

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THIRD APPELLATE DISTRICT

(Sacramento)

MARIA DENISE LITTLE, as Executor, etc.,

Plaintiff and Respondent,

v.

ELAINE FAMBRINI, as Trustee, etc.,
et al.,

Defendants and Appellants.

C064330

(Super. Ct. No.
07AS01530)

Jeannie Ramsay Bacich sued the beneficiaries of the estate of Dorothy Desmond -- Michael Campanella, Leslie Campanella, Tosh Campanella, Forrest Campanella, Jeanette Mae Mendias, Frances "Jenny" Navarro, Joellyn E. Knight, and Elaine Fambrini (Beneficiaries) -- to enforce Dorothy's promise to leave her

estate to Jeannie.¹ Beneficiaries appeal from a judgment following a bench trial.

Beneficiaries contend (1) there is no substantial evidence that Jeannie would suffer unconscionable injury if she did not receive Dorothy's estate, or that Dorothy's estate would be unjustly enriched if Jeannie did not receive Dorothy's estate; and (2) the trial court abused its discretion in not allowing Beneficiaries to recover defense costs from the trust estate.

We conclude:

1. Substantial evidence supports the trial court's findings that Dorothy induced Jeannie to make a serious change of position in reliance on Dorothy's promise to leave her estate to Jeannie, and the failure to enforce Dorothy's promise would result in unconscionable injury to Jeannie. Accordingly, we need not address whether substantial evidence also supports the alternative circumstance of unjust enrichment.

2. The trial court did not abuse its discretion in disallowing recovery of Beneficiaries' litigation expenses from the estate.

We will affirm the judgment.

BACKGROUND

Dorothy gave her daughter Jeannie up for adoption in 1930. At the time, Dorothy was 17 years old and unmarried. Dorothy never had any other children.

¹ We refer to the parties and witnesses by their first names for clarity.

Allan and Grace Archibald adopted Jeannie. Jeannie had a very loving relationship with the Archibalds.

Allan died in 1953. In 1954, when Jeannie was 24, she began efforts to locate her birth mother. As a result of those efforts, Dorothy and Jeannie began communicating. At the time, Dorothy was married to Albert Desmond; Jeannie had two young children, Michael and Suzi Campanella.²

Jeannie and her children stayed with Dorothy and Albert for two months in 1954 or 1955. Dorothy also invited Grace to visit with them. According to Jeannie, Dorothy was a little jealous of Grace.

Dorothy gave Jeannie a copy of a handwritten will dated January 9, 1955, in which Dorothy left her entire estate to Jeannie. After the two-month visit, however, Jeannie's relationship with Dorothy diminished. Dorothy and Jeannie lost touch for nearly 30 years.

Grace subsequently lived with Jeannie and her family. Jeannie took care of Grace toward the end of Grace's life. Grace died in 1972.

In 1984, Dorothy and Jeannie reconnected. After their reunion, Dorothy and Jeannie grew close, seeing each other every week, traveling together, and spending holidays together. Dorothy referred to Jeannie as her daughter and to herself as "mother." Albert died in 1991.

² Jeannie later had another daughter, Maria Little, who is Michael and Suzi's half sister.

In early 1992, when Dorothy was 79 years old, Dorothy proposed adopting Jeannie. Jeannie was 62 years old and had no interest in adoption. Jeannie had a social relationship with Dorothy and saw no reason to change or enhance their relationship. Jeannie was also concerned about severing legal ties with her sister Barbara (also adopted by the Archibalds) and Barbara's two children. Jeannie told Dorothy about her misgivings concerning adoption.

Dorothy invited Jeannie, Jeannie's husband George, and Jeannie's daughter Maria to her home to discuss the proposed adoption. Dorothy said she wanted to establish a legal relationship with Jeannie and Jeannie's children and wanted to make Jeannie her sole heir. According to Jeannie, Dorothy believed adoption would give her companionship and a place of honor in Jeannie's family as the acknowledged legal mother and grandmother. Dorothy told Maria adoption would make Dorothy the "real grandmother."

Maria testified that Dorothy liked being the center of attention and wanted to be the "head of the family. That was very important to [Dorothy]." Jeannie similarly testified that it was important to Dorothy to be "the matriarch" of the family. According to George and Maria, another reason Dorothy wanted to adopt Jeannie was because Dorothy felt bad about giving Jeannie up for adoption and wanted to "make up for the past."

Dorothy told George his consent was necessary for the adoption to occur.³ She showed off her house, jewelry, checkbook, and car to George and told him that if he allowed her to adopt Jeannie, she would make Jeannie her sole heir. Dorothy discussed making a will leaving everything to Jeannie.

George and Maria testified that Dorothy promised to leave her estate to Jeannie if Jeannie consented to the adoption. George consented to the adoption because of Dorothy's promise to devise her estate to Jeannie.

Jeannie testified that she and Dorothy verbally agreed that Jeannie would allow Dorothy to adopt her and Dorothy would leave her estate to Jeannie. Jeannie would not have agreed to be adopted without Dorothy's promise to devise her estate to Jeannie.

Dorothy adopted Jeannie on June 10, 1992. Soon after, Dorothy gave Jeannie a typewritten will dated June 19, 1992, in which Dorothy left her entire estate to Jeannie. On June 22, 1992, Dorothy executed a formal will that again left Dorothy's entire estate to Jeannie. Dorothy told Jeannie that Dorothy had executed the 1992 wills pursuant to their oral agreement.

Jeannie understood that the adoption severed her legal relationship with Barbara and Barbara's children. According to Jeannie, Barbara and her family felt uncomfortable about not

³ "A married person who is not lawfully separated from the person's spouse may not be adopted without the consent of the spouse, provided that the spouse is capable of giving that consent." (Fam. Code, § 9302, subd. (a).)

being Jeannie's legal relatives, and Jeannie felt bad about how they felt.

After the adoption, Dorothy bragged to Jeannie and others about being Jeannie's legal mother and the legal grandmother to Jeannie's children. Dorothy said she felt happier after she adopted Jeannie and it was important to her that she was Jeannie's legal mother. Dorothy told Jeannie's friend Sherrill Goodman Mariscales that Dorothy felt guilty for years about giving Jeannie up for adoption and adopting Jeannie allowed Dorothy to "rectif[y] the whole thing."

Dorothy and Jeannie continued to travel together and socialize after the adoption. Dorothy sent Jeannie greeting cards in which Dorothy referred to herself as "mother" and to Jeannie as her only daughter.

A number of witnesses reported that, after the adoption, Dorothy acknowledged her promise to leave her estate to Jeannie. Among them was Jeannie's friend Gerald Bakarich, who heard Dorothy state on more than one occasion that she was leaving her property to Jeannie. Although she did not use the word "agreement," Dorothy told Peggy Bakarich that Dorothy was leaving Jeannie her estate. While gambling, Dorothy joked that she was spending Jeannie's inheritance.

In 1997, Dorothy gave Jeannie a document dated November 13, 1997, which Dorothy identified as her trust. The 1997 trust left everything to Jeannie with the exception of three \$5,000 bequests to each of Jeannie's children. Jeannie believed the

1997 trust complied with Dorothy's promise and Jeannie did not object to the small bequests to Jeannie's children.

In 1998, Jeannie moved to San Juan Capistrano to be near Maria, who was having her first child. After the move, Jeannie saw Dorothy when Jeannie visited family in Sacramento.

Jeannie saw Dorothy for the last time in 2003, before Jeannie underwent surgery for breast cancer. The two communicated occasionally after that. In about 2005, Dorothy was ill with leukemia. Dorothy died on February 2, 2007.

Jeannie learned after Dorothy's death that Dorothy amended her estate plan many more times. Dorothy left her estate to Beneficiaries -- Jeannie's son Michael, Michael's wife Leslie and their children Tosh and Forrest, and Dorothy's friends -- and named one of the Beneficiaries, Elaine Fambrini, as trustee of the trust. Dorothy left nothing to Jeannie.

Jeannie filed a complaint against Beneficiaries for quasi-specific performance of an oral contract to make a will, imposition of a constructive trust, and accounting. The matter was tried by the court. The trial court determined (1) clear and convincing evidence established that Dorothy entered into an oral contract to leave her estate to Jeannie in exchange for Jeannie's agreement to be adopted by Dorothy, (2) the oral contract was supported by adequate consideration, (3) Jeannie performed her part of the bargain, (4) Dorothy failed to perform under the oral contract, (5) Jeannie did not have an adequate remedy at law for Dorothy's breach, (6) Beneficiaries were estopped from relying on the statute of frauds because failure

to enforce Dorothy's promise to Jeannie would result in unconscionable injury to Jeannie and unjust enrichment to Beneficiaries, standing in Dorothy's shoes, and (7) the trust was not required to pay the cost of defending against Jeannie's lawsuit.

The trial court issued a judgment directing the trustee to transfer trust assets to Jeannie, with the exception of the three \$5,000 bequests set forth in the unamended 1997 trust, and denying the trustee any expenses related to Jeannie's lawsuit. This appeal followed.

Jeannie died on July 8, 2010. We subsequently granted a motion substituting Maria Little, in her capacity as executor of Jeannie's estate, as respondent.

STANDARD OF REVIEW

When factual findings are challenged on the ground that there is no substantial evidence to support them, an appellate court must determine whether there is any substantial evidence to sustain the challenged findings. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) The clear and convincing evidence standard applicable in the trial court does not govern our review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750 (*Crail*).)

Substantial evidence is evidence "of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.'" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, italics omitted.) If substantial evidence exists, it is of no consequence that the evidence could also support a contrary conclusion. (*Id.* at pp. 873-874.) The appellants bear the

burden of demonstrating that there is no substantial evidence to support the challenged factual findings. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

We begin with a presumption that the record contains evidence to sustain every finding of fact (*Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881), and we view the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in the evidence in support of the judgment. (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454.) We do not weigh the evidence, consider the credibility of the witnesses, or resolve conflicts in the evidence or in the reasonable inferences that may be drawn from them. (*Leff v. Gunter, supra*, 33 Cal.3d at p. 518.) If more than one inference reasonably can be deduced from the facts, the trial court's decision will not be disturbed on appeal. (*Boswell v. Reid* (1962) 199 Cal.App.2d 705, 714.) Where the evidence is reasonably susceptible of only one inference, the question is one of law and we exercise our independent judgment. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 377, pp. 435-436; *Estate of Anderson* (1997) 60 Cal.App.4th 436, 441.)

Whether equitable estoppel should be applied in a given case to preclude the use of a statute of frauds defense is generally a question of fact. (*Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068.) But we review the trial court's decision to allow or disallow the payment of litigation expenses

out of trust property for an abuse of discretion. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230 (*Whittlesey*).)

DISCUSSION

I

A contract to make a will can be established only in certain ways. (Prob. Code, § 21700; [former Prob. Code, § 150; Stats. 1990, ch. 79, § 14, p. 474].) Former Probate Code section 150, which applies to this case, provided that a contract to make a will must be in writing.⁴ Nonetheless, a party may be estopped to assert this statute of frauds based on principles of equity. (*McCabe v. Healy* (1902) 138 Cal. 81, 84-85; *Estate of Housley* (1997) 56 Cal.App.4th 342, 351-355, 358.)

Beneficiaries acknowledge there are two alternative circumstances in which a party may be equitably estopped to raise the statute of frauds to avoid an oral agreement to make a will: (1) where the promisor induced the promisee to make a serious change of position in reliance on the oral agreement,

⁴ Former Probate Code section 150 applied to a contract to make a will made after December 31, 1984, and prior to January 1, 2001. (§ 21700, subd. (c); Stats. 1990, ch. 79, § 14, p. 474; Stats. 2000, ch. 17, §§ 2, 8, pp. 71, 75.) Former Probate Code section 150 provided, "(a) A contract to make a will or devise . . . if made after December 31, 1984, can be established only by one of the following: [¶] (1) Provisions of a will stating material provisions of the contract. [¶] (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract. [¶] (3) A writing signed by the decedent evidencing the contract" (Stats. 1990, ch. 79, § 14, p. 474.) Effective January 1, 2001, the requirements for contracts to make a will are found in Probate Code section 21700. (Stats. 2000, ch. 17, §§ 2, 8, pp. 71, 75.)

commonly known as detrimental reliance, and a failure to enforce the oral agreement would cause unconscionable injury to the promisee; or (2) where the promisor would receive unjust enrichment if allowed to retain the benefit of the promisee's performance without abiding by the promisor's obligation under the oral agreement. (*Estate of Housley, supra*, 56 Cal.App.4th at pp. 351, 359.) But Beneficiaries argue substantial evidence does not support the trial court's findings that (1) Jeannie would suffer unconscionable injury if the oral contract was not enforced, and (2) Dorothy's estate would be unjustly enriched. Because substantial evidence supports the trial court's finding regarding unconscionable injury, we need not address whether substantial evidence also supports the alternative circumstance of unjust enrichment.

Beneficiaries argue there would be no unconscionable injury because Jeannie did not devote work, energy or effort for Dorothy and did not give up other opportunities in reliance on Dorothy's promise.

"Unconscionable injury" would exist if a promisee, in reliance on a promise, changed position to such an extent that it would be inequitable if the oral contract was not enforced. (*Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 622-627; *Estate of Housley, supra*, 56 Cal.App.4th at pp. 347-348, 360-361; *Estate of Brenzikofer* (1996) 49 Cal.App.4th 1461, 1465, 1467-1468; *Porporato v. Devincenzi* (1968) 261 Cal.App.2d 670, 673, 678-679; *Horstmann v. Sheldon* (1962) 202 Cal.App.2d 184, 188-189.) Although many cases discussing unconscionable injury involve a

promisee performing labor for the promisor or foregoing other opportunities, those are not the only ways that unconscionable injury can be established. In *Crail, supra*, 8 Cal.3d 744, a change in legal position was enough to invoke estoppel. In that case, wife signed a will leaving her estate to husband based on a verbal agreement that upon his death, husband would leave the residuary estate to their children. (*Crail, supra*, 8 Cal.3d at p. 747.) The California Supreme Court concluded that husband was estopped to deny the oral agreement because he remained silent while wife changed her legal position in reliance upon his promise. (*Ibid.*) Other cases cited by Beneficiaries, such as *Redke v. Silvertrust* (1971) 6 Cal.3d 94, *Day v. Greene* (1963) 59 Cal.2d 404, and *Juran v. Epstein* (1994) 23 Cal.App.4th 882, reach conclusions similar to *Crail* on similar facts.

In this case, although Jeannie was reluctant to sever her legal relationship with the Archibald family, she ultimately agreed to change her legal position (Fam. Code, § 9320), and her husband George ultimately gave his legal consent (Fam. Code, § 9302), in reliance on Dorothy's promise. The adoption changed Jeannie's legal rights, duties and responsibilities. (Prob. Code, § 6451 [adoption severs the parent-child relationship between the adopted person and the prior adoptive parents]; Fam. Code, §§ 9305 [adoptee and adoptive parent have legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship], 9320 [parties to adoption must agree to assume the rights, duties and responsibilities of parent and child]; *Estate of Turkington*

(1983) 147 Cal.App.3d 590, 594 [adoption establishes new family relationship]; *In re Newman* (1888) 75 Cal. 213, 219, superseded by statute on another point as stated in *Dobrick v. Hathaway* (1984) 160 Cal.App.3d 913, 921, fn. 11 [adopted child may inherit from adopting parent]; *Estate of Jobson* (1912) 164 Cal. 312, 317 [adopting parent may inherit from adopted child]; see also *Estate of Jobson, supra*, 164 Cal. at p. 317 [death of an adoptive parent does not revive the parent-child relationship with a birth parent].)

As the trial court noted, Jeannie's decision to consent to the adoption was not an easy one. Jeannie had a very close relationship with Grace and was concerned about how adoption would affect her relationship with her only sibling, Barbara. Jeannie and George would not have consented to the adoption had it not been for Dorothy's promise. The change in legal relationship caused by the adoption was significant for Jeannie.

Jeannie fully performed under the oral agreement. In presenting Jeannie with a copy of the 1992 wills and the 1997 trust, Dorothy led Jeannie to believe that Dorothy had fully performed, too. Like in *Crail*, Dorothy remained silent and did not inform Jeannie that she subsequently amended her estate plan numerous times, ultimately eliminating Jeannie as an heir. (*Crail, supra*, 8 Cal.3d 744.)

The evidence in this case supports the trial court's conclusion that Jeannie, in reliance on Dorothy's promise, changed position to such an extent that it would be inequitable if the oral contract was not enforced. Even if the trial court

could have reached a different conclusion based on the evidence, we are required on appeal to view the evidence in the light most favorable to the judgment. (*As You Sow v. Conbraco Industries, supra*, 135 Cal.App.4th at p. 454.) The trial court's decision is supported by substantial evidence.

II

Beneficiaries also claim that the trial court abused its discretion in not permitting the trustee, beneficiary Fambrini, to deduct litigation expenses from the trust estate.

The litigation expenses were incurred by the Beneficiaries in defending against Jeannie's lawsuit. The trial court found that the litigation expenses were not incurred in furtherance of the trustee's duties to administer the trust or to defend against claims that may cause a loss to the trust.

"The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust.' [Citation.] Consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust assets." (*Whittlesey, supra*, 104 Cal.App.4th at p. 1230.)

In *Whittlesey*, a trust beneficiary challenged the validity of an amendment to the trust and prevailed. This court held that the trustee could not obtain reimbursement of defense costs from the trust because the lawsuit did not attack the validity of the entire trust, it only involved a dispute over who would

control the trust and benefit from the trust. (*Whittlesey, supra*, 104 Cal.App.4th at pp. 1228-1229.) If the lawsuit had succeeded, the trust would remain intact. (*Id.* at p. 1228.) Hence, defeating the lawsuit would not benefit the trust. Recovery of defense costs would also be inequitable, because it would essentially require the prevailing beneficiary to pay her own litigation costs as well as those of the losing defendants. (*Id.* at p. 1230.) This court concluded that in an action involving competing claims by beneficiaries to a trust, the trustee must take a neutral position in the contest. (*Id.* at pp. 1230-1231.) To the extent the trustee represents the interests of one side of the contest over the other, the trustee must look to the parties who stand to gain from the litigation for reimbursement, not the trust. (*Id.* at p. 1231; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1464.)

In this case, Jeannie sought quasi-specific performance of Dorothy's oral promise to make a will benefiting Jeannie. Such "relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant . . . to make such a disposition of the property as will carry out the intent of the [oral] agreement." (*McCabe v. Healy, supra*, 138 Cal. at pp. 84-85.) The imposition of a constructive trust does not remove the trust estate from the trustee's possession as such property is still subject to administration of the estate. (*Estate of Majtan* (1965) 237

Cal.App.2d 7, 20; *Estate of Trissel* (1975) 44 Cal.App.3d 597, 602.) Such action is between the claimant under the oral contract (Jeannie) and the claimants under the amended trust (Beneficiaries) as to who is entitled to all or part of Dorothy's estate. (*Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 132 [constructive trust action is in effect a suit between claimants under the oral contract and claimants under the will or by intestacy]; *Bank of California* (1940) 16 Cal.2d 516, 524 [action for quasi-specific performance of an oral contract to will property is against the distributee personally, not against the estate]; *Estate of Mullins* (1988) 206 Cal.App.3d 924, 931 ["an action for a constructive trust does not involve the internal affairs of a trust"]; *Estate of Miller* (1963) 212 Cal.App.2d 284, 293-295.) In this manner, Jeannie's lawsuit is similar to the one in *Whittlesey*. (*Whittlesey, supra*, 104 Cal.App.4th 1221.) Although the trustee may properly be made a party to the action for the purpose of restraining him or her from distributing the trust property, an action to enforce an oral promise to make a will does not interfere with the administration by the trustee, who is a mere stakeholder with respect to the proceeding.⁵ (*Ludwicki v. Guerin, supra*, 57 Cal.2d at p. 132.)

⁵ Beneficiaries claim that Jeannie argues for the first time on appeal that the trustee was not a necessary party in the underlying constructive trust action. Not so. Jeannie argued in the trial court that the trustee had no duty to defend against Jeannie's lawsuit, was merely a stakeholder in the action, and was not required to participate in the action. At

Jeannie did not seek to invalidate the trust. (See 64 Cal.Jur.3d (2006) Wills, § 62, pp. 94-96 [the remedy of constructive trust does not invalidate the testamentary instrument].) In fact, Jeannie was the primary beneficiary under the unamended 1997 trust, and the judgment enforced the terms of the unamended 1997 trust. The trust authorized the trustee to hire attorneys to advise or help the trustee in the performance of administrative duties and to defend actions for the protection of trust property. But because Jeannie's lawsuit did not seek to invalidate the trust, Fambrini, in her role as trustee, was a neutral party to the dispute and did not have a duty or the authority to defend against the action. (*Ludwicki v. Guerin, supra*, 57 Cal.2d at p. 132; *Whittlesey, supra*, 104 Cal.App.4th at p. 1231.)

Of course, Fambrini was also a beneficiary under the trust, and in that role she had a personal interest in defending against Jeannie's claim. However, Fambrini is not entitled to reimbursement from the trust for championing her personal interest as a beneficiary in this case. (*Terry v. Conlan, supra*, 131 Cal.App.4th at p. 1464.)

Finally, requiring the trust to pay Beneficiaries' defense costs would in effect require Jeannie, as the prevailing party, to pay her own litigation costs plus the costs of the losing

the hearing on the issue of litigation costs, Jeannie's counsel argued that it was not necessary to join the trustee as a defendant in the constructive trust action.

defendants. Such a result would be inequitable. (*Whittlesey, supra*, 104 Cal.App.4th at p. 1230.)

Under the circumstances, the trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

HULL, J.