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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Conservatorship of the Person and Estate of ARTHUR JAMES SIMS.	B227813 (Los Angeles County Super. Ct. No. BP112616)
ANDREA SIMS-JAMES, Petitioner and Respondent, v. HAZEL B. SIMS, Objector and Appellant ENRIGHT PREMIER WEALTH ADVISORS, INC., et al., Defendants and Respondents.	

APPEAL from a judgment of the Superior Court for Los Angeles County, Reva Goetz, Judge. Affirmed as modified.

John Guy; Tritt & Tritt and James F. Tritt for Objector and Appellant.

Law Offices of Paul R. Hammons and Paul R. Hammons for Petitioner and Respondent.

Stone Rosenblatt Cha and John V. Tamborelli; Tamborelli Law Group and John V. Tamborelli for Defendant and Respondent Enright Premier Wealth Advisors, Inc.

Jones, Bell, Abbott, Fleming & Fitzgerald and William M. Turner for Defendant and Respondent TD Ameritrade, Inc.

Margolis & Tisman and Naki M. Irvin for Defendant and Respondent Charles Schwab & Co., Inc.

Hazel B. Sims appeals from a judgment in an action brought on behalf of her husband Arthur James Sims by Andrea Sims-James, the conservator of Arthur's estate.[1] (The action originally was brought by Arthur's brother, Dillard Sims; after Dillard died, Arthur's daughter Andrea was appointed temporary successor conservator.) The probate court found that Hazel breached her fiduciary duty and exercised undue influence over Arthur, who had been diagnosed with dementia, by having Arthur sign a quitclaim deed transferring to her his interest in the real property (their residence) they owned as joint tenants. The court ruled that (1) the transfer of the property, which was community property, severed the joint tenancy and that Hazel and Arthur became tenants in common; (2) for his interest as tenant in common, Arthur was entitled to half of the proceeds Hazel received when she subsequently sold the property; and (3) Arthur was also entitled to half of Hazel's interest as damages for her breach of fiduciary duty under Family Code section

[1] For ease of reference, we will refer to members of the Sims family by their first names.

1101, subdivision (g). The court also ordered Hazel to pay Andrea's attorney fees for her prosecution of the action, as well as all or some of the attorney fees incurred by Enright Premier Wealth Advisors, Inc. (Enright), TD Ameritrade, Inc. (Ameritrade), and Charles Schwab & Co., Inc. (Schwab), who were named as defendants in the action.[2]

We conclude the award of half of Hazel's interest in the sale proceeds is not authorized by law. Therefore, we strike that portion of the damages award. In all other respects, we affirm the judgment as so modified.

BACKGROUND

Hazel and Arthur married in 1968. At the time of their marriage, Arthur had three children -- triplets Andrea, Arthur, and Anthony -- who were teenagers and lived with their mother in Oakland. Hazel and Arthur bought their residence, a triplex, in October 1972, holding title as "ARTHUR SIMS and HAZEL B. SIMS, husband and wife AS JOINT TENANTS." They lived together in the triplex until Arthur was moved to an assisted living facility, Westchester Villa, in late 2005.

In July 1999, Arthur was on a trip with his brother Dillard when Dillard first noticed that Arthur seemed to have some problems with his memory. By early 2002, Arthur's mental health had deteriorated significantly. When Dillard visited him in February of that year, he observed that Arthur "was in very bad shape both physically and mentally." When Dillard took Arthur to a movie, Arthur did not understand it. At dinner with Arthur and Hazel, Dillard learned that Arthur had had a stroke.

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[2] The proceeds from the sale of the residence were held in accounts in Hazel's name at, or managed by, Enright, Ameritrade, and Schwab.

In early June 2002, Hazel went to a neighbor, Robert Duitsman, who was a lawyer, and asked if he could help set up an estate plan for her and Arthur, because she was concerned that Arthur's faculties were beginning to fail. Duitsman met with Arthur and Hazel on June 20, 2002. Hazel, who did most of the talking, told Duitsman that she wanted to make sure that Arthur's needs would be met and that they could stay in their home, because she was concerned that her faculties would eventually fail as well. Duitsman took notes about the documents they intended to create: wills, a trust, advanced health care directives, and general durable powers of attorney. He noted that they wanted standard pour over wills, where their property would go to the survivor or the trust. The executor of Arthur's will would be Hazel, then Patricia Poindexter,[3] then a man named Ron Hairston. The executor of Hazel's will would be Poindexter, then Hairston. The primary asset of the trust would be the triplex (which had an estimated value of $475,000 at that time), and the trustee would be Hazel, then Poindexter, then Hairston. The agent for Hazel's advanced health care directive would be Hairston, then Poindexter, and the agent for Arthur's would be Hazel, then Hairston. Under the general durable powers of attorney, Hazel chose Poindexter, then Hairston, and Arthur chose Hazel, then Poindexter.

After that meeting, Duitsman prepared a quitclaim deed, by which Arthur would transfer his interest in the triplex to Hazel as her sole and separate property. As he explained at trial, "Arthur was in the beginning stages of losing his faculties . . . and Hazel was in better shape. And so the idea was Arthur would convey his interest to Hazel and then through Hazel this trust would be funded . . . under the

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[3] Poindexter, who is a public health advisor at the Centers for Disease Control in Atlanta, is Hazel's niece. She was close to both Hazel and Arthur -- she regularly visited them in Los Angeles and occasionally vacationed with them, and Arthur visited her in Atlanta and regularly called to talk to her.

terms that were included in the draft that we prepared." Duitsman met with Arthur alone for about 20 to 30 minutes, explaining the plan and its consequences, i.e., that the property would go to Hazel, who would be the person making decisions for him. When Duitsman was satisfied that Arthur understood the plan, Arthur signed the deed and Duitsman notarized it. The quitclaim deed was dated August 28, 2002.

Duitsman met again with Hazel in 2003. Poindexter, who happened to be visiting Hazel and Arthur, attended the meeting with Hazel. Following that meeting, Duitsman prepared a trust agreement and a trust transfer deed. Both documents were dated October 16, 2003. The trust transfer deed would transfer the triplex from Hazel to "Hazel B. Sims, as Trustee of the Hazel B. Sims Family Trust Dated October 16, 2003." The trust agreement provided that, upon Hazel's death, the real property of the trust estate would be held for the benefit of Arthur during his lifetime, or for as long as he lived there, and the successor trustee was directed to take any action to maintain and manage the property to provide for Arthur's needs. The trust agreement also provided that when the property was no longer needed to provide for Arthur's needs, it would be added to the residue of the estate. Finally, the trust agreement set forth the distribution of the residue and remainder of the trust estate; under that provision, each of Arthur's children would receive five percent.[4]

Hazel never signed the trust agreement or trust transfer deed, despite having been contacted many times by Duitsman's office. Each time his office contacted her, Hazel had some excuse for not completing the trust, saying that she was busy, or had not been feeling well, or had lost it. He testified at trial that he would not

[4] During his first meeting with Arthur and Hazel, Duitsman learned that there was some tension between Arthur and his children, that it was not a harmonious family.

have recommended that Arthur sign the quitclaim deed had he known that the trust was not going to be completed.

Arthur's condition continued to deteriorate. In 2005, he flagged down a neighbor, Karen Mayo, and asked if she would take him to the airport. As Mayo was talking to him, Hazel came out of her garage. Mayo, who had seen Arthur in the neighborhood but did not know him, learned that Arthur was Hazel's husband. Mayo and Hazel eventually exchanged information, and Mayo began calling to check on them every day and stopping by several times a week. She often picked up groceries for them, drove Hazel to the doctor's office, and accompanied Hazel when she took Arthur to see the doctor. She knew that Arthur had children, but she never saw them at the triplex.

In early October 2005, Dillard visited Arthur at Hazel's request. It was apparent to Dillard that Arthur had severe dementia, and Hazel told him that she no longer could care for him on her own. He told her she had to decide whether to bring in someone to care for him or place him in a facility that could care for him. On October 24, 2005, she admitted Arthur to Westchester Villa.

For the next year, Hazel went to Westchester Villa every day to visit Arthur, and stayed all day. In October 2006, Hazel had knee replacement surgery, after which she spent three or four months in a rehabilitation facility. When she left that facility, she could not get around or take care of her personal needs, so Poindexter arranged for her to have 24-hour care. She continued to visit Arthur; Mayo, who had been visiting him almost every day, would drive her there.

Within a few months after Hazel left the rehabilitation facility, she sold the triplex. As part of the sale, the buyer agreed that Hazel could live in one of the units, rent free, for the first year. At the end of that year, in April 2008, the new owner told Hazel she would have to start paying rent. The cost of 24-hour care and rent was going to be exorbitant, so Poindexter talked to Hazel (who was beginning

to show signs of dementia) about moving into Westchester Villa to be close to Arthur. Hazel moved into the same unit as Arthur's, which was a locked unit for people with dementia, but she kept calling Poindexter, asking why she was there and saying that she wanted to die. Poindexter suggested to Hazel that she could be moved to Atlanta to be closer to Poindexter. After two months at Westchester Villa, Hazel agreed, and was moved to Atlanta and placed in an assisted living facility.

Sometime in 2007, Poindexter was given power of attorney over Hazel's bank accounts. She also oversaw Arthur's care at Westchester Villa and handled his finances. When Arthur needed anything, someone at Westchester Villa would call Poindexter and she would take care of it. If it involved something local, Poindexter would contact Mayo, and Mayo would take care of it. Poindexter and Mayo also would arrange for Mayo to call Hazel while she was visiting Arthur, so Arthur could hear Hazel's voice.

In April 2008, just before Hazel moved into Westchester Villa, Dillard came to Los Angeles to visit Arthur and learned that the triplex had been sold. Several months later, on September 11, 2008, Dillard filed petitions for appointment of himself as temporary conservator and as probate conservator of Arthur's estate. The petitions alleged that Dillard had learned that the family residence (which was alleged to be community property) had been sold, that the proceeds from the sale were placed with Enright, and that Enright would not provide any information to him about those proceeds. The petitions also alleged that both Arthur and Hazel had Alzheimer's disease. Despite the requirement in Probate Code[5] section 1821, subdivision (b), that the petitioner list the names and addresses of the proposed conservatee's spouse and relatives within the second degree, the petitions provided

[5] Further undesignated statutory references are to the Probate Code.

the names and addresses only of Arthur's children and Dillard. Similarly, notice of the hearings on the petitions was given only to Dillard and the children, despite the requirement in section 1822 to give notice to the spouse of a proposed conservatee.

In the Probate Investigator's Petition Report dated September 18, 2008, the probate investigator reported that Dillard told him that Poindexter had a power of attorney for Hazel and that he had spoken to her, although he did not discuss "the issues" with her. The investigator also reported that he did not attempt to contact Poindexter himself, "based on the concern voiced by the proposed conservator."[6] In his recommendations, the investigator stated the conservatorship was not necessary at that time because Arthur was receiving adequate care.

Dillard was appointed temporary conservator on September 19, 2008, and letters of temporary conservatorship were issued on September 24, 2008. On October 27, 2008, Dillard, as conservator of Arthur's estate, filed a petition under sections 3023, 3057, and 3087, alleging six causes of action: (1) to determine the community property characterization of proceeds received by Hazel from the sale of the family residence; (2) breach of fiduciary duty; (3) constructive trust; (4) accounting; (5) money had and received; and (6) set aside. The petition named Hazel, Enright, and Ameritrade as defendants.

The petition alleged that Arthur had executed a quitclaim deed, transferring the community property family residence to Hazel, as part of a plan to give Hazel more control over the couple's finances. It alleged that the plan contemplated that the property would be transferred to a trust, but that was not done, and that Hazel

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[6] The report of the PVP attorney, which also was dated September 18, 2008, stated that the PVP attorney attempted to reach Poindexter, and left a message for her. A subsequent report, dated October 21, 2008, states that he spoke to Poindexter. Neither the PVP attorney's reports, nor the Probate Investigator's report was served on Hazel or Poindexter.

sold the property and preserved the proceeds from the sale (alleged to be $900,000) in assets held by Enright and Ameritrade in Hazel's name. It alleged that Hazel improperly characterized the proceeds from the sale as her separate property, and it asked that they be re-characterized as community property and that Arthur recover damages resulting from Hazel's breach of fiduciary duty. Both Hazel and Poindexter, as holder of power of attorney for Hazel, were personally served with the petition and summons on November 13, 2008 and November 9, 2008, respectively,[7] and Hazel filed verified objections to the petition on January 20, 2009.

Dillard died on March 9, 2009. Prior to his death, he had filed a motion for leave to file a first amended petition to add Schwab as a defendant. The motion was granted on March 11, and the amended petition was filed on March 17. On March 19, Dillard's attorney reported to the court that Dillard had died. A few weeks later, the same attorney filed a petition to appoint Andrea as temporary conservator and another petition to appoint her as successor conservator.[8] At the hearing on the petitions, Hazel's attorney noted that Hazel had not been served with copies of the petition or notice of the hearing. When asked how he came to be at the hearing, he said that he was listed on the proof of service, but his client was not. Andrea was appointed temporary conservator, and the court continued the hearing on the appointment of a permanent successor conservator.

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[7] Hazel's attorney was listed as Poindexter's attorney on the proof of service attached to the petition, with the notation "PROOF OF PERSONAL SERVICE TO FOLLOW."

[8] At that time, Andrea had not seen Arthur in more than two years. In a declaration filed with the original petition for breach of fiduciary duty, Dillard stated that he talked to Andrea in February 2006 to encourage her to visit her father, since she lived in Los Angeles, and she said that she would. At trial, Andrea testified that she did not know that Arthur was at Westchester Villa until 2009.

At the continued hearing, Hazel's attorney objected to the appointment of Andrea as successor conservator; he subsequently filed a petition on behalf of Hazel, seeking appointment of Poindexter as successor conservator of Arthur's estate. The probate investigator interviewed Arthur, and asked him if he wanted Andrea, Poindexter, or someone else to be his conservator. Arthur responded, "I only want Patricia [Poindexter]. I trust her with money." Andrea opposed Hazel's petition, and the hearing on that petition and Andrea's petition was continued, to be heard in conjunction with an evidentiary hearing on the breach of fiduciary duty petition.

Arthur died on November 9, 2009, before that evidentiary hearing was held. Two weeks later, Hazel filed a petition for termination of the conservatorship due to the death of the conservatee, and a motion to dismiss the petition against her on the ground that the conservatorship was terminated by Arthur's death. Those petitions, along with the other petitions, were set for trial in May 2010.

The first witness at trial was Dr. David Trader, who testified as an expert witness on Arthur's mental capacity at the time he executed the quitclaim deed in August 2002. Based upon Arthur's medical records, Dillard's declaration reporting his observations during his visits with Arthur, and Duitsman's deposition testimony regarding his meetings with Hazel and Arthur, Dr. Trader opined that, to a reasonable degree of medical certainty, Arthur met the psychiatric criteria for dementia in August 2002 and had several significant mental function deficits, and that he lacked the mental capacity to execute the quitclaim deed. He also opined that Arthur was susceptible to undue influence in August 2002 and beyond, and that he "lacked sufficient mental capacity to understand and appreciate that he did

not execute trust documents after 2002."[9] The court also heard testimony from Duitsman, Mayo, Poindexter, and Andrea.

In his closing argument, Hazel's attorney argued that Andrea did not have standing to bring the petition for breach of fiduciary duty because she was not the personal representative of Arthur's estate. He contended that, because Arthur was deceased, the correct procedure for bringing such a claim would have been to file a petition as the personal representative under section 850. He also argued that there were no damages because Arthur died intestate, and therefore had the triplex remained community property, it would have become Hazel's separate property upon Arthur's death. Finally, counsel argued the court lacked jurisdiction because no notice was given to Hazel of the initial conservatorship proceedings. The court rejected the final argument, saying that Hazel had submitted to the court's jurisdiction.

The court issued a statement of decision on August 20, 2010. It began its analysis by noting that the petition for breach of fiduciary duty was brought before Arthur died, under sections 3023, 3057, and 3087. It found that the petition could have been brought under section 850, subdivision (a)(1)(D), requesting essentially identical relief under sections 855 and 859; under section 858, such petitions are not subject to dismissal on account of the death of the conservatee and can be maintained by the personal representative of the deceased. Therefore, the court amended the petition to add the allegations already asserted by Andrea, under sections 850, subdivision (a)(1)(D), 855, and 858. The court ordered Andrea to file

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[9] Hazel's attorney objected to and moved to strike Dr. Trader's testimony and report on the ground, among others, that the medical records upon which he relied had not been authenticated. As discussed in more detail in section B., *post*, the probate court overruled the objection and denied the motion to strike.

a petition for appointment as administrator of the Estate of Arthur Sims; once she was appointed, her temporary letters as temporary conservator would expire.[10]

Addressing the merits of the petition, the court found that Arthur did not have the capacity to sign the quitclaim deed on August 28, 2002, and that he did not receive any benefit by signing it. The court also found that the property was community property held in joint tenancy up to the time it was transferred to Hazel, but the transfer severed the joint tenancy and Hazel and Arthur became tenants-in-common. The court observed that, even though there was no evidence of what Arthur intended would happen with his estate, he would not have transferred his property to Hazel without an understanding that the property would be placed in their trust. The court concluded that Arthur was unduly influenced by Hazel within the meaning of Family Code section 721. It found that the transfer of Arthur's interest was not made with full knowledge of the facts because there was no evidence that Arthur knew the property would not be transferred into the trust, and there was no evidence that Arthur intended to disinherit his children. The court awarded damages under Family Code section 1101, subdivision (g), as follows: (1) Hazel is liable to Arthur for 50 percent of the proceeds from the sale of the triplex (net of encumbrances, selling expenses, and PVP attorney fees) for his interest as tenant-in-common; (2) Hazel is liable to Arthur for 50 percent of *her* interest in the proceeds from the sale (net of encumbrances, selling expenses, and PVP attorney fees); and (3) Hazel is liable to Andrea for her attorney fees incurred in prosecuting the petition for breach of fiduciary duty.

Further hearings were held to address various issues, including petitions filed by Enright, Ameritrade, and Schwab to liquidate the holdings at issue and

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[10] Andrea brought such a petition, and the court appointed her as the personal representative of the estate on September 15, 2010.

interplead those funds, and for their attorney fees. Ultimately, the court awarded attorney fees as follows: (1) $84,532.36 in attorney fees and costs to Andrea, to be paid by Hazel; (2) $24,088 to Schwab, to be paid by the parties equally from the holdings in the Schwab account; (3) $21,400.17 to Ameritrade, to be paid by the parties equally from the holdings in the Ameritrade account; (4) $12,000 to Enright, to be paid by Hazel; and (5) $9,127 to the PVP attorney, to be paid by the parties equally. Judgment was entered on December 21, 2010, from which Hazel now appeals.

DISCUSSION

On appeal, Hazel challenges the jurisdiction of the court and Andrea's standing based upon several procedural irregularities. She also contends there was insufficient evidence to support the probate court's finding that Arthur lacked the mental capacity to execute the quitclaim deed or that he was subject to undue influence, and that the court's award of damages was improper because Hazel was entitled to all of the proceeds from the sale of the triplex under intestacy laws. Finally, she asserts that attorney fees should not have been assessed against her.

A. *Procedural Irregularities*

Hazel complains of several procedural irregularities in this case. First, she argues that the probate court did not have jurisdiction from the outset of the conservatorship because no notice was given to Hazel, as required under sections 1821 and 1822. Second, she argues that the first amended petition for breach of fiduciary duty was void because it was filed after Dillard's death and before the appointment of a successor conservator, and it was not verified, as required by section 1021. Third, she argues that the probate court had no jurisdiction to conduct the trial on the petition for breach of fiduciary duty because under section

1860, the conservatorship terminated upon Arthur's death. Finally, she argues that the probate court's sua sponte post-trial amendment of the petition deprived her of due process and that, in any event, Andrea did not have standing to prosecute the amended petition because she was not the personal representative of Arthur's estate. While we acknowledge there were significant procedural irregularities in this case, we conclude that none requires reversal of the judgment.

1. *Failure to Give Notice of Original Petition to Hazel*

Hazel contends the probate court did not have jurisdiction to grant any relief because the entire conservatorship proceeding was void due to Dillard's failure to comply with the statutory mandate to name and give notice to her as the prospective conservatee's spouse. (§§ 1821, subd. (b)(1), 1822, subd. (b)(1).) She is incorrect. Failure to comply with the notice provisions in a conservatorship proceeding does not render the orders issued in the proceeding void, but merely voidable. (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1091-1092, citing *Estate of Joslyn* (1967) 256 Cal.App.2d 671, 676, and *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) Here, despite not receiving notice at the outset, Hazel participated in the conservatorship proceedings, including by filing objections to the petition for breach of fiduciary duty that did not include any objection to the probate court's jurisdiction. Thus, she effectively waived the procedural error. (*Conservatorship of O'Connor*, *supra*, 48 Cal.App.4th at p. 1091.)

2. *Filing of First Amended Petition*

Hazel contends the judgment against her is void because the first amended petition was filed after Dillard died and before a temporary conservator was appointed, and it was not verified. There is no question that, as Hazel asserts, if a

plaintiff bringing an action was deceased before the action was filed, the judgment is void because the court never acquired jurisdiction over the plaintiff. (See *Walter v. National Indem. Co.* (1970) 3 Cal.App.3d 630, 634.) But here, Dillard was alive when the original verified petition for breach of fiduciary duty was filed. Therefore, the probate court had properly acquired jurisdiction, and the court retained jurisdiction after Dillard's death. (See 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 951, pp. 1060-1061 [noting that "'death of the conservator merely terminates the relationship of conservator and conservatee but does not terminate the conservatorship proceeding'"], quoting Cal. Law Revision Com. com to Prob. Code, § 1860.)

While it is no doubt unusual for an amended petition to be filed after the petitioner has died, we note that in this case, Dillard had filed a motion to file an amended petition (which attached the proposed amended petition) before his death. The purpose of the amendment was simply to add Schwab as a defendant and add allegations related to Schwab. Schwab responded to the petition and did not object. Although Hazel objected on the ground that Dillard was deceased and no successor conservator had been appointed, the probate court subsequently appointed Andrea as temporary successor conservator and authorized her to continue prosecuting the action Dillard had commenced. Therefore, to the extent there was error in allowing the amended petition to be filed before the successor conservator was appointed, the error was harmless.

3. *Termination of Conservatorship Upon Arthur's Death*

Hazel contends the conservatorship terminated upon Arthur's death, and therefore Andrea as conservator lost her power to prosecute the petition for breach of fiduciary duty when Arthur died. She is correct, but the issue is moot.

Section 1860 provides that "[a] conservatorship continues until terminated by the death of the conservatee or by order of the court." (§ 1860, subd. (a); see also *Quiroz v. Seventy Ave. Center* (2006) 140 Cal.App.4th 1256, 1269, fn. 11.) However, the probate court's jurisdiction over the conservatee's estate does not immediately terminate upon the conservatee's death; the court retains jurisdiction over the proceeding "for the purpose of settling the accounts of the guardian or conservator or for any other purpose incident to the enforcement of the judgments and orders of the court upon such accounts." (§ 2630.) Although "the scope of the court's jurisdiction should be construed broadly to accomplish these goals" (*Conservatorship of O'Connor*, *supra*, 48 Cal.App.4th at p. 1089), in this case the probate court in its statement of decision found there were no assets subject to supervision under the conservatorship of Arthur's estate. Therefore, there does not appear to be any basis for the probate court's continuing jurisdiction over the conservatorship.

The probate court seems to have recognized that section 2630 did not provide any grounds for continuing jurisdiction over the conservatorship, and thus amended the petition for breach of fiduciary duty after trial to make it an action brought under section 850, subdivision (a)(1)(D), which action may be brought by a conservator on behalf of a conservatee and maintained by the personal representative of the estate after the death of the conservatee. Thus, although Hazel is correct that Andrea did not have the power to prosecute the action as conservator, we find the issue is moot in light of the probate court's ruling, discussed in section A.4., *post*, amending the petition and its appointment of Andrea as personal representative of Arthur's estate.

4. *Post-trial Amendment of the Petition*

As noted, the probate court sua sponte amended the petition for breach of fiduciary duty after trial, converting the claims that had been brought under sections 3023, 3057, and 3087 -- which are claims that may be resolved only in conservatorship proceedings -- into claims brought under sections 850, subdivision (a)(1)(D), 855, and 859, based upon the same allegations and seeking the same relief. Under section 858, claims brought by a conservator under sections 850, 855, and 859 "shall not be dismissed on account of the death of the conservatee" and may continue to be prosecuted by the personal representative of the conservatee's estate. On appeal, Hazel contends the probate court's action deprived her of due process and was ineffective to confer standing upon Andrea because she was not the personal representative at the time of the trial.

Hazel is correct that due process requires that the defendant be given notice of the relief sought and an opportunity to defend. (*Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1321.) But here, Hazel was given notice of the relief sought. As the probate court explained, the original petition was brought under statutes applicable in conservatorship proceedings, and sought relief under Family Code sections 721 and 1101. The post-trial amendment simply changed the statutes under which the same claims were brought, seeking the same relief under the Family Code. While Hazel asserts in her appellant's opening brief that sections 850, 855, and 859 provide "different rights of recovery and [are] subject to different defenses," she fails to show that there were any differences in the kinds of recovery sought or defenses available in this case. In other words, she does not demonstrate how the outcome might have been different had the petition been amended before trial. Thus, to the extent the probate court erred by failing to give Hazel notice of its intent to amend the petition, the error was harmless. (*In re James F.* (2008) 42 Cal.4th 901, 918 ["If the outcome of a proceeding has not been

affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required"].)

Turning to Hazel's second contention -- that regardless of the probate court's post-trial amendment, Andrea lacked standing to prosecute the action under section 850 because she was not the personal representative of Arthur's estate -- we conclude that any error in this respect also was harmless in light of Andrea's subsequent appointment as personal representative (which occurred before judgment was entered). In some ways, the circumstances in this case are similar to cases in which a corporation's corporate status is suspended during the pendency of an action, but the corporate powers are later revived. In those cases, the corporate reviver retroactively validates the corporation's actions taken in the litigation during the suspension. (See, e.g., *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 959.) Here, Andrea's authority to prosecute the petition was technically suspended when Arthur died because his death terminated the conservatorship. But section 858 specifically provides that an action under section 850 may not be dismissed due to the death of the conservatee, and that the personal representative may proceed with the matter. All actions that Andrea took after Arthur's death could have been taken by her as the personal representative. Therefore, there is no prejudice to Hazel by holding that her appointment as personal representative retroactively validated her prosecution.

In short, while the court's action in amending the petition post-trial and ordering Andrea to apply for appointment as the personal representative of Arthur's estate was highly unusual, there was no prejudicial deprivation of due process and Andrea's lack of standing was cured before entry of judgment. Thus, reversal of the judgment is not warranted.

B. *Sufficiency of the Evidence to Establish Lack of Capacity and Undue Influence*

Hazel contends there was insufficient evidence to support the probate court's findings that Arthur lacked the capacity to sign the quitclaim deed and that he was unduly influenced by Hazel within the meaning of Family Code section 721. She asserts that the court based its findings entirely on the testimony of Dr. Trader, and argues that Dr. Trader's testimony was inadmissible because he relied upon medical records that were not authenticated. We agree that Dr. Trader's testimony was inadmissible to the extent it relied upon unauthenticated medical records, and therefore the probate court's finding that Arthur lacked the capacity to sign the quitclaim deed is not supported, but we conclude there was sufficient evidence, other than Dr. Trader's testimony, to support the court's finding that Arthur was unduly influenced by Hazel.

We begin with the admissibility of Dr. Trader's testimony and report. When Dr. Trader was called to testify on the first day of trial, Hazel's counsel objected, saying that he did not receive Dr. Trader's report, with its attachments that included portions of medical records, until 10:30 that morning. The court agreed that counsel needed some time to digest the report before having to cross-examine Dr. Trader, and gave counsel two choices: have Dr. Trader testify the following day, or allow him to testify on direct that day and come back sometime in the future for cross-examination. Hazel's counsel chose the second option.

Dr. Trader came back several weeks later to be cross-examined. After conducting the cross-examination, and before closing arguments, Hazel's counsel moved to strike all of Dr. Trader's testimony on the ground, among others, that his testimony was based upon hearsay medical records that were not authenticated. The court turned to Andrea's counsel, who said that he had the medical records with an authentication from the custodian of records. The court asked whether the

records had been produced pursuant to a subpoena, and upon Andrea's counsel's affirmative response, the court denied the motion to strike, stating that "as an expert, [Dr. Trader] is entitled to rely on written and documentary evidence. And he testified what he was relying on, on what documents assisted him to form the basis for his opinion."

Hazel contends on appeal that the probate court erred by denying her motion to strike. In her respondent's brief, Andrea asserts there was no error because her counsel provided testimony to authenticate the documents. She states: "The court solicited testimony from Attorney Hammons whether the Kaiser Medical records were subpoenaed and he explained that he had the Kaiser Reports and that they met all foundational requirements as they were subpoenaed from Kaiser's and authenticated by the custodian of records." In fact, Hammons did not *testify*, since he was not sworn. And even if his statement to the court had been made under oath, it would be insufficient to satisfy the requirement that business records be authenticated by the custodian of records or other qualified witness. (Evid. Code, § 1562.) It simply was an offer of proof, and the medical records were never authenticated and admitted into evidence.

Because Dr. Trader's testimony was based in large part on the contents of the unauthenticated medical records, his expert opinions had no evidentiary value. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743 [the opinion of a medical expert based upon medical records that have not been authenticated and admitted into evidence has no evidentiary value].) Therefore, Hazel is correct that there was insufficient evidence to support the probate court's findings as to Arthur's capacity to understand and execute the quitclaim deed.

This does not mean, however, that the judgment must be reversed. The probate court's ruling that Hazel breached her fiduciary duty also was based upon the court's finding that Arthur executed the quitclaim deed as part of a plan in

which the property would be placed in the family trust, and there was no evidence that he would have signed it had he known that Hazel was not going to follow through with the plan. Under *In re Marriage of Starr* (2010) 189 Cal.App.4th 277, that finding, if supported by substantial evidence, would be sufficient to support the court's ruling that Hazel breached her fiduciary duty to Arthur under Family Code section 721.

In *Starr*, the appellate court examined a series of Supreme Court cases involving findings of undue influence where one spouse conveyed property to the other spouse based on the latter's unfulfilled promise to reconvey. (*In re Marriage of Starr*, *supra*, 189 Cal.App.4th at pp. 284-286.) The appellate court concluded that the conveyee's failure to fulfill the promise he made when the other spouse agreed to quitclaim her interest in their property to him was constructive fraud and undue influence, which breached the first spouse's fiduciary duty to the other. (*Id.* at p. 287.)

Here, Duitsman testified that he drafted the quitclaim deed as part of the estate plan he created for Arthur and Hazel, that he explained to Arthur that the purpose of the deed was to allow Hazel to transfer the property into a trust, and that he would not have recommended that Arthur sign the deed if he had known that Hazel would not transfer the property into the trust. That evidence is sufficient to support the probate court's finding of undue influence and breach of fiduciary duty.

C. *Damages*

Hazel challenges the probate court's award of damages against her, arguing that if the quitclaim deed is deemed void, the property would remain community property, which would have passed to Hazel under the laws of intestacy. She is correct that, in the absence of the quitclaim deed, Arthur's share of the property

held as community property would have passed to her upon Arthur's death. (See 11 Witkin, Summary of Cal. Law (10th ed. 2005) Community Property, § 251, p. 870.) But Hazel's argument fails to take into account that the probate court found that she breached her fiduciary duty. Under Family Code section 1101, the remedies for the breach "shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. The value of the asset shall be determined to be its highest value at the date of the breach of fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court." (Fam. Code, § 1101, subd. (g).) Therefore, Arthur's estate was entitled to recover 50 percent of the proceeds from the sale of the triplex.[11]

The probate court's award, however, appears to go far beyond the remedies provided in the statute. Family Code section 1101 provides that, upon a finding of breach of fiduciary duty resulting in impairment to the injured spouse's community property interest, in addition to awarding monetary damages under subdivisions (g) or (h), the court may determine the injured spouse's rights of ownership in the community property (Fam. Code, § 1101, subd. (b)), or may order that injured spouse's name be added to the title of the property (Fam. Code, § 1101, subd. (c)). Here, the court determined that the quitclaim deed (which it found was executed by Arthur as a result of Hazel's undue influence) severed the joint tenancy and made them tenants in common, and each party's interest was that party's separate property. It then awarded Arthur's estate 50 percent of the entire property *plus* 50 percent of *Hazel's* interest, for a total of 75 percent. Because the parties had not

[11] Family Code section 1101, subdivision (h) provides that the remedies include an award of 100 percent of the asset if the breach falls within the ambit of Civil Code section 3294, but the probate court found the evidence did not establish that Hazel's conduct fell within that statute.

addressed the statutory authority for such an award, we requested and received supplemental briefs on the issue.

In her supplemental brief, Hazel argues there was no basis under the statute or the facts for the award of 50 percent of Hazel's interest, and that the trial court's comments concerning the amount of proceeds that would be available to Hazel after the award indicate that the court intended Hazel to retain half of the sale proceeds, less certain amounts for attorney fees and costs. Andrea, on the other hand, argues in her supplemental brief that the trial court's award was proper. She asserts that Arthur was entitled to 50 percent of the total proceeds of the sale based upon the court's finding that the quitclaim deed severed the joint tenancy, giving Arthur a separate property interest as tenant in common, and that he was also entitled to 50 percent of Hazel's interest under Family Code section 1101, subdivision (g), as a penalty for her subsequent sale of Arthur's separate property interest.

The problem with Andrea's argument is that it presumes there were two breaches of fiduciary duty -- the first occurring when Hazel unduly influenced Arthur to execute the quitclaim deed, and the second when Hazel sold the triplex. But the case was tried upon the theory that the breach occurred when Hazel had Arthur quitclaim the property to her based upon the understanding that she would transfer the property into a family trust, and then failed to complete the estate plan. Andrea did not ask the trial court to find -- and the court did not find -- that there was a further breach of fiduciary duty when Hazel sold the triplex. Based upon the theory of trial and the trial court's findings, therefore, Arthur's estate was entitled to a monetary recovery under Family Code section 1101 only for the transfer to Hazel of Arthur's interest in the triplex by means of the quitclaim deed. There is no support in the statute for an additional award of damages for Hazel's subsequent sale of the triplex.

Moreover, the remedy here seems excessive. Had Hazel not gone to Duitsman and asked him to set up an estate plan for her and Arthur, she would have been entitled to all of the proceeds from the sale of the triplex upon Arthur's death (assuming she followed the appropriate procedure for the sale, in light of Arthur's diminished capacity) because Arthur did not have a will, and his ability to make a will at that point is somewhat questionable in light of his advancing dementia. Had Hazel executed the trust that was presented at trial, each of Arthur's children would have received five percent of the remainder of the trust after Hazel's death, or a total of 15 percent. With the proper measure of damages under Family Code section 1101, subdivision (g), the 50 percent share of the sale proceeds would be Arthur's separate property; under the intestacy laws, his children will split two-thirds of that, which is 33 percent of the total proceeds from the sale.

Because we conclude the award of 50 percent of Hazel's share of the sale proceeds is not authorized, we strike that portion of the award from the judgment.

D. *Attorney Fee Award*

Hazel devoted a total of six sentences to her argument that attorney fees should not be assessed against her, two of which relate to her assertion that the fees awarded to Andrea should be reversed upon reversal of the judgment on the merits. As to the awards to the financial entities, she notes that the award of fees is discretionary, but makes no real attempt to show an abuse of discretion; she merely states, without citation to the record or any analysis, that it was the conservator's decision to name the entities as defendants, and that their motions for interpleader were withdrawn. Hazel's discussion on this issue is comparable to the appellant's brief in *People v. Dougherty* (1982) 138 Cal.App.3d 278, about which the court observed: "'"Instead of a fair and sincere effort to show that the trial court was

wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift [her] responsibility in this manner."'" (*Id.* at p. 283.) We conclude that Hazel has forfeited the issue.

DISPOSITION

The judgment is modified to strike the damages award to the extent it awards Arthur 50 percent of Hazel's interest in the proceeds from the sale of the triplex. As modified, the judgment is affirmed. Each side to bear their own costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.