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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARC ETTINGER, as Trustee, etc., et
al.,

Plaintiffs and Respondents,

v.

ROGER GASKIN,

Defendant and Appellant.

B287857

(Los Angeles County
Super. Ct. No. BP124175)

APPEAL from a judgment of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Fuller & Fuller, Bruce P. Fuller and Joshua Maldonado for Defendant and Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller; Dean E. Daggett; Reed & Reed, Martin S. Reed and Darren G. Reed; Law Offices of Tracey Hom and Tracey P. Hom for Plaintiffs and Respondents.

Appellant Roger Gaskin (Roger),¹ a beneficiary of the Mollie Gaskin Survivor's Trust, appeals from a judgment of the probate court assessing a surcharge of \$153,245.25 in legal fees and \$11,339.79 in costs for his bad faith objections to accountings presented by the trustee, respondent Marc Ettinger. Roger contends the trial court committed error in concluding his objections were made in bad faith, but he fails to refer to any of the evidence that the court considered in reaching its findings or explain why its findings were in error. Instead, Roger simply asserts that the trial court erred in refusing to grant a trial continuance and in excluding one exhibit at trial. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Survivor's Trust

Meyer and Mollie Gaskin established the Gaskin Family Trust in 1987. They had two sons, appellant Roger and respondent Arnold Gaskin (Arnold). When Meyer Gaskin died in 1995, the trust was divided into three sub-trusts: (1) a Survivor's Trust; (2) a Decedent's Trust; and (3) a Marital Trust. In 2005, Mollie Gaskin replaced and superseded the Survivor's Trust and created the Mollie Gaskin Survivor's Trust (the Survivor's Trust).

In 2006, Ettinger was named the successor trustee of the Survivor's Trust.² He assumed his duties in May 2009, a year before Mollie Gaskin died. Roger and Arnold were designated beneficiaries of the Survivor's Trust, and cotrustees of the

¹ Because members of the Gaskin family share a surname, for clarity we sometimes refer to them by their first names.

² Ettinger is a grandnephew of Mollie and an attorney.

Decedent's and Marital Trusts during the relevant period. The brothers had a contentious relationship.

During Ettinger's administration of the Survivor's Trust, Roger filed various unsuccessful objections challenging Ettinger's actions as the trustee, including his authority to enforce tie-breaking decisions and appoint a conservator over Mollie and her estate.

B. Ettinger's Accountings and Roger's Objections

In 2010, Ettinger filed his first accounting for the Survivor's Trust. Roger, represented by attorney Barry King, filed objections to the first accounting. After a trial, the first accounting was approved and settled in 2013.³

In 2014, Ettinger filed his second accounting for the Survivor's Trust covering his expenditures on attorney fees, trustee's fees, and estate taxes. Ettinger assumed ministerial duties for the Decedent's and Marital Trusts and also filed an accounting for these two trusts. Roger, represented by attorney Justin Gold, filed objections to the accountings, alleging that the fees were excessive and did not benefit the trust, and that the trustee had not administered the trust impartially.⁴

³ The court's order on the first accounting is not part of the appellate record.

⁴ Both Ettinger and Arnold defended against Roger's objections to the accounting for the Decedent's and Marital Trusts. However, Ettinger's involvement in these trusts was minimal. The parties stipulated to consolidate the matters involving both accountings at trial. On appeal, Roger challenges only the surcharges for Ettinger's second accounting of the Survivor's Trust.

Ettinger and Arnold argued that Roger's objections to the accountings were filed in bad faith, "and part of a long history of meritless objections to virtually all actions of the Trustees." They requested Roger be surcharged for the fees and costs they incurred in defending against Roger's objections pursuant to Probate Code section 17211, subdivision (a).⁵

The parties stipulated to litigate all accountings and Roger's objections at trial.

C. Ex Parte Request for Trial Continuance

The day before trial, November 21, 2016, Roger, through attorney King, filed an ex parte application for an order continuing the trial for 60 days. King alleged he had been substituted into the matter as counsel for Roger on November 18, and he needed additional time to prepare for trial because he had not yet even received the case file. Roger alleged that there had been a breakdown in the attorney-client relationship with Gold, who had not returned his daily telephone calls for the past two weeks.

Ettinger and Arnold opposed the ex parte application, arguing that King had represented Roger in connection with the first accounting of the Survivor's Trust and was familiar with the facts and issues of the case. Furthermore, they argued the

⁵ Probate Code section 17211, subdivision (a) provides: "If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded shall be a charge against any interest of the beneficiary in the trust. The contestant shall be personally liable for any amount that remains unsatisfied."

parties had been preparing for trial since the second accounting was filed in 2014.

The court expressed surprise that no request for a continuance had been made at the November 14 final status conference, when all parties had said they were ready to proceed with trial, and it denied the request. However, on November 22, the day trial was set to begin, King renewed his motion for a continuance. He argued that “even a short seven-day continuance” would assist him in getting ready for trial, and later reiterated, “I’m only asking for seven days.” Over Ettinger’s and Arnold’s objections, the trial court granted a one-week continuance. King stated, “[t]he extension of time gives me the chance to prepare going forward and I will do that.”

D. Trial Proceedings

The bench trial began on November 29, 2016, and the trial court took testimony over four days: November 29 and December 13, 14 and 15, 2016. On the first day, King confirmed he was ready for trial. Roger was represented by King, Ettinger was represented by Dean Daggett and Martin Reed, and Arnold was represented by Tracey Hom. Roger, Arnold, Daggett, Reed, King and Ettinger testified.

During Roger’s cross-examination, Reed introduced a previously filed declaration of Carlina Castro, Mollie Gaskin’s caretaker, which asserted that Roger had sexually harassed her in February 2010. King’s objection based on relevance was overruled. On redirect, King sought to introduce a subsequent declaration by Castro from December 2010, which was purportedly filed in a previous proceeding, contradicted the first Castro declaration, and was supportive of Roger, but had not been on the joint exhibit list. Hom objected, arguing that the

exhibit had no court stamp to establish it was filed, and it was not relevant to the determination of fees. The court overruled the objection and marked the declaration for identification as Exhibit 97, but limited the scope of King's examination of Roger about the declaration to five minutes. After reviewing the exhibit, Roger testified he did not dispute Castro's statements in Exhibit 97, but he disputed her statements in the previous declaration. As the parties moved to enter marked exhibits into evidence, Hom reasserted her objection that Exhibit 97 lacked foundation because there was no indication it was filed. The court sustained the objection and stated it would only admit the exhibit if it had a court stamp. Hom later objected that the exhibit had not been shown to respondents before trial. The court refused to admit the exhibit because it "was a new document that was never filed" and "was never part of the exhibit list originally," which "undercut[] trial preparation for the lawyers."

There was substantial evidence presented at trial of the hostile relationship between the brothers and Roger's "malicious intent," including Roger's efforts to obstruct Arnold's and Ettinger's administration of the trusts, and to sabotage Ettinger in other litigation matters related to Mollie Gaskin's estate. Before Mollie's death, she and various caregivers had complained of Roger's abuse of Mollie, and the court had restricted Roger's visitations with her. Arnold testified that the FBI and the Sheriff's Department put him on notice that a wiretap picked up evidence "that Roger . . . was trying to hire an assassin to kill Arnold . . . , his wife, and Roger[']s former wife." Roger claimed not to recall key events and exhibits that bore his signature. He denied filing the objections to the accountings to harass Ettinger and Arnold.

Ettinger testified that he had hired two attorneys, Reed and Daggett, to represent him because they had complementary areas of expertise—Daggett had estate law and elder abuse litigation experience, and Reed had estate law and accounting experience. Daggett and Reed explained their billing practices and how they apportioned the various litigation matters between them.

E. Statement of Decision and Order Determining Surcharge

The court overruled all of Roger’s objections to the trustee’s accounting, finding the objections were made without reasonable cause and in bad faith. The court was “thoroughly convinced” that the attorney work commissioned by Ettinger was “reasonable under the circumstances,” and it approved all fees and costs in the second accounting of the Survivor’s Trust.⁶ The court had “substantial reason to [not] believe” Roger, and found his testimony “manifestly not credible” and “patently false,” noting Roger had presented no evidence to rebut Daggett’s, Reed’s, and Ettinger’s testimony.

The trial court’s statement of decision issued on February 24, 2017, stated in relevant part:

“9. Based on these findings and other evidence the Court finds that Marc Ettinger was definitely facing the potential of being second, third, fourth, fifth and sixth guessed regarding any and all of the decisions he made with respect to Mollie Gaskin and the Survivor’s Trust, and

⁶ The court also awarded Arnold \$70,320 in legal fees and \$1,024 in costs as a surcharge against Roger for the accounting of the Marital and Decedent’s Trusts. Roger does not dispute that order in this appeal, despite naming Arnold as a respondent.

that the attorney[] fees incurred in connection with various litigation and prelitigation matters and administration of the Survivor's Trust were necessary and reasonable.

"10. This Court finds that the testimony of Dean Daggett provided a reasonable and careful analysis of his invoices. Furthermore, Dean Daggett gave a reasonable and careful analysis of the time he spent on the various matters with credible explanations as to why he did or did not do things. The attorney work that was performed or commissioned by Marc Ettinger was also reasonable under the circumstances."

No objections were asserted to the court's statement of decision. In May 2017, Ettinger filed his petition for determination of surcharge amount, requesting \$153,245.25 in legal fees and \$11,339.79 in costs against Roger's share of the Survivor's Trust. He asserted that Reed's law firm spent 246 hours and Daggett spent 142.7 hours defending Ettinger against Roger's bad faith objections over three years. In October, Roger objected that Ettinger's determination of surcharges was too high and unreasonable.

In November, the trial court granted Ettinger's surcharge petition and overruled Roger's objections, awarding Ettinger \$153,245.25 in fees and \$11,339.79 in costs as requested. The final judgment was entered on December 14, 2017.

Roger timely appealed the judgment.⁷

⁷ Ettinger moved to dismiss Roger's appeal on the ground it challenged non-appealable rulings denying a continuance and refusing to admit an exhibit at trial. We denied the motion, concluding the appeal was from the trial court's December 14, 2017 judgment.

DISCUSSION

A. Violation of Appellate Rules

A fundamental flaw in Roger’s appellate brief is that, despite his challenge to the trial court’s judgment determining surcharges against him, and his primary contention that the trial court erred in characterizing his objections as being in bad faith, he nowhere addresses this argument. (See Cal. Rules of Court, rule 8.204(a)(1) [requiring briefs to “support each point by argument and, if possible, by citation of authority”].) Instead, Roger asserts that the trial court’s denial of a trial continuance was prejudicial error because his substituted counsel was ill-prepared for trial, and that the trial court’s refusal to admit Exhibit 97 into evidence was prejudicial error because Roger could not properly defend himself against a prior accusation. None of Roger’s contentions challenges the trial court’s ruling that Ettinger’s determination of surcharges was reasonable, necessary, and supported by the attorneys’ careful accounting of their work or demonstrates that the trial court erred in assessing surcharges for Roger’s bad faith objections. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appealed judgment is “‘presumed correct,’” and error must be “‘affirmatively shown’”].)

Arguments not properly presented or developed may be treated as waived, and on this basis alone we may decline to consider appellant’s appeal. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [“We are not bound to develop appellants’ arguments for them.”]; *ibid* [“The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived.”]; *Spitler v. Children’s Institute International* (1992) 11 Cal.App.4th 432, 442 [where appellant

“offers no argument or authority challenging [the] ruling on appeal,” appellate court may decline to consider the issue on appeal].) Nevertheless, we address the substance of Roger’s contentions below.

B. No Prejudicial Denial of Trial Continuance

Roger contends that the trial court erred in refusing to grant a “reasonable continuance” because his substituted counsel was denied the opportunity to properly prepare for trial. For at least three separate reasons, the contention lacks merit.

First, Roger’s contention that he was denied a continuance is belied by the record. As Roger acknowledges, the trial court granted King’s requested seven-day continuance over Ettinger’s and Arnold’s objections. At the time he renewed his motion for a continuance, King indicated that seven days would be sufficient time to prepare for trial. And on the first day of trial, King confirmed he was ready to proceed. Thus, as Ettinger correctly observes, Roger “appeals from an order that was not made.”

Second, to the extent Roger argues that the trial court erred in refusing to grant his original request for a 60-day continuance, or in not providing “reasonable” time to prepare, his claim of error is inconsistent with his counsel’s prior representations to the trial court. We therefore deem it to have been forfeited. (See *In re Carrie W.* (2003) 110 Cal.App.4th 746, 755 [“ ‘it would be inappropriate to allow a party not to object to an error of which the party is or should be aware, “ ‘thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not’ ” ’ ”]; cf. *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174, 1179–1180 [“ ‘Ordinarily, a party cannot accept the benefits of a judgment, in whole or in part, and then attack it by appeal. His

conduct in taking any of its advantages while seeking to reverse it is inconsistent, and the result is a waiver of the right.’ ”].)

Finally, even if we were to consider Roger’s argument that the trial court should have granted a longer continuance, we find no error or prejudice in the court’s order. Trial continuances are “disfavored,” but they may be granted on a showing of “good cause” based upon a number of factors, including the substitution of trial counsel, proximity of the trial date, prejudice to the parties, and the interests of justice. (Cal. Rules of Court, rule 3.1332(c).) A denial of a continuance is reversible error only if it is prejudicial. (*Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1141 [where denial of trial continuance did not prejudice appellant, error was harmless and not reversible].)

Here, the trial court did not abuse its discretion by refusing to grant a lengthy continuance on the eve of trial. Furthermore, Roger has failed to show King’s allegedly insufficient preparation time affected the outcome of trial. The court found substantial evidence of the reasonableness of Ettinger’s second accounting and of the unreasonableness of Roger’s objections. Roger presented no evidence rebutting the attorneys’ explanation of their billing practices and apportionment of work, and on appeal he does not suggest any way in which additional time to prepare for trial would have resulted in a different outcome. In short, we are not persuaded that granting a longer continuance would have resulted in a favorable ruling for Roger, and thus we find no reversible error.

C. No Abuse of Discretion in Exclusion of Exhibit 97

Roger contends that the trial court abused its discretion by refusing to admit Exhibit 97, which purportedly contradicted Castro’s declaration accusing him of sexual harassment. He

argues that Exhibit 97—which he describes as a subsequent Castro declaration that was supposedly filed in a previous proceeding—was relevant evidence bearing on Castro’s credibility and Roger’s character, and thus should have been admitted. Finally, he urges he was prejudiced by the declaration’s exclusion because the trial court “sanction[ed]” him “based on his alleged bad faith acts.”

“Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion.” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) “[T]he trial court is vested with broad discretion in ruling on the admissibility of evidence, and its ruling will be upset only upon a clear showing that it exceeded the bounds of reason.” (*Professional Engineers in California Government v. Brown* (2014) 229 Cal.App.4th 861, 875.) In addition, a “trial court’s error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a ‘miscarriage of justice’—that is, that a different result would have been probable if the error had not occurred.” (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1480; see Evid. Code, § 354.)

We discern no abuse of discretion in the trial court’s decision to exclude Exhibit 97. “It is well established . . . that declarations constitute hearsay and are inadmissible at trial, subject to specific statutory exceptions, unless the parties stipulate to the admission of the declarations or fail to enter a hearsay objection.” (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354.) Here, respondents objected to the admission of the declaration, and Roger has not identified any legal authority that would justify its admission. Further, the exhibit was not on the

joint exhibit list and had not been shown to respondents before trial. (See *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274 [“One of the principal purposes of civil discovery is to do away with ‘the sporting theory of litigation—namely, surprise at the trial.’”].) Thus, the trial court’s exclusion of the exhibit was well within the bounds of reason and was not an abuse of discretion.

Even if we had found error, we perceive no prejudice resulting from the exclusion of Exhibit 97. Neither Castro’s credibility nor Roger’s character was the main issue at trial. Exhibit 97, which purportedly contradicted the allegation that Roger sexually harassed Castro, did not challenge the reasonableness of Ettinger’s second accounting or directly support Roger’s argument that his objections were not in bad faith. (*People v. Contreras* (2013) 58 Cal.4th 123, 152 [evidence may “bear on the credibility of a witness and still be collateral to the case”]; accord, Cal. Law Revision Com. com., 29B Pt. 2B West’s Ann. Evid. Code (2019 ed.) foll. § 780, p. 368 [“This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible.”].) In addition, although the court excluded Exhibit 97, Roger was still questioned about it, and his testimony established that he disputed Castro’s prior declaration, which had limited probative value. (See *Elkins v. Superior Court*, *supra*, 41 Cal.4th at p. 1358 [written testimony is “substantially less valuable” and disfavored over live testimony to evaluate credibility at contested trial].) Lastly, the court found substantial evidence of Roger’s malicious intent from the testimony of other witnesses and the record before it, including Roger’s overruled objections to Ettinger’s past actions as trustee, Roger’s alleged efforts to obstruct and

assassinate Arnold, and Roger's own untrustworthy conduct at trial. We find no "miscarriage of justice" in the trial court's decision to exclude the marginally relevant evidence.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded costs on appeal.

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EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.