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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of RUTH WILBURN, Deceased.

CATHY TATE,

Petitioner and Respondent,

v.

VERONICA WILBURN, as  
Administratrix, etc.,

Objector and Appellant;

HARI L. WILBURN,

Objector.

D058851

(Super. Ct. No. P193043)

APPEAL from an order of the Superior Court of San Diego County, Julia Craig Kelety, Judge. Affirmed.

I.

INTRODUCTION

The present appeal from the probate court has its genesis in a prior family law

matter.<sup>1</sup> In 1991, the family court entered an order directing Hari Wilburn (Hari) to pay Cathy Tate \$226 per month in child support for their then minor child, A.B. Hari failed to pay any of the ordered support.

Approximately 16 years later, in 2007, Tate filed a notice of lien in this probate matter. Through her lien, Tate sought to collect the past-due child support from Hari's beneficial share of the estate of his mother, Ruth Wilburn (Ruth). Ruth's daughter, and Hari's sister, Veronica Wilburn (Veronica) is the administratrix of the estate. In September 2008, Tate filed a petition seeking an order from the probate court directing Veronica to release funds subject to the lien. In her petition, Tate contended that she had a lien in the amount of \$70,851.17 attached to Hari's interest in the estate, and requested that the court release Hari's distributive share to her as a lien claimant. It appears that the probate court delayed ruling on the matter in order to afford Hari an opportunity to litigate in the family court his contention that the underlying support order was invalid.

Hari did in fact litigate the enforceability of the 1991 child support order in family court. In February 2008, Hari moved to set aside the child support order on the ground that the court that issued the child support order had not made a finding that he was A.B.'s father prior to entering order. The trial court denied the motion. In October 2008, Hari filed a renewed motion to set aside the 1991 child support order. The trial court denied the renewed motion. Hari then filed an appeal from the trial court's order denying

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<sup>1</sup> We have constructed this summary of the relevant procedural history from the parties' briefs, the limited record that Veronica has provided on appeal, and our prior opinion in a related appeal, of which we take judicial notice. (*Tate v. Wilburn* (Apr. 28, 2010) D054609 [cert. for partial pub. opn.] )

his renewed motion. On appeal, Hari argued that the trial court erred in failing to set aside the 1991 child support order on the grounds that he had never been properly served with Tate's underlying order to show cause seeking child support, the record contained no finding that he is A.B.'s father, and genetic testing performed in August 2008<sup>2</sup> purportedly demonstrated that he is not A.B.'s father. In our opinion in this prior appeal, this court rejected each of these contentions "on the merits." (*Tate v. Wilburn, supra*, D054609.)

In December 2010, after the remittur issued in the prior appeal, the probate court granted Tate's petition to release funds and directed Veronica to distribute \$35,426 to Tate in partial satisfaction of Tate's child support lien on Hari's share of the estate.<sup>3</sup> Veronica appeals from the December 3, 2010 order granting Tate's petition to release the funds. Veronica contends that the probate court erred in ordering her to release the funds because the 1991 child support order was procured by fraud. We affirm.

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<sup>2</sup> Our prior opinion incorrectly stated that the DNA test was performed in August 1998. (*Tate v. Wilburn, supra*, D054609.) In fact, the test was performed in August 2008.

<sup>3</sup> It appears from the record that Hari's share of the estate is less than the amount subject to the Tate's lien for past due child support.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The family law matter*<sup>4</sup>

##### 1. *The 1991 child support order*

On September 23, 1991, Tate filed an application for an order to show cause and for a temporary restraining order. In her application, Tate requested that Hari be ordered to have no contact with Tate, and that Tate be granted temporary custody of A.B. A judge of the superior court signed the temporary restraining order that day.

In a declaration attached to her application, Tate stated that she and Hari had "been separated for the last [four] months." Tate also stated that Hari had "punched [her] in the face," and "threatened to kill [her]." Tate indicated that she and Hari had a five-year-old child, and requested that Hari be ordered to pay child support. Tate listed Hari's home address in her declaration, and indicated that both she and Hari worked at "Kaiser-Zion."

On September 30, after a hearing that Tate attended and Hari did not, the trial court found that Hari had been properly served with Tate's application and order to show cause. The court entered a restraining order against Hari, awarded Tate custody of A.B., and continued the hearing on Tate's request for child support.

On October 1, Hari filed an application for an order to show cause, seeking to modify the restraining order. On October 7, the trial court held a hearing on Tate's request for child support. Tate personally attended the hearing. Hari was not present.

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<sup>4</sup> (*Tate v. Wilburn* (Super Ct. San Diego County, 1991, No. D330716.)

That same day, the trial court entered an order directing Hari to pay Tate \$226 per month in child support. On October 28, the court took Hari's order to show cause off calendar when neither party appeared at a scheduled hearing on the matter.

2. *Hari's February 2008 order to show cause to set aside the 1991 child support order*

In February 2008, Hari filed an application for an order to show cause seeking to set aside the 1991 child support order. In a brief in support of his order to show cause, Hari's counsel argued that the trial court should set aside the 1991 child support order because the record was "devoid of a prima facie finding of paternity." Counsel also asserted that the record did not contain "proof of service of [Tate's] order to show cause upon [Hari]."5

Tate filed a brief and a responsive declaration in opposition to Hari's order to show cause.6 In her declaration, Tate stated that she had personally attended a hearing on October 7, 1991 at which the trial court considered her order to show cause seeking child support. Tate stated in her declaration that, at that hearing, "the judge called the case, and indicated on the record that . . . Hari was properly noticed of the hearing, but failed to

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5 The records on appeal in both this case and in our prior appeal (*Tate v. Wilburn, supra*, D054609) contain a portion of a document that appears to be Hari's declaration in which he states that he did "not recall ever being served" with Tate's 1991 order to show cause. The document also states, "I did not know of the order of October 7, 1991 until [Tate] filed a claim in the probate of my mother's estate on September 26, 2007."

6 Veronica has not included Tate's brief in the record in this appeal.

answer or appear."<sup>7</sup> Tate also stated that at the October 1991 hearing, the trial court took testimony regarding "whether . . . Hari was the biological father of [A.B.]," and that the court "made a finding of paternity." Tate also claimed in her declaration that Hari "knew about the support order and admitted he knew about it more than fourteen years ago because he received collection correspondence from government agencies and admitted to me that he lost his driver's license for failure to pay support."

On July 14, the trial court held a hearing at which it heard oral argument from counsel for both parties. At the conclusion of the hearing, the court denied Hari's request to set aside the 1991 child support order. On August 22, the trial court entered a written order denying the motion to set aside.

3. *Hari's renewed motion to set aside the 1991 child support order*

In October 2008, Hari filed a renewed motion pursuant to Code of Civil Procedure section 1008, subdivision (b), in which he again requested that the court set aside the 1991 child support order. Hari included a one-page "DNA Test Report" from an entity called "DNA Diagnostics Center," with his declaration in support of the motion. The report describes the results of genetic testing purportedly performed in August 2008 on Hari and A.B., and states that Hari is "excluded as the biological father of the tested child."

Hari also offered a declaration from A.B. In her declaration, A.B. stated, "[Hari]

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<sup>7</sup> In explaining the genesis of Hari's 2008 order to show cause, Tate stated that Hari was the beneficiary of an interest in this probate matter. Tate indicated that she had filed a lien in the probate matter seeking to recover past due child support based on the 1991 child support order.

never lived with us as a family during my childhood and has never acted like a father to me." A.B. also stated, "My mother [Tate] has lied to me all of my life saying that [Hari] was my father. I now know that he is not, and still do not know who my father is. I am 22 years old. I feel it is very unfair and wrong that my mother is trying to make [Hari] responsible for my support. He is not my father and never assumed responsibility as my father."

The trial court denied Hari's renewed motion. Hari filed a notice of appeal from the trial court's denial of his October 2008 renewed motion to set aside.

4. Tate v. Wilburn, supra, D054609

On appeal, Hari argued that the trial court erred in failing to set aside the 1991 child support order because he had never been properly served with Tate's underlying order to show cause, the record contained no finding that he is A.B.'s father, and genetic testing performed in August 2008 purportedly demonstrated that he is not A.B.'s father. This court rejected each of these contentions "on the merits." (*Tate v. Wilburn, supra*, D054609.)

B. *The present case*<sup>8</sup>

In 2007, Tate filed a notice of lien on Hari's share of Ruth's estate seeking to collect past-due child support. In September 2008, Tate filed a petition seeking an order from the probate court directing Veronica to release funds subject to the lien. In her petition, Tate contended that she had a lien in the amount of \$70,851.17 attached to Hari's

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<sup>8</sup> (*Estate of Ruth Wilburn* (Super. Ct. San Diego County, 2007, No. P193043).)

interest in the estate and requested that the court release Hari's distributive share to her as a lien claimant. In November 2010, the trial court held a hearing on the petition. On December 3, the court entered a written order granting Tate's petition to release funds and directing Veronica to distribute \$35,426 to Tate, plus certain interest. Veronica appeals from the December 3 order.

### III.

#### DISCUSSION

A. *The probate court did not err in granting the petition to release funds*

Veronica contends that the probate court erred in granting the petition to release funds, on several related grounds. First, Veronica contends that the underlying 1991 child support order was the product of extrinsic fraud and that the probate court therefore erred in granting the petition to release funds based on that child support order. With respect to the purported fraud, Veronica argues as follows:

"When Tate misrepresented under oath that . . . [Hari] was the father of her daughter [A.B.], she committed fraud. When Tate misrepresented that she properly served [Hari], she committed extrinsic fraud so he couldn't expose her actual fraud."

In an unpublished portion of our prior opinion, which Veronica fails to address in the legal argument portion of her brief,<sup>9</sup> we rejected Hari's contention that the 1991 child support order was void on the ground that Tate had not effectuated service of her order to

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<sup>9</sup> Veronica's opening brief contains the following single reference to our prior opinion: "On February 11, 2009, [Hari] filed a Notice of Appeal. [A]ppeal was also denied, again on procedural grounds." In fact, in our prior opinion we "reject[ed] each of [Hari's] contentions on the merits." (*Tate v. Wilburn, supra*, D054609.)

show cause on Hari:

"[Hari] argues that the 1991 child support order was void because he was never properly served with Tate's underlying application and order to show cause. The record from the 1991 proceedings contains an express finding that [Hari] was properly served. Specifically, the trial court's September 30, 1991 order states, 'Petitioner/plaintiff [Tate] was personally present and proof of service of the Order to Show Cause was provided.' The trial court thus did not err in refusing to set aside the 1991 child support order on the ground that [Hari] had not been personally served." (*Tate v. Wilburn, supra*, D054609.)

We also rejected Hari's contention that the trial court erred in determining that the 1991 child support order was void on the ground that a genetic test performed in August 2008 purportedly demonstrated that Hari is not A.B.'s father. (*Tate v. Wilburn, supra*, D054609.) We explained that it was undisputed that Hari's motion was not timely pursuant to Family Code section 7646,<sup>10</sup> and that, even assuming that Family Code section 7646 did not preclude Hari's claim, the test results were not properly authenticated by a person with personal knowledge concerning the manner by which the testing was conducted. (*Tate v. Wilburn, supra*, D054609.)

Notwithstanding these conclusions, Veronica refers to the very same evidence that was presented in the record in the prior appeal and contends that the 1991 child support order is void as a product of extrinsic fraud. Even assuming that Veronica's assertion that the 1991 order was the product of "extrinsic fraud" would permit relitigation of the validity of that order in this case, there is absolutely no evidence in the record in this

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<sup>10</sup> Family Code section 7646 establishes a statutory procedure for setting aside a paternity judgment through the use of genetic testing.

appeal that indicates that the 1991 order was fraudulently procured. Hari's protestations that he was not served with the underlying order to show cause in 1991 and the unauthenticated DNA test do not demonstrate fraud.<sup>11</sup>

Veronica also contends that the probate court's order must be reversed because the court purportedly failed to examine the record to determine whether the 1991 order was the product of extrinsic fraud. This contention fails because there is no evidence in the record that would have permitted the probate court to find that the child support order was the product of fraud.

Veronica also contends that the probate court should have exercised its "equitable power" to set aside the 1991 order. Citing *County of Los Angeles v. Navarro* (2004) 120 Cal.App.4th 246 (*Navarro*), superseded by statute as stated in *County of Fresno v. Sanchez* (2005) 135 Cal.App.4th 15, 20, Veronica contends, "It is simply unjust to make [Hari] pay for a child that, as the DNA certification shows, is not his and that he never helped raise as [A.B.'s] own declaration proves." We expressly rejected this argument and Hari's reliance on *Navarro* in our prior opinion (*Tate v. Wilburn, supra*, D054609), and Veronica offers no reason for us to reach a different conclusion in this appeal.

Finally, Veronica contends that this court should exercise its "general equitable power to grant relief to the estate by negatively enjoining Tate to cease her claim or by setting-aside the probate (trial court's) order to release funds as unjust." Assuming that

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<sup>11</sup> Veronica's brief also contains a section in which she contends that the 1991 child support order is void for improper service of process. Even assuming that Veronica may litigate this claim in the present case, Veronica's claim fails since she has not established that Hari was not properly served in 1991.

this court has the equitable power to issue such an injunction or to set aside the probate court's order, we see no basis in the record for exercising any such power in this case.

B. *Appellate sanctions*

In her brief on appeal, Tate requests that we impose sanctions on Veronica for willfully and knowingly filing a frivolous appeal and requesting numerous extensions of time to complete briefing in this matter. Sanctions cannot be sought in a respondent's brief and Tate has not filed a separate sanctions motion, as is required by California Rules of Court, rule 8.276(b)(1). (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919-920.) Accordingly, the request for sanctions is denied.

Notwithstanding our denial of Tate's request, we would have considered imposing sanctions on Veronica's counsel if an appropriate motion had been filed. In addition to the complete lack of merit of all of Veronica's claims on appeal, and counsel's failure to discuss in Veronica's opening brief the impact in this case of our prior opinion in the related appeal, California Rules of Court, rule 8.204(a)(1)(C) provides that all appellate briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Veronica's brief makes numerous references to documents that are not contained in the record, and contains wholly inadequate citations to documents that are in the record. To take but one instance of citing to matters outside the record, counsel states in Veronica's reply brief, "This counsel called the company that performed the DNA test, one of [the] largest in the nation and world, and was told that it was genuine and the certification stamp will allow them to presenting [*sic*] expert in court to vouchsafe for the test's authenticity." Simply

put, counsel should know better than to make unsworn assertions in an appellate brief concerning factual matters that are wholly outside the record. With respect to failing to provide adequate citations to the record, the seven-page statement of facts in Veronica's opening brief contains a total of *two* citations to the record.<sup>12</sup> Counsel's flagrant disregard for the rules governing the preparation of an appellate brief is inexcusable and will not be tolerated by this court in the future.

IV.

DISPOSITION

The December 3, 2010 order is affirmed. Tate is entitled to costs on appeal as provided in California Rules of Court, rule 8.278(a)(4).

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AARON, J.

WE CONCUR:

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BENKE, Acting P. J.

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HUFFMAN, J.

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<sup>12</sup> In addition, those two citations themselves are improper in that they simply refer to the "augmented appellant's record," without any corresponding page number.