Filed 4/14/15 Hanna v. Harmon CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ALEXANDER S. HANNA, as Administrator, etc. Petitioner and Appellant, v. STEVEN LYNDON HARMON, Objector and Respondent.	A139142 (Alameda County Super. Ct. No. RP05205062)

Sydney Hanna (Hanna) appeals from the Probate Court's denial of his Petition to Determine the Existence of a Trust. Hanna claims his mother's trust (Trust), created in 2005 by a substituted judgment order, was "void" because he did not receive notice of the substituted judgment proceedings. The probate court considered Hanna's Petition to Determine the Existence of a Trust in two phases. During the first, it ruled that although Hanna, a residual beneficiary of the Trust, should have received notice of the substituted judgment proceedings, the order and Trust need not, and should not, be "voided." During the second phase, it rejected Hanna's claim the Trust's distribution provisions, which did not provide equally for Hanna and his two siblings, were the result of undue influence or fraud by his sister.

Respondent and trustee Steven Harmon maintains Hanna's Petition to Determine the Existence of a Trust was untimely since it was filed many months after the expiration of the limitations period to challenge the Trust following notice of Hanna's mother's

death, a claim Harmon unsuccessfully advanced in a motion for summary judgment. Harmon also maintains the probate court's two merits rulings are amply supported by the record.

To the extent Hanna sought a determination the substituted judgment order was "void" for lack of notice to him, his petition was arguably a species of collateral attack on the order, invoking the probate court's inherent equitable power and not subject to any limitations period. While the probate court in phase one found Hanna should have been served with notice of the substituted judgment proceedings, we conclude the court also duly exercised its discretion in refusing to declare the substituted judgment order, and the Trust created pursuant thereto, "void."

As for the remainder of Hanna's petition, which challenged the Trust's distribution provisions as not comporting with his mother's testamentary intent, we agree with Harmon this claim was time barred and the probate court never should have heard it on the merits. We therefore need not, and do not, consider the merits of the probate court's second phase ruling, and affirm the disposition of that claim on the ground the claim was time barred.

BACKGROUND

We summarize here only the facts germane to our disposition. A conservatorship of the estate was established in 1983 after Dolores Hanna suffered a stroke. A conservatorship of her person was not established until 2006.

Dolores's daughter, Cylia Rico, was appointed the conservator of the estate. Twelve years later, in 1995, Rico was removed as conservator and surcharged for approximately $12,000 for goods and services she continues to claim were purchased for her mother's benefit. Although the public guardian took over as conservator, Rico continued to be the primary caregiver for her mother.

In 1996, Dolores executed a will, leaving her Oakland condominium to Rico and her interest in a San Francisco apartment building equally to Rico and her son, Cyril. She

left the residual of her estate equally to Rico, Cyril and Hanna. Dolores worked with an attorney, who in addition to meeting with her and Rico, also met with Dolores alone and was satisfied she had testamentary capacity and the will reflected her testamentary wishes.

During this time period and through the early 2000's, Hanna was in and out of trouble with the law because of a drug problem and was incarcerated many times. In 1986, he was ordered by the Alameda County Superior Court to stay away from his mother's house because of his drug use and criminal conduct.

In 2002, the public guardian resigned because of a disagreement over how to deal with the San Francisco property, which the guardian wanted to sell to improve the conservatorship's cash position. The probate court then appointed Harmon, a Berkeley High School math teacher and Rico's long time domestic partner, conservator of the estate.

Six years later, in 2004, Harmon filed a petition for a substituted judgment order (Prob. Code, § 2580 et seq.)[1] to create the Trust, the dispositive terms of which reflect Dolores's 1996 will.[2] Thus, while Hanna is a beneficiary of the Trust, his interest is not equal to that of his sister or brother. A guardian ad litem was appointed for Dolores to protect her interests during the substituted judgment proceedings. Among other things, the guardian ad litem interviewed the attorney who had prepared Dolores's will and was satisfied he had competently handled the matter.

Dolores passed away on April 16, 2010. Ten days later, Harmon served Hanna

---

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

[2] The doctrine underlying the substituted judgment statutes allows for a probate court, after obtaining relevant information, to "substitute" its judgment for that of a conservatee and issue an order authorizing a conservator to perform a variety of acts necessary or beneficial for the management of the conservatorship estate. (See generally *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1251–1254.)

with a Notification By Trustee pursuant to section 16061.7. The notification specified, among other things, that Hanna had 120 days—until August 25, 2010—to bring an action to challenge the Trust.

Six months later, on October 1, 2010, Harmon filed his third and final Petition for Accounting.

On February 25, 2011, seven months after the statutory 120-day period expired and five months after Harmon filed his third and final accounting petition, Hanna filed a Request for Judicial Notice and Finding That Will Resulted From Undue Influence. Hanna claimed he had not been "consistently or fully informed" of events related to Dolores's conservatorship and, in particular, he "was never privy" to her 1996 will until he retained counsel in February 2011 and counsel reviewed the file in the conservatorship proceeding. Hanna maintained the conservatorship file, alone, was sufficient to prove undue influence by Rico that caused Dolores to "essentially disinherit" him. Harmon filed a response pointing out, among other things, there was no distribution by will; rather, Harmon was trustee and had filed a petition for accounting and final distribution of the Trust assets.

On March 16, 2011, Hanna filed his "Petition to Determine Existence of Trust [section 17200]."[3] In his petition, Hanna maintained the probate court had no "jurisdiction" to issue the substituted judgment order allowing the creation of the Trust because he had not received notice of the substituted judgment proceedings. He further asserted Dolores's 1996 will, on which the distribution provisions of the Trust were based, had been procured through fraud or undue influence by his sister. He sought a declaration that (a) the Trust "did not exist" and (b) the 1996 will did not reflect Dolores's testamentary intent.

---

[3] Section 17200 provides that a trustee or a beneficiary may petition the court concerning the "internal affairs" of the trust, including determining the validity of trust provisions. (§ 17200, subd. (b)(3); see § 15800.)

Harmon moved for summary judgment on the ground Hanna's petition was untimely since it was filed seven months after expiration of the 120-day limitations period to challenge the Trust.

Hanna responded that the Trust had "never existed" since he had not received the statutorily required notice of the substituted judgment proceedings. Thus, Hanna maintained his petition was not a challenge to the Trust subject to section 16061.7's 120-day limitations period. Rather, his challenge "relate[d]" to the prior conservatorship proceeding because it was in that proceeding that Harmon had filed the petition for a substituted judgment order that created the Trust. Hanna asserted Harmon's failure to provide notice of the substituted judgment proceedings amounted to "unconstitutional and fraudulent" conduct. He maintained the statutorily required notice was "jurisdictional," and the substituted judgment order was therefore "void" and subject to collateral attack "at any time." According to Hanna, he was "not trying to contest the terms of the purported trust or any aspect of the administration of the purported trust." Rather, his position was "there is no trust to contest due to extrinsic fraud and lack of due process."

In reply, Harmon asserted Hanna was, indeed, contesting the Trust and asking the probate court to create an "exception" to the 120-day limitations period. Harmon also presented evidence notice of the substituted judgment petition had been sent to Hanna's father's residence, an address Hanna had listed with the Department of Motor Vehicles and at which he received his identification card, and where he visited his father once a month. Hanna, in turn, asserted he never lived at that address, Harmon knew it, and he was not served with and did not know about the petition for a substituted judgment order.

The probate court (Judge Bean) concluded the gravamen of Hanna's Petition to Determine Existence of Trust was extrinsic fraud in procuring the substituted judgment order and, thus, Hanna's petition was an attack on that order and not a challenge to the terms of the Trust subject to the 120-day limitations period. The court further ruled there

were triable issues as to whether Hanna was adequately served with the petition for a substituted judgment order and, thus, whether he had had a "full and fair opportunity" to litigate his claims in the substituted judgment proceedings.

Thereafter, the probate court (Judge Whitley) conducted what was ultimately a two-phase trial. At the end of the first phase, on April 17, 2012, the court issued a Final Statement of Decision ruling Hanna had not been adequately served with notice of the substituted judgment proceedings and was critical of Harmon's purported efforts to serve Hanna (Harmon "failed to take the necessary and reasonable steps to attempt to locate" Hanna).

The court further ruled, however, this did not require invalidation of the substituted judgment order and Trust. The court pointed out that in 2004 Hanna had only a hope or expectancy he would be an heir or beneficiary, and until his mother died he had no property rights in her assets giving rise to any "due process" right to notice about their disposition. Further, the conservatorship statutes, including the notice provisions pertaining to petitions for substituted judgment orders (§ 2581),[4] are primarily for the benefit of the conservatee and to ensure the probate court obtains all relevant facts. Nothing in the notice provisions, concluded the court, confers on a noticee "any constitutionally protected rights to control or claim any of a conservatee's assets." The court therefore rejected Hanna's assertion the probate court lacked "jurisdiction" to enter

[4] Section 2581 provides: "Notice of the hearing of the petition shall be given, regardless of age, for the period and in the manner provided in Chapter 3 (commencing with Section 1460) or Part 1 to all the following: [¶] (a) The persons required to be given notice under Chapter 3 (commencing with Section 1460) of Part 1. [¶] (b) The persons required to be named in a petition for the appointment of a conservator. [¶] (c) So far as is known to the petitioner, beneficiaries under any document executed by the conservatee which may have testamentary effect unless the court for good cause dispenses with such notice. [¶] (d) So far as is known to the petitioner, the persons who, if the conservatee were to die immediately, would be the conservatees' heirs under the laws of intestate succession unless the court for good cause dispenses with such notice. [¶] (e) Such other persons as the court may order." (§ 2581.)

the substituted judgment order. Moreover, the conservatorship file, itself, demonstrated sufficient grounds existed to authorize the creation of the Trust in place of the will.

The court then observed that under section 17200, a beneficiary can challenge the validity of the provisions of a trust and seek modifications, which appeared to be part of what Hanna was trying to do through his petition. However, at the trial, Hanna had focused only on service and had not made any showing as to the terms of the Trust. The court therefore concluded Hanna had waived this claim, but allowed him the option of filing, in 25 days, a supplemental petition if he had "good cause" as to why he had not presented any such evidence at the trial. If he failed to do so, the court would deem the claim waived and enter judgment.

Hanna failed to file anything with the court within the specified time period. Accordingly, the court entered judgment on April 17, 2012.

Over a month later, on May 21, 2012, Hanna filed a Supplemental Petition Requesting Further Litigation. He asserted the court's order following phase one was inconsistent with the order denying summary judgment. Specifically, Hanna claimed the order denying summary judgment compelled two conclusions upon a finding he had not been properly served with notice—that his "due process" rights had been violated, and the substituted judgment order and Trust were "void." Moreover, in light of his understanding of the summary judgment order, Hanna had believed the only relevant issue at trial was notice. He had further believed any challenge to the Trust, other than a "jurisdictional" one attacking the substituted judgment order as "void" for lack of notice to him, was barred by the 120-day limitations period to challenge the Trust.

Two days later, on May 23, 2012, Hanna filed a Motion to Vacate the judgment, which the probate court granted on June 29, 2012. No appeal was taken from this post-judgment order to vacate.[5]

---

[5] Because Hanna did not designate the order vacating the judgment as part of the record on appeal, this court requested supplemental briefing on the finality of the

Seven months later, on February 2, 2013, the probate court took up Hanna's claim that Dolores either lacked testamentary capacity when she executed the 1996 will, or the will was procured through fraud or undue influence by his sister. After three days of trial, the court issued a Final Statement of Decision and Order finding Hanna failed to present sufficient evidence rebutting the presumption Dolores had sufficient testamentary capacity to make the 1996 will. It also found Hanna failed to carry his burden of establishing a presumption of undue influence that would have shifted the burden of proof to Harmon. It specifically found Rico's involvement in taking her mother to the lawyer did not constitute the type of conduct that is considered being "active in the preparation or execution" of a dispositional document. It also found Rico's close relationship with her mother and the many years she cared for her following her stroke, and Hanna's relative lack attention to his mother, as well as his lifestyle and criminal conduct, reasonably explained the differences in Dolores's disposition of her property.

The court, in particular, found the testimony of Dolores's lawyer who had prepared her will credible, as well as that of Dolores's guardian ad litem, who had investigated Dolores's testamentary capacity at the time the court approved the substituted judgment order. While the guardian ad litem believed it would have been preferable to use substituted judgment proceedings to prepare the will, she did not see that as an issue since substituted judgment proceedings had been used to establish the Trust. The guardian ad litem would have exercised heightened scrutiny had she known Rico had been removed as conservator and would have examined other indicia of testamentary intent. The court observed, however, Hanna made no showing sufficient to

---

April 17, 2012 judgment. Hanna then made a motion to augment the record with the order vacating the judgment. Since that postjudgment order was appealable (Code Civ. Proc., § 904.1, subd. (a)(2)) and no appeal was taken, the order vacating the judgment is final and not subject to the challenges Harmon raised in his supplemental briefing. We also note that in the trial court Harmon did not contest the tentative order granting the motion.

raise a presumption of undue influence. The court denied fees and costs to Hanna, and allowed Harmon's costs and fees as expenses of the Trust.

DISCUSSION

A. *That Harmon Did Not Seek Interlocutory Writ Review of the Denial of His Summary Judgment Motion Does Not Bar Consideration of His Limitations Argument*

In his respondent's brief, Harmon asserted the final order can be affirmed on the alternative ground Hanna's Petition to Determine the Existence of a Trust was filed too late and is time barred under section 16061.7, subdivision (h).

This statutory provision provides that the trustee of a trust that has become irrevocable by the trustor's death must provide notification to the beneficiaries of the limitations period for contesting the trust. (§ 16061.7, subd. (h).) The requisite notification states: " 'You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during the 120-day period, whichever is later.' " (*Ibid.*)

Harmon served notice on Hanna by mail on April 26, 2010, 10 days after Dolores died. Hanna has never disputed he was properly served with the section 16061.7 notice. Thus, under section 161061.7, Hanna had until August 25, 2010 to challenge the Trust. He did not file his Petition to Determine the Existence of a Trust until March 16, 2011, seven months after the statutory period ended.

Hanna's sole response to Harmon's untimeliness argument is that Harmon cannot raise it as an alternative ground to affirm the final order, because Harmon did not seek a peremptory writ challenging the denial of his summary judgment motion. This is not the case.

It is well established a prevailing party need not file a "protective cross-appeal" in order to raise alternative grounds to *affirm* the judgment. (See *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671; *California State Employees' Assn. v. State Personnel Bd.*

(1986) 178 Cal.App.3d 372, 382, fn. 7; *Central Manufacturing District, Inc. v. Board of Supervisors* (1960) 176 Cal.App.2d 850, 857; Code Civ. Proc., § 906 ["The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any [decision which necessarily affects the judgment or order appealed from or which substantially affects the rights of a party] . . . for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. . . ."].) Indeed, a respondent who has ultimately prevailed in the trial court is generally not "aggrieved" by the judgment in his or her favor, and therefore has no basis to "appeal" that judgment. (See Code Civ. Proc., § 902 ["Any party aggrieved may appeal in the cases prescribed in this title. . . ."]; *Mao's Kitchen, Inc. v. Mundy* (2012) 209 Cal.App.4th 132, 137 [ordinarily if a judgment is in favor of a party, he or she is not aggrieved and cannot appeal].)

Similarly, a party who ultimately prevails in the trial court need not have sought discretionary, interlocutory writ review of the denial of a summary judgment or summary adjudication motion as a prerequisite to advancing, as an alternative grounds for *affirmance*, a legal issue rejected on summary judgment or summary adjudication. Failure to seek interlocutory writ review is a bar to raising an issue in a subsequent appeal only if writ review is the exclusive means of obtaining appellate review of that issue. (See *People v. Mena* (2012) 54 Cal.4th 146, 155–158.) By its express terms, writ review under Code of Civil Procedure section 437c is optional, and is not the exclusive means to obtain appellate review of issues unsuccessfully advanced in a summary judgment motion. (Code Civ. Proc., § 437c, subd. (m)(1) ["party *may*, within 20 days after service upon him or her of a written notice of entry of the order [denying summary judgment or adjudication] petition an appropriate reviewing court for a peremptory writ"], italics added.) Indeed, a party may well decide not to incur the expense of seeking discretionary writ review of a summary judgment denial order since such interlocutory review is rarely

granted by the appellate courts.

B. *Even Assuming Hanna's Petition Can, in Part, Be Characterized as a Collateral Attack on the Substituted Judgment Order, the Probate Court Did Not Abuse Its Equitable Discretion by Refusing to "Void" the Order and Trust*

As we have recited, the probate court denied Harmon's motion for summary judgment on the ground Hanna's Petition to Determine the Existence of a Trust was a collateral attack on the substituted judgment order, on the ground he did not receive statutorily required notice of the substituted judgment proceedings and therefore his due process rights were violated.

The probate court correctly recognized a judgment or order may be subject to collateral attack on the basis of "extrinsic fraud"—which has been construed to include conduct by one party that "prevented [another] party to the litigation from presenting his or her case." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342 (*Marriage of Park*).) " 'Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' [Citation.]" (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.)

It has also been stated that " '[a] judgment is void for lack of jurisdiction of the person where there is no proper service of process on or appearance by a party to the proceedings.' " (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226 (*Gorham*).) "Because the 'total absence of notice in any form cannot comport with the requirements of due process' [citation], it has been said that a judgment of a court lacking such personal jurisdiction is a violation of due process [citation] . . . ." (*Id.* at pp. 1226–1227.) "Although a judgment or order that is invalid or void on its face for lack of personal jurisdiction may be directly or collaterally attacked at any time, California cases have generally precluded collateral attack where the invalidity of the judgment or order, as in this case, does not appear on its face even though the effect of the voidness, as noted

above, is the same. [Citations.] If the validity does not appear on its face, the judgment or order may be attacked either in an independent equitable action without time limits [citations], or by motion in the action in which the judgment or order was entered, usually within certain time limits or a reasonable time." (*Id.* at p. 1228.) Thus, "even where relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a default judgment or order on equitable grounds where a party establishes that the judgment or order was void for lack of due process." (*Ibid.*)

Plainly, Hanna's Petition to Determine Existence of a Trust cannot be deemed a "motion" filed within a reasonable time or statutory time limits. (See Code Civ. Proc., § 473, subd. (b) [application for relief must be made within "reasonable" time and no later than six months from challenged order or judgment].) It arguably could, however, be construed as a collateral attack invoking the *equitable* jurisdiction of the court, not subject to statutory time limits.

What Hanna has failed to appreciate, however, is that when a court's equitable jurisdiction is invoked, the court is not required to grant relief. "[A] court sitting in equity in such situation may 'refuse to exercise its jurisdiction in a proper case by declining to grant affirmative relief' "—for example, where the party seeking relief after having notice of the judgment manifested an intent to treat it as valid, or where granting relief would impair another person's substantial interest in reliance on the judgment. (*Gorham, supra,* 186 Cal.App.4th at p. 1229, quoting *Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 731.) Similarly, relief may be denied where the party seeking equitable relief has "been guilty of inexcusable neglect" or where laches should attach. (*Marriage of Park, supra,* 27 Cal.3d at p. 345.) Indeed, "[b]ecause of the strong policy in favor of the finality of judgments, equitable relief from a default judgment or order is available only in exceptional circumstances." (*Gorham, supra,* 186 Cal.App.4th at pp. 1229–1230.)

Further, we review the denial of equitable relief only for abuse of discretion,

"determining whether that decision exceeded the bounds of reason in light of the circumstances before the court." (*Gorham, supra*, 186 Cal.App.4th at p. 1230.)

Thus, there is no merit to Hanna's assertion that, on finding he was not properly served with notice of the substituted judgment proceedings, the probate court was compelled to declare the substituted judgment order and Trust "void." Rather, this was a matter committed to the court's sound discretion.

The probate court also did not abuse its discretion in this case by refusing to "void" the substituted judgment order and Trust. We initially observe the court's discretion could be upheld on the ground Hanna's delay of nearly a year after receiving notice of his mother's death and the existence of the Trust before challenging the "jurisdictional" validity of the substituted judgment order, is inexplicable. There is no dispute he was promptly and properly served with the notice and a copy of the Trust. That he did not get around to hiring a lawyer to review the conservatorship file until long after his mother's death is no excuse. (See *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898.)

Moreover, as the probate court observed, at the time of the substituted judgment proceedings, Hanna did not have any property interest in the conservatorship assets. At best, he had a hope he might someday be a beneficiary of his mother's estate by way of will, trust or intestacy succession. A hope, or even an expectation, of inheriting is not tantamount to a property interest to which constitutional due process protections attach. (See *Estate of Castiglioni* (1995) 40 Cal.App.4th 367, 380.) Thus, while Hanna was one of many "interested" parties to whom notice should have been given of the substituted judgment proceedings (see *Conservatorship of Hart, supra*, 228 Cal.App.3d at p. 1262), he was not a party in the usual sense that *his own* person and assets would be subject to risk or compromise by the probate court's substituted judgment order. In short, the instant context is not the equivalent of a civil case, for example, in which a default judgment, obtained through a fraudulently executed service of process or notice, has been

entered against the *defendant*, imperiling that party's *own* assets. (Compare, e.g., *Gorham, supra,* 186 Cal.App.4th 1215 [relief from default judgment in paternity and child support case procured through false return of service of summons and complaint].)

As the probate court also observed, the primary purpose of the rather wide-ranging notice provisions pertaining to any petition concerning a conservatorship, including a petition for a substituted judgment order to establish a trust (§§ 2580, subd. (b), 2581), is to provide the court with information so it can make an informed decision as to what the conservatee would do if able. (See *Conservatorship of Hart, supra,* 228 Cal.App.3d at p. 1254 ["the superior court will (as the conservatee would) obtain information, and hear applications and suggestions, from various sources, and will or should obtain a sense of the situation more or less analogous to that the conservatee might have had"].) Nothing in the statutes suggests defective notice to a single noticee is a "jurisdictional" impediment to the probate court hearing and ruling on a petition. (See § 2580 et seq.) As the probate court further noted, in the substituted judgment proceedings, a guardian ad litem was appointed to represent Dolores' interests, and the guardian specifically advised the court at that time that Rico accompanied Dolores to the attorney's office when she executed her 1996 will and the will did not provide equally for the three children. Thus, the probate court during the substituted judgment proceedings was apprised of the salient facts underlying Hanna's belatedly asserted claim of fraud and undue influence.

Moreover, the singular question before the probate court during the substituted judgment proceedings was whether Dolores's 1996 will should be replaced by a Trust with the same distribution provisions—a change in form, rather than substance. In that regard, there were plainly sufficient grounds to grant the petition as an action benefitting the administration of the conservatorship estate. Accordingly, Hanna's assertion—i.e., that the conservatorship file, alone, showed fraud or undue influence by his sister, establishing detriment to the estate—is without merit. Indeed, Hanna failed to make any showing during the initial trial that "if the judgment were set aside and the proceedings

were reopened, a different result would probably follow." (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 554; see also *Marriage of Park, supra*, 27 Cal.3d at p. 346 [while plaintiff seeking to set aside default judgment did not have to show with "certainty" result would be different, she was required to show "facts indicating a sufficiently meritorious claim" to warrant new hearing].)

We also note that while Hanna perhaps could have challenged the testamentary provisions of the will during the substituted judgment proceedings to establish the Trust, that was by no means his only opportunity to contest Dolores's stated testamentary wishes. Had he taken any interest in his mother's well being, he could have reviewed the conservatorship file at *any* time and could have brought a petition under section 2580 before her death. Likewise, after receiving notice of the 120-day period to challenge the Trust, he could have timely filed a petition after her death.

In short, Hanna has not shown that the probate court abused its equitable discretion by declining to declare the substituted judgment order and resulting Trust "void" because he was not served with notice of the substituted judgment proceedings.

C. *To the Extent Hanna's Petition Challenged the Distribution Provisions of the Trust, It Was Time-Barred*

To the extent Hanna's Petition for Determination of Existence of a Trust was an attack on the distribution provisions of the Trust on the grounds of lack of testamentary intent, or fraud or undue influence by his sister, we agree with Harmon it was time-barred under the 120-day limitations period set forth in section 16061.7.

The only conceivable theory under which Hanna could avoid the explicit 120-day limitations period to contest the provisions of the Trust was that the substituted judgment order authorizing the creation of the Trust was "void" because he was not adequately served with notice of the substituted judgment proceedings. Accordingly, the only issues that should have been tried by the probate court were notice and the manner in which the court should exercise its equitable jurisdiction if it found Hanna had not been properly

served with notice.

To the extent Hanna's petition challenged the distribution provisions of the Trust as not reflecting his mother's testamentary wishes, it was a run-of-the-mill trust contest, subject to and, in this case, barred by the statutory 120-day limitations period. (See *Bridgeman v. Allen* (2013) 219 Cal.App.4th 288 [petition challenging trust amendments filed nine days after 120-day period was untimely].) On this basis, alone, the judgment must be affirmed.

We therefore need not consider the merits of the probate court's phase two ruling that Hanna did not carry his burden of either overcoming the presumption of testamentary capacity or shifting the burden of proof as to alleged fraud or undue influence by his sister. We note, however, Hanna's argument on appeal is essentially that the probate court should have completely discredited the evidence presented by Harmon, including the testimony of Dolores's attorney, and should have resolved all inferences against Harmon and in favor of Hanna. These, however, were matters committed to the trier of fact, and are not our province on appeal. (See *People v. Jones* (2013) 57 Cal.4th 899, 963.) Even apart from being time-barred, ample evidence supported the probate court's phase two ruling denying Hanna's petition.

DISPOSITION

The final order denying Hanna's Petition for Determination of Existence of a Trust is affirmed. Respondent to recover costs on appeal.

_____
Banke, J.

We concur:

_____
Margulies, Acting P. J.

_____
Dondero, J.