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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

KATHRYN A. GREENELSH, as  
Cotrustee, etc.,

Plaintiff and Appellant,

v.

ROBERT L. JOHNSON, as Cotrustee, etc.,

Defendant and Respondent.

2d Civil No. B198228  
(Super. Ct. No. PR050017)  
(San Luis Obispo County)

Kathryn Greenelsh (Greenelsh) appeals an order of the probate court that a demand for arbitration violated a trust's no contest clause.<sup>1</sup> She contends that her arbitration demand is not a contest because it does not pertain to an instrument, would not nullify or alter any provision of the trust, and is permitted by an express provision of the trust requiring arbitration of disputes. She also contends that the no contest clause does not apply to actions alleging trustee misconduct, and that her proceeding is statutorily exempt from the no contest clause because it alleges improper influence in preparing a trust instrument. (Prob. Code, § 21307, subd. (b).)<sup>2</sup> We affirm.

<sup>1</sup> The order is appealable. (Prob. Code, § 1304, subd. (d).)

<sup>2</sup> All statutory references are to the Probate Code.

## FACTUAL AND PROCEDURAL HISTORY

In August 1993, Walter and Florence Warren, a married couple, created the Warren Family Trust (the "Trust"). Walter M. Warren, Florence Warren, Greenelsh, and William E. Warren were the initial trustees of the Trust. William and Greenelsh are Walter and Florence's children. Walter died in August 1996, and William died in July 2003.<sup>3</sup>

In July 2003, Florence named respondent Robert L. Johnson (Johnson), her son by a prior marriage, to succeed her as a trustee of the Trust. The Trust agreement provides that each trustee "shall have the power to designate a successor trustee(s) to act when he or she becomes unable or unwilling to act as Trustee of the trust(s). . . . Any Trustee may resign at any time."

In September 2003, Florence, using her own counsel and with the approval of a special trustee, withdrew all of her assets in her survivor's trust. The Trust provides that, upon the death of Walter or Florence, the surviving spouse's interest in the community estate is placed into a survivor's trust. The surviving spouse "shall have the right to withdraw all or any part of the Trust Estate in the Survivor's Trust . . . by an instrument in writing approved by the Special Trustee. . . . The Trustees shall comply with any such written directions and shall have no responsibility whatsoever to inquire into or determine for what purpose any such withdrawals are made."

The Trust includes a no contest provision stating in relevant part that if "any beneficiary under this Trust or any amendments thereto . . . seeks to obtain in any proceeding in any court or before any arbitrator an adjudication that this Trust or any of its provisions is void, or seeks otherwise to void, nullify, set aside this Trust or any of its provisions, including amendments hereto, or to change provisions which are clearly and unambiguously expressed herein, . . . or through other means endeavors to secure or take any part of the Trust Estate in any manner

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<sup>3</sup> For clarity, we sometimes refer to members of the Warren family by their first names.

other than as set forth herein, then the right of that person to take any interest given to him or her by this Trust shall be determined as it would have been determined had such person predeceased the execution of the trust instrument without surviving issue. The provisions of this paragraph include . . . the act of filing of a petition, application, complaint, motion, or other document with any court or other arbitrator for the purpose of accomplishing any of the acts described herein."

In 2005, Greenelsh filed an application under the "safe harbor" provision in section 21320 asking the court to rule that a proposed petition to compel arbitration would not constitute a contest under the Trust's no contest clause.<sup>4</sup> The petition to compel arbitration alleged, among other things, that Florence did not have the mental capacity to name Johnson to succeed her as trustee, or to withdraw funds from her survivor's trust. The court denied the application without prejudice, concluding that the petition to compel arbitration alleged "a mix of disputes that may or may not trigger the no contest clause," but that "[a] dispute concerning Florence Warren's capacity to withdraw funds from the survivor's trust and appoint Robert Johnson as a successor trustee could be identified as a direct contest under Probate Code Section 21300(b)(2)."

In June 2006, Greenelsh filed a second section 21320 application requesting an order that a proposed petition for declaratory relief was not a contest. The petition sought a declaration that, after William Warren's death, Greenelsh became and is now the sole trustee of the Trust. The petition for declaratory judgment alleged that Florence executed a power of attorney to her

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<sup>4</sup> Section 21320 provides in relevant part: "(a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary . . . would be a contest within the terms of the no contest clause. [¶] (b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a). [¶] (c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required."

husband, the power of attorney was "activated" in July 2001 by Greenelsh and William Warren as successor attorneys-in-fact, and Greenelsh and William determined that Florence was "incompetent" and "unable to properly manage her assets or finances." The petition also alleged that the determination of incompetence "met the requirements of" a Trust provision stating that, in the event any trustee becomes unable to participate in trust activities, the other trustees may "make any and all decisions regarding the Trust Estate" during the period of incapacity. The court denied the application for a section 21320 order.

In October 2006, Greenelsh served a notice demanding arbitration which alleged that Johnson falsely claimed to have become a trustee in 2003, improperly caused Florence to transfer assets out of her survivor's trust into her "personal ownership" and had committed a variety of other acts, including the filing of lawsuits, which were detrimental to the Trust and its property. The notice demanded arbitration of these disputes, and sought to "remove" Johnson from the Trust and "abate" any rights Johnson may have "to take any interest given to him by" the Trust.

In response to the notice demanding arbitration, Johnson filed a petition to enforce the no contest clause of the Trust. Johnson's petition sought a determination that the initiation of arbitration by Greenelsh to invalidate Florence's withdrawal of assets from the survivor's trust and appointment of Johnson as successor trustee violated the no contest clause of the Trust as a matter of law. Although Greenelsh later withdrew her demand for arbitration, the probate court granted Johnson's petition, ruling that Greenelsh had violated the no contest clause in the Trust by initiating arbitration.

#### DISCUSSION

Greenelsh contends the trial court erred in ruling that her notice demanding arbitration violated the no contest clause of the Trust. Based on our independent review of the language of the Trust, we conclude that the trial court correctly ruled that the initiation of arbitration by Greenelsh constituted a violation

of the Trust's no contest clause. (*Burch v. George* (1994) 7 Cal.4th 246, 254; *McKenzie v. Vanderpoel* (2007) 151 Cal.App.4th 1442, 1449-1450.)

A no contest clause requires a beneficiary to acquiesce to the terms of a trust or will as a condition to receiving its benefits, and disinherits any beneficiary who challenges the instrument. (*Burch v. George, supra*, 7 Cal.4th 246, 254-255, 265; *Estate of Hite* (1909) 155 Cal. 436, 441.) A contest is defined as "any action identified in a 'no contest clause' as a violation of the clause," and includes "a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms" on various grounds including "lack of capacity." (§ 21300, subs. (a), (b)(2).) The circumstances of each case and the particular language used in the no contest clause determines whether there has been a contest. (*Burch*, at pp. 254-255.)

No contest clauses are valid and favored in California as a means to discourage litigation and give effect to the expressed purpose of a settlor or testator. (*Burch v. George, supra*, 7 Cal.4th 246, 254; *Estate of Ferber* (1998) 66 Cal.App.4th 244, 249.) A no contest clause is strictly construed to avoid forfeiture, but should not be construed to immunize a beneficiary who attempts to nullify or alter a provision of a trust or will or frustrate the intent of the settlor or testator. (*Burch*, at p. 255; *Estate of Black* (1984) 160 Cal.App.3d 582, 587.)

The arbitration initiated by Greenelsh directly attacks provisions of the Trust in an attempt to change Walter and Florence's testamentary plan and, accordingly, directly contravenes the express language of the no contest clause. The clause applies to "any proceeding in any court or before any arbitrator" that would "void, nullify [or] set aside" any provision of the Trust agreement or "change" any clear and unambiguous provision, or that attempts "to secure or take" any Trust asset in a manner not set forth in the Trust agreement. The arbitration initiated by Greenelsh sought to nullify the unambiguous right given to a settlor by the Trust agreement to appoint a successor trustee when he or she chooses, and to nullify the unambiguous right given to a surviving settlor to

transfer assets in the survivor's trust from the Trust to the survivor individually. Also, by seeking to reverse withdrawal of assets from the survivor's trust, Greenelsh is attempting to "secure or take" a portion of the former trust estate in a manner contrary to the estate plan set forth in the Trust.

Greenelsh argues that her arbitration petition does not fall within the section 21300, subdivision (b)(2) definition of a contest because she did not allege "the invalidity of an instrument." She argues that the documents naming Johnson as successor trustee and withdrawing assets from the survivor's trust are not "instruments" because they are not a "writing that designates a beneficiary or makes a donative transfer of property." (§ 45.) We disagree.

A contest may "indirectly challenge[] the validity of an instrument." (§ 21300, subd. (c).) Even if the documents appointing Johnson as trustee and withdrawing assets from the survivor's trust are not considered "instruments," the arbitration initiated by Greenelsh necessarily includes a challenge to the provisions of the Trust agreement pertaining to those subjects. The broad language of the no contest clause makes this clear. The clause applies to actions regarding provisions of the Trust "including amendments," and to an attempt to secure or take a trust asset through any means.

Cases interpreting no contest clauses hold that they apply to actions and documents that may not qualify as instruments under the definition set forth in section 45. A no contest clause applies not only to specific provisions of the underlying trust agreement, but also to amendments that carry out the purposes of those instruments, and other actions that are contrary to a settlor's intent regarding the distribution of his or her assets. (See *Burch v. George*, *supra*, 7 Cal.4th at pp. 256, 275; *Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 171, fn. 3.) In *Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1420, the court concluded that a contest was not confined to a direct attack on a will or trust instrument but extended to a separate legal proceeding designed to thwart the testator's expressed wishes by invalidating a stock redemption agreement. Because the stock

redemption agreement was part of the decedent's estate plan, an attack on that agreement was an attack on the trust. (*Id.* at p. 1422.)

Greenelsh's withdrawal of her demand for arbitration before substantive adjudication of the issues does not change this result. The no contest clause applies to any proceeding in a court or "before any arbitrator" and to the filing of a "petition, application, complaint, motion, or other document" with a court or arbitrator "for the purpose of accomplishing any of the acts described herein." The courts have held that a dismissal or withdrawal of a legal proceeding does not moot a determination of whether the proceeding constituted a contest. (See *Estate of Hite, supra*, 155 Cal. 436, 442 [dismissal after compromise reached]; *Estate of Fuller* (1956) 143 Cal.App.2d 820, 822-823, 828 [dismissal after ruling on a demurrer and motion to strike]; see also *Estate of Bergland* (1919) 180 Cal. 629, 634.)

Greenelsh argues that the arbitration should be deemed not to violate the no contest clause on public policy grounds because it challenges the exercise of fiduciary power. We agree that an action alleging breach of fiduciary duties or an improper appointment or removal of a fiduciary does not violate a no contest clause. (§ 21305, subd. (b)(6), (7).) As a matter of public policy, a beneficiary should be permitted to bring a fiduciary's alleged misconduct to the court's attention without fear of being disinherited. (*Estate of Ferber, supra*, 66 Cal.App.4th 244, 251.)

In this case, however, Greenelsh is challenging Florence's capacity, not Johnson's breach of his fiduciary duty as a trustee of the Trust. Greenelsh does not claim Johnson mismanaged the Trust--she contends that he has never managed the Trust at all. She contends that Johnson has never been a trustee. She seeks a ruling that she is the sole trustee of the Trust based on a power of attorney she and William "activated" in an attempt to replace Florence with themselves as trustees.

The notice demanding arbitration includes lengthy factual allegations regarding the conduct of Johnson as administrator of William Warren's

will, as beneficiary of the Trust, and as a beneficiary under Florence's will. It asserts a series of acts by Johnson that have thwarted the wishes of Greenelsh, but does not allege Johnson breached his fiduciary duty to the Trust or to Florence. The fundamental issue in this case concerns the assets that went into the survivor's trust at the time of the death of Walter Warren. It is clear from the Trust that Florence as surviving spouse has complete control over those assets, including whether they would remain in the Trust or be transferred back to her in her individual capacity.

Other arguments made by Greenelsh on appeal also lack merit. She argues that the arbitration sought only an interpretation of ambiguous provisions of the Trust agreement, but identifies no such ambiguous provisions. Greenelsh claims the provision covering the appointment of a "special trustee" upon the death of one of the settlors is ambiguous. She emphasized in oral argument that, under this provision, Florence was converted from a trustee into a "special trustee" when Walter Warren died in 1996 and that, as a consequence, Johnson is ineligible to succeed her as trustee. This argument misreads the special trustee provision. The provision unambiguously provides that, upon the death of a settlor, the person who succeeds the deceased settlor as trustee is denominated a "special trustee." The provision cannot be interpreted reasonably to convert the surviving settlor into a "special trustee."<sup>5</sup>

In addition, Greenelsh's arguments that the Trust requires arbitration of all disputes and that she is acting as trustee rather than as a beneficiary are both disingenuous and unsupported by the language of the Trust. The arbitration provision requires arbitration of disputes regarding Trust property and operation, but nothing in the Trust permits the conclusion that the settlors intended the arbitration provision or Greenelsh's dual capacity as trustee and beneficiary to supersede or invalidate the no contest clause.

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<sup>5</sup> The record indicates that Forrest Warren became special trustee after Walter Warren's death.



Finally, Greenelsh argues that she is exempt from enforcement of the no contest clause pursuant to section 21307.<sup>6</sup> This issue was not presented to the probate court and cannot be raised for the first time on appeal. (E.g., *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746.) It raises an entirely new theory on appeal that would require the determination of factual issues that were not presented in the trial court. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 221-222, fn. 15.)

Furthermore, based on the allegations made by Greenelsh, we question whether section 21307 would apply. Section 21307 precludes enforcement of a no contest clause against a beneficiary who, with probable cause, contests a provision in a donative instrument benefiting a person who drafted the instrument, gave directions to the drafter, or acted as a witness. (*Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 256.) "The policy underlying section 21307 arises from the trust and power a testator or trustor necessarily places in those who participate in the drafting of a will or trust instrument. Because such participants are in a position where they can easily control or influence the distribution of property under the instrument to their benefit and contrary to the true intent of the trustor or testator, the Legislature has deemed it appropriate to guard against potential abuses by enacting section 21307." (*Id.* at p. 257.) The notice demanding arbitration does not assert that Johnson had anything to do with drafting of the Trust agreement, or that he benefited directly from Florence's withdrawal of assets from the survivor's trust, or that he did anything that increases his share of the Trust estate.

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<sup>6</sup> Section 21307 states in part: "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 . . . ."

## CONCLUSION

The remedy for proceeding in violation of a trust or will's no contest clause is serious, and section 21320 provides a "safe harbor" for a beneficiary to obtain an advance ruling whether a proposed legal action would be a contest under a no contest clause if it were to be filed. (*Estate of Ferber, supra*, 66 Cal.App.4th 244, 248-249, fn. 4.) On two occasions, Greenelsh sought section 21320 determinations that a proposed proceeding against Johnson would not be a contest. She was unsuccessful both times. Ignoring these rulings, Greenelsh initiated a proceeding raising substantively the same issues. Having been forewarned, Greenelsh reasonably cannot have expected any other result.

The order is affirmed. Respondent shall recover costs.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Martin J. Tangeman, Judge  
Superior Court County of San Luis Obispo

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David P. Weilbacher, Sandra Waite for Appellant Kathryn A. Greenelsh, as Cotrustee of the Warren Family Trust.

George ♦ Cyr, LLP, J.K. George, Anne C. Cyr for Respondent Robert L. Johnson, as Cotrustee of the Warren Family Trust.