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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NICHOLAS BLEICH et al., Plaintiffs and Appellants, v. DANIEL BLEICH, Defendant and Respondent.	B287236 (Los Angeles County Super. Ct. No. BC655246)

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

Law Office of Sara B. Poster and Sara B. Poster for Plaintiffs and Appellants.

Greines, Martin, Stein & Richland LLP, Cynthia E. Tobisman and Edward L. Xanders; Oldman, Cooley, Sallus, Birnberg, Coleman, & Gold and Susan J. Cooley for Defendant and Respondent.

INTRODUCTION

Brothers Nicholas Bleich and Matthew Bleich filed this action against their uncle Daniel Bleich for intentional interference with expectation of inheritance. The probate court granted Daniel's motion for judgment on the pleadings and entered judgment. Nicholas and Matthew contend the court erred in ruling they could not pursue this action because they had an adequate and exclusive probate remedy. They also contend the court erred in denying them leave to amend their complaint. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *David and Ricky Bleich Establish the Bleich Family Trust and Execute Its First Restatement*

David and Florence "Ricky" Bleich, husband and wife, had four children: Daniel, Catherine, and two other sons. David and Ricky also had several grandchildren, among them Nicholas and Matthew, nephews of Daniel and Catherine.

In 1988, as part of their estate plan, David and Ricky transferred substantially all their assets to the Bleich Family Trust (the Trust) and designated themselves co-trustees of the Trust. David and Ricky amended and restated the Trust in

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[1] Where, as here, we review an order granting a motion for judgment on the pleadings, we assume the truth of all facts reasonably inferable from the facts pleaded, the facts in exhibits attached to the complaint, and the facts subject to judicial notice. (*Fiorini v. City Brewing Co., LLC* (2014) 231 Cal.App.4th 306, 322, fn. 12.)

April 2005, and amended that restatement in March 2006 and again in July 2006. The restated Trust as amended in July 2006 (the First Restatement) provided that, upon the death of the surviving spouse, Nicholas and Matthew would each receive 10 percent of the Trust's assets and Matthew would be a successor co-trustee. It also provided that, upon the death of the first spouse, the surviving spouse would have a limited "power of appointment" to modify the distribution of Trust assets upon his or her death.

The First Restatement was the zenith of Nicholas and Matthew's expected inheritance and reflected their "very close" relationship with their grandparents. Indeed, in the years before and after execution of the First Restatement, Ricky told Nicholas, Matthew, and others that it was important to her to include Nicholas and Matthew in the estate plan and that she and David had decided to leave them a "substantial inheritance."

B. *As Ricky's Health Declines, She and David Execute Additional Restatements of the Trust*

In 2008 Ricky began to exhibit signs of dementia. And in 2009, with several family members expressing alarm over Ricky's deteriorating condition, Daniel moved in with Ricky and David to become Ricky's full-time caregiver. By 2010 Ricky was having trouble carrying on conversations and remembering the names and identities of those close to her. Because of David's advanced age and declining health, he also became dependent on Daniel, and Daniel "became closely involved in handling [Ricky and David's] affairs." Daniel also "severely restricted" Ricky's access to her other children and her grandchildren and frustrated their attempts to visit with her. Nicholas and Matthew, however,

managed to visit Ricky at her house in November 2012. She did not recognize them and could not carry on a conversation. Afterward, Ricky's condition continued to worsen. By January 2014 Daniel was giving her antipsychotic medication to treat schizophrenia and manic episodes.

Meanwhile, between May 2010 and May 2014, Ricky and David executed four more Restatements of the Bleich Family Trust. The Second Restatement (May 2010) removed Matthew as a successor co-trustee and added Daniel as a successor co-trustee. It also provided that, by default—i.e., in the event the surviving spouse did not exercise the power of appointment—Daniel and his children would receive (collectively) over 50 percent of Trust assets, with Ricky and David's other sons receiving substantial shares and Nicholas and Matthew receiving $25,000 each. The Third Restatement (December 2010) made Daniel the sole default beneficiary and sole successor trustee. The Fourth Restatement (June 2013) made Daniel and Catherine the primary default beneficiaries, with Ricky and David's other sons receiving $50,000 each and Nicholas and Matthew receiving nothing. It also made Catherine's husband the successor trustee. Finally, the Fifth Restatement (May 2014) again made Daniel the sole default beneficiary and sole successor trustee.

C. *Ricky Dies, and David Exercises the Power of Appointment*

Ricky died in October 2014. David, in poor physical health and emotionally vulnerable, now relied on Daniel for assistance in virtually all his daily affairs—financial, legal, medical, and personal. In particular, Daniel took a hand in David's estate planning activities and limited David's access to other family

members. Under these circumstances, David exercised his power of appointment in a June 2015 trust instrument that modified distribution of Trust assets upon his death to give $1.25 million to charities, $250,000 to Catherine, and the balance to Daniel.

D. *Catherine Files a Petition in Probate, and David Dies*

In July 2015 Catherine filed a petition in the probate court under Probate Code section 17200[2] to challenge the validity of the Fifth Restatement and to restore the Fourth Restatement as the operative Trust instrument. She alleged that Ricky did not have capacity to execute the Fifth Restatement because of her mental condition and that David and Daniel exerted undue influence on her to execute the Fifth Restatement. After Daniel demurred to the petition, Catherine amended it to add a request for reformation of the Fourth Restatement to eliminate the provision giving the surviving spouse a power of appointment. Appraisals filed in the proceeding valued the Trust assets at $14.2 million.

David died in January 2016 with the probate proceeding pending. The proceeding was still pending when Nicholas and Matthew filed this action.

E. *Nicholas and Matthew File This Action, and the Trial Court Overrules Daniel's Demurrer*

In March 2017 Nicholas and Matthew filed this action against Daniel for intentional interference with an expected inheritance and, among other remedies, imposition of a constructive trust. Nicholas and Matthew alleged that the First Restatement was the last Trust document Ricky executed while still in possession of her cognitive faculties and that, in executing

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[2] Undesignated statutory references are to the Probate Code.

subsequent Restatements and the June 2015 exercise of his power of appointment, David knowingly acted against Ricky's wishes and in violation of his statutory duties to her by effectively "disinheriting" Nicholas and Matthew. Nicholas and Matthew further alleged that Daniel "knowingly provided substantial assistance and encouragement in connection with David's breaches of his duty to Ricky" and that, had Daniel "not exerted undue influence over David, David would have exercised his distributive power in such a way as to ensure [Nicholas and Matthew] received a substantial inheritance."

Daniel demurred to the complaint, contending it failed to state a cause of action for intentional interference with expected inheritance because Nicholas and Matthew had an adequate probate remedy. (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1056 (*Beckwith*) [plaintiff may not state a cause of action for intentional interference with expected inheritance "when an adequate probate remedy exists"].) Daniel argued that he served Nicholas and Matthew in June 2016 with notice of David's death pursuant to section 16061.7, which triggered the 120-day period for bringing an action to contest the Trust (i.e., the Fifth Restatement), and that neither brother filed a timely contest. Daniel also suggested Nicholas and Matthew had an adequate remedy in Catherine's probate proceeding, of which they were aware.

The trial court overruled Daniel's demurrer. After denying Daniel's request for judicial notice of documents relating to the section 16061.7 notice and the pending probate proceeding, the court found Daniel's "fundamental argument that Plaintiffs had received notice pursuant to Probate Code § 16061.7 of decedent David Bleich's death to trigger the 120-day period to bring an

action in probate court to challenge the trust is not supported by the record at this time." (Italics omitted.) The court also ruled Daniel's argument "was not sufficiently developed . . . in the moving papers, especially in that [he] presented an inadequate discussion of how the probate proceedings offered Plaintiffs an adequate remedy in light of their allegations in the Complaint." The court stated, "Of course, [Daniel] is free to raise this issue as an affirmative defense and/or to seek the same remedy by means of a different type of motion." The court ordered Daniel to answer the complaint, which he did.

F. *The Probate Court Grants Daniel's Motion for Judgment on the Pleadings*

Daniel proceeded to file a notice of related case, indicating that this action and the probate proceeding by Catherine involved the same parties, the same or similar claims, and the same property. Deeming the cases related, the superior court reassigned this action to the probate department courtroom in which Catherine's probate proceeding was pending.

After reassignment of the case, Daniel filed a motion for judgment on the pleadings, again contending Nicholas and Matthew failed to state a cause of action for intentional interference with expectation of inheritance because they had an adequate probate remedy. Daniel also contended the one-year statute of limitations in Code of Civil Procedure section 366.3 barred the action.

On September 27, 2017 the probate court granted the motion, ruling the right to assert a cause of action for intentional interference with expectation of inheritance "exists only in those who have no standing to pursue remedies for wrongful conduct in

a probate setting." The court stated: "The issue of Probate Code section 16061.7 notice is immaterial. Whether Plaintiffs did or did not receive notice, as trust beneficiaries who have allegedly been wrongfully deprived of their beneficial expectancy as alleged in [their] complaint, they have remedies under the Probate Code. Those remedies are exclusive." The minute order reflecting this ruling indicated the court granted Daniel's motion "with leave to amend." A week later, however, the court, in a nunc pro tunc order, observed that "through inadvertence and clerical error" the minute order did not correctly reflect the court's ruling. The court corrected the order to read that the court granted Daniel's motion "with out [*sic*] leave to amend."

G. *After Nicholas and Matthew File a Motion for Reconsideration, the Probate Court Enters Judgment*

On October 16, 2017 Nicholas and Matthew moved for reconsideration of the order granting Daniel's motion for judgment on the pleadings without leave to amend. In support of the motion, they submitted a proposed amended complaint that they argued contained new allegations establishing they lacked an adequate probate remedy. The hearing on the motion was set for November 20, 2017.

On November 2, 2017, however, the probate court signed a document titled "[Proposed] JUDGMENT RE MOTION FOR JUDGMENT ON THE PLEADINGS," which Daniel had apparently submitted to the court on October 20, 2017.[3] This

[3] The copy in the record does not indicate when the probate court received this document. A proof of service, however, indicates counsel for Daniel served it on October 20, 2017, the

document recited the court's ruling granting Daniel's motion for judgment on the pleadings without leave to amend. It also stated that Nicholas and Matthew had standing in probate court to pursue their claims, that they had "appropriate remedies" under the Probate Code, that those remedies were "exclusive," and that therefore Nicholas and Matthew could not pursue their alleged "grievances . . . and remedies therefor in civil court" or, more specifically, "pursue the civil action of Intentional Interference with Expectation of Inheritance." The document did not, however, state the court was dismissing the action or entering judgment in favor of Daniel, and it did not specifically address Nicholas and Matthew's request for imposition of a constructive trust, which they had pleaded as a separate cause of action.

On November 13, 2017 Nicholas and Matthew filed a reply brief in support of their motion for reconsideration. On November 16, 2017, however, counsel for Daniel informed counsel for Nicholas and Matthew that earlier that day, during a hearing in the probate proceeding—a hearing not attended by Nicholas, Matthew, or their counsel and of which they claim they did not have notice—the court directed counsel for Daniel to tell counsel for Nicholas and Matthew their motion for reconsideration was "off calendar . . . as the case is over" and the court had entered judgment.

Counsel for Nicholas and Matthew appeared on November 20, 2017 for the hearing on the motion for reconsideration and asked why the court had taken the motion off calendar. The court stated that the November 2, 2017 judgment had disposed of all issues in the case, that the court therefore

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date they assert (in their opening brief) Daniel submitted it to the court, which Daniel does not dispute.

lacked jurisdiction to consider the motion for reconsideration, and that any remedy Nicholas and Matthew might be entitled to would "be an appellate issue." Nicholas and Matthew timely appealed.[4]

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[4] Nicholas and Matthew complain that counsel for Daniel acted improperly by submitting a proposed judgment four days after they filed their motion for reconsideration of the court's order sustaining Daniel's demurrer and that the court should not have signed the judgment because doing so prematurely divested the court of jurisdiction to hear the motion. Nicholas and Matthew may have a point: A "trial court should not enter judgment while a timely motion for reconsideration is pending, unless by so entering a judgment the court intends to deny the motion for reconsideration by implication." (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1483; see *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 182 ["trial court should not have signed the order of dismissal while the motion for reconsideration was pending"].) There is no indication in the record here the trial court meant to impliedly deny the motion for reconsideration. And counsel for Nicholas and Matthew served counsel for Daniel with the motion for reconsideration on October 16, 2017, four days before counsel for Daniel submitted the proposed judgment for the court's signature. Nicholas and Matthew, however, do not argue that this procedural irregularity justifies reversal, nor do they ask this court to remand the matter to allow the trial court to hear their motion for reconsideration. In any event, we address below the amendments proposed by the motion for reconsideration.

DISCUSSION

A. *Applicable Law and Standard of Review*

"'A motion for judgment on the pleadings may be made on the ground that the complaint fails to state facts sufficient to constitute a legally cognizable claim. [Citations.] In reviewing the grant of such a motion, an appellate court applies the same rules that govern review of the sustaining of a general demurrer. [Citation.] Thus, "we are not bound by the determination of the trial court, but are required to render our independent judgment on whether a cause of action has been stated."' [Citation.] 'When conducting this independent review, appellate courts "treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law."' [Citation.] '"The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken."'" (*Monsanto Co. v. Office of Environmental Health Hazard Assessment* (2018) 22 Cal.App.5th 534, 544-545 (*Monsanto*)).

"Whether a motion for judgment on the pleadings should be granted with or without leave to amend depends on 'whether there is a reasonable possibility that the defect can be cured by amendment . . . .' [Citation.] When a cure is a reasonable possibility, the trial court abuses its discretion by not granting leave to amend and a reviewing court must reverse. [Citation.] 'The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402; see *Monsanto*, *supra*, 22 Cal.App.5th at p. 545.)

B. *The Probate Court Did Not Err in Granting Daniel's Motion for Judgment on the Pleadings Because Nicholas and Matthew Had an Adequate Probate Remedy*

1. *The Allegations of Intentional Interference with Expectation of Inheritance*

To state a cause of action for intentional interference with expectation of inheritance, the plaintiff must allege (1) "expectancy of an inheritance"; (2) "interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference"; (3) "causation," i.e., "'there must be . . . a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator . . . if there had been no such interference'"; (4) "intent," i.e., "the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it"; and (5) damages. (*Beckwith*, *supra*, 205 Cal.App.4th at p. 1057; see *Munn v. Briggs* (2010) 185 Cal.App.4th 578, 588 (*Munn*).)

Nicholas and Matthew argue they satisfied the first element by alleging that, "[i]n the years preceding and following the execution of the First Restatement," Ricky frequently expressed her intent to leave Nicholas and Matthew "a substantial inheritance." Nicholas and Matthew also point to their allegation that the First Restatement, the last trust instrument Ricky executed while still possessing "her cognitive faculties," gave Nicholas and Matthew each 10 percent of the Trust's assets upon the death of the surviving spouse.

Nicholas and Matthew argue they satisfied the second element by alleging Daniel aided and abetted David in breaching "various duties" David owed to Ricky. In particular, David allegedly violated a statutory duty "to act with the highest good faith and fair dealing toward Ricky"[5] by "entering into various Restatements with [her] while intending to exercise one of the benefits he obtained therefrom—namely, the power of the surviving spouse to distribute the Trust's assets . . . —in a manner contrary to Ricky's wishes" and by later exercising his power in that manner. Nicholas and Matthew argue they further satisfied the second element by alleging Daniel "exert[ed] undue influence over David and Ricky in procuring the testamentary instruments that ultimately benefited him."

Nicholas and Matthew argue they satisfied the third element, causation, by alleging that, but for Daniel's aiding and abetting David's breach of duties to Ricky, "David would not have entered into various of the restatements with Ricky while intending to exercise one of the benefits he obtained therefrom—namely, the continuation of the power of appointment conferred on the surviving spouse—in a way . . . contrary to Ricky's true wishes. [¶] Rather, David (a) would have been candid with Ricky about his intentions vis-à-vis the power of appointment—as a result of which Ricky would never have agreed to enter into the

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[5] Nicholas and Matthew cite Family Code section 721, subdivision (b), which provides that in property-related "transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other."

Second, Third, Fourth, and Fifth Restatements as written, but would have insisted that plaintiffs' interests be protected . . . ; and/or (b) never would have presented Ricky with trust documents that he intended to use in a way contrary to her wishes, but instead would have presented her with trust documents that would have ensured that her wishes with respect to plaintiffs would be carried out." The brothers argue they further satisfied the causation element by alleging that, but for Daniel's undue influence over David and Ricky, "the estate-planning instruments that were ultimately executed—the ones that cut plaintiffs out of David and Ricky's estate and left almost everything to defendant—would never have seen the light of day. . . . Instead, David and Ricky would in all likelihood have allowed to come to fruition what they had contemplated before defendant moved in on them: that their children and grandchildren—including plaintiffs—would share in their estate in roughly equal shares," as provided in the First Restatement.

Nicholas and Matthew argue they satisfied the fourth element, intent, because they alleged facts supporting an inference Daniel knew Nicholas and Matthew expected an inheritance and deliberately interfered with that expectation. And as for the final element, damages, Nicholas and Matthew argue "[t]he First Restatement—which is the last trust document that Ricky signed while of sound mind—contains the best approximation of what [Nicholas and Matthew] would have received had Ricky's wishes been honored and had defendant not interfered with those wishes." Citing appraisals of the Trust's assets in Catherine's probate proceeding, Nicholas and Matthew contend that under the First Restatement they would have each

inherited approximately $1.5 million and that these amounts are their damages.

2. *Nicholas and Matthew Had an Adequate Probate Remedy*

Daniel does not dispute his nephews sufficiently alleged all five elements of intentional interference with expected inheritance. He does contend, however, Nicholas and Matthew cannot maintain such a cause of action because they had an adequate remedy in probate. As Nicholas and Matthew concede, a plaintiff cannot recover for intentional interference with expected inheritance if "an adequate probate remedy exists." (*Beckwith*, *supra*, 205 Cal.App.4th at p. 1056; see *id.* at p. 1058 ["the tort . . . developed to provide a remedy when . . . the plaintiff had no independent tort action because the underlying tort was directed at the testator and . . . the plaintiff had no adequate remedy in probate"]; *Munn*, *supra*, 185 Cal.App.4th at pp. 587, 591-592 [same].) And here, Nicholas and Matthew had an adequate probate remedy.

Munn, *supra*, 185 Cal.App.4th 578 is instructive. There a brother brought an action against his sister for intentional interference with expected inheritance, alleging she exerted undue influence on their mother and convinced her to execute a codicil that reduced his inheritance. (*Id.* at pp. 581, 584.) He elected to bring this tort cause of action, rather than challenge the validity of the codicil in probate, to avoid triggering a no-contest clause in the codicil.[6] (*Id.* at. p. 591.) The *Munn* court

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[6] The no-contest clause left everything to the sister in the event he "unsuccessfully contested the validity of the codicil." (*Munn*, *supra*, 185 Cal.App.4th at p. 581.)

affirmed the trial court's order sustaining the sister's demurrer, concluding that, even if California recognized the tort of intentional interference with expected inheritance (it had not at the time), the brother could not recover because he had an adequate remedy in probate. (*Id.* at pp. 584, 594.) Reviewing cases from jurisdictions that had recognized the tort, the court in *Munn* stated: "'The proper focus of the tort is on the just distribution of estate assets; when that can be achieved in probate, the need for the tort disappears.'" (*Id.* at p. 590, italics omitted.) The court concluded the brother had an adequate probate remedy, notwithstanding the codicil's no-contest clause, because he had standing and adequate opportunity to challenge the validity of the codicil in probate court and, if successful, his "expected inheritance would have been fully reinstated." (*Id.*, at pp. 591-592.)

Here, Nicholas and Matthew allege they expected an inheritance as provided in the First Restatement. And they allege they would have received it had not David—with Daniel's assistance and under his undue influence—taken advantage of Ricky's deteriorated mental condition to execute, in violation of his statutory duties to her, all subsequent Restatements and the June 2015 exercise of his power of appointment. But as Nicholas and Matthew concede, these allegations, if proven, would have invalidated those trust documents in a probate proceeding. And under the circumstances alleged in the complaint, that result would have "fully reinstated" the inheritance Nicholas and Matthew claim they are entitled to under the First Restatement, which is the very (adequate) remedy they seek. (See *Munn*, *supra*, 185 Cal.App.4th at p. 592.)

As "interested person[s]" within the meaning of section 48, Nicholas and Matthew had standing to pursue that remedy in probate court by challenging the allegedly invalid trust documents. (See § 48, subd. (a) ["interested person" includes any "person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding"]; §§ 1040, 1043 ["[a]n interested person may appear and make a response or objection in writing at or before" a hearing held under the probate code]; *Schwan v. Permann* (2018) 28 Cal.App.5th 678, 698 [an "'interested person'" has "legal standing to contest the provisions of a will or trust"]; *Estate of Sobol* (2014) 225 Cal.App.4th 771, 781 ["[a] party has standing to contest a will if that contestant is an 'interested person'"]; *Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 728 ["[w]e have found no reason to conclude that this concept of an 'interested person' applies any differently to probate proceedings other than a will contest"].)

In fact, standing in probate court to challenge a will or trust requires only a prima facie showing of an interest in the estate under an earlier testamentary instrument, a showing Nicholas and Matthew made. (See *Estate of Harootenian* (1951) 38 Cal.2d 242, 248 [an "interested person" is one having a pecuniary interest that "may be impaired or defeated by the probate of the will or benefited by setting it aside," which includes "a legatee under a prior will," and "[a] prima facie showing of [that] interest is enough"]; *Estate of Plaut* (1945) 27 Cal.2d 424, 430 ["petitioner is at least a possible beneficiary under a plan of devolution established by the testator himself" and "should, therefore, be allowed to contest any testamentary disposition of the testator likely to impair her legacy"]; *Estate of*

Lind (1989) 209 Cal.App.3d 1424, 1431 ["appellant must allege his standing as an interested person," that is, "he must allege he would take under another will or by intestacy in the event of a successful contest to the purported will"]; *Jay v. Superior Court* (1970) 10 Cal.App.3d 754, 758 ["a beneficiary under an earlier will may contest a later one . . . if his pecuniary interest in the devolution of the property would . . . be affected or impaired by the later will or codicil"].) As the Supreme Court has explained, "Although the right to ask the court for an adjudication of his claim to the estate should be denied a person whose interest 'has not even the appearance of validity or substance' [citation], it should not be denied a person who, even though he may ultimately not receive any part of the estate, has at least established a prima facie interest in the estate." (*Estate of Plaut*, at pp. 428-429.)

Nicholas and Matthew argue they did not have standing to challenge the series of trust documents they alleged are invalid because they were not beneficiaries under "the current version of the trust," i.e., the Fifth Restatement. For that proposition Nicholas and Matthew cite *Barefoot v. Jennings* (2018) 27 Cal.App.5th 1 (*Barefoot*), which they describe as "the first published opinion to have recognized that only current beneficiaries of a trust have standing to contest the trust under section 17200." And according to Nicholas and Matthew, section 17200 "is the only vehicle by which the Bleich Family Trust could have been contested."

The precedential value of the Court of Appeal's opinion in *Barefoot*, however, has decreased. After Nicholas and Matthew filed the brief in which they made their argument based on *Barefoot*, the Supreme Court granted the former beneficiary's

petition for review in that case. (See *Barefoot v. Jennings* (Dec. 12, 2018, S251574) __ Cal.5th __ [240 Cal.Rptr.3d 702].) Consequently, the *Barefoot* decision has no "precedential effect," only "potentially persuasive value." (Cal. Rules of Court, rule 8.1115(e)(1).)

Moreover, the court's holding in *Barefoot* was narrower than Nicholas and Matthew suggest. The court in *Barefoot* held that only a current beneficiary or a trustee of a trust can "file a petition" (or "proceed with a petition") under section 17200. (*Barefoot*, *supra*, 27 Cal.App.5th at p. 6.)[7] Nicholas and Matthew do not explain how that holding would preclude them from appearing as interested persons in a pending probate proceeding—such as the one initiated by their aunt Catherine. (See §§ 1040, 1043.) As Nicholas and Matthew make clear in their complaint, they were aware of that proceeding within a few months of its inception, if not earlier. Thus, they were "interested persons" for purposes of that proceeding. (See *Estate of Sobol*, *supra*, 225 Cal.App.4th at p. 782 [section 48 "permits the court to designate as an interested person anyone having an interest in an estate which may be affected by a probate proceeding"]; *Arman v. Bank of America* (1999) 74 Cal.App.4th

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[7] The court stated: "The plain language of section 17200 makes clear that only a beneficiary or trustee of a trust can file a petition under section 17200. A beneficiary is further defined by statute as one that receives a present or future interest, whether vested or contingent, through a donative transfer from the trust. Under the [current version] of the Trust, appellant is not a beneficiary as she is expressly disinherited under that document and is not named as a trustee. She thus lacks standing to proceed with a petition under section 17200 attacking that trust." (*Barefoot*, *supra*, 27 Cal.App.5th at p. 6.)

697, 702-703 ["As we can see from section 48 and the cases that have interpreted it, standing for purposes of the Probate Code is a fluid concept dependent on the nature of the proceeding before the trial court and the parties' relationship to the proceeding, as well as to the trust (or estate)."].) And the proceeding involving their aunt was still pending at the time Nicholas and Matthew filed this action.

Finally, as Daniel points out, in reaching its conclusion the court in *Barefoot* appeared to place some importance on the consideration that someone who is not a current beneficiary may contest the validity of a trust by some procedure other than the filing of a petition under section 17200, though the court did not specify what that procedure might be. (See, e.g., *Barefoot*, *supra*, 27 Cal.App.5th at p. 7 ["it would be imprudent to open challenges to the internal workings of the current trust to those no longer included in the most current version of the trust when such individuals have alternative methods of seeking relief should they allege foul play"].) We have suggested one such procedure potentially applicable to the circumstances of this case. But to the extent that applying the court's decision in *Barefoot* would leave Nicholas and Matthew with no recourse in probate to challenge the validity of the trust documents at issue, it is not persuasive. (See *Estate of Plaut*, *supra*, 27 Cal.2d at pp. 428-430.)

3. *Waiver and Judicial Estoppel Do Not Apply*

Nicholas and Matthew argue the existence of an adequate probate remedy is an affirmative defense Daniel waived by not pleading it in his answer. But even if Daniel did not sufficiently allege the defense in his answer (he maintains he did, by alleging

Nicholas and Matthew "failed to allege facts sufficient to constitute a cause of action"), failure to raise an affirmative defense in the answer does not "of necessity preclude[ ]" a defendant from asserting that defense later in the proceedings. (*Ramos v. City of Santa Clara* (1973) 35 Cal.App.3d 93, 95; accord, *Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1225; see *Ramos*, at pp. 95-96 ["A trial court has discretion to allow amendment of any pleading at any stage of the proceedings and it has been said that liberality should be particularly displayed in allowing amendment of answers so that a defendant may assert all defenses available to him."].) This is particularly true where, as here, the plaintiffs did not argue in opposition to the motion that the defendant failed to allege the defense in his answer, essentially forfeiting the argument, and the plaintiffs did not make any showing of prejudice or surprise. (See *Ramos*, at p. 96 [affirming summary judgment based on an affirmative defense not asserted in the answer where the plaintiff did not raise the issue in the trial court and did not claim prejudice or surprise].) Although Nicholas and Matthew suggest Daniel's failure to assert the defense in his answer somehow deprived them of "the opportunity to challenge th[e] factual assertions" supporting his motion for judgment on the pleadings, they concede he made the same argument on demurrer, before answering the complaint. Besides, the "factual assertions" supporting his argument were in the complaint.

Nicholas and Matthew also contend Daniel should be judicially estopped from arguing they had standing in probate to pursue the remedy they seek because he supposedly took "the opposite position" in Catherine's probate action by arguing, in his

demurrer to her petition, that she lacked standing because her interest in the estate was "wiped out" by David's exercise of the power of appointment. (See *Padron v. Watchtower Bible and Tract Society of New York, Inc.* (2017) 16 Cal.App.5th 1246, 1263-1264 [judicial estoppel generally """"precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position""""]). But as Daniel points out, and the Bleich brothers do not contest, Nicholas and Matthew forfeited their judicial estoppel argument by failing to raise it in opposition to the motion for judgment on the pleadings. (See *Estate of Herzog* (2019) 33 Cal.App.5th 894, 907 [argument not made in probate court was forfeited on appeal]; *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 357 [appellants forfeited argument because they "failed to raise or develop it in the trial court"].)

C. *The Probate Court Did Not Err in Denying Nicholas and Matthew Leave To Amend*

Nicholas and Matthew contend the trial court abused its discretion in denying them leave to amend their complaint because, as demonstrated in the proposed amended complaint accompanying their motion for reconsideration, they can allege additional facts establishing they lacked an adequate probate remedy. They point to two such sets of proposed allegations, but neither would cure the defect in their complaint.

First, they propose to allege that, in addition to exercising his power of appointment in June 2015, David also exercised his power of appointment in November 2014. The November 2014 instrument "left the vast majority of the trust assets to a charity," "left nothing to" Nicholas and Matthew, and "left [Daniel] a

relatively minor portion of the trust assets." Nicholas and Matthew propose to allege that, by leaving them nothing, this instrument "was contrary to Ricky's wishes," but apparently not the result of undue influence by Daniel, because it made only a relatively minor gift to him. In fact, Nicholas and Matthew maintain the instrument was a valid exercise of David's appointment power under the First Restatement. In their words: "The upshot is this: even if plaintiffs were able to invalidate the Second through Fifth Restatements and David's June 2015 exercise of his power of appointment, the November 2014 exercise of his power of appointment would become effective. Meaning that plaintiffs would still take nothing." And because they would take nothing, even after successfully challenging all the allegedly invalid trust documents in probate, they argue they had no adequate remedy in probate for the loss of their expected inheritance.

But to the extent these proposed allegations plead Nicholas and Matthew out of a remedy in probate, they also plead them out of a civil cause of action for intentional interference with expected inheritance. Nicholas and Matthew propose to allege David executed a valid trust instrument that left them nothing. They do not suggest Daniel did anything "independently tortious" in connection with that instrument.[8] (*Beckwith*, *supra*, 205 Cal.App.4th at p. 1057.) But in that case Nicholas and Matthew

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[8] Indeed, it is important for their purposes to avoid suggesting Daniel did anything improper here—whether by exerting undue influence on David or by aiding and abetting him in committing a legally cognizable wrong—because that would present grounds for invalidating the November 2014 instrument in probate.

would no longer satisfy the causation element of their cause of action against Daniel for interference with expected inheritance: They did not lose their expected inheritance as a result of his tortious interference, but as a result of David's valid exercise of his appointment power. (See *ibid.*; *Munn*, *supra*, 185 Cal.App.4th at p. 588.)

Second, Nicholas and Matthew propose to allege that "improper transfers were made to [Daniel] from the trust assets" and that "Catherine herself may have looted assets from the trust as well." But beyond asserting in vague terms that these allegations, if proven, would have "adversely affected" the remedy available to them in probate, Nicholas and Matthew do not explain why, or cite any authority suggesting, they would not have had a remedy for those alleged wrongs in probate court. (Cf. *Estate of Stephens* (2002) 28 Cal.4th 665, 668 [petition to return property to a trust estate based on allegations of an improper inter vivos transfer]; *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1350 [affirming a probate court judgment finding the defendant liable for conversion and "in constructive trust of decedent's converted funds and trust property"].) Nicholas and Matthew have not shown a reasonable possibility of curing the defects of their complaint by amendment.[9]

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[9] Although the court's judgment did not separately state the court was entering judgment against Nicholas and Matthew on their cause of action for constructive trust, we interpret the judgment to dispose of that claim as well. A constructive trust is not a cause of action; it is a remedy. (See *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1485; *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 277, fn. 4; *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 398; *Embarcadero*

DISPOSITION

The judgment is affirmed. Daniel is to recover his costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.

Mun. Improvement Dist. v. County of Santa Barbara (2001) 88 Cal.App.4th 781, 793; *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3.) Because the trial court properly granted Daniel's motion for judgment on the pleadings, there was no substantive basis for imposing a constructive trust.