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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL ALLAHVERDI,

Petitioner and Appellant,

v.

SEROJ ASADOURIAN,

Claimant and Respondent.

B191586 c/w B194739

(Los Angeles County
Super. Ct. Nos. BP096901, BP096902)

APPEALS from orders of the Superior Court of Los Angeles County, Mitchell Beckloff, Commissioner. Vacated with directions.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marc L. Sallus, Ronald Gold and Justice B. Gold for Petitioner and Appellant.

Law Offices of David Glubok, David Glubok; Scherer, Bradford & Lyster and Christopher T. Bradford for Claimant and Respondent.

INTRODUCTION

Petitioner Michael Allahverdi (Michael) appeals from a May 23, 2006 order denying his “Petition for Determination of Violation of No Contest Clause by Seroj Asadourian” as a result of a will contest filed by Seroj Asadourian (Seroj). (No. B191586.) Michael also appeals from an October 24, 2006 order denying his “Petition for Determination that Seroj’s Challenge to the First Amendment of 1998 Carmen Asadourian Revocable Trust” is a violation of the trust’s no contest clause. (No. B194739.)

We consolidated the two appeals for purposes of argument and decision. We deny the motions to dismiss the appeals. We remand the matters to the trial court to hold a hearing to determine the applicability of Probate Code section 21307.¹

FACTS

On December 30, 1998, Carmen Asadourian (Carmen) executed a trust, naming her brother, Seroj, successor trustee and primary beneficiary of the trust. The trust contained a no contest clause which provided as follows: “If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly contests this instrument, any amendment to this instrument, or the will of the settlor in whole or in part, or opposes, objects to, or seeks to invalidate any of the provisions of this instrument or the will of the settlor, or seeks to succeed to any part of the estate of the settlor other than in the manner specified in this instrument or in the will of the settlor, then the right of that person to take any interest given to him or her by this instrument or any amendment to this instrument shall be void, and any gift or other

¹ Unless otherwise stated, all statutory references are to the Probate Code.

interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without issue.”

At the same time, Carmen executed a will. The will also contained a no contest clause, which provided: “If any person, directly or indirectly, contests the validity of this will in whole or in part, or opposes, objects to, or seeks to invalidate any of its provisions, or seeks to succeed to any part of my estate otherwise than in the manner specified in this will, any gift or other interest given to that person under this will shall be revoked and shall be disposed of as if he or she had predeceased me without issue.”

After the trust and will were executed, Carmen met and married Michael. Prior to their marriage, Carmen and Michael executed a premarital agreement, waiving all property rights and the right of inheritance as a pretermitted spouse. Prior to the marriage and continuing after the marriage, Carmen acquired real property, taking the title in her name only as her sole and separate property, or in her name only as trustee of the trust.

Carmen was diagnosed with cancer in 2002. On August 29, 2005, she allegedly executed a new will.² On September 29, 2005, Carmen allegedly executed The First Amendment to the 1998 Carmen Asadourian Revocable Trust. The first amendment changed the nomination of the successor trustee, devised real property to a niece who was not born at the time the initial trust was established in 1998, and made Michael primary beneficiary of the residue of the trust. Carmen died on November 1, 2005. On November 7, 2005, Seroj filed a petition for probate of the 1998 will and for issuance of letters testamentary to himself, on the basis that the 1998 will was the true and correct last will and testament of Carmen. Seroj was the nominated executor in the will, which left nearly all of Carmen’s estate to the trust.

Michael filed objections to Seroj’s petition and produced copies of the 2005 will, the first amendment to the trust and the revocation of Carmen’s premarital agreement.

² She also amended her trust in September 2005 adding her husband and a niece as beneficiaries. In addition, she and Michael revoked their premarital agreement in October 2002.

The effect of the documents would have been to transfer nearly all of Carmen's estate to Michael and away from Seroj.

On November 28, 2005, Michael filed a petition for probate of the August 29, 2005 will. On January 9, 2006, Seroj filed a will contest. The will contest was predicated on Seroj's allegation that after September 2004, Carmen was too ill from cancer to sign her name or understand the significance of legal documents. The will contest asserted claims that the 2005 will, first amendment to the trust and revocation of the premarital agreement were forged. Thereafter, Seroj filed his first amended will contest alleging forgery, fraud, undue influence, and lack of capacity.

On February 21, 2006, Michael filed a petition to enforce the trust's no contest clause. The probate court ultimately determined that Carmen did not intend the trust's no contest clause to apply to any codicil or subsequent will, but intended it to apply only to her existing 1998 will. The court determined that Seroj had not challenged the December 30, 1998 will, but the August 29, 2005 will. As a result, he had not violated the no contest clause of the trust. The order was filed on May 23, 2006.

On March 8, 2006, Seroj filed a pleading entitled "Petition for Determination of Validity of First Amendment to the 1998 Carmen Asadourian Revocable Trust." Additionally, on March 29, 2006, Seroj filed objections to Michael's petition for a determination of the validity of the first amendment to the 1998 Carmen Asadourian Revocable Trust.

On June 1, 2006, Michael filed another petition requesting the court to enforce the trust's no contest clause. On August 1, 2006, Seroj filed objections to petition for determination of violation of no contest clause.

On September 25, 2006, the probate court issued its ruling, finding that the petition filed by Seroj was not a violation of the no contest clause, in that the prayer in the petition was very narrow and based on forgery. The order was filed on October 24, 2006.

DISCUSSION

A. *Motion to Dismiss*

Seroj moved to dismiss the consolidated appeals on the ground they were taken from nonappealable orders. We find the May 23 and the October 24, 2006 orders are appealable and deny the motions to dismiss.

Code of Civil Procedure section 904.1, subdivision (a)(10), provides that an appeal may be taken from an order made appealable by the provisions of the Probate Code. Section 1303 governs appeals involving decedents' estates, and section 1304 governs appeals involving trusts. Under section 1304, subdivision (a), "[a]ny final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9" is appealable, with limited exceptions not applicable here. Only if the orders from which Michael appeals fall within the foregoing sections are they appealable. (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125-1126.)

Section 17200 sets forth proceedings concerning the internal affairs of a trust concerning which a trustee or beneficiary may petition the probate court. In the first appeal (No. B191586), the order appealed from is purportedly a determination as to whether Seroj violated the no contest clause in the trust by his will contest. However, the order is, in effect, a determination as to the construction of the no contest clause in the trust. (Cf. *Estate of Baker* (1915) 170 Cal. 578, 583.) The court determined that the no contest clause in the trust must be construed to apply only to the 1998 will, not the 2005 will. Insofar as it is a determination as to the construction of the trust, it is appealable. (§§ 1304, subd. (a), 17200, subd. (b)(1).)

The order in the second appeal (No. B194739) is also appealable. While the order merely denies Michael's petition for a determination that Seroj's challenge to the first amendment to the trust violates the trust's no contest clause, it may be interpreted as an order to determine the construction of the trust. As such, it is appealable. (§§ 1304, subd. (a), 17200, subd. (b)(1).)

B. *Section 21307*³

The trial court determined that the no contest language in the 1998 trust applied only to Carmen's existing will and the no contest clause would not apply to any subsequent will to resolve the issue concerning the will contest.⁴

Even assuming *arguendo* that the no contest provision in the 1998 trust would apply to the 2005 will and the challenge to the first amendment to the trust was not a permissible challenge, the no contest clause may be unenforceable against Seroj if his pleadings fall within the statutory exception to the enforceability of no contest clauses set forth in section 21307, subdivision (a). Because we reach our decision based upon section 21307, subdivision (a), we need not and do not reach the merits of the other issues raised by Michael.

It appears that Michael "drafted or transcribed" (§ 21307, subd. (a)) the 2005 will and first amendment to the trust. Michael argues that because he did not draft the trust which contained the no contest clause he attempts to enforce, the exceptions set forth in section 21307 are not applicable to Seroj's challenge to the 2005 will and trust amendment. We disagree. While section 21307, subdivision (b), refers to the instrument

³ Section 21307 provides as follows: "A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons:

"(a) A person who drafted or transcribed the instrument.

"(b) A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor instructed the drafter to include the contents of the provision or the no contest clause.

"(c) A person who acted as a witness to the instrument."

⁴ While it is clear that by its terms, the no contest clause in the 1998 trust extends to amendments to the trust, the trial court determined that the challenge to the first amendment to the trust based upon forgery was a permissible challenge, allowed by section 21306, subdivision (a). This section provides that "[a] no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with reasonable cause, brings a contest that is limited to one or more of the following grounds: [¶] (1) Forgery."

containing the no contest clause, there is no such language in section 21307, subdivision (a). A plain reading of the statute shows the legislative intent that when a person drafts an “instrument” containing a provision benefiting the drafter, and that instrument is contested with probable cause, the drafter cannot enforce a no contest clause against the contestant.

If section 21307, subdivision (a), applies, then a number of the issues before the probate court may be resolved on that basis. Accordingly, we will remand the matter to the probate court for a determination as to the applicability of section 21307, subdivision (a)—that is, to determine (1) whether Michael in fact “drafted or transcribed” the 2005 will and first amendment to the trust, and (2) whether Seroj had probable cause to file his will and trust contests.

DISPOSITION

The motions to dismiss the appeals from the May 23, 2006 order and the October 24, 2006 order are denied. The orders are vacated. The matter is remanded to the probate court with directions to hold an evidentiary hearing on the applicability of section 21307 to the contest to the 2005 will and the contest to the first amendment to the trust by determining whether Michael drafted or transcribed these documents and whether Seroj had probable cause to file his will and trust contests. Thereafter, the probate court is to hold any further proceedings it deems necessary. The parties are to bear their own costs on appeal.

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JACKSON, J.*

We concur:

VOGEL, Acting P. J.

ROTHSCHILD, J.

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