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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

Estate of RICHARD C. SCHERER, Deceased.

BARBARA J. SCHERER,
Petitioner and Appellant,

v.

KIMBERLY SCHERER,
Contestant and Respondent.

C066259

(Super. Ct. No.
SPR5674)

This case tenders the question whether a complete property settlement entered into after the dissolution of a marriage waives the right of a spouse to property that would pass pursuant to the terms of a will executed before the settlement but after the dissolution. We hold that in these circumstances the settlement waives the testamentary rights under the will by

virtue of the express provisions of Probate Code sections 141 and 145.¹

Petitioner Barbara Scherer appeals from an order denying her petition to probate her former husband Richard Scherer's 1979 will and granting their daughter, contestant Kimberly Scherer's petition to administer the estate.² (§ 1303.) The trial court ruled that Barbara waived her right to property under the 1979 will by executing a stipulated judgment in 1991 disposing of all remaining property issues between her and Richard where the will was executed *after* the dissolution of the marriage.

Sections 141 and 145, read together, provide in relevant part that "[u]nless the . . . property settlement provides to the contrary, . . . a complete property settlement entered into *after* . . . dissolution . . . of marriage, is a waiver by the spouse of" any right to "[p]roperty that would pass from the decedent by testamentary disposition in a will executed *before* the waiver. . . ." (Italics added.)

The will was executed between the dissolution and the property settlement. Thus, the property settlement prevails over the will since it was entered into after the dissolution and after the execution of the will. Having satisfied the

¹ Further undesignated statutory references are to the Probate Code.

² To avoid confusion, we shall refer to the parties and the decedent by their first names. No disrespect is intended.

provisions of the probate code it makes no difference that the will was executed after the dissolution.

We shall conclude that the stipulated judgment between Richard and Barbara constituted a complete property settlement and was an enforceable waiver of Barbara's right to property under the 1979 will.

Accordingly, we shall affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND³

Richard and Barbara married in 1955 and had seven children, including Kimberly.

In 1978, they initiated divorce proceedings and executed a property settlement agreement. On May 4, 1979, they obtained a decree of divorce as to the marital status only. The property settlement agreement was not incorporated in the final judgment of dissolution, the issue of property rights was bifurcated, and the court retained jurisdiction to divide the marital property.

On May 14, 1979, 10 days after the marital status was terminated, Richard executed a will leaving his entire estate to Barbara.

On February 13, 1985, the trial court ordered that the 1978 property settlement agreement be set aside. Richard appealed,

³ Barbara has not provided a reporter's transcript of the hearing on the petition. "These facts have been taken from the clerk's transcript, the appeal being upon the judgment roll alone. Therefore, the findings are conclusively presumed to be supported by the evidence and are to be liberally construed." (*Estate of Crawford* (1945) 69 Cal.App.2d 607, 608; see also *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324-325.)

and this court affirmed the trial court's order. Thereafter, the matter was arbitrated, and both parties rejected the arbitrator's award. On October 16, 1990, the trial court entered judgment, and Richard appealed.

On August 16, 1991, an amended judgment was entered. According to the amended judgment, Richard and Barbara, both of whom were represented by separate counsel, stipulated in open court to a specific division of their community property, and a final agreement was executed by the parties in September 1991. The agreement was in the form of a "Stipulated Judgment on Remaining Issues," executed by the parties and their attorneys and approved by the court on October 4, 1991.

The stipulated judgment set forth the amount of spousal support and the length of payment, and made specific divisions of all real and personal property acquired during the marriage, Richard's military and disability benefits, Richard's life insurance policy, and all other property. It provided that both parties waived their claims against the community and each other to be reimbursed for payments made by them on community obligations. It provided that Richard would make an additional payment to Barbara to equalize the division of community property. It further provided that the division of the community property set forth therein was a substantially equal division, and that the parties waived their respective rights to a precisely equal division as well as various other rights, including their rights to move to set aside the judgment under Code of Civil Procedure section 473, and to appeal. At trial,

Barbara acknowledged that the stipulated judgment resolved all of the remaining property issues between her and Richard.

On October 21, 1991, Richard and Barbara executed a one sentence addendum to the stipulated judgment clarifying the provision relating to spousal support. The addendum was approved by the court on October 25, 1991.

Barbara did not challenge the stipulated judgment at any time during the nearly 20 years following its execution and approval.

Richard died on December 23, 2009.

On January 8, 2010, Barbara filed a petition to probate Richard's 1979 will. On January 12, 2010, Kimberly petitioned to administer her father's estate under the Independent Administration of Estates Act. On February 11, 2010, Kimberly filed a contest to Barbara's petition. On February 16, 2010, Barbara filed an objection to Kimberly's petition. On February 16, 2010, the trial court consolidated the two actions.

A trial was held on July 13, 2010. At the conclusion of the trial, the parties were ordered to submit closing briefs. In particular, the trial court requested the parties address how section 145 supported their respective claims in light of the evidence.

The court issued its decision on August 23, 2010, denying Barbara's petition to probate Richard's 1979 will and granting Kimberly's petition to administer Richard's estate. In a detailed, 18-page decision, the court found that Barbara waived her right to recover under the 1979 will by executing a

stipulated judgment in 1991, which disposed of all remaining property issues between herself and Richard. More particularly, the court found that section 145 applied even though the will in question was executed after dissolution. The court further found that the stipulated judgment constituted a complete property settlement as required under section 145, and that to the extent Barbara challenged the distribution of property made under the 1991 stipulated judgment, "the challenge . . . constitute[d] an unwarranted collateral attack on the judgment." Finally, the court rejected Barbara's argument that any waiver under section 145 was not enforceable because Richard failed to provide fair and reasonable disclosure of property or financial obligations.

DISCUSSION

I

Section 145 Applies Even Though the Will In Question Was Executed After the Dissolution of the Marriage

Barbara first contends that the trial court erred in finding she waived her right to any property under Richard's 1979 will by entering into the 1991 stipulated judgment because the will was executed after her marriage to Richard was dissolved. We disagree.

Whether Barbara waived her right to property under the 1979 will by executing the stipulated judgment in 1991 is governed by sections 141 and 145. Section 145 states: "Unless the waiver or property settlement provides to the contrary, a waiver under this chapter of 'all rights' (or equivalent language) in the

property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or dissolution or annulment of marriage, is a waiver by the spouse of the rights described in subdivision (a) of Section 141." (Italics added.) Among the rights described in section 141, subdivision (a) is any right to "[p]roperty that would pass from the decedent by testamentary disposition in a will executed before the waiver. . . ." (§ 141, subd. (a)(2), italics added.)

"The trial court's construction of the Probate Code is subject to our de novo review. [Citation.]" (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1124.) "Our primary duty when interpreting a statute is to "determine and effectuate" the Legislature's intent. [Citation.] To that end, our first task is to examine the words of the statute, giving them a commonsense meaning. [Citation.] If the language is clear and unambiguous, the inquiry ends. [Citation.] However, a statute's language must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 326, fn. omitted.)

Sections 141 and 145 unambiguously provide that a complete property settlement entered into after dissolution of marriage is a waiver by the spouse of any right to "[p]roperty that would pass from the decedent by testamentary disposition in a will executed before the waiver. . . ." (Italics added.) Barbara's arguments to the contrary are not persuasive.

Barbara claims that section 145 applies only to a waiver by a surviving spouse, which does not include a person whose marriage to the decedent has been dissolved. Not so. While sections 140 through 147 generally "concern a surviving spouse's waiver of inheritance rights" (*Estate of Will* (2009) 170 Cal.App.4th 902, 908; see also § 140), and the term "surviving spouse" does not include a person whose marriage to the decedent has been dissolved (§ 78, subd. (a)), the construction urged by Barbara is contrary to the express language of section 145, which states that "a complete property settlement entered into *after . . . dissolution . . . of marriage*, is a waiver by the spouse of the rights described in subdivision (a) of Section 141." By its express terms, section 145 includes a person whose marriage has been dissolved. Construing section 145 to exclude such persons would render its provision concerning property settlements meaningless, and statutes should be interpreted to avoid making some words surplusage. (*Palos Verdes Faculty Association v. Palos Verdes Peninsula Unified School District* (1978) 21 Cal.3d 650, 659.)

As the trial court cogently explained: Section 145 "reflects the fact that property settlements are often reached in bifurcated fashion, *after* marital status has been terminated, as occurred here. . . . Barbara's interpretation of the statute effectively would blunt one of the stated objectives of Probate Code section 145, which is to permit a waiver of inheritance rights to occur as a result of a complete property settlement entered into after termination of marital status."

We likewise reject Barbara's assertion that section 141, subdivision (b)'s provision that "[n]othing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a)," suggests that subdivision (a)(2) does "not necessarily [apply] to every will executed before the waiver was executed." Again, such a construction is contrary to the plain language of section 141, subdivision (a)(2), which lists among the rights that may be waived: "[p]roperty that would pass from the decedent by testamentary disposition in a *will executed before the waiver.*"

Having concluded the language of the statutes is clear and unambiguous, we decline Barbara's invitation to delve into the legislative history. (*Van Horn v. Watson, supra*, 45 Cal.4th at p. 326, fn. omitted.)

The trial court properly concluded that section 145 applies even though the will in question was executed after the dissolution of the marriage.

II

The Stipulated Judgment Constituted A Complete Property Settlement As Required By Section 145

Barbara next contends that even if a spouse may be found to have waived his or her right to property under a will that was executed after dissolution, she did not do so here because the stipulated judgment was not a complete property settlement. Again, she is mistaken.

We review the trial court's finding that the stipulated judgment constituted a complete property settlement as required

by section 145 for substantial evidence. (See *Spencer v. Marshall* (2008) 168 Cal.App.4th 783, 792.)

The stipulated judgment purported to resolve all "remaining issues," suggesting that the agreement set forth therein was complete. The stipulated judgment allocated all community property between Richard and Barbara, and Barbara testified that it resolved all remaining property issues between her and Richard. In the stipulated judgment, Richard and Barbara agreed that the distributions made therein constituted a substantially equal division of the community estate and waived all their respective rights to a precisely equal division. Substantial evidence supports the trial court's finding that the stipulated judgment constituted a complete property settlement.

Barbara asserts that the stipulated judgment was not a complete property settlement because it purportedly gave Richard a disproportionately large share of the community property, which she claims was offset by the will. As the trial court found, Barbara failed to offer any evidence to support her assertion. Moreover, her assertion is belied by the stipulated judgment itself, in which she stipulated that the division made therein constituted a "substantially equal division" of the community property and waived her right to "a precisely equal division."

Barbara also claims that the stipulated judgment was not a complete property settlement because it did not expressly waive testamentary rights. Again, she is mistaken. Section 145 is written in the disjunctive -- either a waiver of testamentary

rights or a complete property settlement entered into after or in anticipation of dissolution of marriage "is a waiver by the spouse of the rights described in subdivision (a) of Section 141." (§ 145.) If the Legislature intended section 145 to apply only to express waivers, the provision regarding property settlements would be redundant, and statutes should be interpreted to avoid such redundancies. (*Palos Verdes Faculty Association v. Palos Verdes Peninsula Unified School District*, *supra*, 21 Cal.3d at p. 659.)

Finally, in her reply brief, Barbara argues that a stipulated judgment cannot constitute a complete property settlement because section 145 does not apply to stipulated judgments. This argument is forfeited because it is raised for the first time in her reply brief without a showing of good cause. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; see also *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2.) In any event, the argument lacks merit.

In support of her argument, Barbara relies on *Estate of Gibson* (1990) 219 Cal.App.3d 1486 (*Gibson*) for the proposition that "[s]ections 140-147 do not apply to property judgments." As we shall explain, *Gibson* arose in an entirely different factual context and is distinguishable on that basis. There, a husband and wife entered into a marital property settlement agreement, which provided in relevant part: "'In the event of a reconciliation between the parties, this Agreement nevertheless shall continue in full force and effect until modified, altered

or terminated by an Agreement in writing to such effect, signed by each of the parties and their signatures notarized.'" (*Id.* at p. 1491.) The agreement was incorporated as part of the judgment of dissolution. (*Id.* at p. 1489.) The judgment recited that the marital status would terminate on December 4, 1985. On November 26, 1985, the parties entered into a stipulation to set aside the marital status termination date. (*Ibid.*) The stipulation provided in pertinent part: "the marital status termination date of December 4, 1985, . . . shall be set aside, but that *all other provisions set forth in said judgment shall remain in full force and effect.*" (*Ibid.*) When the husband died, the marriage had not been terminated, and the husband's son from a prior marriage and the wife filed competing petitions regarding the husband's estate. (*Ibid.*) The court granted the son's petition for letters of administration and to administer the estate under the Independent Administration of Estates Act and appointed him administrator. (*Ibid.*) When the son filed a petition to determine distribution, the wife objected on the ground that she and the decedent had reconciled, and thus, there was no valid waiver of her rights to the husband's estate. (*Id.* at p. 1490.) The trial court granted a directed verdict in the son's favor, finding that the judgment incorporating the terms of the marital settlement agreement was binding on the court. (*Ibid.*) The wife appealed, contending that "sections 140-147 statutorily limit the manner and means by which a spouse or former spouse may waive certain rights in the deceased spouse's estate, arguing inferentially that the

judgment in the marital dissolution case does not meet the requirements of those sections." (*Id.* at p. 1491.) In particular, she asserted that enforcement of her express waiver of any rights to her husband's estate was "unconscionable" under section 144.⁴ (*Id.* at pp. 1490-1491.) In rejecting her claim, the court of appeal observed that "the Legislature's concern [in enacting section 143,⁵ the primary enforceability provision of the statutory scheme] was that the circumstances of the waiver be evaluated by a court to determine enforceability. Once an agreement merges into a judgment, enforceability has already been determined and achieved." (*Id.* at p. 1493.) The court concluded that the wife's challenge constituted "a collateral attack on a 'final' judgment." (*Ibid.*) Accordingly, the court affirmed the trial court's finding that the judgment in the

⁴ Section 144 states in pertinent part: "(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver pursuant to subdivision (a) would be unconscionable under the circumstances existing at the time enforcement is sought, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result."

⁵ Section 143 provides that a written waiver signed by a surviving spouse "is enforceable under this section unless the surviving spouse proves either of the following: [¶] (1) A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse prior to the signing of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice by independent legal counsel. [¶] (2) The surviving spouse was not represented by independent legal counsel at the time of signing of the waiver."

marital dissolution case was binding and that the waiver contained therein was valid. (*Id.* at p. 1494.) In rejecting the wife's assertion that the judgment was subject to attack under sections 140 through 147, the court stated: "Such a cumbersome, unnecessary, and time-consuming procedure in the probate court and such lack of finality and certainty in marital dissolution judgments are to be avoided. Probate Code sections 140 through 147 do not apply to a judgment." (*Ibid.*)

Here, there was no express waiver, and Barbara is not attempting to invoke sections 140 through 147 for the purpose of establishing the waiver was invalid. Rather, she asserts that the waiver that arises by operation of law upon entry of a complete property settlement after dissolution does not apply where, as here, the property settlement is in the form of a stipulated judgment. Barbara misconstrues the holding of *Gibson*.

Gibson stands for the proposition that an express waiver contained in a property settlement agreement that is merged into the judgment is not subject to collateral attack for failing to comply with the waiver requirements set forth in sections 140 through 147. (219 Cal.App.3d at pp. 1491-1494.) Contrary to Barbara's assertion, *Gibson* does not hold "that a stipulated judgment cannot constitute a complete property settlement" or waiver under section 145. To the extent *Gibson* can be read to hold that waivers that arise by operation of law when spouses enter into a complete property settlement agreement in anticipation of or after dissolution as provided for in section

145 are unenforceable when the settlement is merged into a judgment or where, as here, the settlement takes the form of a stipulated judgment, we respectfully disagree.

The trial court correctly concluded that the stipulated judgment constituted a complete property settlement under section 145.

III

The Stipulated Judgment Was an Enforceable Waiver

Lastly, Barbara contends that the stipulated judgment was not an enforceable waiver because Richard purportedly failed to reveal that he had granted an interest in one of his duplexes to a third party. We are not persuaded.

Section 143 provides in relevant part that a waiver is enforceable unless the surviving spouse proves that "[a] fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse prior to the signing of the waiver"

Here, Richard and Barbara's complete property settlement was set forth in a stipulated judgment which was approved by the court on October 4, 1991. As the trial court properly found, "the court's approval of the 1991 stipulated judgment rendered the agreement between Richard and Barbara enforceable."

(*Gibson, supra*, 219 Cal.App.3d at pp. 1493-1494.) Accordingly, the judgment is not subject to challenge under section 143.

(*Ibid.*)

Moreover, as the trial court found, Barbara offered no evidence at trial to support her claim that Richard failed to

make a fair and reasonable disclosure of the property or financial obligations "prior to signing the waiver" as required by section 143. Instead, she asserted for the first time in her post-trial closing brief that Richard purportedly failed to disclose that he had executed a quitclaim deed to the "Alicante property" in favor of his friend Gene Glover in 1979. However, she offered no evidence that Richard had deeded that property to Mr. Glover. The trial court did not err in finding the stipulated judgment was an enforceable waiver of Barbara's rights to property under the 1979 will.

DISPOSITION

The order denying Barbara's petition to probate Richard's 1979 will and granting Kimberly's petition to administer Richard's estate is affirmed. Kimberly shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1),(2).)

BLEASE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.