Filed 5/20/14 Estate of Lara CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SIXTH APPELLATE DISTRICT

Estate of RUBEN M. LARA, Deceased. JUDITH ANNE LARA, as executor, etc., Petitioner and Appellant, v. ROBERT LARA, Objector and Respondent.	H039060 (Santa Clara County Super. Ct. No. PR170162)

I. INTRODUCTION

Judith Anne Lara, the wife of the decedent, Ruben M. Lara, appeals from an order admitting to probate a will offered by Robert Lara, the decedent's son from a prior marriage.[1] We understand Judith's principal argument to be that the will should not have been admitted to probate because the witness attestations did not meet the requirements of Probate Code section 6110, subdivision (c)(1).[2] We also understand Judith to argue that clear and convincing evidence was not presented as required under section 6110,

[1] For ease of reference and meaning no disrespect, we will refer to Judith Anne Lara, Ruben M. Lara, and Robert Lara by their first names.

[2] All further statutory references are to the Probate Code.

subdivision (c)(2), and that the decedent's testamentary capacity at the time the will was executed is unknown.

For reasons that we will explain, we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Petition*

Ruben died on July 15, 2011. His wife, Judith, filed a petition to administer his estate, alleging that he had died intestate. Robert, the decedent's adult son from a previous marriage, filed an objection to Judith's petition. Robert alleged that the decedent had a will and a trust, and that Judith knew about both documents. The decedent's will, which the decedent apparently executed on February 25, 2011 and subsequently mailed to Robert, was submitted to the court.

B. *The Evidentiary Hearing*

The matter was set for an evidentiary hearing. In connection with the hearing, Robert filed a written brief stating that he had "discovered that the witness attestations attached to the Will that was lodged with this Court . . . [do] not comply with the requirements of Probate Code section 6110(c)(1). Accordingly, [Robert] submits the Decedent's Will for probate under Probate Code section 6110(c)(2) . . . ." The probate court treated Robert as the petitioner at the evidentiary hearing although Judith had initiated the probate action. Robert and Antonio Barrera, a friend of the decedent, were the only individuals who testified at the hearing.

C. *Robert's Testimony*

Robert testified that beginning in approximately 2004, his father, the decedent, had told him "lots of things" about his estate plan, including that a trust had been established, that Robert had been named trustee, and that he was preparing a will.

The will mailed to Robert (Exhibit 1)

In March of 2011, the decedent mailed Robert an envelope containing a typewritten note, the February 25, 2011 will, and other documents and drawings. Robert

testified that the handwriting on the envelope was the decedent's. Regarding the drawings in the envelope, Robert explained that the decedent had sent a computer-generated design for a kite that he wanted Robert to make with his sons, as well as plans for a BB gun target. The accompanying typewritten note, entitled "SIMPLE FAMILY PROJECTS," includes directions for assembling the kite and BB gun target. The note concludes by stating: "I've updated my will. Keep it safe along with the Lara trust D-1. [¶] I plan to come by this spring and summer for target practice and kite flying! [¶] Your dad."

Robert testified that he and the decedent had had "multiple conversations" about the will before the decedent sent it to him. Upon receiving the will, Robert looked at it because he was "a little curious" about what the decedent had "actually drafted." The decedent later asked Robert if he had received the will, and whether Robert had any questions about it. Robert told him, " 'Dad, anything you want to leave to anybody is fine with me. Anything I need from you as a dad, you have given me. So whatever you want whoever to go to is fine.' " According to Robert, the decedent responded, " 'I'm just sorry I don't have more to leave.' " Robert then "kept [the will] safe along with [the decedent's] other documents" as the decedent had "asked [him] to do."

The will that Robert received in the mail from the decedent is three pages. The first page states: "Will of Ruben Michael Lara [¶] I, Ruben Michael Lara . . . declare that this is my will. [¶] 1. I revoke all wills and codicils that I have previously made. [¶] 2. I am married to Judith Anne Lara. [¶] 3. I am the father of two adult children whose names are: Robert Michael Lara and Ruby Michelle Lara Moore." The will provides for the distribution of the decedent's property to Judith, Robert, and Ruby Michelle Lara Moore. The property includes photographic equipment, collectibles, antiques, a computer, CD's, DVD's, shop tools, writings, drawings, a 1957 vehicle, and furniture. The will further states: "I assign Judith Anne Lara to serve as executor of my will and to carry it out as prescribed herein. If she is unable to serve, or to continue

serving as executor, I assign my son, Robert Michael Lara as first alternate executor, and my daughter, Ruby Michelle Lara Moore as second alternate executor. [¶] No bond shall be required of any executor. [¶] I subscribe my name to this will this 25th day of February 2011 at: [¶] The city of San Jose, in the county of Santa Clara, in the State of California, [¶] I declare that it is my will, that I sign it willingly, that I execute it as my free and voluntary act for the purpose expressed, and that I am of the age of majority or otherwise legally empowered to make a will and under no constraint or undue influence. [¶] Signature . . . ." Robert testified that the signature on the will is the decedent's and that it is an original. About three weeks before the evidentiary hearing, Robert learned that the original will had to be lodged with the court. He thereafter realized that the will the decedent had sent him was the original.

The second page of the will is entitled "Witnesses." It states that the "undersigned" witnesses were requested by the decedent to be witnesses to the will, that the will was signed in their presence, and that they "understand this to be the testator's will." The witnesses are not identified on this page and there are no signatures on this page.

The third page of the will contains the names, signatures, and addresses of three individuals identified as "Witness[es]." Although the first page of the will is an original, Robert testified that these witness signatures on the third page of the will appear to be copies rather than original signatures.

Robert testified that he never gave Judith a copy of the will that the decedent had mailed him. Robert's counsel offered the envelope and its contents, including the February 25, 2011 will which was marked as Exhibit Number 1, into evidence. The documents were admitted without objection.

The three-page will from Judith's counsel (Exhibit A)

Robert testified that months before the evidentiary hearing, Judith's counsel sent him a letter along with a document that was purportedly another will by the decedent.

Robert assumed that Judith's counsel received the document from Judith. The three-page document, entitled "Will of Ruben Michael Lara," is similar in content to the will that Robert received in the mail from the decedent, although the document from Judith's counsel includes a few additional items for distribution, such as a pistol and a wall phone. The decedent's name is signed on the document, which is a copy. The document has the same execution date as the will that Robert received in the mail from the decedent (February 25, 2011), and the third page of the document appears to contain the same three witness signatures as the will that Robert received in the mail from the decedent. The document is typewritten with some handwritten markings. Robert testified that Judith's counsel had told him that the handwritten circles on the document were made by Judith. Judith's counsel offered the document, marked as Exhibit A, into evidence, and it was admitted without objection.

The two-page will from Judith's counsel (Exhibit D)

Robert also testified that Judith's counsel "had raised the issue" of "a list of items found on the computer in the home where [the decedent] and Judith resided." Robert testified that Judith's counsel sent him a document containing the list. The two-page document begins with, "I, Ruben Mendez Lara, . . . declare that this is my Last Will and Testament. . . ." The distribution of items in the list is somewhat similar to the distribution in the will that Robert received in the mail from the decedent, but the document also includes additional items of distribution and additional beneficiaries, such as grandchildren of the decedent. Handwritten on the top is the following: "dated on computer 6/22/11." The document is not signed. Judith's counsel offered the document, marked as Exhibit D, into evidence, and it was admitted without objection.

Robert "never believed" there was a second will in addition to the one the decedent had mailed him because there was "nothing else signed by [the decedent] that [the decedent] told [Robert] was his will." Robert testified that the decedent did not have

any “major assets” other than a home, which was handled through a trust rather than the will.

D. *Barrera’s Testimony*

Antonio Barrera testified that he went to high school with the decedent and that they grew up together. During the last few years of the decedent’s life, Barrera saw the decedent sometimes twice a week. They and several others from the same hometown regularly went to a doughnut shop. Barrera testified that he and the decedent had a history with kites, as they had built them when they were kids.

Barrera testified that “around 2009” and prior to the decedent’s surgery, the decedent asked Barrera and two others who went to the doughnut shop to sign the witness attestation. The decedent told Barrera “[n]othing really” about the document Barrera was signing. There were other documents underneath the witness attestation, and it was Barrera’s understanding that the documents were the decedent’s will. The decedent did not ask Barrera to sign anything else thereafter.

E. *The Probate Court’s Order*

After the parties presented their evidence, the probate court stated as follows:

“I’m puzzled here. And let me tell you my problem. We’ve got [Robert’s Exhibit] Number 1, which is the will of Ruben Michael Lara. And attached to it is the last page with three witnesses’[] signatures. Then we have [Judith’s Exhibit] A, . . . which has another will of Ruben Michael Lara with what appears to be the same photocopied signatures. The difference between the two [wills] is that the second one has . . . four [additional provisions], two of which seem to be captured in the first one.

“The other two [provisions], like the . . . pistol and the wall phone don’t seem to be captured in the first one. . . . And then we’ve got [Judith’s] Exhibit [D], which . . . starts out that ‘I, Ruben Mendez Lara, declare this to be my last will and testament,’ and starts to go very similar and it’s a very detailed listing of all kinds of disposition to son,

daughter, grandchildren, and the like -- which apparently was retrieved off of his computer.

"So my sense was that Mr. Lara had this on his computer and he kept toying with it, tinkering with it, expanding it, shifting it. And he kind of prints it up and signs it and attached these things. And then he would play with it a little more, print and sign it -- to the point where I understand what he was trying to do . . . . Because if you notice in all of these items, there's nothing mentioned about the real property . . . .

"So the sense I get is that here is my biggest asset. It's going to be taken care of by other means. But I have got all these personal items . . . .

". . . [U]nfortunately, Mr. Lara had a computer. And with things being on a computer and things being real easy to tinker and play with, just by calling it up and tinkering around a bit, it's real easy to do. So a couple of things that I'm troubled with is, first of all, although, it's clear in my mind that he wanted to dispose of these personal property items. And, like I said, they are very, very consistent. Some have things that others don't have, but it's generally very consistent.

"It's almost like 'Which one is his will?' I mean, I'm not quite sure which one would be controlling. Because, like I said, I've got witnesses'[] signatures that appear to have been done at a different point in time than when these were executed, so it's not like we're attesting to -- in fact, they never saw what it was. They saw the top page. And like I said, it just kept getting copied and attached to various things.

"So even though I'm disposed to say we have a will, I'm not quite sure which version of the will is the will. But, bottom line, as I said before, this will appears to be something to just take care of the miscellaneous property items and that everything was going to be handled by some other vehicle. Because, again, clearly if dad didn't have much and what he did have was really the real estate, that would have been addressed in some fashion. But, as I said, it's not mentioned in any one of these things.

"So, . . . I'm open to suggestions. And, again, I don't see this as intestate versus testate. It's kind of like -- I'm not quite sure."

After hearing briefly from Judith's counsel, the probate court reiterated that two of the wills indicate they were executed on February 25, 2011, but the witness signatures attached to those documents were done in 2009 according to the testimony. The court stated: "So, clearly, it appears that those witness signatures did not occur at the time and maybe even preexisted what we've got here." The court believed that "the intent of the settlor was that his most significant asset was already being taken care of by a trust. And that now we have just the miscellaneous personal items that need to be distributed."

The probate court then heard argument from Robert's counsel. Robert's counsel explained that when he interviewed Barrera and realized that Barrera had signed the witness attestation in 2009, counsel "could not proffer the original will under . . . [section] 6110(c)(1) because the witness statements were clearly not valid." Regarding the three different wills, counsel argued that, "by process of elimination, the last [one] is not signed and can't be a will." Regarding Judith's Exhibit A, which was one of the two wills dated February 25, 2011, counsel contended that "we have no original, we have no sponsoring witness. It's submitted as attached to [Judith's counsel's] letter. . . . [¶] So, technically, the only document before Your Honor that satisfies any of the requirements of [section] 6110 is the original signed will which was sent to [Robert] which does have a letter saying 'I've updated my will.' " Counsel stated that he did not "disagree" with the court that the decedent "was constantly tinkering," but contended that "the only evidence as to the last signed original will is Exhibit 1," which Robert had received in the mail from the decedent.

The probate court later stated, "[F]rom a purely speculative standpoint, this is a disaster because of the multiple versions and slight adjustments. The one plus in all of this is they all seem to be very consistent and evidences the settlor's desires with regard to these properties. I mean, if we were talking about things suddenly going a totally

different direction and everything else, I could understand where we would have a real problem."

The probate court ultimately concluded that it was "going to admit into probate" the will that the decedent had mailed to Robert, which had been designated as Robert's Exhibit Number 1. The court stated: "I think this is evidence of the settlor's desires, intent to create a will, at least with regard to these items. And for want of something technically more perfect, we're going to accept this as the will for this proceeding."

By order filed October 5, 2012, the court admitted to probate the will dated February 25, 2011 that the decedent had mailed to his son, Robert. Judith was appointed executor of the will.

On December 4, 2012, Judith filed a notice of appeal from the order admitting the will to probate.

III. DISCUSSION

On appeal, we understand Judith to contend that the will should not have been admitted to probate because the witness attestation requirements of section 6110, subdivision (c)(1)[3] were not met. We also understand Judith to contend that there is no indication the probate court admitted the will based on subdivision (c)(2) of section 6110, and that clear and convincing evidence was not presented as required by that subdivision. Lastly, we understand Judith to argue that the decedent's testamentary capacity on February 25, 2011 is unknown.

Robert contends that he sought and the probate court found that the will was properly executed pursuant to section 6110, subdivision (c)(2), and thus any argument concerning subdivision (c)(1) is irrelevant. Robert further contends that substantial evidence exists to admit the will to probate under subdivision (c)(2). Lastly, Robert

[3] Judith repeatedly refers to subdivision (c) of section 6100. There is no subdivision (c) in section 6100. Based on the arguments she raises and the language she quotes from the Probate Code, we understand her to be relying on section 6110.

contends that Judith failed to raise the issue of the decedent's testamentary capacity below and thus she may not raise it on appeal and, in any event, substantial evidence establishes that the decedent had the requisite capacity.

A. *Subdivision (c)(1) of Section 6110*

To comply with section 6110, a will generally must be in writing and signed by the testator. (*Id.*, subds. (a) & (b).) Regarding witnesses to the will, subdivision (c) of section 6110 states: "(1) Except as provided in paragraph (2), the will shall be witnessed by being signed, during the testator's lifetime, by at least two persons each of whom (A) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (B) understand that the instrument they sign is the testator's will. [¶] (2) *If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will*." (*Id.*, subd. (c)(1), (2), italics added.)

In this case, Robert's counsel acknowledged at the hearing and in a written brief that the witness attestations attached to the will that Robert received in the mail from the decedent did not comply with the requirements of section 6110, subdivision (c)(1). Counsel indicated that he instead intended to establish that the will met the requirements of subdivision (c)(2). At the conclusion of the evidentiary hearing, the probate court similarly recognized that there was a problem with the witness attestations, which were made in 2009 according to the witness testimony, yet were attached to a document with a later execution date of February 25, 2011. Given that Robert did not seek to admit the will to probate under subdivision (c)(1) and expressly made that known to the court, and in view of the court's comments indicating that it was aware that the document did not meet the witness requirement of subdivision (c)(1), we do not believe that the court admitted the will to probate based on that subdivision. Accordingly, we need not

consider further Judith's contention that the will should not have been admitted to probate pursuant to that subdivision.

B. *Subdivision (c)(2) of Section 6110*

As we have just stated, Robert explained to the probate court that he intended to establish that the will met the requirements of section 6110, subdivision (c)(2). Subdivision (c)(2) required Robert to establish that, at the time the decedent signed the will, the decedent "intended the will to constitute [his] will." (§ 6110, subd. (c)(2).) The court, after stating that it was going to admit into probate the will that had been mailed to Robert, referred to the "evidence of the settlor's desires" and "intent to create a will." Given that subdivision (c)(2) was the only legal authority cited by Robert as a basis for admitting the will into probate, and given that the court's comments were consistent with the language of that subdivision, it appears that the court relied on that subdivision in admitting the will into probate. We thus turn to the question of whether the evidence was sufficient under that statute.

"The broad and remedial goal of [section 6110, subdivision (c)(2)] is to give preference to the testator's intent instead of invalidating wills because of procedural deficiencies or mistakes." (*Estate of Stoker* (2011) 193 Cal.App.4th 236, 242.) " '[N]o particular words [in the document] are necessary to show a testamentary intent . . .' as long as the record demonstrates that the decedent intended the document to be his or her last will and testament. [Citation.]" (*Id.* at p. 244.) Extrinsic evidence may be admitted to determine whether a document constitutes a will under section 6110. (§ 6111.5; *Estate of Stoker*, *supra*, 193 Cal.App.4th at p. 244.)

When a court's order " 'is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [court]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the

trial court.' " (*Estate of Bristol* (1943) 23 Cal.2d 221, 223, italics omitted; accord, *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; see *Estate of Stoker*, *supra*, 193 Cal.App.4th at pp. 244-245.) Thus, "[i]f there is a conflict in the evidence bearing on the question of decedent's intent . . . , or in the reasonable inferences to be drawn therefrom, we are bound by the trial court's determination of that conflict." (*Estate of Beebee* (1953) 118 Cal.App.2d 851, 856-857; accord, *Estate of Ehrenfels* (1966) 241 Cal.App.2d 215, 222.) Even where proof of a fact in the trial court is required by clear and convincing evidence, the standard for appellate review is substantial evidence. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750; *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863.)

In this case, Robert testified that he received the original will in the mail from the decedent, and that the signature on the will is the decedent's. He also testified that he and the decedent had conversations about the will before and after Robert received it. In the will itself, the decedent expressly declares that it is his will and he provides for the distribution of certain property to his wife and two adult children. The decedent also refers to it as his updated will in the accompanying note he sent to his son Robert, and he requests that Robert keep the will safe along with a trust document. With respect to the two wills admitted into evidence on behalf of Judith, only one is signed and there was no evidence presented at the hearing concerning the circumstances of its preparation or execution. Based on our careful review of the record, we determine that ample evidence supports a finding that at the time the decedent signed the will that was eventually mailed to his son Robert, the decedent intended that document to constitute his will. (§ 6110, subd. (c)(2).)

C. *Testamentary Capacity*

An individual "who is of sound mind may make a will." (§ 6100, subd. (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." (§ 6100.5, subd. (a)(1), (2).) In this case, Judith had the burden of proving that the decedent was *not* mentally competent to make a will at the time he executed the will. (See *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1678; *Estate of Mann* (1986) 184 Cal. App. 3d 593, 602, 606.)

On appeal, Judith states that the decedent's testamentary capacity on February 25, 2011 "is not known." Based on the fact that he used the name "Ruben Michael Lara" in the will admitted to probate, and that his name appears as "Ruben Mendez Lara" in the will purportedly found on a computer in the home where he and Judith resided, Judith contends that "[a] testator who does not know his own name may not have the testamentary capacity to make a valid will."

Based on our careful review of the record, it appears that Judith did not raise the issue in the probate court, let alone attempt to prove, that the decedent was mentally incompetent at the time of the execution of the will that was admitted into probate. "Appellate courts generally will not consider matters presented for the first time on appeal. [Citations.]" (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) An argument raised for the first time on appeal is generally deemed forfeited. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.) Further, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to

appear at trial. [Citation.]" (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780; see also *McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618 [a new theory may not be raised for the first time on appeal unless it involves a question of law on undisputed facts].) In this case, the issue of the decedent's testamentary capacity was not raised below and involves factual questions that were not addressed or determined below. Consequently, we determine that Judith has forfeited the issue on appeal.

Accordingly, we conclude that the trial court did not err in admitting to probate the will that Robert received in the mail from the decedent.

IV. DISPOSITION

The order is affirmed.

_____
BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MIHARA, J.

_____
GROVER, J.