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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of CLARA RICHARDSON,
Deceased.

MICHAEL STRETTON,

Petitioner and Appellant,

v.

SHARON FREEBURN,

Contestant and Respondent.

D059207

(Super. Ct. No. P184008)

APPEAL from an order of the Superior Court of San Diego County, Gerald C. Jessop, Judge. Affirmed.

Michael Stretton is the grandson of Clara Richardson. He appeals from an order denying his petition to probate Richardson's 1992 will and to appoint his mother, Diane Stretton, as the executor. Michael raises numerous issues on appeal, including (1) Diane's sister, Sharon Freeburn, lacks standing to contest the 1992 will, (2) the probate court erred by failing to hold a hearing concerning the validity of the 1992 will,

(3) the probate court did not have discretion to deny admission of the 1992 will to probate based on its finding that the nominated executor was ineligible to serve, (4) the probate court violated his statutory and constitutional rights, and (5) Sharon made misrepresentations to the court. Most of these issues were not considered by the probate court and thus are not properly before us for the first time on appeal. The central issue in the appeal, however, is whether the probate court erred in failing to consider the validity of the 1992 will after ruling that Diane could not act as the executor because she had a conflict of interest and was unable to obtain a bond. We limit the scope of our review to that issue and conclude that the trial court did not err in denying Michael's petition.

FACTUAL AND PROCEDURAL BACKGROUND

Richardson died in January 2003, leaving three surviving adult children, including Diane, Sharon, and Donna Tobey. Since that time, Richardson's family members have engaged in bitter, protracted and complex litigation regarding her estate. We summarize only the factual and procedural history relevant to this dispute.

Shortly after Richardson's death, Diane petitioned the court to admit Richardson's 2002 will to probate and to be appointed executor. Richardson's 2002 will purportedly left the residue of her estate to Diane. The trial court eventually dismissed Diane's petition for violations of discovery rules, and we affirmed that order. (*Estate of Richardson* (Sept. 21, 2007, D046794) [nonpub. opn.])

In 2003, the court appointed Marilyn Kriebel as the special administrator for Richardson's estate and granted her general powers. Kriebel's letters of administration

were extended multiple times because the estate was not in a condition to be closed. The current status of the administration is not in the record before us.

In late 2008, Michael petitioned for probate of Richardson's 1992 will and requested that Diane be appointed executor. The 1992 will named an executor and three successive executors to "serve in the order designated if the prior designated executor fail[ed] to qualify or cease[d] to act." The executor and successor executors, in the order designated, were the following: John Richardson, Donna, Sharon, and Diane. In requesting that Diane be appointed executor, Michael's petition alleged that the other executors named in the 1992 will either died or declined to act.

At a hearing, the probate court expressed concerns about Diane's appointment and stated that it was inclined to require a bond. Thus, the court requested that the parties provide briefing on these matters. In a brief on the bond issue, Diane argued that a bond should not be required because "[t]he 2002 Will devises everything to [her]. Since she is the sole heir, there are *no heirs to protect!!*"

Sharon objected to the admission of the 1992 will and Diane's appointment as executor. In regard to the executor appointment, Sharon argued that Diane had a conflict of interest with the estate and other heirs because Diane adversely claimed ownership of estate assets. Sharon also argued that Diane was not a proper executor because Diane could not post a bond and should be required to do so.

At the trial on Michael's petition, the court stated that it saw no need to hear evidence to corroborate the 1992 will if Diane was not a proper executor. Thus, the court heard arguments concerning whether Diane had a conflict of interest that prevented her

from being the executor and whether she could get a bond. The probate court then denied Michael's petition on the basis that the nominated executor was ineligible to serve and unable to obtain a bond. The court's minute order stated the following: "Petition for Probate of Will and Letters Testamentary with Authorization to Administer Under the Independent Administration of Estates Act filed by Michael Stretton is denied."

DISCUSSION

Michael argues that the probate court erred in denying his petition without determining whether the 1992 will was valid. Specifically, he contends that the appointment of an executor and validity of the 1992 will are separate issues requiring independent determinations. Thus, despite the probate court's denial of his petition to appoint Diane the executor, Michael contends it should have considered the will's validity. While we agree that the appointment of an executor and validity of a will are separate issues, we conclude the trial court did not err in denying Michael's petition because Michael never requested the appointment of an alternative executor or administrator after the court found Diane was ineligible.

At any time after a decedent's death, any interested person may petition the court for either or both of the following: "(1) Appointment of a personal representative. ¶¶ (2) Probate of the decedent's will." (Prob. Code, § 8000, subd. (a); undesignated statutory references are to this code.) Proceedings for the admission of a will to probate and for issuance of letters to a representative are distinct in their nature. (*Estate of Richardson* (1898) 120 Cal. 344, 346.) In determining whether a will should be admitted to probate, "the only question before the court is as to whether or not the propounded paper or papers

constitute the will of the decedent." (*Estate of Montgomery* (1949) 89 Cal.App.2d 664, 667.) In evaluating the appointment of a personal representative, the court can consider factors impacting eligibility, including whether the prospective representative has a conflict of interest. (§§ 8402, 8502; *Estate of Hammer* (1993) 19 Cal.App.4th 1621, 1641–1642.) Where "the sole executor or all the executors named in the will . . . are for any reason unwilling or unable to act[.]" the court shall appoint an administrator with the will annexed. (§ 8440; see *Estate of Kimball* (1927) 200 Cal. 247, 251.)

As an initial matter, we note that Michael did not argue in his opening brief that the probate court erred in ruling that Diane was ineligible to act as executor because she had a conflict of interest and could not obtain a bond. He does, however, raise these issues in his reply brief. It is well settled that ""points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. . . ."" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10, quoting *Neighbours v. Buzz Oates Enterprises* (1990) 217 Ca.App.3d 325, 335, fn. 8.) Michael waived any claim regarding the trial court's conclusion that Diane is not a proper executor because he failed to raise this issue in his opening brief and has not demonstrated good cause for his failure to do so.

Michael's petition requested probate of Richardson's 1992 will with appointment of Diane as the executor of that will. The trial court denied Michael's petition on the grounds that Diane was ineligible to serve as an executor because she had a conflict of interest and was unable to obtain a bond. While the naming of a competent executor does not have a bearing on the will's validity (*Estate of Iburg* (1925) 196 Cal. 333, 337),

Michael never requested appointment of an alternative executor or administrator with the will annexed. Indeed, in his reply brief on appeal, Michael emphatically confirms his "position is that there *is* no other candidate who is both willing and able to administer the estate pursuant to the terms of the 1992 Will." Given Michael's failure to propose an alternative executor or seek the appointment of an administrator with the will annexed, the probate court could have reasonably concluded that Michael's request to probate the will was contingent on Diane's appointment as the executor. Thus, the probate court did not err in denying his petition.

DISPOSITION

The order denying Michael's petition is affirmed. The parties shall bear their own costs on appeal.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.