Filed 7/28/15 Estate of Karsin CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ESTATE OF LEO KARSIN, DECEASED. _____ HOLLY GETLIN, Petitioner and Appellant, v. RONALD KARSIN, Objector and Respondent.	B257622 (Los Angeles County Super. Ct. No. BP001897)

APPEAL from an order of the Superior Court of Los Angeles County, Maria E. Stratton, Judge. Affirmed.

Loeb & Loeb, David C. Nelson and Gabrielle A. Vidal for Petitioner and Appellant.

Greenberg Traurig, Eric V. Rowen, Scott D. Bertzyk and Lisa C. McCurdy for Objector and Respondent.

INTRODUCTION

Appellant Holly Getlin (Holly) and respondent Ronald Karsin (Ronald) are both children of Leo and Irene Karsin, now deceased.[1] Although Leo died more than 25 years ago, Ronald recently filed a petition to enforce Leo's will. Holly wishes to file a demurrer in that proceeding and, under the safe harbor provision in former Probate Code section 21320, subdivision (a), she applied to the probate court for an order confirming that her proposed demurrer would not violate the no contest provision contained in Leo's will. We affirm the probate court's denial of Holly's safe harbor application.

FACTUAL AND PROCEDURAL BACKGROUND

Leo and Irene Karsin married in 1942. The marriage produced three children: Holly, Ronald and Gordon.[2] Shortly after Leo and Irene married, Leo executed a will (the "1942 will") leaving his separate property and his half of the couple's community property to his two sisters, Sylvia Harow and Sophie Weiner.

Forty years later, Leo executed another will (the "1982 will" or "Leo's will") that became the operative will upon his death.[3] Leo included two specific gifts in the 1982 will. First, he devised his household-related personal property and his interest in the family home to Irene outright. Second, Leo devised $25,000 to his sister Sophie. He later struck that gift in a codicil to the will, which he executed in 1987.[4]

---

[1] We refer to the members of the Karsin family by their first names. We intend no disrespect but simply aim for clarity and convenience.

[2] Although Gordon is involved in the litigation in the probate court, he is not a party to this appeal.

[3] The 1982 will contains provisions that would have gone into effect if any of the children predeceased either Leo or Irene. Because the children survived their parents, we do not discuss those contingent provisions.

[4] The codicil made no other changes and otherwise confirmed and ratified the 1982 will.

Leo provided that the rest of his estate would pass, in stages, to his children. First, he devised to his children, equally and outright upon his death, the maximum allowable amount that could pass to them without incurring federal estate tax along with any other undistributed assets in his estate.[5]

Second, Leo provided for the creation of a trust (the "marital deduction trust") funded with the maximum allowable amount that would qualify for the federal estate tax marital deduction at the time of his death.[6] Irene was entitled to receive all income produced by the marital deduction trust during her lifetime. Under the trust terms, Irene could only access the trust principal in two circumstances. First, if the trustee determined, in his or her discretion, that the interest income from the trust was insufficient to provide for Irene's "reasonable support, care and maintenance," the trustee had discretion to disburse principal to Irene in an amount the trustee "deem[ed] proper or necessary for that purpose." Second, Irene could withdraw a modest amount of the trust principal (the greater of 5% or $5,000) annually.

Upon Irene's death, the trust principal was to be divided into equal parts and distributed, in trust, to his three children. Leo named Irene as the initial trustee of the marital deduction trust and provided that the couple's three children should act as co-trustees upon Irene's death. Importantly for our purposes, Leo included a no contest clause in the 1982 will.[7]

---

[5] Holly represents that the federal estate tax exemption amount was $600,000 at the time of Leo's death.

[6] "Federal law allows the property of a deceased spouse to be passed to the surviving spouse without payment of federal estate tax through the allowance of a 'marital deduction.' (Int. Rev. Code, § 2056.)" (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 416.)

[7] The no contest clause provides: If any devisee, legatee, or beneficiary under this Will or any legal heir of mine, or person claiming under any of them, shall contest this Will or attack or seek to impair or invalidate any of its provisions, or conspire with or voluntarily assist anyone attempting to do any of those things, in that event I specifically disinherit each such person and all legacies, bequests, devises and interests

Leo died on January 5, 1989. Two estate distribution proceedings followed.

1. *Intestacy Proceedings*

Approximately six months after Leo's death, Irene filed a spousal property petition in which she represented that Leo died intestate. She asked the court to confirm that Leo's share of the couple's community property—virtually his entire estate—passed to her under the intestacy statute. Irene also filed a federal tax return for the estate in which she represented that Leo died intestate. At the time of Leo's death, the couple's community property was worth approximately $28 million.

The superior court issued a spousal property order confirming that Irene inherited Leo's property upon his death. The order confirmed that no administration of Leo's estate would be necessary.

2. *Probate Proceedings*

Nearly a year after Irene obtained the spousal property order, Leo's sisters filed a petition to probate Leo's 1942 will. Irene objected to the petition, asserting that Leo "executed Wills made long after 1942, and each Will expressly provided that [Leo] intended to revoke and and [sic] all former Wills and codicils made by him."

In mid-October, 1990, Irene filed her own petition seeking to probate Leo's 1982 will and 1987 codicil.[8] Concurrently, she filed supplemental objections in the sisters' pending probate action, advising the court of her probate petition and attaching a copy of Leo's 1982 will and the 1987 codicil.

The probate court consolidated the two probate actions, ordered the probate of Leo's 1982 will, and appointed Irene the executor of his estate. According to the

---

given under this Will to that person shall be forfeited and shall augment proportionately the shares of my estate going under this Will to or in trust for such of my devisees, legatees and beneficiaries as shall not have participated in such acts or proceedings.

[8] The sisters filed their probate action in the central district of the Los Angeles Superior Court, located in downtown Los Angeles. Irene filed her competing probate action in the central district as well, but filed her spousal property petition in the northwest district, located in Van Nuys. It appears that Irene did not disclose, and the probate court was otherwise unaware, of the previously-issued spousal property order.

probate court, Irene never marshaled or distributed Leo's assets in the estate proceedings.[9] Instead, she acted under the authority of the spousal property order which confirmed her outright ownership of all the community's assets.

In 1989, Irene created a revocable trust and transferred to it, among other things, the family home and its contents, several pieces of real property, and five general partnerships that were in existence at the time of Leo's death. According to the trust's terms, Irene would receive the income produced by the trust during her lifetime and could withdraw any amount of trust principal upon request.

Irene provided that all trust assets would be distributed outright to her three children upon her death. Unlike Leo, Irene did not provide for an equal distribution of the trust assets. Irene gave Holly the family home and its contents, as well as all profits and cash distributions realized from one of the five partnerships. Irene divided the rest of the trust assets equally among the three children.

Irene initially designated herself as the sole trustee of the trust, and designated Holly as the successor trustee. She also designated her son Ronald as the second successor trustee, who would serve as trustee in the event that both Irene and Holly were unable to do so. Irene later amended the trust and designated Holly as her co-trustee. Holly remained as the successor trustee, but Irene removed Ronald as the second successor trustee and substituted Holly's son, Joel Getlin, in his place.

Irene died on January 26, 2014. Shortly thereafter, Ronald filed a petition to enforce Leo's will in the still-pending probate proceeding regarding Leo's estate. Ronald alleges that Irene failed to distribute Leo's estate in accordance with the 1982 will and that Irene misappropriated those assets following Leo's death. The petition requests the appointment of a new executor of the estate and an accounting, as well as injunctive and equitable relief in furtherance of the enforcement of Leo's 1982 will.

---

[9] The consolidated probate action, *Estate of Leo Karsin, Deceased*, Superior Court of Los Angeles County, No. BP001897, is still pending and is the matter from which this appeal arises.

Holly prepared a demurrer to Ronald's petition, asserting that all causes of action are "barred by res judicata and collateral estoppel and because there are no assets within the Estate of Leo Karsin . . . . " Under former Probate Code, section 21320(a),[10] Holly filed a "safe harbor" application asking the probate court to confirm that her proposed demurrer would not violate the no contest provision contained in Leo's 1982 will.

The probate court denied Holly's application. The court observed that "Leo wrote a will that disposed of his property with very specific bequests in a very specific way," namely through the use of a marital deduction trust. The court found that Holly's proposed demurrer seeks to "eviscerate [Leo's] plan by making it subordinate to a spousal property petition that was, the parties agree, based on incorrect information Irene gave to the probate court." In sum, the court concluded, "Holly's demurrer, if successful, makes Leo's will a nullity."

Holly appeals.[11]

STANDARD OF REVIEW

"The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein. [Citations.]" (*Burch v. George* (1994) 7 Cal.4th 246, 254 (*Burch*); *Donkin v. Donkin* (2013) 58 Cal.4th 412, 422 (*Donkin*).) Because the record discloses no conflict in the extrinsic evidence and the parties have identified no issues of credibility, we review the trial court's decision de novo. (*Id.,* at p. 254.)

CONTENTIONS

Holly contends the proposed demurrer is not a will contest because it does not affirmatively attack or invalidate the 1982 will or any of its provisions, nor would it (if sustained) impair any provision of the 1982 will. Alternatively, she contends that even if the demurrer would impair some provisions of the 1982 will, the impairment would

---

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

[11] The order is appealable. (*Zwirn v. Schweizer* (2005) 134 Cal.App.4th 1153, 1156, fn. 7.)

be unintended and therefore would not fall within the scope of the no contest provision. Holly also contends that enforcement of the no contest provision would violate public policy.

DISCUSSION

1. *Applicable Law*

Former Probate Code section 21320, subdivision (a)[12], provides a "safe harbor for beneficiaries who seek a judicial determination whether a proposed legal challenge would be a contest, and that is the only issue to be decided when such an application is made." (*Estate of Davies* (2005) 127 Cal.App.4th 1164, 1173.) Like the probate court, we consider only whether the proposed demurrer violates the no contest provision in the 1982 will; we do not consider the merits of the proposed demurrer. (See *Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1136 ["if the merits of the action itself must be determined, the section 21320 petition will not be entitled to safe harbor protection"].)

"An in terrorem or no contest clause in a will or trust instrument creates a condition upon gifts and dispositions provided therein. [Citation.] In essence, a no contest clause conditions a beneficiary's right to take the share provided to that beneficiary under such an instrument upon the beneficiary's agreement to acquiesce to the terms of the instrument. [Citation.]" (*Burch, supra*, 7 Cal.4th at p. 254; *Donkin, supra*, 58 Cal.4th at p. 422.) No contest clauses, whether in wills or trusts, are valid in California. (*Id*.) Further, no contest clauses "are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. [Citations.] Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the

---

[12] Effective January 1, 2010, the Legislature repealed former sections 21300 through 21308 (General Provisions) and former sections 21320 through 21322 (Declaratory Relief) and enacted a major revision of the statutory scheme governing no contest clauses. (See §§ 21310–21315.) However, this new statutory scheme applies only to instruments that became irrevocable on or after January 1, 2001. (§ 21315.) Because Leo's will became irrevocable upon his death on January 5, 1989, the former law applies to Holly's safe harbor petition.

testator's intent. [Citations.]" (*Burch, supra*, 7 Cal.4th at pp. 254-255, fn. omitted; *Donkin, supra*, 58 Cal.4th at p. 422.)

" 'Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used.' [Citations.] '[T]he answer cannot be sought in a vacuum, but must be gleaned from a consideration of the purposes that the [testator] sought to attain by the provisions of [his] will.' [Citation.] Therefore, even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court 'must not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.' [Citation.]" (*Burch, supra*, 7 Cal.4th at pp. 254-255 [citations omitted, other alterations in the original; *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.)

2. *The Proposed Demurrer Violates the No Contest Provision of the 1982 Will*

Simply stated, the 1982 will evidences Leo's intent to pass the vast majority of his estate to his children, while giving Irene a stream of income during her life. Leo provided that his children would receive upon his death one portion of his estate, i.e., the maximum amount that would avoid the federal estate tax, plus any assets that remained in his estate after the funding of the marital deduction trust. He provided that the other portion of his estate would be placed in trust for Irene's benefit during her lifetime, and then be distributed to the children in trust upon Irene's death. The restrictions Leo placed upon Irene's access to the trust principal reflect his intention to preserve the trust assets so that they would pass to his children upon Irene's death.

By contrast, the spousal property order Irene obtained in the intestacy proceeding states that Irene inherited Leo's entire estate outright. The implications of that order are apparent: Irene gained unrestricted access to all of Leo's assets during her lifetime and Leo's intention to provide for his children was unfulfilled.

The spousal property order plainly frustrates Leo's testamentary intent. Holly's proposed demurrer asserts that the spousal property order is "the final and conclusive order disposing of [Leo's] property outside of his Estate." Holly contends that each of the four causes of action set forth in Ronald's petition to enforce Leo's will "is barred by res judicata and collateral estoppel and because there are no assets within the Estate." The proposed demurrer, if sustained, would therefore terminate Ronald's efforts to enforce Leo's will and investigate Irene's possible misuse of the estate's assets, effectively sanctioning Irene's conduct as a *fait accompli*.

Because the proposed demurrer seeks to enforce the spousal property order, which itself plainly contradicts the testamentary plan set forth in the 1982 will, it is a "contest" of the 1982 will. Further, the proposed demurrer "attacks" and "seeks to impair or invalidate" multiple provisions of the will within the meaning of the no contest provision. We reject Holly's arguments to the contrary.[13]

3. *Public Policy Does Not Prohibit Enforcement of the No Contest Provision*

Holly asserts that enforcing the no contest clause against her would violate public policy. She argues that the public policies supporting the res judicata doctrine, which she describes as favoring the finality of orders and preservation of the integrity of the judicial system, outweigh the public policy concerns at work in the typical will contest case. In order to determine whether the competing policies underlying the res judicata doctrine are implicated here, we would need to decide, or at least presume, that the doctrine is applicable. We do not reach this issue because the applicability of res judicata relates to the merits of the proposed demurrer rather than the more narrow question before us. (See *Zwirn v. Schweizer, supra,* 134 Cal.App.4th at p. 1156, fn. 5 ["The merits of a claim cannot be decided in a section 21320 petition"].)

---

[13] Because we conclude that the proposed demurrer is a "contest" and seeks to "invalidate" the 1982 will, as those terms are used by the no contest provision, it is unnecessary for us to reach Holly's alternative argument that any possible impairment of Leo's will that might occur if the demurrer were sustained would not violate the no contest provision.

For the foregoing reasons, we find no error in the probate court's denial of Holly's safe harbor application.

DISPOSITION

The order is affirmed. Respondent to recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.*

WE CONCUR:

EDMON, P. J.

KITCHING, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.