured at a time when testator was in extremely poor health and totally dependent on others, submission of will did not meet previous, less demanding “ ‘reasonable cause’ ” standard necessary to avoid no contest clause].)

It may well be that, after further litigation on this novel issue, respondent would not have obtained relief. As the trial court concluded, however, respondent’s “ultimate success” need not be assured in order for her supplemental opposition to be supported by probable cause. This is especially true in light of the fact that a determination of a reasonable likelihood of obtaining the requested relief is based, not only on the facts known to the contestant at the time of filing a contest, but also on what a reasonable person expects may be learned “after an opportunity for further investigation or discovery.” (§ 21311, subd. (b).) The holographic will purports to be witnessed by someone other than respondent, and respondent argued in her opposition below that she and other witnesses could attest to the will’s validity. In other words, it may well be that respondent reasonably believed that discovery would lead to further support for her position. We cannot say on the record before us that the holographic will was so obviously invalid that, as a matter of law, respondent lacked probable cause when she submitted it to the trial court as an exhibit to the supplemental opposition.

3. Laches

Finally, appellant claims, as he did below, that a reasonable person would not have believed that presenting the holographic will to the trial court would have a reasonable likelihood of success, because any effort to use the holographic will was barred by the doctrine of laches. “ ‘The basic elements of laches are: (1) an omission to assert a right; (2) a delay in the assertion of the right for some appreciable period; and (3) circumstances which would cause prejudice to an adverse party if assertion of the right is permitted.’ ” (*Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1170.) A party who acquiesces to the terms of a testamentary instrument may later be barred from contesting the document’s validity. (*Castro v. Castro* (1856) 6 Cal. 158, 161 [parties acquiesced to terms of will for 20 years].) Appellant renews his argument that there was abundant evidence that laches applies here, because respondent waited eight years after Raymond’s

death to inform her cotrustees about the holographic will despite being present when it was signed. During that time, respondent entered into loans using trust interest as collateral, received a trust accounting and trust distributions, tried to open a trust bank account 16 days before filing the supplemental opposition, and requested multiple times that she remain a trustee of the trust before submitting the holographic will.

The trial court concluded that respondent's delay in presenting the holographic will did not necessarily doom her claim, in light of Raymond's directions to respondent regarding how the will was to be used: "If settlor had intended that the holographic will should be used only if 'trouble arose' and if 'the need' were present, respondent would have faced a quandary in seeking to effectuate that intent. What was the precise moment of 'trouble' or 'need' that would compel use of the holographic will? Was it at the beginning of the trust relationship in 2002? Or was it after the petition for removal [of respondent as cotrustee] was filed in 2009? The latter could be viewed as more timely in the sense that an earlier filing would not necessarily have been consistent with settlor's intent. The Court does not mean to suggest that it agrees with such a line of reasoning. But the Court must acknowledge that such reasoning would not be unreasonable."

We agree with the trial court's analysis. Again, it may well be that, after further litigation over the holographic will, the court would have concluded that laches barred relief. But the application of the doctrine of laches is not such a foregone conclusion that we can say, as a matter of law, that respondent lacked probable cause in submitting the holographic will to the trial court.

The trial court praised both parties' legal arguments below as "brilliant," and compared counsel in its order denying relief to grandmaster chess players. Its order denying relief included this final observation: "[I]f the Court is incorrect in its analysis, respondent may then feel constrained to revisit the matter of the holographic will, and perhaps may not be precluded from doing so. Respondent may have introduced it initially for *in terrorem* purposes. Respondent subsequently may have withdrawn it either from a desire to work cooperatively with [appellant and Katherine] or for concerns about the long-term consequences of a probable protracted will contest. Like many

matches between grandmasters, the outcome for this petition suggests a draw, at least for the moment.” The same is true with respect to this appeal. Were this court to reverse, and conclude that respondent’s supplemental opposition triggered the no contest clauses of the trust and pour-over will, respondent thereafter would have nothing to lose by formally submitting the holographic will to probate, which could lead to further protracted litigation.

In any event, we agree with the trial court that the supplemental opposition could have been construed as a petition for probate, and that such a pleading was supported by probable cause, thus barring application of a no contest clause. (§ 21311, subd. (b).)

III.
DISPOSITION

The trial court’s order is affirmed. Respondent shall recover her costs on appeal.

Sepulveda, J.*

We concur:

Reardon, Acting P.J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.