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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LAURA L. KEEZELL, as Trustee, etc.,

Plaintiff and Respondent,

v.

MARVA LEIGH SMITH,

Objector and Appellant.

D059279

(Super. Ct. No. 37-2010-00150888-  
PR-TR-CTL)

APPEAL from orders of the Superior Court of San Diego County, Julia C.

Kelety, Judge. Affirmed.

Marva Leigh Smith, appearing in propria persona, appeals after the trial court determined that her father's First Restated Revocable Trust (Restated Trust) was a valid amendment to his original trust and that Smith violated the no contest clause in the Restated Trust by objecting to its validity. On appeal, it is difficult to determine Smith's arguments. She has identified her arguments as: (1) bribery and corruption by public officials should not prohibit her constitutional right to equal protection and

due process; (2) medical malpractice accusations by U.S. Attorneys stand between her and her inheritance and thus, the no contest clause should not be triggered; and (3) tribal courts are afforded exclusive jurisdiction over the probate of nontrust movable assets of Indians. However, she appears largely to complain about the trial court's denial of her request for a victim advocate and trial continuance. Because Smith has not shown any basis to reverse the trial court's orders, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Smith's father, Marvin Smith, created a trust that provided his estate would pass to each of his five children in equal amounts, with one child's share to be retained in trust because that child was disabled. In 2006, Marvin executed the Restated Trust, which changed the successor trustee from a son to his daughter, Laura Keezell, and provided that the disabled child's inheritance would be put into a special needs trust. Marvin died in 2009 and was survived by his five children.

In February 2010, Keezell filed a petition asking the court to affirm the validity of the Restated Trust. (All further date references are to the year 2010.) Smith objected to the petition on the grounds that Marvin lacked testamentary capacity and the Restated Trust was the result of undue influence by Keezell. Thereafter, in May, Smith filed a request for accommodations, which the court granted in part and denied in part. The court granted Smith's request for preferential seating to accommodate a hearing impairment and for copies of proceeding transcripts, but denied her request for a crime victim advocate.

In June, Keezell requested the court find that, by filing objections, Smith violated the no contest clause in the Restated Trust and thus, the estate should be distributed in four equal shares, leaving Smith out. In July, Smith requested a continuance to respond to Keezell's petition regarding the no contest clause because she was attempting to retain an attorney. The court informed Smith that she needed to file any objections prior to the hearing on the petition.

Smith's attorney appeared at a hearing regarding the no contest clause petition and informed the court that she would be seeking to withdraw as Smith's counsel. The court informed counsel that either she or Smith needed to file objections by October 19 and set a trial date for December. A minute order regarding the proceedings indicated that the deadline for objections was October 1. Irrespective of the date discrepancy, Smith had not filed any objections to the petition by November, and thus, the court deemed them waived.

In December, on the day set for trial, Smith's counsel made a request for accommodations on behalf of her client. The request sought a trial continuance for "medical assessment and treatment" that was scheduled on the day of trial. The request was not accompanied by any medical documentation. The trial court denied the request, finding that it was untimely and that a trial continuance did not constitute an "accommodation" under California Rules of Court, rule 1.100.

The trial regarding the validity of the Restated Trust and no contest clause proceeded with Smith's attorney present on her behalf. The trial court ultimately found that the Restated Trust was valid and that Smith violated the no contest clause

by objecting to the trust's validity. As a result, the trial court deemed Smith to have predeceased Marvin without issue, and instructed the trustee to distribute Marvin's estate in equal shares to the four remaining beneficiaries.

## DISCUSSION

### I. *Notice of Appeal*

To be sufficient, the notice of appeal must "identif[y] the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) Notices of appeal are liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from and so long as the respondent could not possibly have been misled or prejudiced. (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361.) In the absence of a sufficient notice of appeal, there is no appellate jurisdiction. (See *Beets v. Chart* (1889) 79 Cal. 185; *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47.)

Smith's notice of appeal indicates that she is appealing from a December 17, 2011 judgment after a court trial. The record before us does not contain such judgment; there were, however, two orders entered on December 17, 2010, after the hearing regarding the validity of the Restated Trust and enforcement of the no contest clause. Additionally, Smith raises arguments concerning the trial court's denial of her request for a victim advocate and trial continuance.

We conclude that Smith was trying to appeal from the December orders finding the Restated Trust was valid and that Smith violated the no contest clause.

Accordingly, we address claims of error relating to the December orders. We do not, however, address any claims of error pertaining to the trial court's denial of Smith's requests for accommodations, as these determinations are not appealable orders and may be reviewed only by a writ of mandate sought within 10 days of the date that the court's response to the request was delivered or sent to the petitioner. (Cal. Rules of Court, rule 1.100(g)(2).)

## II. *Principles of Appellate Review and Smith's Claims*

In resolving Smith's contentions, we apply settled standards of appellate review. Specifically, "it is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.'" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

All litigants, including those acting in pro per (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247), are bound by the rule that "[a]ppellate courts will not act as counsel for either party to an appeal and will not assume the task of initiating and prosecuting a search of the record for the purpose of discovering errors not pointed out in the briefs. It is the duty of [the appellant] to refer the reviewing court

to the portion of the record to which he objects and to show that the appellant was prejudiced thereby." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 695, pp. 764-765.) Points are deemed abandoned when they are entirely unsupported by argument or reference to the record. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699; *Renden v. Geneva Development Corp.* (1967) 253 Cal.App.2d 578, 591; Cal. Rules of Court, rule 8.204(a)(1)(C) ["Each brief must . . . [¶] . . . [¶] . . . [s]upport any reference to a matter in the record by a citation to the . . . record".]) "Arguments should be tailored according to the applicable standard of appellate review." (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1388.)

Here, the bulk of Smith's arguments pertain to the trial court's denials of her requests for accommodations. As we already discussed, any error regarding these determinations should have been raised by way of a petition for writ of mandate. (*Ante*, Part I.) Her remaining arguments concerning bribery and corruption by public officials, medical malpractice, and tribal court jurisdiction are not supported by any references to the record and, based on our review of the record, were not raised below. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 113 [arguments not asserted below are waived and will not be considered for the first time on appeal].) Even if these arguments were raised, however, Smith has not met her burden to show the trial court committed any error. We find no irregularities in the proceedings below and thus affirm the trial court's orders.

### III. *Request for Sanctions on Appeal*

Keezell requests that this court sanction Smith for filing a frivolous appeal.

We deny this request.

"When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc., § 907.) An appeal may be deemed frivolous when (1) under a subjective standard, it is prosecuted for improper motives of harassment or delay, or (2) under an objective standard, it indisputably has no merit because any reasonable attorney would agree that the appeal is totally and completely without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650 (*Flaherty*); *In re Marriage of Schnabel* (1994) 30 Cal.App.4th 747, 754.) "The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Flaherty*, at p. 649.) "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*Id.* at p. 650.) Accordingly, we heed the caution that the power to sanction for frivolous appeals should not be used "in all but the clearest cases . . . ." (*Ibid.*)

While we agree with Keezell that Smith's appeal lacks merit, we decline to assess sanctions. Sanctions should be imposed sparingly "so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal" (*Flaherty, supra*, 31

Cal.3d at p. 650) and this is not a case where we can conclude that Smith appealed for an improper purpose.

DISPOSITION

The orders are affirmed. Respondent is entitled to costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.