

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ESTATE OF MONROE F. MARSH,
Deceased.

STEPHEN D. MARSH et al.,

Petitioners and Respondents,

v.

JANE L. MARSH et al.,

Objectors and Appellants.

G048211

(Super. Ct. No. 30-2009-00331535)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Law Office Michael Weiss and Michael A. Weiss for Objectors and Appellants.

Law Offices of Stephen M. Magro and Stephen M. Magro for Petitioners and Respondents.

* * *

This is the fourth appeal arising from the Estate of Monroe F. Marsh, deceased. Unwilling to accept the baselessness of their attacks against Marsh's estate plan, Jane L. Marsh (Jane), his surviving spouse, through her son and attorney Michael A. Weiss, continue to assert frivolous claims against it.

In *Estate of Marsh* (Feb. 7, 2012, G044938) (nonpub. opn.), we dismissed Jane's appeals from orders that consolidated her first civil action against the estate with this probate matter and sustained a demurrer to her first amended will contest. Our opinion affirmed orders dismissing the civil action and denying Jane's motion to vacate that dismissal. We found the lawsuit procedurally improper because, "it represent[ed] a claim against [the] estate and therefore should have been brought under the procedures prescribed in the Probate Code" (*id.* at p. 14) and substantively, it asserted a frivolous marital "partnership theory" (*id.* at p. 15) "predicated on the idea that, upon [her] marriage [to Marsh], all of his separate property investments became either community or 'partnership' property to which she succeeded upon his death" (*id.* at pp. 2, 15-18).

The same day we issued an opinion in a companion appeal. (*Estate of Marsh* (Feb. 7, 2012, G045474) [nonpub. opn.].) It dismissed Jane's appeals from orders that consolidated her second civil action against the estate with this probate matter and denied her motion to abate a petition to determine title to Marsh's Irvine home (Prob. Code, § 850; all further undesignated statutory references are to the Probate Code). (*Estate of Marsh, supra*, G045474 at p. 5.) We also affirmed orders that admitted Marsh's will to probate, granted letters of administration to Stephen D. Marsh, his son, and Damon Marsh (collectively executors) and, again rejecting arguments based on the frivolous marital partnership theory, dismissed Jane's second civil action. (*Id.* at pp. 5-7.)

Ten months later we issued an opinion in Jane's third appeal affirming a judgment for executors on their section 850 petition which declared the estate held title to the Irvine residence. (*Estate of Marsh* (Dec. 7, 2012, G046446) [nonpub. opn.].) We rejected Jane's reliance "on her affidavit of surviving spouse under section 13540"

because “the statute’s plain terms demonstrate it does not apply to separate property” (*Estate of Marsh, supra*, G046446 at p. 6), and Weiss could not claim to be her “bona fide transferee . . . because the property was never validly transferred to Jane in the first place” (*id.* at pp. 7, 12). Our opinion also rejected Jane’s claims based on the doctrine of estoppel (*id.* at pp. 7-10), the law of irrevocable trusts (*id.* at pp. 10-11), the arbitration clause in a deed of trust securing a reverse mortgage Marsh had obtained (*id.* at pp. 12-13), and the assertion this court prematurely issued the remittiturs in the prior appeals (*id.* at pp. 13-14). However, we reversed an order that imposed sanctions on Jane for failing to appear at a settlement conference. (*Id.* at p. 14.)

The current appeal challenges an order that determined Jane is not entitled to any distribution under Marsh’s will because, without probable cause, she contested its validity and thereby violated the will’s no contest clause. (§ 11705, subd. (a).) While Jane’s opening brief fails to “explain why the order appealed from is appealable” (Cal. Rules of Court, rule 8.204(a)(2)(B)), we note the ruling is appealable. (§ 1303, subds. (f) & (j).) Also, as in *Estate of Marsh, supra*, G044938, Jane has filed “incoherent and disjointed . . . briefs” (*id.* at p. 19) that are “hard to follow and . . . nonsensical” (*id.* at p. 18). As best we can tell, Jane asserts several procedural attacks on the order granting the executors’ petition to determine persons entitled to distribution (§ 11700 et seq.), and seek to reverse that ruling on grounds either irrelevant, lacking in merit, or previously rejected by this court. Thus, we affirm the order finding Jane is not entitled to any benefits under Marsh’s will.

FACTS AND PROCEDURAL BACKGROUND

Marsh died in late 2009 when he was approximately 92 years old. Prior to 2003, he had accumulated numerous assets, including a home on Lakefront in the City of

Irvine, California. That year, Marsh married Jane. As we noted in *Estate of Marsh*, *supra*, G044938, Marsh “properly segregated all the property which he brought with him to his . . . marriage to Jane” (*id.* at p. 17) and “kept [that] . . . property [including the Lakefront home] . . . in his own name until his death” (*id.* at p. 3).

In 2007, Marsh made a will that left the bulk of his assets to Stephen and Stephen’s children, including Damon. To Jane, he granted “the right to occupy,” rent-free, the Irvine residence and to have the use of its furniture and furnishings “for the balance of her life.”

The will also contained a no contest clause that sought “the greatest deterrence against interference with my estate plan that the law allows.” In relevant part it declared, “If any . . . beneficiary, or other interested person; or any person who is provided for under this Will, . . . directly or indirectly . . . institutes any legal proceeding that attacks or contests this Will . . . or seeks to impair, nullify, void, or invalidate [it] or any of [its] provisions . . ., I direct that that person (the ‘Contestant’) and all persons conspiring with or assisting him or her shall take none of my property and nothing from my estate. All these persons are expressly disinherited. Any and all gifts or property that otherwise would have gone to these persons shall be forfeited and shall pass as if these persons had predeceased me without leaving living issue.” However, this clause contained exceptions, one of which provided it “shall not be violated by . . . the exercise by my surviving spouse of any election granted by law.”

After Marsh died, executors filed a petition to probate the will and for their appointment to administer his estate. The probate court subsequently granted these requests.

Meanwhile, as mentioned above, Jane asserted several challenges to Marsh’s estate plan claiming the bulk of his assets based on the previously mentioned marital partnership theory. As relevant here, in March 2010 she filed an objection to the

request to probate the will based on a claim of fraud. Jane alleged she was entitled to “any and all community or separate property of decedent” based on assertions the dispositions made by his will were ineffective because: (1) During the marriage, decedent gave her property, including a half interest in the Lakefront home; (2) he commingled community and separate assets to the extent it was impossible to identify the source through tracing; and (3) he breached his fiduciary duty not to impair her community property rights by making gifts of assets to others without her consent. Jane requested “the [w]ill of decedent be denied probate” and the alleged “ineffective property dispositions pass to her by intestate succession . . . or otherwise under law.”

Arguing Jane’s pleading failed to state facts justifying relief, executors demurred to it. The trial court sustained the demurrer with leave to amend.

In response, Jane filed her first amended will contest. In it she asserted Marsh’s “[w]ill was executed due to his fraud, duress, undue influence, and violation of public policy” and as his “surviving spouse” and “heir,” she “had a vested property right to succession of all [his] property.” Thus, Jane claimed “all property in the estate . . . is in fact either her [c]ommunity property, her [s]eparate property, property she succeeds to as heir under [section] 6400 [intestate succession], property that she is entitled to as surviving partner and/or as creditor and victim of decedent[’]s torts upon her . . . under Family Code [section] 1101 [remedies for breach of fiduciary duty between spouses] or as otherwise provided by law.” Executors again demurred and again the probate court sustained it, but this time without leave to amend.

The latter ruling was one of the matters asserted in Jane’s first appeal. (*Estate of Marsh, supra*, G044938.) We dismissed the appeal as to this ruling on the ground it was not independently appealable. (*Id.* at p. 6.) Our opinions in that case and in *Estate of Marsh, supra*, G045474 were issued February 7, 2012. The clerk issued remittiturs in both appeals on April 9.

The next month, executors filed their petition under section 11700 seeking a determination Jane's will contests resulted in her being disinherited under the will's no contest clause. Jane initially demurred to the petition, but the probate court overruled this objection. The court also gave her time to file an amended statement of interest in response to the executors' petition.

Jane filed a statement of interest on September 6. Executors demurred to it. Jane challenged the demurrer on several grounds, including the merits of the section 11700 petition, the lack of jurisdiction due to this court's purported premature issuance of the remittitur in *Estate of Marsh, supra*, G044938 and *Estate of Marsh, supra*, G045474, plus a claim the statutes governing no contest clauses are unconstitutional. The court sustained the demurrer without leave to amend.

However, the court refused to proceed on the petition by way of a default hearing. At an October trial setting conference, trial was scheduled for December 17.

The week before trial, executors filed two requests for judicial notice. One sought judicial notice of Jane's opening brief in *Estate of Marsh, supra*, G045474 and the second requested the court take judicial notice of 18 documents.

At the December 17 trial, Jane filed a motion in limine to delay trial on the ground a case management order had not been issued for it. The court denied this request. She then moved to disqualify the trial judge, citing Code of Civil Procedure sections 170.6 and 170.2. The court rejected these motions as well.

Executors sought a ruling on their judicial notice requests. The court took judicial notice of the existence of, but not the truth of the statements in, the opening brief in *Estate of Marsh, supra*, G045474, plus all but three of the documents submitted with the second request. Executors then rested their case. After the parties presented arguments on the petition's merits, the court ruled Jane had contested Marsh's will without probable cause and thus she was not entitled to any benefits under it.

DISCUSSION

1. The Petition to Determine Persons Entitled to Distribution of the Estate

Chapter 2 of Part 10 of the Probate Code, beginning with section 11700, sets forth a procedure for resolving issues concerning a person's right to inherit under a decedent's estate. Section 11700 declares, "At any time after letters are first issued to a general personal representative and before an order for final distribution is made, the personal representative, or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate, may file a petition for a court determination of the persons entitled to distribution of the decedent's estate. . . ."

Executors employed this proceeding to obtain a ruling on whether Jane's attacks on Marsh's estate plan violated his will's no contest clause. A recurring theme in Jane's confused and disjointed appellate briefs is that the probate court's ruling on this petition is both procedurally and substantively erroneous.

One assertion is that the probate court failed to make a finding "that general letters of probate administration had been issued as required by . . . [section] 11705." Section 11705 does not impose such a requirement. Instead, it declares the court shall "make an order that determines the persons entitled to distribution of the decedent's estate and specifies their shares," and "[w]hen the court order becomes final it binds and is conclusive as to the rights of all interested persons." (§ 11705, subds. (a) & (b).) Section 11700 does require the issuance of "letters . . . to a general personal representative" before the petition is filed, but here that was the case. Among the documents the probate court judicially notice were the orders appointing Stephen and Damon Marsh as the estate's executors and issuing letters testamentary to them.

Jane also claims the probate court lacked jurisdiction because this court prematurely issued its remittitur in *Estate of Marsh, supra*, G044938 and *Estate of Marsh, supra*, G045474. As noted, we rejected this argument in *Estate of Marsh, supra*,

G046446, at p. 13, and that ruling is now the law of the case. (*Water Replenishment Dist. of Southern California v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1071 [“Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court’s decision must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal”].) Even if this court did issue the remittitur too early, the appropriate procedure to correct that mistake was to petition for a recall of the remittitur. (See *People v. One 1937 Plymouth 6* (1940) 40 Cal.App.2d 38, 40-41.) Jane made no such request.

Next, Jane asserts she failed to receive adequate notice of the trial on the section 11700 petition. (§ 11701, subs. (b) & (c) [“Notice of the hearing on the petition shall be given” to, among others, an “heir” or “devisee” “whose interest in the estate would be affected by the petition”].) Here, the probate court expressly found notice had been given as required by law. The appellate record supports its finding. While the initial notice of hearing specified a July 19, 2012 trial date, the matter was continued due to the parties’ pretrial litigation. At an October 1 trial setting conference attended by Weiss, the case was set for trial on December 17. Further, even assuming lack of proper notice, Jane appeared at trial, both through counsel and by telephone, and challenged the petition on its merits, thereby waiving any defect in this respect. (*Estate of Pailhe* (1952) 114 Cal.App.2d 658, 661 [“By his voluntary appearance at the hearing appellant waived any defect there may have been in the giving of notice to him”].)

Another claim is that there was no evidence presented supporting executors’ petition. Jane is wrong. Section 11704, subdivision (a) expressly states “The court shall consider as evidence in the proceeding any statement made in a petition filed under Section 11700 and any statement of interest” Executors’ petition incorporated the documents essential to their claim that Jane violated the will’s no contest clause without probable cause. Further, it is settled that a probate court hearing a petition to determine interests in an estate “may take judicial notice of” documents filed in the same

proceeding. (*Estate of Kearns* (1954) 129 Cal.App.2d 832, 837.) That was the case here. Thus, Jane failed to carry her burden “to demonstrate that there is no substantial evidence to support the challenged findings.” (*Estate of Edwards* (1959) 173 Cal.App.2d 705, 711.)

Jane argues the judge who heard and decided the section 11700 petition was biased against her and her attorney. She did unsuccessfully seek to disqualify the judge. But her failure to timely file a writ of mandate challenging the denial of the disqualification requests as required by Code of Civil Procedure section 170.3, subdivision (d) forfeited this claim. (*People v. Freeman* (2010) 47 Cal.4th 993, 999-1000; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 849-850.)

Next, Jane challenges several of the probate court’s factual findings. The resolution of these claims is governed by the substantial evidence rule. (*Estate of Strong* (1966) 244 Cal.App.2d 250, 254; *Estate of Cagner* (1958) 165 Cal.App.2d 260, 265-266.) But her opening brief fails to provide a full summary of the evidence presented to the probate court, resulting in a waiver of this issue. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Estate of Palmer* (1956) 145 Cal.App.2d 428, 430-431.)

Finally, Jane claims the probate court’s order is erroneous because a section 11700 petition cannot be used to enforce a will’s no contest clause and the order failed to make complete findings on the persons entitled to distribution under Marsh’s will. These claims lack merit. The applicability of a will’s no contest clause can be determined in a proceeding under section 11700. (*Estate of Bergland* (1918) 177 Cal. 227, 229; *Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1430 [“When the no contest clause appears in a will, the question whether the no contest clause applies such that a beneficiary forfeits his or her right to take under the will is determined in a proceeding for administration of the decedent’s estate to determine the persons entitled to distribution of the estate assets (§ 11700) (formerly called an heirship proceeding)]”). As for the failure to rule on the inheritance rights of others, Jane is not harmed by this aspect of the court’s order and thus

cannot raise it as a ground for reversal on appeal. (Code Civ. Proc., § 902; *Estate of Uhl* (1969) 1 Cal.App.3d 138, 144 [“A party whose rights are not affected by an order is not aggrieved thereby”].)

2. *The No Contest Clause*

The remaining question is whether the probate court properly found Jane disinherited under Marsh’s will because she violated its no contest clause without probable cause to do so.

“No contest clauses . . . have long been held valid in California” because they “promote the public policies of honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument.” (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 422.) Marsh sought “the greatest deterrence against interference with [his] estate plan that the law allows.” But in recent years “the Legislature [has] amend[ed] the statutes regarding the enforcement of no contest clauses, . . . identifying specific types of actions against which a no contest clause was not enforceable as a matter of public policy.” (*Id.* at p. 423.) Under current law, a no contest clause is enforceable only against “[a] direct contest that is brought without probable cause” (§ 21311, subd. (a)(1)) and, where expressly provided, “[a] pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer” or “a creditor’s claim” (§ 21311, subd. (a)(2) & (3)).

Executors rely on the “direct contest” provision, claiming Jane violated the no contest clause in Marsh’s will by filing the objection to probate of the will and the first amended will contest. Both of the cited documents qualified under this definition. The Probate Code defines the term “[c]ontest” as “a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.” (§ 21310, subd. (a).) Marsh’s will disinherited “any . . . beneficiary,

or other interested person; or any person who is provided for under this Will,” who “directly or indirectly . . . institutes any legal proceeding that attacks or contests this Will . . . or seeks to impair, nullify, void, or invalidate [it] or any of [its] provisions” or who “asserts or pursues in any manner any claim . . . against my estate or property other than as permitted in this Will” The phrase “[d]irect contest” means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more” specified grounds, including “[f]orgery” or “[m]enace, duress, fraud, or undue influence.” (§ 21310, subd. (b)(1) & (4).) Jane’s two challenges to probate of the will sought to invalidate various clauses of Marsh’s will on the ground of fraud, duress, and undue influence.

But to succeed on their direct contest theory, executors also needed to show Jane’s attacks on Marsh’s will were made “without probable cause.” (§ 21311, subd. (a)(1).) The Probate Code explains “probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.” (§ 21311, subd. (b).) This definition was proposed by the California Law Revision Commission. (Recommendation: Revision of No Contest Clause Statute (Jan. 2008) 37 Cal. Law Revision Com. Rep. (2007) pp. 359, 397.) The Commission’s explanation of this test, which the Supreme Court has recognized as “persuasive evidence of the intent of the Legislature” (*Donkin v. Donkin, supra*, 58 Cal.4th at p. 424, fn. 8), is that “[a] no contest clause should deter more than just a frivolous contest.” (Revision Rep., *supra*, 37 Cal. Law Revision Com. Rep. at p. 398.) Rather a showing of probable cause to avoid a finding a pleading constitutes a direct contest under section 21311, subdivision (a) (1) requires “the proof of facts that are sufficient to establish a legally sufficient ground for the requested relief,” with a “degree of probability” “requiring more than a mere possibility, but less than a likelihood that is ‘more probable than not.’” (Revision Rep., *supra*, 37 Cal. Law

Revision Com. Rep. at pp. 397, 398.) It distinguished this standard from the former requirement, “requiring only that the contest be ‘legally tenable[,]’” which it found “too forgiving.” (*Id.* at p. 398, fn. omitted; see *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296, 1304-1305.)

The record shows Jane’s attacks on Marsh’s will lacked the requisite probable cause. Other than conclusory allegations of fraud, duress, or undue influence, each pleading complained about the instrument’s disposition of specific property items on the theory Marsh’s disposition of them violated her property rights “as surviving spouse,” or as the “owner of separate and community property, as heir, as creditor, and as a surviving partner.” These theories are the same arguments this court found were frivolous in the prior appeals. (*Estate of Marsh, supra*, G044938, at pp. 20-21; *Estate of Marsh., supra*, G045474 at pp. 7-8.)

Here, Jane simply repeats many of these claims. She argues the income produced by Marsh’s assets during their marriage constitutes community earnings and that Marsh gave away much of this income in violation of her community property rights. Jane also reasserts her claim that title to the Lakefront was reconveyed to her upon her payoff of the reverse mortgage, including her assertion that the principles of trust law apply to deeds of trust. As mentioned above, we rejected these arguments in the earlier appeals and the doctrine of the law of the case bars Jane from reasserting them in this case. (*Water Replenishment Dist. of Southern California v. City of Cerritos, supra*, 202 Cal.App.4th at p. 1071.)

Finally, Jane repeatedly claims throughout her opening brief that the probate court erred in granting executors’ section 11700 petition because she “elected to take her rights and property under law; but not under the will of the decedent.” Marsh’s will expressly provided Jane would not violate the no contest clause if she merely “exercise[d] . . . any election granted by law.” But Jane’s objections to the probate of the will and her first amended will contest were not so limited. We conclude the probate

court did not err in finding her attacks on Marsh's will amounted to a violation of its no contest clause and resulted in her losing the benefits provided for her in that instrument.

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.