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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| Estate of LYNDA LOU CATLIN, Deceased. | |
| GRETCHEN BROWN,<br><br>Petitioner and Respondent,<br><br>v.<br><br>MARK CHAGOYA,<br><br>Objector and Appellant. | F077368<br><br>(Kern Super. Ct.<br>No. S-1501-PB-62540)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Alisa R. Knight, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Hulsy & Hulsy and James R. Hulsy for Objector and Appellant.

Borton Petrini and Jeff L. Bean for Petitioner and Respondent.

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## INTRODUCTION

Gretchen Brown[1] claimed that her mother, Lynda Catlin, promised she would leave her residence to Brown when she died. However, two days before she died, Catlin purportedly executed a grant deed transferring the residence to herself and appellant Mark Chagoya, "as husband and wife as joint tenants." Lynda Catlin then died without a will.

Brown was appointed administrator of Catlin's estate. In that capacity, Brown sought to impose a constructive trust on the residence based on the promise Catlin had made to Brown before she died. A court trial was held without a court reporter. After trial, the probate court granted Brown's request for a constructive trust on the residence, among other relief.

The probate court also found that Chagoya was not validly married to Catlin at the time of her death and did not qualify as a "putative spouse"[2]. Chagoya challenges these and other factual findings by the probate court. Because there was no reporter's transcript, we must reject these challenges.

However, we also conclude that while Brown pursued her constructive trust claim in her capacity as administrator of the estate, she was "actually attempting to pursue a personal claim …." (*Estate of Scott* (1987) 197 Cal.App.3d 913, 920.) And even if she had properly pursued the claim in her personal capacity, the claim would have been time-barred. (See Code Civ. Proc., § 366.3.)

Therefore, we will reverse the imposition of a constructive trust, correct the judgment's "distribut[ion]" of property to Brown without specifying her capacity as administrator of the estate, and otherwise affirm the judgment.

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[1] Brown, in her capacity as administrator of Catlin's estate, is the respondent on appeal.

[2] See Family Code section 2251, subdivisions (a) and (a)(1).

## FACTS

On January 28, 2013, Gretchen Brown, filed a petition to probate the estate of her mother, Lynda Catlin. Brown was appointed administrator of the estate. (See Prob. Code, § 8460.) In that capacity, Brown petitioned the court to require transfer of certain property to the estate. (See Prob. Code, § 850, subd. (a)(2).) A court trial was held over two days, at which the court received testimony without a court reporter. Below, we will summarize the probate court's orders and findings of fact based on the minute order issued after trial.[3]

*Decedent Lynda Catlin's Relevant Marital History*

In 1991, Lynda Catlin married Robert Koelzer.[4] She filed for divorce in 2002, but no judgment of dissolution was ever entered.

In 2003, Catlin purportedly married appellant Mark Chagoya. Chagoya claimed he lived with Catlin from 1998 until her death. Chagoya further claimed he did not know until after Catlin died that her divorce from Koelzer was never finalized.

*Bucknell Street Property*

Brown claimed she provided "personal care and services" to her great-grandmother, Evelyn Brothers, for 15 years. Brown said that Brothers verbally promised to give Brown a property on Bucknell Street (the "Bucknell Street Property") in exchange for the services provided by Brown.

At some point, Brothers added Catlin as a joint tenant on title to the Bucknell Street Property. This was "purportedly" done with the understanding Catlin would hold the property in trust for Brown.

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[3] In their appellate briefs, the parties cite to their own closing briefs filed after trial was completed. We decline to rely on the parties' briefing to establish the facts and instead rely solely on the court's minute order.

[4] Brown is Catlin's child from another marriage that predated her marriage to Koelzer.

After Brothers died, Brown lived in the Bucknell Street Property. Eventually, Catlin sold the Bucknell Street Property with Brown's "assent." The proceeds from that sale were used to "pay down the balance due" on Catlin's own residence on Pesante Road (the "Pesante Road Property").

*Pesante Road Property*

Brown claims that Catlin made a verbal promise to her, whereby Catlin would give Brown the Pesante Road Property upon Catlin's death, in exchange for "personal care services" similar to those Brown had provided for Brothers.[5] Under the agreement, Brown would also provide janitorial services for Catlin's hair salon.

Brown said she indeed "provided such services for a number of years, without pay, in reliance upon [Catlin's] promise to convey the real and personal property to [Brown] upon [Catlin's] passing."

*Grant Deed to Pesante Road Property*

Despite the alleged promise to give the property to Brown upon her passing, Catlin purportedly executed a grant deed on February 2, 2011. The grant deed transferred the Pesante Road Property from Catlin alone to Catlin and Chagoya as joint tenants. At the time, Catlin was hospitalized for an illness that would claim her life two days later on February 4, 2011.

*Irregularities Concerning the Grant Deed*

Evidence was presented about certain irregularities surrounding Catlin's "deathbed" execution of the grant deed.

Notaries must keep a sequential journal "of all official acts performed as a notary public." (Gov. Code, § 8206, subd. (a)(1).) The journal must be kept "in a locked and secured area." (*Ibid.*) If the journal is lost or stolen, the notary must "immediately notify the Secretary of State." (Gov. Code, § 8206, subd. (b).)

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[5] The court did not make a finding on the precise date of the agreement between Brown and Catlin but did find the promise was made some time before February 2, 2011.

The notary who notarized Catlin's signature on the grant deed testified that her sequential journal had been lost or stolen after notarizing Catlin's signature. There was no evidence the notary informed the Secretary of State that the journal had been lost or stolen.

Additionally, a doctor testified that the dosage and type of pain medication provided to Catlin was "substantial," and its effect would depend on her "tolerance." Some evidence indicated Catlin's ability to communicate worsened each day beginning with her hospitalization on January 29, 2011.

There was also evidence that on the day after the grant deed was executed, Chagoya said, "I got everything I want anyway," before leaving the hospital.

After summarizing this evidence, the court concluded in its minute order: "Based upon the foregoing, the court finds that the property was wrongfully obtained by [Chagoya]…."[6]

*Putative Spouse*

Chagoya argued and presented evidence at trial that even if his marriage to Catlin was void or voidable, he was still her "putative spouse" because he had a good faith belief the marriage was valid. (Fam. Code, § 2251, subds. (a) & (a)(1).)

Chagoya cited the fact that they had a wedding ceremony, and that Catlin had told him her divorce to Koelzer was "completed." However, in a deposition, Chagoya had testified that Catlin had *not* told him the divorce was completed, and he never inquired as to the status of the divorce.[7]

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[6] We understand this to mean that the court was invalidating the grant deed.

[7] Chagoya argues that he changed his answer to the relevant deposition question (see Code Civ. Proc., § 2025.520), and the deposition transcript submitted as an exhibit at trial does not reflect the change. Chagoya attached an exhibit to his opening appellate brief reflecting the change. Because we conclude that Chagoya's factual challenges cannot prevail without a reporter's transcript, we need not address the propriety of the exhibit to his brief.

The court's minute order also noted that there was "testimony at trial" that "revealed" Catlin's petition for divorce from Koelzer and marriage to Chagoya occurred "immediately" after Catlin learned she would be taken off of Koelzer's health insurance plan. The court concluded this fact was "consistent" with Brown's claim that Catlin and Chagoya "knowingly proceeded with a sham marriage" to get Catlin covered under Chagoya's health insurance.

The court ultimately found that Chagoya was *not* Catlin's putative spouse.

*Probate Filings*

On January 28, 2013, Brown filed a probate petition in superior court. The petition listed Robert Koelzer as Catlin's husband.

On March 2, 2015, Brown filed a petition to determine distribution rights. (See Prob. Code, § 11700.)[8] The petition sought a court order declaring that Koelzer, not Chagoya, was Catlin's surviving spouse.[9]

On May 2, 2016, Brown filed an amended petition to determine distribution rights and a "petition to determine title to and require transfer of property to estate." (Italics removed.) The petition alleged that Catlin did not understand the nature of the grant deed conveying the Pesante Road Property when she executed it on February 2, 2011. It further alleged that Chagoya induced Catlin to execute the grant deed "by fraud, undue influence and duress." The petition requested, among other things, that the court "vest[]" title of the Pesante Road Property "in Petitioner [Brown] as administrator of decedent's Estate" pursuant to Probate Code section 850, subdivisions (a)(2)(B) & (D).

*Probate Court's Findings, Orders and Judgment*

After trial, the court ruled largely in favor of Brown. The court found that an "oral contract existed between Petitioner [Brown] and Decedent [Catlin.]." The court found

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[8] All future statutory references are to the Probate Code unless otherwise stated.

[9] The petition also sought an order amending Catlin's certificate of death to reflect this fact.

that the terms of the oral contract were that Brown would receive the Pesante Road Property and Catlin's personal property in exchange for providing "personal care services," janitorial services at Catlin's beauty salon, and the use of the proceeds from the Bucknell Street Property. The court also concluded that Brown "fulfilled" her obligations under the contract. The court then held that "the refusal to complete the agreement works as a fraud against Petitioner. Petitioner is therefore entitled to quasi-specific performance of both [Brothers's] and [Catlin's] oral agreements." The court ordered "that the real property commonly known as [address] Pesante Lane,[10] or a constructive trust imposed on the proceeds of sale of such property for the benefit of the Petitioner Gretchen Brown, in her capacity as administrator of the estate of Lynda Catlin…."[11]

The court also ruled that Chagoya "was not the putative spouse of the Decedent and that [his] marriage to the Decedent was void"; Chagoya "wrongfully obtained" the Pesante Road Property; Brown was "entitled to receive all of Decedent's real and personal property owned at the time of her death" pursuant to section 6402, subdivision (a); that Catlin's death certificate be amended to reflect that her surviving spouse was Koelzer; that certain funds held in an account must be transferred to Brown, as administrator of Catlin's estate; and that Brown would recover costs of suit from Chagoya.

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[10] The court refers to the property as being on Pesante Lane. Documentary evidence in the record list the address as being on Pesante Road.

[11] There is evidence in the record that Chagoya sold the Pesante Road Property in 2016. Nonetheless, the lower court on several occasions refers to the property *or* proceeds from its sale. We will follow the lower court's lead in this regard.

## DISCUSSION

### I. Without a Reporter's Transcript, Appellant Cannot Challenge Probate Court's Factual Determinations

Chagoya challenges the probate court's resolution of several contested factual issues, including whether Catlin told Chagoya her divorce from Koelzer was finalized;[12] when certain decisions about Catlin's medical treatment were made; whether Catlin was in pain and how well she could communicate during her final days; whether there were irregularities in the notarization of the grant deed; whether Catlin was subjected to undue influence in executing the grant deed; and the nature of any oral promises allegedly made by Catlin. However, without a reporter's transcript, Chagoya's claims cannot prevail.

"[T]he absence of a court reporter at trial court proceedings and the resulting lack of a verbatim record of such proceedings will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court."

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[12] We do note that the evidence cited by Chagoya does suggest he had a good faith belief in the validity of his marriage to Catlin. Catlin and Chagoya participated in a marriage ceremony; lived together thereafter; filed joint income tax returns; and Chagoya's paycheck was used to pay their joint bills. Chagoya also testified that Catlin told him the divorce was "completed." These factors suggest Chagoya "believed in good faith that the marriage was valid," which would, if proven, entitle him to "putative spouse" status. (Fam. Code, § 2251, subds. (a) & (a)(1).) "The good faith inquiry is a subjective one that focuses on the actual state of mind of the alleged putative spouse." (*Ceja v. Rudolph Sletten, Inc.* (2013) 56 Cal.4th 1113, 1128.)

The court, as trier of fact, concluded that Chagoya did not have a good faith belief in the validity of his marriage with Catlin. The trial court was apparently persuaded by the evidence that Chagoya may have "married" Catlin so she could benefit from his health insurance. It could be argued that even if that was a motivating factor, the marriage would still be valid.

Thus, the lack of a reporter's transcript presents us with a challenge. While accepting the testimony as described by either side could lead to a different holding, we will not speculate as to the sufficiency of the testimony to support the fact-finder's conclusions. Instead, we "presume[] that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

(*Jameson v. Desta* (2018) 5 Cal.5th 594, 608.) "This is so because it is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and … 'all presumptions in favor of the trial court's action will be made by the appellate court.' " (*Id.* at p. 609.) Consequently, when there is no reporter's transcript, "it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)

"Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*." (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992; see also *In re Estate of Plumb* (1918) 177 Cal. 300, 302–303; *Estate of Bernard* (1962) 206 Cal.App.2d 375, 384–385; *In re Guardianship of Waite* (1939) 33 Cal.App.2d 315, 316; *Mau v. McManaman* (1938) 29 Cal.App.2d 631, 636; *J.S. Morgan & Sons v. Bradner* (1934) 3 Cal.App.2d 206, 206–207.) "The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence. [Citations.]" (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)

Appellant cannot evade these clear rules by describing the trial testimony in his briefing. We cannot "act upon a mere assertion of an appellant in his brief as to matters not shown by the record …." (*County of Nevada v. Phillips* (1952) 111 Cal.App.2d 428, 430.)

Nor do appellant's citations to evidence in the clerk's transcript suffice. Even if some evidence in the clerk's transcript supports the factual findings urged by appellant, we must "presume[] that the unreported trial testimony would demonstrate the absence of error. [Citation.]" (*Estate of Fain*, *supra*, 75 Cal.App.4th at p. 992.)

For these reasons, the absence of a reporter's transcript is fatal to appellant's claims. Though we reverse other aspects of the judgment as described below, the probate court's factual findings remain intact and cannot be relitigated.

## II. Brown Failed to Pursue Claim for Constructive Trust in her Personal Capacity, Which Would Have Been Time-Barred Anyway

Chagoya argues that the court erred in basing its decision, in part, on the oral promise Catlin made to Brown because it was not pled in Brown's March 2, 2015 petition. He also contends the claim is barred by the statute of limitations. (See Code Civ. Proc., § 366.3.)

This court requested supplemental briefing on a more fundamental issue: whether Brown could pursue her claim for a constructive trust while acting in her representative capacity on behalf of the estate. For the reasons that follow, we conclude that claim was personal to Brown, the individual, and was not a claim made for the benefit of the estate. And, even if Brown has properly pursued the claim in her personal capacity, it would have been time-barred. As a result, we will reverse the imposition of a constructive trust on the Pesante Road Property (or its proceeds).[13]

*Role of an Estate's Personal Representative*

" ' "Probate" is the court-supervised administration of a decedent's estate.' " (*Estate of Bonanno* (2008) 165 Cal.App.4th 7, 17.) " 'The probate court is concerned with passage of title to the decedent's property whether by will or by the laws of intestate succession.' " (*Ibid*.)

"An 'estate' is not a legal entity," but simply a collection of assets and liabilities of a decedent. (*Estate of Bright v. Western Air Lines, Inc.* (1951) 104 Cal.App.2d 827, 828.) As a result, an estate can neither sue nor be sued. (*Id.* at p. 829.) Instead, the estate is represented in litigation by a "personal representative." (See Code Civ. Proc., § 369, subd. (a)(1).)

Executors and administrators are examples of personal representatives. (§ 58, subd. (a).) Executors are identified by the decedent's will, whereas administrators are appointed by the court when the decedent dies without a will. (See §§ 8420, 8460.)

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[13] Consequently, we do not reach Chagoya's other challenges to the pleading of the constructive trust claim.

Personal representatives take possession of the estate's property (§ 9650, subd. (a)(1)); collect its debts (§ 9650, subd. (a)(1)); manage, protect, and preserve the estate's property (§ 9650, subd. (b)); and commence or defend actions *for the benefit of the estate* (§ 9820, italics added.)

In addition to the estate's personal representative, other parties often appear in probate proceedings. Heirs, for example, are people who are entitled to take property by intestate succession. (§ 44.) Sometimes, competing heirs get into a dispute about how the estate should be distributed. Personal representatives must generally remain neutral in such disputes because they "represent[] all the heirs and cannot favor one claimant over another." (24 Cal.Jur.3d, Decedents' Estates, § 420, fn. removed; see also *Estate of Bartsch* (2011) 193 Cal.App.4th 885, 895–896.) Personal representatives are "mere stakeholders who should remain neutral in estate proceedings as between the real parties in interest, such as heirs and devisees with conflicting claims to portions of the estate…." (24 Cal.Jur.3d, Decedents' Estates, § 420.) Thus, the personal representative "cannot litigate any question that arises only between" such heirs and devisees. (*Ibid*.)[14]

*Distinction Between Appearance as Personal Representative vs. Appearance in One's Personal Capacity*

However, sometimes, the administrator also has a *personal* claim to the estate as an heir, devisee, etc. In that situation, the person may appear in the probate proceedings

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[14] A statutory enactment in 1976 created a " 'narrow exception' " to the general rule that a personal representative may not participate in such proceedings. (*Estate of Kerkorian* (2018) 19 Cal.App.5th 709, 716.) That enactment has been repealed and replaced, with the most recent iteration enacted in 2013 as current section 11704. (*Estate of Kerkorian*, at pp. 716–717.) The statute permits executors to "tak[e] sides … in a proceeding to determine who is entitled to a distribution of estate assets" but "requires" that they first "obtain court permission" on a showing of good cause. (*Id.* at p. 713; see § 11704.) Good cause can be established when, for example, the personal representative has "a high degree of personal familiarity with the matters relevant to [the] proceeding" and a "*a lack of self-interest in the distribution of the estate*." (*Estate of Kerkorian*, *supra*, at pp. 721–722, italics added, fn. omitted, but see *Estate of Bartsch*, *supra*, 193 Cal.App.4th at p. 893.) Obviously, those are not the circumstances present here.

in their personal capacity as an heir or claimant *and* in their representative capacity as an executor or administrator of the estate. (See, e.g., *Estate of Smith* (1966) 241 Cal.App.2d 205, 207–208; cf. *Olsen v. Lockheed Aircraft Corp.* (1965) 237 Cal.App.2d 737.)[15] When acting in their *personal* capacity, a person who happens to also be the administrator of the estate can bring a claim against the estate. (See *Estate of Scott*, *supra*, 197 Cal.App.3d at p. 920, citing *Wilkerson v. Seib* (1942) 20 Cal.2d 556, 562–563; cf. § 10501, subd. (a)(8) [referencing claims of the personal representative against the estate in cases under the Independent Administration of Estates Act].)

Here, however, Gretchen Brown has only appeared and participated in the present case in her representative capacity as administrator of Catlin's estate. Brown has not appeared in her personal capacity as an heir.[16] In her *sole capacity* as administrator, she may "[c]ommence and maintain actions and proceedings *for the benefit of the estate*" (§ 9820, subd. (a), italics added), but "cannot litigate any question" arising between heirs with conflicting claims to portions of the estate. (24 Cal.Jur.3d, Decedents' Estates, § 420.)

The question is whether her request for a constructive trust on the Pesante Road Property based on Catlin's oral promise to her is truly for the benefit of the estate. Brown insists the claim is made on behalf of the estate. We disagree. As explained below, we conclude that while Brown ostensibly presents her constructive trust claim in her capacity as the administrator, she is "actually attempting to pursue a personal claim …." (*Estate of Scott*, *supra*, 197 Cal.App.3d at p. 920.)

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[15] The importance of appearing in a particular capacity is demonstrated in several cases. (See *Larsen v. Van Dieken* (1939) 34 Cal.App.2d 352, 366–367; see also *In re Estate of Smith*, *supra*, 241 Cal.App.2d at pp. 207–208; *Olsen v. Lockheed Aircraft Corp.*, *supra*, 237 Cal.App.2d 737; *Estate of Hart* (1959) 167 Cal.App.2d 499, 502.)

[16] We note that the circumstances would be different if Brown *had* appeared in her personal capacity below and then simply mis-identified her capacity on appeal. (See, e.g., *Estate of Perkins* (1943) 21 Cal.2d 561, 565–566.)

*Nature of a Constructive Trust Claim Based on a Contract to Make a Will*

A person may "may make a valid contract with another to devise or bequeath property by his last will in a certain specified way."[17] (*Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 829.) Such a contract may be breached if the person dies without a will or otherwise fails to dispose of the property as agreed. (See *Goldstein v. Hoffman* (1963) 213 Cal.App.2d 803, 811.) "In case of a breach the promisee has several remedies, such as an action at law for damages and equitable relief in the form of 'quasi specific performance.' [Citations.] Equity will give relief equivalent to specific performance by impressing a constructive trust upon the property which the decedent has promised to leave to the promisee. [Citations.]" (*Id.* at p. 812.)

An action on a contract to make a will is "independent" of probate proceedings (*Bank of California, Nat'l Asso. v. Superior Court of San Francisco* (1940) 16 Cal.2d 516, 524).[18] Instead, it "is in effect a suit between *a claimant under the contract* and claimants … by intestacy as to who is entitled to all or part of the estate,…" (*Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 132, italics added.)

*Brown's Claim is Personal, Rather Than One Made on Behalf of the Estate*

Here, the "claimant under the contract" was not the estate, but rather Gretchen Brown in her personal capacity. Catlin's alleged promise was that she would leave the Pesante Road Property to Gretchen Brown, the individual. The parties to the agreement were Lynda Catlin, the individual, and Gretchen Brown, the individual. Because this claim belonged to Brown and not the estate, Brown needed to pursue it in her personal capacity, not her representative capacity.

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[17] This is often called a "contract to make a will." (*Estate of Housley* (1997) 56 Cal.App.4th 342, 357.)

[18] These claims are substantively "independent" from probate because they arise from principles of contract and estoppel, not wills or intestate succession. However, they are not procedurally independent, because the claims can be litigated in probate court. (See § 850, subd. (a)(2).)

In contending otherwise, Brown emphasizes that she has a duty as administrator to initiate litigation to set aside fraudulent conveyances or transfers. We agree, but that is a different issue. Indeed, we uphold Brown's successful claim that Chagoya "wrongfully obtained" the Pesante Road Property through the grant deed. But that is not the claim we are addressing now. The relevant claim here is that Brown was entitled to a constructive trust because of Catlin's oral promise. *That* claim is personal to Brown herself.

Brown notes that Catlin's oral promise is relevant to the claim that Chagoya improperly induced Catlin to execute the grant deed on her deathbed. We agree that Catlin's promise to leave the Pesante Road Property to Brown is circumstantially relevant to the question of whether Catlin was improperly induced to execute the grant deed. The prior oral promise to Brown raises an inference that Catlin's subsequent execution of the grant deed may have been contrary to her true wishes and was therefore done out of coercion or duress. (Of course, other inferences are also reasonable; Catlin could have simply changed her mind on how she wanted to dispose of the Pesante Road Property.) But we are not holding that the oral agreement between Catlin and Brown was *inadmissible*. Rather, we hold that the oral agreement cannot form the basis for imposing a constructive trust because that claim was not brought by the proper party (i.e., Brown in her individual capacity rather than in her representative capacity).

*Even if Brown had Pursued the Claim in Her Personal Capacity, it Would Have Been Time-Barred*

Moreover, we note that even if Brown had properly pursued this claim in her personal capacity at the outset of these probate proceedings, it would have been time-barred.

> "If a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would

have been applicable does not apply." (Code Civ. Proc., § 366.3, subd. (a).)[19]

"Code of Civil Procedure section 366.3 has been construed to 'reach any action predicated upon the decedent's agreement to distribute estate … property in a specified manner.' [Citation.]" (*Estate of Ziegler* (2010) 187 Cal.App.4th 1357, 1365.) The statute applies "to a claim based on a contract to make a will."[20] (*Ibid*.)

An appellate court has discretion to address the applicability of this statute even when it was not raised below. (*Allen v. Stoddard* (2013) 212 Cal.App.4th 807, 811.)

Under the plain terms of the statute, Brown's claim is clearly one "that arises from a promise or agreement [i.e., Catlin's oral promise to Brown] with a decedent [i.e., Catlin] …." (Code Civ. Proc., § 366.3, subd. (a).) Therefore, it needed to be commenced within one year from Catlin's death.[21]

Catlin died on February 4, 2011. Brown filed the present probate petition more than a year later, on January 28, 2013. Even if Brown had sought the constructive trust in her personal capacity on January 28, 2013, it would have been untimely.[22]

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[19] Brown argues that the statute's "purpose" is "protecting the debtors from the Estate." The plain language of the statute does not support the assertion that only debtors may invoke it to protect themselves from claims of the estate. The only limitation on the identity of claimants is that they be "a person." (Code Civ. Proc., § 366.3.)

[20] In a single sentence in his opening brief, Chagoya asserts this statute of limitations also bars Brown's claim that the grant deed to the Pesante Road Property is invalid. Even assuming Chagoya did not forfeit this issue by failing to adequately address it in his brief, we see no merit to it. The statute of limitations applies to promises or agreements to dispose of property after death. (See Code Civ. Proc., § 366.3, subd. (a) [referring to a "promise or agreement … to distribution from an estate or trust or under another instrument"; referring to "the claim to distribution"].) The grant deed was not such a promise or agreement.

[21] The same is true of Brothers's promise to Brown, which occurred even earlier than Catlin's promise.

[22] The initial probate petition did not raise the oral agreement/constructive trust issue concerning the Pesante Road Property. Arguably, then, the relevant date for the statute of limitations likely would have been the filing of the amended petition for distribution on May 2, 2016. However, because we conclude that Brown's personal

*Fact that Final Distribution Will Occur in Later Probate Proceedings Does not Impact Propriety of Brown's Constructive Trust Claim*

Brown also says that distribution of the estate amongst intestate beneficiaries is "[y]et to be determined" and will be overseen by the probate court "after the beneficiaries receive proper notice." We agree the probate court will need to distribute estate assets on remand. But that distribution must not be affected by a constructive trust theory (1) that was not asserted by the proper party and (2) that would have been untimely if it had been asserted by the proper party.

For these reasons, we must vacate the trial court's grant of quasi-specific performance of the oral promises.[23]

## III. Court's Order Distributing Assets to "Petitioner" and "Petitioner, Gretchen Brown" Without Specifying her Representative Capacity Must be Amended

In the judgment, the probate court made the following order:

> "IT IS FURTHER ORDERED that all personal property that has not otherwise been sold, transferred or otherwise conveyed, shall be distributed to the Petitioner. The Objector, Mark Chagoya shall hold all proceeds from the sales of real and personal property in trust for distribution to the Petitioner, Gretchen Brown."

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claim would have been untimely even if we used the date on which this probate proceeding began (i.e., January 28, 2013), we need not decide that issue.

[23] We note, without deciding, that Brown *may* still end up receiving some or all of the Pesante Road Property (or the proceeds from its sale) at the final distribution of the estate. While she is not entitled to a constructive trust on the property, the invalidation of the grant deed would apparently result in the property reverting to the estate. It will therefore need to be distributed according to the laws of intestacy.

We also note that because of the court's finding that Chagoya's marriage to Catlin was "void" and he was not a "putative spouse," a portion of the estate's assets may ultimately be distributed to Koelzer's heirs. This is an odd result considering that Koelzer and Catlin had not lived together as a married couple for some 20 years. Yet, the court's factual findings, by which we are bound, could lead to that outcome.

However, we do not decide how the estate will ultimately be distributed, whether to Brown or Koelzer's heirs or otherwise. We only hold that Brown is not entitled to a constructive trust on the property (or the proceeds of its sale) based on her oral agreements with Brothers and Catlin.

Brown concedes the failure of this order to identify her in her capacity as administrator of the estate was an "omission," but contends it was "harmless error." We disagree.

There is a substantial difference between ordering assets transferred to the estate's personal representative (see § 856) and distributing estate assets to heirs in their personal capacity (§ 11641). The court's minute order provided that because Chagoya was not Catlin's putative spouse, Brown "is entitled to receive all of Decedent's real and personal property at the time of her death. See Probate Code, Section 6402(a)." The citation to section 6402, subdivision (a) indicates the probate court was purporting to *distribute* estate assets to Brown as an heir. This suggests that the judgment's reference to Brown (without specification as to her capacity as administrator) was not a mistake, but an accurate reflection of the probate court's intentions. It appears even Brown would acknowledge such a distribution order would have been premature. She notes in her supplemental brief that distribution of the estate amongst intestate beneficiaries is "[y]et to be determined" and will be overseen by the probate court "after the beneficiaries receive proper notice." Therefore, we will direct that the probate court order the property in question conveyed or transferred (§ 856) to Brown *in her capacity as administrator of the estate*, with ultimate distribution to be determined in accordance with the Probate Code after proper notice.

**DISPOSITION**

The portion of the probate court's judgment imposing a constructive trust on the Pesante Road Property is reversed and the matter remanded. On remand, the probate court shall treat the Pesante Road Property (or the proceeds of its sale) as an asset of the estate.

The probate court's orders "distribut[ing]" "all personal property that has not been otherwise sold, transferred or otherwise conveyed" to the "Petitioner"; and requiring Chagoya to "hold all proceeds from the sales of real and personal property in trust for

distribution to the Petitioner, Gretchen Brown" are to be amended to reflect that such property and proceeds are to be conveyed or transferred to "Gretchen Brown as administrator of the estate of Lynda Catlin" and ultimately distributed according to the Probate Code after proper notice.

In all other respects, the judgment is affirmed.

The parties shall each bear their own appellate costs.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
PEÑA, J.

_____
DESANTOS, J.