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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ETHEL ELLINGTON LIVING
TRUST.

VIKRAM BRAR,

Petitioner and Respondent,

v.

AZARIAH ELLINGTON,

Objector and Appellant.

B278887

(Los Angeles County
Super. Ct. No. 16STPB01301)

APPEAL from an order of the Superior Court of Los Angeles County, William P. Barry, Judge. Reversed and remanded.

Azariah Ellington, in pro. per., for Appellants.

No appearance for Respondent.

Appellant Azariah Ellington,¹ one of Ethel Ellington's sons, challenges the trial court order invalidating the Ethel Ellington Living Trust, imposing a constructive trust on the assets appellant marshaled and collected on behalf of the trust, and directing appellant to deliver these assets to the personal representative of the Estate of Ethel Ellington. Appellant raises several issues which are not pertinent to this appeal, but instead involve other cases in the probate court. He also argues, and we agree, that there is insufficient evidence to support the court's order invalidating the trust. For that reason, we reverse the order.

FACTUAL AND PROCEDURAL SUMMARY

This case is one of many arising from disputes among the children of Ethel Ellington, who was the subject of a conservatorship and whose assets are now being administered in the Probate Court. Ethel suffered a stroke in 2006, and required full-time care, which was provided by her sons or by caregivers hired by her sons. There was ongoing disagreement among the sons about the best arrangements for Ethel. At some point between 2007 and 2010, Ethel was diagnosed with dementia.

Ethel's son Willie died intestate in February 2013. Appellant was appointed administrator of his estate, and Ethel was Willie's sole heir. In June 2013, the Ethel Ellington Living Trust (the trust) was created. It named Ethel and appellant as co-trustees. Upon Ethel's death, all the trust property was to be distributed to "Momma's House, an Ethel Ellington Private Foundation." Appellant was to continue as executor of this

¹ Appellant's brother Mitchell was a party to the order being challenged, but is not a party to this appeal.

foundation, which “will be constructed and designed to provide assistance for those related to the offspring of Luther Jacob Ellington Sr. and Ethel Ellington.” Ethel listed Willie’s house in Inglewood as trust property, although administration of Willie’s estate was not completed until March 21, 2016.

A conservatorship over Ethel was established in September 2015; respondent Vikram Brar, a probate panel attorney, was appointed temporary conservator. Ethel died on March 8, 2016, which ended the conservatorship, and respondent was appointed special administrator of her estate.

Appellant began proceedings for the administration of the trust. On June 15, 2016, he and his brother Mitchell, each self-represented, filed a *Heggstad* petition (*Estate of Heggstad* (1993) 16 Cal.App.4th 943) for an order confirming trust assets. They asserted that Willie’s house was included in Ethel’s trust estate, without the need for a separate deed transferring the property to the trust.

On July 26, 2016, respondent special administrator filed a petition to determine the invalidity of the purported trust and to impose a constructive trust. He asserted that at the time Ethel allegedly signed the purported trust, she “was not of sound and disposing mind” and did not have testamentary or donative capacity. He also asserted that appellant, who had a confidential relationship with Ethel, exercised a controlling influence on her, inducing her to execute the purported trust from which he would benefit. Respondent asked the court to impose a constructive trust on the assets marshaled by appellant, and order them delivered to the personal representative of Ethel’s estate.

At a hearing on September 6, 2016, the court denied the *Heggstad* petition without prejudice, deeming it premature. As to

the petition to invalidate the trust, the court gave appellant and Mitchell two weeks to file written objections to the petition, otherwise it would deem the objections waived. Hearing on the petition was continued to November 4.

No objections were filed before the November 4 hearing. The court noted that since the last hearing, appellant and Mitchell had filed an ex parte application to grant or deny the *Heggstad* petition. Since the court already had denied the *Heggstad* petition without prejudice, it denied the ex parte application.

Appellant and Mitchell had filed a request to dismiss the petition to invalidate the trust, claiming respondent lacked standing to bring the petition. The court concluded respondent had the requisite authority because letters of administration were issued to him, and denied the motion to dismiss.

Neither appellant nor Mitchell had filed any objections to the petition to invalidate the trust. The court explained: “the law requires that until that’s challenged, I have to assume that the allegations in the petition are true and correct, because it’s a verified petition.” The court rejected appellant and Mitchell’s argument that the motion to dismiss constituted a timely objection. “When the matter was last before me, the court stated that written objections needed to be filed by a date certain . . . That date passed. The motion to dismiss was not a substantive objection. No factual challenge was made to the facts set forth in the petition, therefore, I’m granting the petition as stated.”

Ten days later, appellant and Mitchell filed a written request for a statement of decision. The court found the request untimely because the matter had been heard in less than 8 hours and the court had explained its reasoning on the record. This

appeal challenges the order granting the petition to invalidate the trust.

DISCUSSION

I

Appellant claims the evidence is insufficient to support the court's finding that the trust was invalid based on lack of capacity and undue influence.

We first consider the claim of lack of capacity. Respondent's verified petition stated: "Ethel Ellington has been diagnosed with dementia since at least 2007, and had various other physical and mental ailments. Petitioner is informed and believes that, at the time Ethel Ellington allegedly signed the purported Trust on June 8, 2014 [*sic*], Ethel Ellington was not of sound and disposing mind, and did not have sufficient mental capacity to understand the nature of her acts, the character of her property, and her relation to the natural objects of her bounty. She was over 87 years of age at that time. She lacked the capacity to contract in general, and did not have testamentary or donative capacity."

Under Probate Code section 1022,² "[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." Appellant filed a motion to dismiss the petition based on the pendency of several appeals, but filed no substantive opposition to the petition. In the absence of filed opposition, the trial court treated the allegations in the petition as true and correct.

² All undesignated statutory references are to the Probate Code

We note that the absence of filed opposition did not render this an uncontested proceeding. Appellant and his brother appeared at the hearing and presented argument in opposition to the petition, including an assertion that no evidence had been presented that the trust is invalid. Section 1022 was not applicable. (See *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309.)

More importantly, the assertions in the verified petition were insufficient to support the court's ruling of incapacity. The fact that Ethel had been diagnosed with dementia and mental ailments before the trust instrument was executed does not, in itself, establish a lack of capacity. The Probate Code sets out different standards for mental capacity: section 6100.5 describes specified circumstances in which an individual is not competent to make a will; sections 810 through 812 describe the standards for determining legal mental capacity to enter into a contract or make other decisions. (See *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 726–729 (*Andersen*).)³

³ In *Andersen, supra*, 196 Cal.App.4th at p. 731 we held the standard of testamentary capacity (§ 6100.5) should be applied to the challenged trust amendment because of the amendment's simplicity and testamentary nature. In the present case, the issue is Ethel's capacity to enter into the trust itself. This is a more complex document, establishing a foundation to be administered by just one of Ethel's six living children, with a vague directive "to provide assistance for those related to the offspring" of Ethel and her husband. On remand, the trial court should consider which standard should be applied to determine Ethel's competency at the time of executing the trust.

Under either standard, more is required than a diagnosis of dementia at some date prior to the execution of the trust. For example, section 811, subdivision (d) provides: “The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.” And ““old age or forgetfulness, eccentricities or mental feebleness or confusion at various time of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity.”” (*Andersen, supra*, 196 Cal.App.4th at p. 727.) Similarly, failure to recognize old friends or relatives, physical disability, absent-mindedness, or mental confusion do not in themselves furnish grounds for finding a lack of testamentary capacity. (*Ibid.*)

The remainder of respondent’s allegations with respect to incapacity were made on information and belief. It is well settled that matters alleged on information and belief “do ‘not serve to establish the facts . . . because an affidavit which is to be used as evidence must be positive, direct and not based upon hearsay.’” (*Gutierrez v. Superior Court* [1966] 243 Cal.App.2d 710.) A ruling ‘of the court is to be based upon facts which may be presented to it, and not upon the belief of the affiant.’ (*Pelegrielli v. McCloud River etc. Co.* [1905] 1 Cal.App. 593, 597.) Such allegations on ‘information and belief’ furnish ““no proof of the facts stated . . .”” (*Franklin v. Nat C. Goldstone Agency* [1949] 33 Cal.2d 628, 631; *Kellett v. Kellett* [1934] 2 Cal.2d 45, 48.)” (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204–205.) The court should have requested direct evidence of Ethel Ellington’s mental capacity in order to rule on this question.

The assertion regarding undue influence suffers from the same problem. In the verified petition, respondent states: “On information and belief, the purported Trust was executed as a direct result of undue influence by Respondents including Azariah Ellington, who had a confidential relationship with Ethel Ellington and in whom Ethel Ellington had great trust and confidence, as a result of which Respondents including Azariah Ellington exercised a controlling influence on the mind and actions of Ethel. On information and belief, taking advantage of this trust, confidence and influence, Respondents including Azariah Ellington induced and persuaded Ethel Ellington to execute the purported Trust, from which Azariah Ellington unnaturally benefited.”

The proceeding was contested, so the allegations in the petition could not be accepted as true under section 1022. And the allegations were made on information and belief, and thus did not provide evidence to establish the facts for a finding of undue influence. The court erred in finding undue influence without receiving evidence.

The order granting the petition to invalidate the trust on the grounds of incapacity and undue influence must be reversed and the cause remanded for an evidentiary hearing on the petition.

II

Appellant also asserts error in the court’s denial of his request for a statement of decision. In the absence of a timely request, the court is not required to prepare written findings of fact and conclusions of law. (Code Civ. Proc., § 632.) In the case of a trial which is concluded within one calendar day or in less

than eight hours over more than one day, the request must be made prior to the submission of the matter for decision. (*Ibid.*)

The hearing in this case was concluded within one calendar day, November 4, 2016. Appellant did not request a statement of decision before the matter was submitted. His request was made on November 14, 2016. The court properly denied the request.

III

Appellant also asserts error in the court's dismissal of his *Heggstad* petition, which sought to confirm title to the Inglewood property in the trust, rather than having it included as part of Ethel Ellington's estate. The dismissal was made without prejudice, on the ground that it was premature. We find no error in that determination. If on remand the trust is found to be valid, the *Heggstad* petition can be re-filed; if the trust is found to be invalid, the petition will be moot.

DISPOSITION

The order declaring the Ethel Ellington Living Trust to be invalid is reversed and the cause remanded for a new hearing in accordance with the views expressed in this opinion. The order dismissing the *Heggstad* petition without prejudice is affirmed.

Appellant to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.