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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

Estate of TIMOTHY KIRK SAURESSIG, Deceased. SCOTT SMITH, Petitioner and Appellant, v. SHIRLEY K. GOFF, Objector and Respondent.	B167907 (Los Angeles County Super. Ct. No. BP 076076)

APPEAL from orders of the Superior Court of Los Angeles County, H. Ronald Hauptman, Temporary Judge. (Pursuant to California Constitution, article VI, section 21.) Reversed.

Paul Buchberg for Petitioner and Appellant.

Hinojosa & Wallet, Lynard C. Hinojosa and Trudi Sabel for Objector and Respondent.

In this case we conclude that a person who otherwise satisfies the requirements of Probate Code section 6110[1] as a witness to the execution of a will may fulfill the signature requirement after the testator's death. Since the trial court concluded otherwise, we reverse.

FACTUAL AND PROCEDURAL SUMMARY

In December 1999, Timothy Kirk Sauressig went to Mail Boxes, Etc. in Van Nuys and asked proprietor Joongok Shin, who is a notary public, to notarize the execution of his will. Ms. Shin did so, and Sauressig delivered a copy of the 1999 will to his friend Scott Smith. On December 26, 2000, Sauressig again went to Mail Boxes, Etc. and asked Ms. Shin to notarize his will (the 2000 will). Ms. Shin notarized the 2000 will, and Sauressig delivered copies to Smith and Harry Ernst. Smith was appointed executor, and he, Ernst and Cliff Thomas were the sole beneficiaries under the 2000 will.

Sauressig died in August 2002. In October, Smith filed a petition for probate of the 2000 will. He filed a proof of subscribing witness, executed by Ms. Shin. Smith contended the 2000 will qualified as a holographic will because on the envelope containing the typed will, decedent had written in his own handwriting "DEC. 26th, 2000" and "TIMOTHY K SAURESSIG'S LAST WILL AND TESTAMENT."

The Public Administrator filed objections and exceptions to the petition, asserting that the proposed will failed to comply with the statutory requirements. He also filed a competing petition for letters of special administration. On December 16, 2002, the trial court denied the petition for probate of the 2000 will, finding that it did not qualify as a holographic will because its material terms were typed, and it did not qualify as a formal will because it contained the signature of only one witness. The court granted the petition for letters of special administration.

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[1] All statutory references are to the Probate Code unless otherwise indicated.

On December 23, 2002, Division One of this court published its opinion in *Estate of Eugene* (2002) 104 Cal.App.4th 907, 912, holding that an otherwise qualifying witness's subscription of a will after the testator's death is not prohibited by section 6110. In light of this new case, Smith renewed his petition for probate of the 2000 will, on the ground that there was a second qualifying witness to the decedent's execution of his will. This individual was Theodore Boody, who is the husband of notary Joonkok Shin and assists Ms. Shin in managing Mail Boxes, Etc. According to his supporting declaration, Mr. Boody heard decedent request that Ms. Shin notarize his will, saw decedent sign a document which he understood to be decedent's new will, and saw Ms. Shin notarize decedent's signature on the will. Mr. Boody stated that he was "ready and willing to sign the will as a witness to the signing of the will by [decedent] on December 26, 2000." Smith sought relief under Code of Civil Procedure section 473, reconsideration under Code of Civil Procedure section 1008, subdivision (b), or new trial.

Opposition to the motion was filed by claimant and interested person, Shirley K. Goff. The Public Administrator joined in the opposition. After hearing argument, the trial court denied the motion. Smith appeals from the order denying the petition for probate, and from the order denying his renewed petition.

DISCUSSION

I

We first address the issue of appealability. Appellant sought relief from the order denying the petition for probate on several alternative grounds: renewal of the petition "and/or" reconsideration of the order pursuant to Code of Civil Procedure section 1008, subdivision (b); relief from the order pursuant to Code of Civil Procedures section 473, subdivision (b); and/or new trial. Reconsideration was sought based on the existence of new law (*Estate of Eugene, supra*, 104 Cal.App.4th 907) and new facts (discovery of a second, non-subscribing witness to the execution of the will). Relief from the order was based on the grounds of reasonable mistake and surprise, based on counsel's failure to anticipate the holding in *Estate of Eugene* and consequent excusable neglect in failing to

discover pertinent facts. New trial was sought based on accident or surprise, newly discovered evidence, and the assertion that the order denying probate was contrary to law.

The court denied the motion and ordered respondent's counsel to prepare a notice of ruling. The record contains the court's minute order, which states, "Motion denied." There is no other notice of ruling in the record. Denial of a motion under Code of Civil Procedure section 473 is appealable. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 611.) There also is authority supporting the appealability of denial of a motion for reconsideration where, as here, it is based on new grounds not entertained in conjunction with the original order. (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 523, fn. 4; see also *Tunis v. Barrow* (1986) 184 Cal.App.3d 1069, 1076.) The appeal is properly before us. We turn to the merits.

II

"Before 1983, a formal or witnessed will had to be in writing, subscribed, acknowledged and published by the testator, and attested by two witnesses *in the presence of the testator*." (*Estate of Eugene, supra*, 104 Cal.App.4th at pp. 910-911; Prob. Code, former § 50, repealed Stats. 1983, ch. 842, § 18, p. 3024.) As part of a substantial overhaul of the Probate Code, former section 50 was replaced by section 6110, which "relaxed the formalities required under former Section 50 by eliminating the requirements (1) that the testator's signature be 'at the end' of the will, (2) that the testator 'declare' to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be 'at the end' of the will, (4) that the testator 'request' the witnesses to sign the will, and (5) that the witnesses sign the will in the testator's presence." (Recommendation proposing New Probate Code (Dec. 1989) 20 Cal. Law Revision Com. rep. (1990) p. 1420.)

In accordance with this intent to relax formalities, section 6110, subdivision (c) provides: "The will shall be witnessed by being signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the

testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will." Section 6110 was based on section 2-502 of the Uniform Probate Code. (See Tentative Recommendation relating to Wills and Intestate Succession (Nov. 1982) 16 Cal. Law Revision Com. rep. (1982) p. 2511.) Section 2-502, subdivision (a)(3) of the Uniform Probate Code requires that a will be "signed by at least two individuals, each of whom signed within a reasonable time after he [or she] witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will." (8 West's U. Laws Ann. (1998) U. Prob. Code, § 2-502, subd. (a)(3).) The comment to this section explains: "The witnesses must sign as witnesses . . . and must sign within a reasonable time after having witnessed the signing or acknowledgment. *There is, however, no requirement that the witnesses sign before the testator's death*; in a given case, the reasonable-time requirement could be satisfied even if the witnesses sign after the testator's death." (Italics added.) (8 West's U. Laws Ann. (1998) U. Prob. Code (1969) com. to § 2-502, p. 145.)

We find nothing in the language of section 6110, or in its inspiration, Uniform Probate Code section 2-502, to preclude an otherwise qualified witness from signing a will after the death of the testator. Nevertheless, there is a split of authority in California as to the validity of an after-death signature. In *Crook v. Contreras* (2002) 95 Cal.App.4th 1194, the court considered whether two documents complied with the witnessing requirements of section 6110 and therefore qualified as codicils. It was undisputed that both witnesses saw the testator sign the documents, but only one witness signed the documents at or about the time of their execution. Two years after the first document was executed, a year and a half after the second document was executed, and a month after the death of the testator, both witnesses signed witness attestations.

Finding no California law on point, the court looked to cases from other jurisdictions rejecting postdeath subscription of a will, and was "unpersuaded that we should chart a new course. Our independent construction of Probate Code section 6110, in light of its legislative history, discloses no indication that the Legislature intended by

its 1983 statutory revision to permit postdeath subscription of a will. A conclusion otherwise would attribute to the Legislature an intent to allow the validity of a will to depend upon the will or caprice of one who had been requested to perform the very simple act of becoming a witness by allowing such a person to wait until after the testator's death to decide whether or not to subscribe his or her signature to the will. Such an interpretation would invite fraud and subvert the basic intent of will authentication requirements. We conclude that the subscription of a will by two witnesses must occur prior to the testator's death, and a will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with Probate Code section 6110." (*Crook v. Contreras, supra*, 95 Cal.App.4th at p. 1205.)

A different conclusion was reached in *Estate of Eugene, supra*, 104 Cal.App.4th 907. In that case, two sisters had mutual wills prepared. They signed their wills in the presence of two witnesses. One witness signed both wills, but the other witness signed only one, inadvertently failing to sign the other. That omission was not discovered until after the testator's death. The court observed it was undisputed that the sisters executed mutual wills at the same time and in the same place, that both witnesses intended to sign both wills, that the omission of one witness's signature was an oversight, and, "perhaps most importantly -- there is not the slightest hint of fraud or any wrongdoing by anyone involved at the time the wills were executed or at any time thereafter . . . ." In light of those facts, the court read the plain language of section 6110 to express legislative intent to admit both wills to probate, and found substantial compliance with both the letter and the spirit of the rules governing the execution of formal wills. (*Estate of Eugene, supra*, 104 Cal.App.4th at pp. 912-913.) "Formal attestation rules exist to prevent fraud, not to encourage it by penalizing candor about the condition of a will when it is examined after the testator's death. For this reason, we conclude that, in the absence of legislative direction to the contrary, judicial inquiry should focus on a rule that best accommodates all circumstances surrounding the actual witnessing of a testator's unquestioned intent concerning the disposition of her estate." (*Id*. at p. 914.) The court disagreed with the

absolute rule articulated in *Crook v. Contreras*, and concluded that "at least on the facts of this case, a postdeath subscription of a will is not prohibited by section 6110." (*Ibid*.)

In *Estate of Rabinowitz* (2003) 114 Cal.App.4th 635, 640, the court found the holding of *Estate of Eugene*, rather than *Crook v. Contreras*, more persuasive. The court took pains to emphasize "how important the absence of any hint of fraud is to our holding. The *Contreras* court was reasonably concerned about the risk of fraud, for after-death attestations are potentially rife for abuse. If the evidence of no fraud in this case were less strong, we would be less certain to apply *Eugene* over *Contreras*. . . . Both recognized the potential for fraud, but *Contreras* found its facts posed an unacceptably high risk, whereas *Eugene* concluded its facts presented virtually no risk. We join *Contreras* and *Eugene* in recognizing such risks, but favor *Eugene's* analysis in the particulars of this case because, like *Eugene*, there is no evidence of fraud here." (114 Cal.App.4th 635, 640-641, fn. 4.)

Despite the attempt by respondent to imply otherwise, the record in our case contains no evidence of fraud. No one challenged the authenticity of the decedent's signature on the 2000 will. There was no challenge to the Proof of Subscribing Witness executed by Ms. Shin, in which she states that the decedent signed his name in her presence, that the decedent acknowledged that the instrument he signed was his will, and that when she signed the instrument, Ms. Shin understood that it was his will. Nor was there evidence contradicting Mr. Boody's declaration that he was present at the Mail Boxes Etc. when decedent asked his wife, Ms. Shin, to notarize his will, that he saw decedent sign a document which he understood to be decedent's will, and that he was standing next to Ms. Shin at the time decedent signed the document. Most importantly, Ms. Shin states in her Proof of Subscribing Witness, and Mr. Boody states in his declaration, that they have no knowledge of facts indicating that the will, or any part of it, was procured by duress, menace, fraud, or undue influence.

Nothing in these undisputed facts indicates fraud in the execution of the will, or in the attestations of the two individuals who witnessed the execution of the will. "The requirements for due execution of a will set forth in section 6110, including the

requirement of two subscribing witnesses, exist to protect the testator from fraud or undue influence when the will is executed." (*Estate of Burdette* (2000) 81 Cal.App.4th 938, 945, fn. omitted.) That purpose appears adequately satisfied in this instance, despite the fact that only one of the two individuals who witnessed the execution of the will signed it before the testator's death. Where, as here, the second witness is available to testify, his credibility can be tested at the trial of a will contest, should one be filed. (See § 8253.) We fail to see how these circumstances present any greater opportunity for fraud than a situation where a purported witness whose signature appears on a will is no longer available.

It makes no difference whether Mr. Boody had the intent to witness the will. (See *Estate of Lee* (1964) 225 Cal.App.2d 578, 581.) It also was not necessary for the decedent to have intended that Mr. Boody be a witness to the signing of the will. The Probate Code no longer requires that the testator request the witnesses to sign the will. (Recommendation proposing New Probate Code, *supra,* 20 Cal. Law Revision Com. rep. p. 1420.) The issue is whether Mr. Boody did in fact witness decedent's execution of the will at the same time as Ms. Shin witnessed it, and whether he understood the document was the decedent's will. That is what section 6110 requires, and that is what Mr. Boody stated in his declaration, signed under penalty of perjury.

Under these circumstances, we conclude the trial court abused its discretion in denying appellant's motion for reconsideration of the order denying the petition for probate of decedent's will, and in denying that petition.

DISPOSITION

The orders denying reconsideration and denying appellant's petition for probate of the 2000 will are reversed. Appellant is to have his costs on appeal.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

GRIMES, J.*

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