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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT C. LEACH, as Executor, etc.,

Plaintiff and Appellant,

v.

KENDALL KLEVELAND, as Trustee, etc.,

Defendant and Respondent;

BORIS SIEGEL,

Objector and Appellant.

D061371

(Super. Ct. No. PN29534)

APPEAL from orders of the Superior Court of San Diego County, Robert P.

Dahlquist, Judge. Affirmed.

In this second appeal in this probate matter, plaintiff Scott C. Leach appeals from an order approving a petition for approval of accounting and proposed plan of distribution (the petition for approval) for the estate of Janis Kleveland (Kleveland family trust), filed by the successor trustee, defendant Kendall Kleveland. Additionally, Leach's

attorney, Boris Siegel, has filed a brief appealing from the court's award of sanctions against him.

On appeal, Leach asserts the court's order approving the petition for approval should be set aside because (1) the petition for approval failed to state the names and addresses of each person entitled to notice as required by law; (2) no Judicial Council form entitled "Notice of Hearing" for the petition for approval was ever served on Leach or attorney Siegel; and (3) the order should be set aside on equitable grounds or for extrinsic fraud because Kleveland never served the petition for approval on him.

On his appeal, attorney Siegel asserts the sanctions order should be set aside because neither he nor his client filed with the court any improper papers upon which the court could base a sanctions order under Code of Civil Procedure section 128.7.¹

We affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

Because the factual background of this long running dispute is stated in detail in the previous appeal, *Leach v. Kleveland* (March 24, 2010, D054532 [nonpub. opn.]), we state only the facts relevant to this appeal.

In the court's statement of decision following the trial concerning division of the Kleveland family trust, it was ordered that defendant Kleveland "prepare an accounting and a plan for dividing the trust estate. . . . The accounting and plan of distribution shall be presented to [Leach] for his approval. Any objections to the accounting and plan of

¹ All further undesignated statutory references are to the Code of Civil Procedure.

distribution shall be resolved by the Court in future proceedings. The court reserves jurisdiction to make further orders concerning the final accounting of the trust estate and the proper distribution of trust assets."

Following the sale of the real property that was the main asset of the Kleveland family trust, Kleveland prepared an accounting and proposed plan of distribution, and submitted them to attorney Siegel. In response, Siegel sent to Kleveland objections to the accounting and distribution, which stated, "Said accounting is not in compliance with the judgment after trial of the Probate Court and not in compliance with the Probate Code."

Based upon the objections, Kleveland prepared a proposed motion for sanctions under section 128.7, which he served on attorney Siegel's office by certified mail. The motion for sanctions contained a hearing date of November 18, 2011, which was set forth on the first page of every document filed in support of the motion.

Because of Leach's objections, Kleveland also prepared the petition for approval, which, along with all supporting documents, was served by ordinary mail on attorney Siegel, and a declaration of service by mail was filed with the court. That motion also contained a hearing date of November 18, 2011, on the first page of the petition, and all supporting documents.

Kleveland filed his motion for sanctions, which was also served by ordinary mail on attorney Siegel, with a declaration of service filed with the court. That motion also contained a hearing date of November 18, 2011, which was set forth on the first page of the motion and all supporting documents.

On November 18, 2011, the court heard the petition for approval and motion for sanctions. No appearance was made by Leach or attorney Siegel. The court granted the petition for approval and the motion for sanctions, ordering sanctions in the amount of \$1,625, jointly and severally against Leach and attorney Siegel.

In granting the motion for sanctions, the court stated:

"The conduct that constitutes a violation of [section] 128.7 is as follows: Scott Leach signed an 'objection' to the proposed plan of distribution that was presented primarily for an improper purpose, namely to cause unnecessary delay and to needlessly increase the cost of litigation. Boris Siegel submitted the 'objection' for an improper purpose, namely to cause unnecessary delay and to needlessly increase the costs of litigation. Under those circumstances, monetary sanctions are warranted under [section] 128.7[, subdivision] (b)(1) because the objection was presented primarily for an improper purpose."

DISCUSSION

I. LEACH'S APPEAL

A. Alleged Deficiencies with Form of Pleadings

Leach asserts that the order granting the petition for approval must be overturned because the petition for approval (a) failed to state the names and addresses of each person entitled to notice, and (b) failed to include a Judicial Council form entitled "Notice of Hearing." These contentions are unavailing.

First, the only persons entitled to notice are the parties to this action. As is detailed, *ante*, Leach received notice of the petition for approval.²

² Following the briefing in this matter, Leach filed a request for judicial notice requesting that we take notice of certain court documents he contends show others were

Moreover, any deficiencies in a notice in a probate matter is cured by the fact the parties actually received a copy of the petition setting forth the nature of the relief sought. (*Estate of Wakefield* (1968) 258 Cal.App.2d 274, 280.) It is undisputed that Leach received notice of the petition for approval.

Judicial Council Form DE-120 is entitled "NOTICE OF HEARING-DECEDENT'S ESTATE OR TRUST." It does state that "[t]his notice is required by law" and that it is a "Form Adopted for Mandatory Use Judicial Council of California."

However, the notice given by Kleveland informed Leach of all information required by that form: the moving party, the nature of the motion, and the date, time and department in which the hearing would be conducted. (See Prob. Code, § 1211.) Thus, any defect in Kleveland's notice was technical and not grounds for reversal of the court's order, as Leach received actual notice of every item to which he was entitled.

We will not reverse an order based upon procedural error unless the error complained of resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) That clearly did not occur here.

entitled to notice of the petition for approval. We decline to take judicial notice of these matters because (a) these documents were never presented to the trial court and are thus outside the record on appeal; (b) the request is an improper attempt to present further argument after briefing in this matter has been concluded; and (c) as Kendall points out in his opposition to the request for judicial notice, the documents do *not* show others were entitled to notice. Kleveland's unopposed motion to take judicial notice of (1) notice of ruling and ruling in San Diego Superior Court Case No. 37-2010-0001990-CU-MC-NC; and (2) complaint to set aside order in Ventura County Superior Court Case No. 56-2012-00412820-CL-MC-VTA is granted.

B. Alleged Failure To Receive Notice

Leach next contends the order approving the petition for approval should be set aside on equitable grounds or for extrinsic fraud because the court ruled on the petition for approval "without providing him with notice and an opportunity to be heard." He also asserts that Kleveland never "served any of these documents on [Leach] or his counsel," These contentions are unavailing.

A court's ruling is presumed correct and an appellant has the burden of overcoming that presumption by affirmatively showing error based upon an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Leach has not provided anything in the record to substantiate his claim that that he was not served with the petition for approval or the motion for sanctions. No declaration or other evidence is contained in the record on appeal. Accordingly, this claim is considered abandoned. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002-1003.)

If Leach truly did not receive the petition for approval (whether because it was lost in the mail, through an error of attorney Siegel's staff, or otherwise), his remedy was to move the trial court under section 473 to set aside the order granting the petition for approval. (*Standard Microsystems Corp. v. Winbound Electronics Corp.* (2009) 179 Cal.App.4th 868, 893-894; *Wilkinson v. Wilkinson* (1970) 12 Cal.App.3d 1164, 1166.)

Moreover, there is a presumption that a declaration of proof of service by mail demonstrates notice has been received in the ordinary course of mail. (*Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1479.) Again, because Leach has

provided nothing to rebut this presumption, we must conclude that he received all the documents that made up the petition for approval and motion for sanctions.

II. ATTORNEY SIEGEL'S APPEAL

Attorney Siegel asserts the court erred in sanctioning him because he did not file his objections to Kleveland's accounting with the court, but sent them only to Kleveland. We reject this contention.

Section 128.7, subdivision (b)(1) provides:

"By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."
(Italics added.)

First, attorney Siegel misstates the record by asserting that the court "ordered [KLEVELAND] to file his final accounting with the Probate Court along with a noticed petition for its approval." This is done in an apparent attempt to assert that he did not force Kleveland to file the petition for approval based upon his objections.

However, as discussed, *ante*, the court's statement of decision specified that Kleveland was to present the accounting and proposed plan of distribution *to Leach for his approval*. The statement of decision further states that any objections thereafter made by Leach "shall be resolved by the court in future proceedings."

Thus, as attorney Siegel was aware, resolution of any "objections" was to be accomplished before the court, necessitating Kleveland's filing of the petition for

approval, if Leach objected, for the court to rule upon. Knowing this, attorney Siegel replied to the accounting with boiler plate objections. Because the objections did not specify as to what portion of the accounting there were objections, there was no way they could be resolved without Kleveland returning to court to have the court approve the accounting by way of a petition for approval. When Kleveland served attorney Siegel with the "proposed" motion for sanctions, as is required by section 128.7, he was put on notice that if he did not withdraw his objections, a motion for sanctions would be filed and heard on November 18, 2011. He did not withdraw the objections or delineate the basis for the objections prior to Kleveland's filing of the actual motion for sanctions. When Kleveland filed and served the motion for sanctions, attorney Siegel did not respond to the motion and did not appear at the hearing on the motion.

The court acted within its discretion in imposing sanctions because attorney Siegel presented the objections to the court by "signing" the objections, which, based on the foregoing, the court could reasonably conclude were for the improper purpose of delay and/or needlessly increasing the costs of litigation. That he did not directly file the objections with the court is of no moment because he knew that he was forcing Kleveland to present those objections to the court for resolution by way of the petition for approval, an act that would have been unnecessary had he not made those objections.

DISPOSITION

The orders are affirmed. Kleveland shall recover his costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.