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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROSE HERRADOR, Plaintiff and Appellant, v. EDWIN HERRADOR, as Trustee, etc., et al., Defendants and Respondents.	A171058 (San Mateo County Super. Ct. No. 23PR000365)

This is an appeal in a probate matter involving the decedent Oswaldo Herrador's two adult sons (defendants Edwin and Dennis Herrador) and second wife of seven years (plaintiff Rose Herrador).[1] Rose contends the trial court erred in granting summary adjudication in favor of Edwin and Dennis after finding that she was not entitled to a share of Oswaldo's California estate as an omitted spouse because Oswaldo provided for her separately in a will executed in the Republic of El Salvador. Since Rose's contention runs counter to the plain language of Probate Code section 21610, we affirm.

[1] All parties share the Herrador surname. As such, to avoid confusion and with all due respect, we refer to the parties by their first names.

FACTUAL AND PROCEDURAL BACKGROUND

Oswaldo, a 72-year-old retiree, met Rose at church in spring 2013. They were married about two and a half years later, on September 10, 2015. When Oswaldo died on August 29, 2022, at age 79, Rose and Oswaldo had been married less than seven years.

Before his marriage to Rose, Oswaldo was married to his late wife, Gloria Herrador, for over 45 years. The couple shared two children, defendants Edwin and Dennis. Gloria and Oswaldo were both employed during the course of their marriage and were able to jointly acquire several parcels of real property, including a four-unit building in Daly City and a residence in San Bruno. Oswaldo and Gloria fully paid off the mortgage on the San Bruno property in 1987. The mortgage on the Daly City property was paid with rents collected from the property.

On February 18, 2010, during their marriage, Oswaldo and Gloria executed the Revocable Trust of Oswaldo Herrador and Gloria E. Herrador (Trust), naming Edwin and Dennis as Trust beneficiaries. Gloria died on November 5, 2012. When Oswaldo's death followed in August 2022, the remaining Trust assets consisted of the deceased couple's mortgage-free residence in San Bruno and the four-unit Daly City property, the rental income of which paid for its mortgage.

On April 12, 2023, Rose filed a petition for order to determine share of omitted spouse (petition) asserting two causes of action. With respect to the first cause of action, for determination of omitted spouse share (Prob. Code, §§ 6401, 21610), the petition alleged: "Oswaldo . . . neglected to create and execute either a Trust or a Will to provide for Rose. Oswaldo also failed to provide for Rose otherwise, commensurate with her spousal share," by naming her as beneficiary "on any account or insurance policy, or granting

her an interest in title to either of his two real properties located in San Mateo County." The petition thus claimed Rose was an "omitted spouse" entitled to receive Oswaldo's one-half interest in any community or quasi-community property and a share of his separate property equal to the amount she would have received if he had died without having executed any type of testamentary instrument.[2]

As to the second cause of action, for determination of community property rights (Prob. Code, § 21610), the petition alleged on information and belief that a portion of the assets currently held by the Trust or the Trust beneficiaries consisted of community property. Accordingly, the petition asked the court to adjudicate the character of these Trust assets and to award Rose "the amount properly attributable to her interests in those assets as community property."

On July 28, 2023, Edwin and Dennis, in their capacities as Trust beneficiaries, filed an objection to the petition (objection). This objection disputed that Rose was an omitted spouse since Oswaldo provided for her in a separate testamentary instrument, his "Last Will and Testament," which governed his assets in El Salvador and was subject to probate in El Salvador (El Salvador Will). It also alleged, inter alia, that Rose was not an omitted spouse because Oswaldo designated her as the sole beneficiary of his Wells Fargo Bank account.

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[2] Specifically, Rose sought a one-third share of Oswaldo's separate property, with the remaining two-thirds going to Edwin and Dennis as Oswaldo's two surviving children, under Probate Code section 6401, subdivision (c)(3)(C).

The El Salvador Will was included as an exhibit to the objection.[3] This will, executed on September 18, 2019, identifies Rose as the "SOLE AND UNIVERSAL HEIR" to all of Oswaldo's assets in El Salvador, namely, a condominium and a vehicle. This will, which Oswaldo disclosed to Rose, also nominated her as executor.

Edwin and Dennis subsequently served 39 requests for admission. Rose responded to these requests on December 8, 2023, with general and specific objections as well as substantive responses.

On January 3, 2024, Edwin and Dennis moved for summary adjudication as to the first cause of action on the grounds that Rose was not an omitted spouse because she was named as beneficiary under the El Salvador Will, which Oswaldo executed during their marriage. Rose filed her opposition on March 12, 2024, and both sides then filed separate statements of undisputed facts.

On April 15, 2024, the trial court held a hearing on the motion for summary adjudication. Afterward, the trial court granted the motion, ruling, "Petitioner is not an omitted spouse having been named as a beneficiary under decedent Oswaldo Herrador's testamentary instrument, namely his last will and testament governing his assets in El Salvador, executed after his marriage to Petitioner." Accordingly, the trial court dismissed the first cause of action.

On April 23, 2024, the parties filed a stipulation and proposed order acknowledging there were no remaining issues in the case and, thus, vacating the trial date. The trial court signed the requested order.

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[3] A copy of Oswaldo's El Salvador Will is attached to the objection as exhibit B. A copy of a certified Spanish-to-English translation of his El Salvador Will is attached as exhibit B to the declaration of Jamay Lee, attorney of record for Edwin and Dennis, filed in support of the objection.

On April 29, 2024, Rose moved for reconsideration of the court's summary adjudication ruling. With this motion, Rose filed a declaration from Silvia Wheatley, a friend of Rose and Oswaldo, who attested that, before his death, Oswaldo told her in a phone conversation "that he wanted to make sure that Rose would be provided for and taken of for the rest of her life; especially so that she could maintain the standard of living they had enjoyed together."

On July 8, 2024, the trial court denied Rose's motion for reconsideration upon finding: "The additional evidence provided does not change the analysis under Probate Code Section 21610 or 21611." This appeal followed.[4]

DISCUSSION

The only issue on appeal is whether the trial court erred in finding that Rose does not qualify as an omitted spouse for purposes of Probate Code sections 21610 and 21611.[5] It was on this basis that the court entered summary adjudication in favor of defendants and denied Rose's subsequent motion for reconsideration.

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[4] An order granting a motion for summary adjudication is usually a preliminary, nonappealable order. (*Wilson v. County of San Joaquin* (2019) 38 Cal.App.5th 1, 7; *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1677, fn. 1 [appeal generally must be taken from the final judgment entered in the case].) Here, however, the court's order is final and appealable pursuant to Probate Code section 1304, subdivision (a), which allows an appeal from an order made appealable under Probate Code section 17200, subdivision (b)(4) [authorizing proceedings for the purpose of "[a]scertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument"].

[5] Unless otherwise stated, all statutory citations that follow herein are to the Probate Code.

We review the trial court's resolution of this statutory interpretation question de novo. (*Colvis v. Binswanger* (2023) 96 Cal.App.5th 393, 396.) " '[W]e begin by examining the statutory language, giving the words their usual and ordinary meaning. If there is no ambiguity, the plain meaning of the language governs.' " (*Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 496.) Here, there is no ambiguity. The trial court appropriately found as a matter of law that Rose does not qualify as an omitted spouse under the plain meaning of the relevant statutory language.

Section 21610 states: "Except as provided in Section 21611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive a share in the decedent's estate, consisting of the following property in said estate: [¶] (a) The one-half of the community property that belongs to the decedent under Section 100. [¶] (b) The one-half of the quasi-community property that belongs to the decedent under Section 101. [¶] (c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate."

Section 21610 reflects California's public policy that "a person's failure to 'provide for [their] surviving spouse' in their testamentary instruments is ' "strong[ly]" ' ' "disfavor[ed]" ' and thus generally presumed to be the product of 'oversight, accident, mistake or unexpected change of condition' rather than intent." (*Reich v. Reich* (2024) 105 Cal.App.5th 1282, 1288–1289.)

Section 21611, in turn, identifies three circumstances under which an omitted spouse is *not* entitled to a share of the decedent's estate under section

21610, including if either of the following circumstances is established: "(a) The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments. [¶] (b) The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence. . . ." (§ 21611.)

Thus, as the statutory language makes clear, an omitted spouse is entitled to a share of the decedent's estate only "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments . . . ." (§ 21610.) Rose does not meet this standard—as Oswaldo did not fail to provide for her in a testamentary instrument after execution of all of his testamentary instruments. On the contrary, Rose admits Oswaldo provided for her in his El Salvador Will, which he executed during the course of their marriage and disclosed to her prior to his death. Accordingly, Rose was not omitted from Oswaldo's estate and, thus, is not entitled to an additional share of his estate under section 21610.

Under these circumstances, section 21611 is irrelevant to our inquiry because the statute only applies if a spouse qualifies as omitted under section 21610 in the first place.

Rose disputes our statutory interpretation. She reasons: "[T]he only rational construction of . . . sections 21610 and 21611 is one that excludes a foreign will from defeating an omitted spouse claim unless that foreign will disposes of California assets (or of the decedent's major assets) or clearly expresses an intention to omit the spouse from inheritance of assets other

than those specifically gifted in the foreign will. The El Salvador will does neither."

Rose's construction fails. Indeed, Rose essentially asks that we read new terms into sections 21610 and 21611 that would impose: (1) a new geographic limitation such that a spouse is only omitted for purposes of section 21610 if the decedent fails to provide for him or her in a *California* testamentary instrument after the execution of all of the decedent's *California* testamentary instruments or, alternatively, (2) a new requirement that the decedent express a clear intention to omit his or her spouse from receiving a share of the estate under section 21610 whenever the spouse receives a gift under a foreign will. We decline to rewrite these statutes in this manner. (See *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301 [" 'the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language' "]; see also *In re Estate of Layton* (1933) 217 Cal. 451, 465 ["generally, a will valid under the laws of a foreign jurisdiction within which it was executed is valid in this state so far as it relates to personal property"]; *Conservatorship of Hume* (2006) 139 Cal.App.4th 393, 398 ["*Property* is defined in the Probate Code, in section 62, in way [*sic*] that includes out-of-state real property: ' "Property means anything that may be the subject of ownership and includes both real and personal property and any interest therein" ' "].)[6]

Finally, Rose argues that factual issues remain regarding Oswaldo's intentions in creating and executing the El Salvador Will that should have

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[6] Rose cites *Estate of Katleman* (1993) 13 Cal.App.4th 51, 60, for the position that a testator's intent to disinherit a "surviving after acquired spouse" must appear in " 'strong and convincing language' " on the face of the will. (Accord, *Estate of Shannon* (1990) 224 Cal.App.3d 1148, 1153.) Since Rose was not disinherited, this authority is inapposite.

precluded the grant of summary adjudication. In particular, she insists Oswaldo never stated the El Salvador Will would be the exclusive means of provision for her and, in fact, that "Oswaldo did state his intention that I be provided for out of the properties he owned in San Mateo [County] in addition to what was in the El Salvador Will." For reasons identified *ante*, this argument fails. For purposes of our inquiry, evidence of Oswaldo's intentions is simply not relevant. Because Oswaldo executed a testamentary instrument (the El Salvador Will) during the course of his marriage to Rose which made her the beneficiary of his El Salvador property, she is not an omitted spouse for purposes of the Probate Code. Accordingly, as a matter of law, Rose is not entitled to a share of Oswaldo's California property.[7]

DISPOSITION

The orders granting summary adjudication in favor of defendants and denying Rose's motion for reconsideration are affirmed. Rose shall bear all costs on appeal.

Jackson, P. J.

WE CONCUR:

Simons, J.
Burns, J.

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[7] Because Oswaldo's intentions are not relevant to our inquiry, the trial court was correct to deny Rose's motion for reconsideration based on new evidence in the form of a friend's declaration attesting to the fact that Oswaldo expressed an intent to gift Rose his California property.