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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ARTHUR CERVANTES,

Plaintiff and Appellant,

v.

WILLIAM CERVANTES, as Trustee, etc.,

Defendant and Respondent.

G049661

(Super. Ct. No. PROPS0600037)

O P I N I O N

Appeals from a judgment and postjudgment order of the Superior Court of San Bernardino County, J. Michael Welch, Judge. Affirmed.

Ward & Ward, Alexandra S. Ward; Albertson & Davidson and Keith A. Davidson for Plaintiff and Appellant.

Harrison Law and Mediation and Susan L. Harrison for Defendant and Respondent.

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INTRODUCTION

Two months before she died, Kathleen Cervantes executed a new will and an amendment to her family trust. Under these documents, one of her sons was disinherited.¹ Kathleen believed that this son had kidnapped her, emotionally and physically abused her, placed her in a convalescent home against her wishes, and improperly sought to become her conservator. At the time Kathleen executed the will and trust amendment, she was under a stipulated conservatorship order, by which another of her sons had been appointed as the conservator of Kathleen's person and estate. The disinherited son contends the trust amendment is invalid because the conservatorship order determined that, as a matter of law, Kathleen lacked the capacity to execute it.

We affirm the trial court's determination the trust amendment is valid and enforceable. Despite the existence of the conservatorship, Kathleen retained the right to execute her will. In this case, the trust amendment was the functional equivalent of a will, and, therefore, Kathleen also retained the right to execute it. Substantial evidence supported the trial court's finding Kathleen had testamentary capacity to execute the will and trust amendment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Kathleen, a widow, established the Cervantes Family Trust (the Trust) on December 3, 1997. Kathleen was the settlor and trustee of the Trust. The beneficiaries of the Trust were Kathleen's four adult children—Kathleen Helgedalen (Katie), Arthur Cervantes, Kenneth Lopez, and William Cervantes; the terms of the Trust provided that after Kathleen's death, the Trust's assets would be divided among the beneficiaries in four equal shares.

¹ We will refer to the Cervantes family members by their first names to avoid confusion; we intend no disrespect.

Kathleen executed a first amendment and complete restatement of the Trust in August 2002, after Kenneth's death, to provide that after Kathleen's death the Trust's assets would be divided into four equal shares between Katie, Arthur, William, and Kenneth's son, Scott Lopez. The first amendment also provided that Kathleen and Katie would serve as cotrustees. In December 2003, Kathleen resigned as trustee and appointed William as successor trustee. On the same day, Kathleen and William executed a second amendment to the Trust. This amendment revoked Katie's appointment as trustee and appointed William as trustee, effective immediately. It also provided that Katie's share of the Trust's assets was to be distributed in equal parts to Katie's two children (Katie had suffered two strokes the previous year that left her unable to care for herself). Kathleen also executed a pour-over will, giving all the residue of her estate to the Trust.

In June 2004, Kathleen flew from her home in Hawaii to Oregon (via California) to attend Arthur's son's college graduation. The parties' accounts of what happened after Kathleen arrived in Oregon are vastly different. What is undisputed is that Arthur and his wife drove Kathleen back to California, where they admitted her to a nursing home, Oakpark Manor Care Facility, on June 20, 2004. On June 23, Arthur filed a petition for appointment of a temporary conservator of Kathleen's person and estate; Arthur asked the court to appoint him as Kathleen's conservator. The court granted a temporary conservatorship, and appointed Arthur as Kathleen's temporary conservator on June 24. The petition for appointment of a conservator was supported by a declaration from Dr. Venkata Pulakanti, a physician who had examined Kathleen at Oakpark Manor on June 24, and had diagnosed her with dementia. The court also appointed an attorney, Annette deBellefeuille, to represent Kathleen's interests in the conservatorship proceedings.

While at Oakpark Manor, Kathleen went into a diabetic coma and was admitted to a hospital. After her release from the hospital, Kathleen was transferred to

another nursing home, Country Villa. Kathleen believed that Arthur and his wife had kidnapped and physically abused her. Kathleen expressed a desire to return to Hawaii and did not want Arthur to be her conservator.

In September 2004, William filed a competing petition to be appointed as conservator of Kathleen's person and estate. In March 2005, pursuant to a compromise between Arthur and William, William was appointed by court order as Kathleen's conservator. Kathleen was released from Country Villa, and returned to Hawaii with William.

An attorney in Hawaii began representing Kathleen in connection with revisions to her estate plan. Kathleen told the attorney she wanted to remove Arthur as a beneficiary of the Trust because he had kidnapped her. This wish was consistent with conversations Kathleen had with deBellefeuille.

On September 16, 2005, Kathleen and William signed a third amendment to the Trust (the Third Amendment), and Kathleen executed a new will. Both of those documents disinherited Arthur and his children.

Kathleen died on November 2, 2005. The order appointing William as Kathleen's conservator was still in place at the time of Kathleen's death.

In September 2006, Arthur filed a petition seeking an order requiring an accounting from William in connection with the Trust. In February 2007, Arthur filed a petition to void the Third Amendment.² After a bench trial, the court found the Third Amendment was valid and enforceable, and denied Arthur's petition to declare it void. Judgment was entered in William's favor, and Arthur timely appealed.

William filed a memorandum of costs; Arthur filed a motion to tax William's costs. The trial court entered an order granting in part and denying in part the

² Both of Arthur's petitions were filed in the Los Angeles County Superior Court. On William's motion, the matter was transferred to the San Bernardino County Superior Court and consolidated with related litigation.

motion, and awarding William over \$20,000 in costs. Arthur timely appealed from the postjudgment order.

DISCUSSION

Arthur suggests the appropriate standard of review in this case is *de novo*, citing *Conservatorship of Kane* (2006) 137 Cal.App.4th 400, 403, in which the issue on appeal was whether the probate court had statutory jurisdiction to establish a special needs trust for a developmentally disabled adult by using its substituted judgment.

Whether an individual has the capacity to execute a will or amend a trust, however, is a factual question; we therefore review the trial court's decision to determine whether it is supported by substantial evidence. (*Estate of Schwartz* (1945) 67 Cal.App.2d 512, 520.)

A testator is presumed to be competent at the time he or she executes a will. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 372.) The burden is on the party challenging the will to overcome the presumption. (*Ibid.*) The same rule applies to persons making or amending trust instruments. (Prob. Code, § 810, subd. (a).) (All further statutory references are to the Probate Code.)

Arthur's primary argument is that because William had been appointed as Kathleen's conservator, Kathleen, *as a matter of law*, lacked the capacity to execute the Third Amendment. "Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." (§ 1872, subd. (a).)

Arthur contends the Third Amendment constituted a transaction for purposes of section 1872, subdivision (a). The authority Arthur cites for this proposition is not persuasive. In *Brown v. Labow* (2007) 157 Cal.App.4th 795, 814-815, the court considered whether the conservator had the authority to cause an redemption of stock, which was the primary asset of the conservatorship estate, at a time when the conservatee was unquestionably incapacitated. In *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 87,

the court concluded a beneficiary of a revocable trust did not have the right to receive trust accountings—despite management of the trustor’s affairs by a conservator—because the conservator had the right to revoke the trust. In *Conservatorship of Bookasta* (1989) 216 Cal.App.3d 445, 451-452 (*Bookasta*), the court concluded revocation of a trust, which occurred after a conservator was appointed for the trustors, was not prohibited under section 1872. None of these cases establishes conclusively that a conservatee may not amend a trust; indeed, *Bookasta* reaches the opposite result.³ We cannot say, as a matter of law, that a conservatee is precluded from amending an existing trust, pursuant to section 1872.

The appointment of a conservator constitutes a judicial determination the conservatee lacks the capacity to give away real property. (*O’Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327, 332.) A conservatorship does not necessarily establish the conservatee lacks testamentary capacity. (*In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 642; *Bookasta, supra*, 216 Cal.App.3d at pp. 449-450; *Estate of Mann* (1986) 184 Cal.App.3d 593, 604-605; Cal. Law Revision Com. com., 52A West’s Ann. Prob. Code (2002 ed.) foll. § 1871, p. 259 [“Subdivision (c) codifies *Estate of Powers*, 81 Cal.App.2d 480, 184 P.2d 319 (1947). Appointment of a conservator is not a determination that the conservatee lacks testamentary capacity. Testamentary capacity is determined by a different standard, which depends on soundness of mind. Section 6100.” (Italics added.)].)⁴

³ Arthur argues that the holding of *Bookasta* is based solely on the trial court’s failure to consider certain factors when ruling on a petition to broaden a conservatee’s legal capacity, under section 1873 (which will be discussed, *post*). One of the factors the appellate court criticized the trial court for failing to consider was that “the trust revocations do not bind or obligate the conservatorship estate” (*Bookasta, supra*, 216 Cal.App.3d at p. 452), which would have effectively removed the trust amendment from the ambit of section 1872. We believe Arthur reads the holding of *Bookasta* too narrowly.

⁴ The standards for appointment of a conservator are set forth in section 1801: “A conservator of the person may be appointed for a person who is unable to provide

Indeed, the conservatee’s right to make a will is guaranteed by statute, subject to the rules applicable to determining testamentary capacity. “Nothing in this article shall be construed to deny a conservatee any of the following: [¶] . . . [¶] . . . The right to make a will.” (§ 1871, subd. (c).) Arthur does not challenge Kathleen’s ability to execute a new will, despite the conservatorship; Arthur contends the section 1871, subdivision (c) exception is not “relevant to the issues presented by this appeal.”

The question we are called on to answer is what standard should be applied to determine Kathleen’s capacity to execute the Third Amendment. “When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person’s mental deficits are sufficient to allow a court to conclude that the person lacks the ability ‘to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.’” (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.” (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 731.) Arthur argues that *Andersen v. Hunt* is inapplicable because the trustor in that case was not under an order of conservatorship at the time he amended his trust. Factually, this is true, but irrelevant. While the existence of an order of conservatorship can absolutely prevent the conservatee from undertaking certain actions, the execution of a will is not one of them. Therefore, the correct first step in the analysis, under *Andersen v. Hunt*, is to determine whether the

properly for his or her personal needs for physical health, food, clothing, or shelter [¶] . . . A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence” (§ 1801, subds. (a), (b).)

action taken is the functional equivalent of the execution of a will, or is an action the conservatee may no longer undertake independently.⁵

In this case, the trial court properly concluded the Third Amendment was, “in reality, the same as a Will or Codicil.” The only change to the Trust made by the Third Amendment was the disinheritance of Arthur, an act Kathleen also undertook in the new will executed the same day. Therefore, the trial court correctly analyzed Kathleen’s capacity to execute the Third Amendment under the standard of section 6100.5, which provides: “(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true: [¶] (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual’s property, or (C) remember and understand the individual’s relations to living descendants, spouse, and parents, and those whose interests are affected by the will. [¶] (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual’s devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done. [¶] (b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders. [¶] (c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.”

⁵ *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1351-1353, approved the *Andersen v. Hunt* court’s use of section 6100.5 to consider the legal capacity of a trustor to make certain trust amendments. The *Lintz v. Lintz* court decided section 6100.5 was not applicable because “[t]he trust instruments here were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse.” (*Lintz v. Lintz, supra*, at pp. 1352-1353.)

The trial court set forth its findings regarding Kathleen's capacity in its statement of decision: "I want to find out if Kathleen did have testamentary capacity when she executed the 2006 Amendment and Will. [¶] I conclude that she did have capacity. Those that knew Kathleen described her as a wonderful, beautiful woman full of life and proud of her family and friends. The Court heard a story of a car trip [from] Oregon to Southern California with an 80 year old woman without her medications suffering mile after mile. When the trip ended, she was just dropped out at an Alzheimer's facility and locked up. Her son left her there and hired an attorney to get power over her and her money. He did this without telling any other family members. He gave no notice to his brother or sister about their mother. This ordeal lasted over eight days. [¶] When Kathleen was safe, she told people she will disinherit Arthur. She promised to do it. She waited from July, 2004, to September 2005, to do it. She thought about it. She knew what she was doing. [¶] Kathleen's lawyer asked her and tested her. The lawyer had to determine whether Kathleen had capacity at the moment she signed that Third Amendment. Mrs. Jackson was satisfied and said so under oath. [¶] Therefore, the totality, of all the circumstances of this trial, points to the only reasonable conclusion. Kathleen had testamentary capacity when she signed the Third Amendment and Will on September 16, 2005."

Substantial evidence supports the trial court's finding Kathleen had the capacity to execute the Third Amendment. During the disputed conservatorship proceedings, Kathleen advised her court-appointed attorney, deBellefeuille, she wanted to disinherit Arthur. deBellefeuille advised Kathleen to wait a few months in case she changed her mind. Kathleen consulted with a probate attorney, Kimberly Jackson, in February 2005 to implement her plan to disinherit Arthur. Jackson testified Kathleen was "very clear, very alert" about her testamentary desires, understood their communications, had a good memory, and was never confused. Kathleen had also told William's retained attorney in the conservatorship proceedings, Debra Rice, she wanted to disinherit Arthur.

Kathleen instructed deBellefeuille to oppose Arthur's request for fees incurred as her temporary conservator, and to oppose Arthur's attorney's request for fees.

Kathleen met with Jackson on June 21, 2005; at that meeting, Kathleen expressed to Jackson her anger with Arthur, and told Jackson very clearly she wanted to change her estate plan to disinherit Arthur and his children. Also at that meeting, Jackson expressly questioned Kathleen regarding her family members, her assets, and her intention as to the distribution of her estate. Jackson testified Kathleen was clear and consistent in her responses, and she did not have any question in her own mind regarding Kathleen's capacity to execute a new will and an amendment to the trust. Nor did Jackson believe Kathleen was subject to undue influence.

Jackson testified she sometimes insisted her clients see a medical doctor to determine their mental capacity before executing estate planning documents. Jackson did not believe such an examination was necessary for Kathleen because it was so clear to Jackson that Kathleen had the capacity to execute a will and an amendment to the Trust. Jackson prepared a new will and the Third Amendment.

On September 16, 2005, William drove Kathleen to Jackson's office, where Kathleen executed the will and the Third Amendment. Jackson met with Kathleen, alone, before the execution of the documents. Jackson again asked Kathleen questions about her family, her assets, and her desires regarding the distribution of her estate. Jackson testified Kathleen was "very alert, very clear, very determined as to what her wishes were," and she was "[n]ot at all" confused on that day. Jackson had "no concerns" about Kathleen's mental capacity. It appeared to Jackson that Kathleen "had sufficient mental capacity to understand the nature of her act in disinheriting Art[,] [¶] . . . [¶] . . . to understand and recollect the nature and situation of her property and assets . . . [¶] . . . [¶] . . . [and] to remember and underst[an]d her relation to her various children and grandchildren."

Kathleen's next-door neighbor testified Kathleen was "perfectly lucid" on the day she signed the new will and the Third Amendment. From the time the neighbor had met Kathleen in the summer of 2004 until a few days before Kathleen died in November 2005, Kathleen was always "in touch with reality," was coherent, was aware of everything around her, knew her family, and was "completely lucid."

William's wife testified that on the day the new will and the Third Amendment were executed, Kathleen "was fully oriented. She knew where she was, who she was surrounded by."

Given Arthur's argument that the existence of the conservatorship was a conclusive determination that Kathleen lacked the capacity to execute the Third Amendment, he does not argue there was insufficient evidence supporting the trial court's factual findings.

Arthur relies heavily on the fact a court order pursuant to section 2580 was not obtained. Section 2580 allows the trial court to substitute its judgment for that of a conservatee to preserve the conservatee's estate, for the benefit of the conservatee or the ultimate beneficiaries. (*Hall v. Kalfayan* (2010) 190 Cal.App.4th 927, 930, fn. 1; *Conservatorship of McDowell* (2004) 125 Cal.App.4th 659, 665.) The substituted judgment statutes may come into play when a person is insane or incompetent. (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 552, quoting *Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1251-1252, and *Estate of Christiansen* (1967) 248 Cal.App.2d 398, 424.)⁶ Kathleen was neither incompetent nor insane, making the use of the substituted judgment statutes inapplicable.

⁶ As relevant to the issues presented by this appeal, section 2580 provides: "(a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes: [¶] (1) Benefiting the conservatee or the estate. [¶] (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee. [¶] (3) Providing gifts for any purposes, and to any charities, relatives (including the other

Arthur also relies on the lack of an order under section 1873, which may broaden or narrow the legal capacity a conservatee has, as a matter of law. As explained *ante*, because Kathleen did have the legal capacity to execute the Third Amendment, the lack of an order under section 1873 expanding her capacity is irrelevant.

Arthur contends he was prejudiced by the failure to seek a court order under either section 2580 or section 1873, for two reasons. First, Arthur contends if either a petition regarding substituted judgment or a petition to broaden Kathleen's capacity had been filed, the court could have examined Kathleen in person. Such an examination, he argues, would have given the court a better basis for determining Kathleen's level of capacity than the "post-mortem" testimony of Kathleen's relatives, attorneys, and neighbor. Testimony regarding testamentary capacity is regularly provided after the testator's death by witnesses to the execution of the estate planning documents, and by those who knew the testator and had observed him or her at or near that time. This kind of testimony is also sufficient here.

Second, Arthur contends if a petition had been filed before the Third Amendment was executed, the court would have been able to determine whether Kathleen truly wanted to disinherit Arthur's wife and children, or just Arthur. Arthur points to Kathleen's "established gifting pattern, which was to have an unrepresented child's . . . share of the Cervantes Family Trust pass to their children." We need not

spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee. [¶] (b) The action proposed in the petition may include, but is not limited to, the following: [¶] . . . [¶] (11) Exercising the right of the conservatee (A) to revoke or modify a revocable trust or (B) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable trust if the instrument governing the trust (A) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (B) provides expressly that a conservator may not revoke or modify the trust, or (C) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust."

spend much time on this argument. There is a clear difference between Kathleen bypassing her incapacitated daughter and predeceased son in favor of their children, on the one hand, and her desire to disinherit the son and daughter-in-law who she believed had caused her fear, suffering, and abuse, as well as everyone in their direct lineage, on the other hand.

Arthur's appeal from the postjudgment order granting in part and denying in part the motion to tax costs rests solely on the outcome of the appeal of the judgment. A reversal of the judgment would necessarily compel the reversal of an award of costs to the prevailing party under that judgment. (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053.) Because we affirm the judgment and because Arthur did not make any independent argument that the postjudgment award of costs should be reversed, we also affirm the postjudgment order awarding William his costs.

DISPOSITION

The judgment and postjudgment order are affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.