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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Estate of KRSTA BOSKO SAVIC, Deceased.	B275155 (Los Angeles County Super. Ct. No. BP141697)
ZIVOMIR SAVIC, Petitioner and Appellant, v. STEVEN C. SOSA, Special Administrator of the Estate of JANEEN WHALEN, Contestant and Appellant.	

APPEALS from an order of the Superior Court of Los Angeles County, David S. Cunningham, Judge. Affirmed; cross-appeal dismissed.

Law Offices of Steven C. Sosa and Steven C. Sosa for Contestant and Appellant.

Law Offices of Lillian Tomich, Lillian Tomich; Law Offices of Christopher Carr and Christopher Carr for Petitioner and Appellant.

Krsta Bosko Savic died in 2005 at the age of 98. His son Zivomir[1] filed a petition for probate of Krsta's 1992 will, which left the entirety of Krsta's estate to Zivomir. Krsta's longtime neighbor and friend Janeen Whalen filed a competing petition for probate of a 2005 will, executed six weeks before Krsta's death, which left $1 to Zivomir and the remainder of Krsta's estate to Whalen.

In its statement of decision following a bench trial on the competing petitions, the trial court found the 2005 will was valid, but that Whalen had been Krsta's "care custodian" (care custodian) within the meaning of Probate Code former section 21350, subdivision (a).[2] Thus, Whalen was statutorily disqualified from inheriting under the will unless she presented clear and convincing evidence the donative transfer to her was free of undue influence. (Former §§ 21350, subd. (a)(6), 21351, subd. (d).) The trial court found Whalen failed to meet this

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[1] Because Krsta, Zivomir, Krsta's second wife Dorothy, and Zivomir's wife Slavka share the same last name, we refer to them by their first names to avoid confusion.

[2] All undesignated statutory references are to the Probate Code.

burden; therefore, Zivomir inherited Krsta's estate under the 2005 will.

We conclude Whalen was a care custodian because she provided "social services" to Krista during the last year of his life, as that term is used in Welfare and Institutions Code section 15610.17, subdivision (y), including visiting him on a daily basis, controlling his finances, and taking care of his other daily needs. Thus, Whalen was presumptively disqualified from inheriting under Krsta's will. Further, Whalen failed to prove she did not exercise undue influence over Krsta. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The 1992 and 2005 Wills*

On January 30, 1992 Krsta executed a will leaving his entire estate to his wife Dorothy; if she predeceased him, to his only child Zivomir; and if Zivomir predeceased his wife Slavka, to her. Dorothy was named executor of the will, with Daniel Hromadka, the attorney who prepared the will, named her successor.

A will dated September 3, 2005 left Krsta's estate to Krsta's neighbor Whalen, except for a $1 bequest to Zivomir. However, if Whalen predeceased Krsta, Zivomir would inherit the entire estate. Whalen was named executor of the will. The will revoked all prior wills.

B. *The Petitions for Probate*

On May 20, 2013 Zivomir, through his cousin Bogosav Begovic, acting as his "attorney in fact," filed a petition for

probate of Krsta's 1992 will.[3] The petition estimated the value of the property of the estate at $340,715.92. On June 19, 2013 Whalen filed a petition for probate of Krsta's 2005 will, identifying herself as the executor.[4] The petition estimated the value of the property of the estate at $349,068.05.

On July 18, 2013 Whalen filed objections to Begovic's petition for probate of the 1992 will, asserting that Begovic lacked standing to bring the petition and that the later 2005 will was presumptively valid.

On August 13, 2013 Zivomir, through Begovic, filed a will contest challenging the 2005 will. Zivomir asserted that at the time of execution of the 2005 will, Krsta lacked testamentary capacity, Whalen exercised undue influence over Krsta, and Whalen was disqualified from inheriting under the will as a care custodian within the meaning of former section 21350, subdivision (a).

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[3] Begovic's petition does not include a power of attorney, nor is there one in the record. While this is the basis for one of Whalen's challenges to Zivomir's petition to probate the 1992 will, we do not reach the validity of the 1992 will.

[4] Whalen died on February 6, 2017. On June 27, 2017 we augmented the appellate record to include the Los Angeles Superior Court Order of Probate and Letter appointing Steven C. Sosa, Whalen's trial and appellate counsel, as special administrator of Whalen's estate. At the same time, we granted Sosa's motion for substitution as a party appellant. For ease of reference, we will refer to Sosa, as the administrator of Whalen's estate, as "Whalen."

C. *The Evidence at Trial*

The trial court conducted a four-day bench trial. Both Zivomir and Whalen testified about their relationships with Krsta.

1. *Krsta's Life in Yugoslavia*

Before World War II Krsta, his wife, and their son Zivomir lived in Yugoslavia (now Serbia). During the war Krsta and Zivomir were physically separated because Krsta served in the Yugoslavian army. After the war Krsta could not return home under the new communist government, so he joined the Allied Occupational Forces in England. From the time the war started, Krsta and Zivomir wrote each other, and "[a]ll the time . . . had connection and contact" through their letters, even during the four years Krsta spent in a German prison camp.

Krsta's wife died in 1948; three years later Krsta married Dorothy. In 1953 Krsta and Dorothy moved to the United States.

2. *Krsta's Life in the United States Until 2003*

Whalen met Krsta and Dorothy sometime around 1991, when Whalen moved into the apartment building where they lived. When they first met, Krsta and Dorothy were in their 80's. From that point on they all became friends.

Krsta and Zivomir wrote letters to each other during the 52 years that Krsta lived in the United States until his death. They were "always in contact" with each other. Zivomir saved approximately 440 letters he received from Krsta.[5]

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[5] Krsta's letters were handwritten in Serbian. Zivomir brought to trial binders of his father's letters with envelopes postmarked from 1979 through July 2005.

In a letter dated November 6, 1996 Krsta forwarded copies of his and Dorothy's 1992 wills to Zivomir (Zico), and told him (as translated), "We do not have anything except the money in the savings (bank). In case that Dorothy dies first everything is mine. I would send you most of it, and what is left I would like to come there, if possible, and bring all the rest there. If I die first—then everything is Dorothy's, as long as she lives. She does not have any family that she would give anything to, so after her death—all of it will be yours. [¶] If something unexpected would happen, our attorney (you have his address in the Testament) would withdraw all the money and send all of it to you. [¶] You Zico are the first in the Testament and daughter-in-law Slavka comes after you. . . ." Krsta never communicated to Zivomir an intention to change this estate plan.

In 1999 Zivomir and Slavka came to the United States to visit Krsta and Dorothy. They spent 65 days with them in Santa Monica. Krsta had saved all of Zivomir's letters, and Krsta and Dorothy had family photographs of Zivomir and his mother displayed throughout the apartment. Zivomir never met Whalen during this visit. Zivomir had planned to stay longer, but when war broke out in Serbia, he and Slavka took the last plane home before the bombing began. Krsta and Dorothy had considered moving to Serbia, but they did not go because of the war.

Krsta and Zivomir continued to correspond, and on several occasions Krsta sent Zivomir and Slavka money. In 1999 Krsta sent them $20,000; in 2001 he sent them three $25,000 checks.

3. *Period from 2004 to May 2005*

a. *Krsta's Relationship with Zivomir*

In a letter dated October 15, 2004 addressed to Zivomir and Slavka, Krsta wrote (as translated), "I am answering your last letter. It took me a longer time to do it, although Zica [*sic*] would like it every month[.] But there is nothing new with the two of us, everything is the same as it was when we wrote you last time, only we do sit longer on the couch and watch television. The food that we get prepared is good, *the woman that helps us is also good*, so we can use all our time for ourselves and everything that is best for our old age. . . . As you know, we are entering our advanced old age and naturally the end will come. We are not afraid, as that is natural and better than fighting the hardships of old age. That is all for this time, both of you and all our people there we love and send heartfelt regards. Krsta and Dorothy[.]" (Italics added.)

In a letter dated March 1, 2005 Krsta wrote (as translated), "I have not written for a long time and the reason is our old age difficulties. We both are not able to walk, but all our internal organs are healthy so it is hard to tell how long we are going to live[.] *With great help, we still live well.* How are you dealing with the tests of old age[?] Do not worry about us, as nature will decide what will happen. Zico, write and I hope that I will answer your next letter. You can tell from my handwriting what condition I am in. To both of you and to all our people there many heartfelt regards[,] Krst[a] and Dorothy[.]" (Italics added.) According to Whalen, she addressed the handwritten envelope because Krsta by this time had difficulty writing; however, Krsta's and Zivomir's first names were added in Krsta's own "shaky" handwriting.

b. *Krsta's Relationship with Whalen*

Whalen testified that in 2004 she began to assist Krsta and Dorothy "with certain daily tasks," including picking up "a couple things" at the grocery store. However, Whalen stated she only went to the grocery store for them three times. In late 2004 Whalen drove Krsta and Dorothy on two occasions to medical appointments. Whalen testified she helped Krsta and Dorothy with their "'everyday needs,'" but later clarified that she was referring to visiting them and providing emotional support.

Krsta broke his hip in January 2005, and moved to Fireside Convalescent Hospital (Fireside). Dorothy was living alone in their apartment, so Whalen visited her frequently to make sure she was happy and not afraid. In March or April 2005 Dorothy was hospitalized, then moved to Fireside to be with Krsta. Whalen continued to visit Krsta and Dorothy at Fireside several times a week. They gave her a key to their mailbox, and Whalen brought their mail to them at Fireside. Because Krsta's handwriting was illegible, Whalen wrote out checks for him to sign. Whalen also maintained Krsta's check register for him.

4. *Preparation of Krsta's Will in June 2005*

Sometime before June of 2005 Whalen introduced Krsta to William Dolinsky, an attorney who was Whalen's "longtime friend" since the 1970's. Dolinsky met with Krsta and Dorothy initially to prepare advance health care directives. Whalen testified she introduced Krista to Dolinsky because Krsta wanted to "get[] his affairs in order," and "kn[e]w that he wanted to include a gift to [her]."

On June 6, 2005 Dorothy died. Whalen then contacted Dolinsky on Krsta's behalf to request that Dolinsky prepare a new will for Krsta. Whalen was not present when Dolinsky discussed the will with Krsta. Dolinsky testified that when he asked Krsta if he wanted to leave anything to Zivomir, Krsta "made a dismissive gesture" and responded, "Zivomir, Bah." Krsta told Dolinsky that he wanted to leave Zivomir only $1, and to make Whalen his beneficiary. Dolinsky did not recall why Krsta wanted to leave his entire estate to Whalen, but Whalen had told him at the time she was Krsta's neighbor and was helping out with chores. At that time Dolinsky was unaware of the 1992 will.

On June 21, 2005 Dolinsky asked Krsta's physician, Michael Herbst, M.D., to evaluate Krsta's capacity. Dr. Herbst had been Krsta's physician for five years. Dolinsky requested the examination to satisfy himself that Krsta "had the capacity to sign the will." Dr. Herbst examined Krsta on June 21, 2005, and "found him to have intact memory and orientation to person, place and situation. He was able to recall [the doctor's] name and the recent events in his and his wife's lives, as well as current events in the news" with "no evidence of dementia or delirium." Dr. Herbst confirmed his findings in a June 22, 2005 letter addressed "To Whom It May Concern."

Dr. Herbst's letter continued, "Mr. Savic's wife recently passed away and I know this has affected him emotionally, though he appears composed and resilient." He noted that Krsta's "spoken language is very difficult to understand. His native language is Serbian, German was his second language and

English [is] his third.[6] He has a difficult accent in English and he also mixes many non-English words into his speech. I understand that this language barrier might raise doubts as to his mental capacities, and I recommend that German translation be offered whenever there is any doubt concerning important decisions he wishes to make. [¶] Given his advanced age and fragile health, and despite his capacity to act on his own behalf, I have suggested that Mr. Savic . . . seek legal help in managing his personal affairs."

5. *Summer of 2005*

During the summer of 2005 Zivomir received an undated letter in English, purporting to be from Krsta, but not in his handwriting. The letter stated, "With this letter I want to let you know that Dorothy died on June 6. She had stopped eating for several weeks and wanted to die. I am in pretty good health excep [*sic*] for my leg. I cannot walk. My plans are still uncertain although I will probably stay where I am, in the convalescent home. For you and Slavka and everyone else my best wishes. Krsta and Dorothy[.]" Whalen testified she had written the letter because Krsta's handwriting was "real shaky."

At this time Slavka was very ill and could not leave the house. Zivomir was the only one who could care for her, so he could not travel to visit Krsta in Santa Monica.

Whalen was Krsta's only visitor at Fireside after Dorothy died. She visited frequently—sometimes for an hour; sometimes

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6 Dr. Herbst explained that Dorothy's native language was German, and Krsta and Dorothy often spoke to each other in German.

for three hours, depending on her schedule. Despite his heavy accent, Whalen was able to understand Krsta because of their familiarity. Krsta realized after Dorothy died that he would not be able to move back to the apartment. He had previously given Whalen a key to his apartment, and Whalen went into the apartment to clean it out.

During July 2005 approximately $40,000 in checks were cashed on Krsta's checking account. At trial no evidence was presented as to who cashed the checks. On July 25, 2005 a check in the amount of $19,581 was cashed against the account. Several more checks, including ones in the amounts of $8,990, $3,770, $1,780.70, and $1,973.02, were cashed during the period from August through October 2005. Whalen testified Krsta's check register "probably got tossed when other things got thrown out." Whalen "did the purging" when she cleaned out Krsta's apartment.

6. *Krsta's Last Letter to Zivomir in July 2005*

Zivomir testified that in the last six months of his life, Krsta "never, never, never" expressed any negative feelings toward him in his letters. The last letter Zivomir received from his father was dated "7 -2005," and the envelope was postmarked July 30, 2005. The first part was written in his father's handwriting. Although some of the letter was illegible, part of it stated (as translated), "The elderly are subject to conspiracy and plots, but I am not going to write about it. FACTS: [¶] 1. Dorothy and I have lived 53 years together"; "2. Zuza works on (illegible)"; "3. " " " ".” Zivomir testified that two of the words in Serbian in the empty quotes were "intrigue" and "pact."

The letter continued in English in Whalen's handwriting, "As you will see my handwriting is not very good because I am almost 99 years old. I don't want you to worry about me living at the Fireside Convalescent Hospital; I am happy with my living situation. The doctors and everyone else here are doing everything possible for me and are helping me get better. The doctors have told me that my broken hip will take a while to heal and that bit by bit the pain will go away. . . . [¶] Even though I didn't expect to be in the hospital I am satisfied here, so please don't worry. I will not be coming to Serbjia [*sic*], even though you wished me to do so. Because of my health and age I will not be traveling. [¶] My wish for you is to remain healthy and not work too hard. You should have somebody else work the farm who can also live there. You should take care of your wife and yourself. [¶] Don't worry if I do not write regulally [*sic*]." Whalen testified that Krsta's handwriting was mostly illegible, and he asked her to finish writing the letter for him. However, Krsta had signed his own first name.

Zivomir wrote Krsta to say he was worried about Krsta's handwriting and the letter's use of the Slavic (Serbian) words meaning "intrigue" and "pact," which refer to something that somebody is doing to someone. The interpreter explained that the words used in the letter refer to "something negative that is being plotted."

7. *Execution of 2005 Will and Krsta's Death*

Dolinsky, his wife Paula Dolinsky, and his friend of 60 years Dudley Fetzer, testified they were present at Fireside when Krsta executed the will dated September 3, 2005.

After preparing the 2005 will, Dolinsky requested a second opinion regarding Krsta's capacity to handle his affairs. Dolinsky testified his "reasoning was [that] if a doctor said he was competent prior to signing and a doctor said he was competent after the signing, then the inference was he had capacity during the entire period." On September 16, 2005, in another letter addressed "To Whom It May Concern," Jordan Chun, M.D., wrote that he had examined Krsta on a monthly basis over the preceding six months, and he concurred with Dr. Herbst's earlier assessment of Krsta.

In the last month of his life, Krsta was dying, and could not respond to Whalen. However, Whalen felt he interacted with her differently from the way he did with the Fireside staff. They held hands, and he appeared to have trust and confidence in her.

On September 27, 2005 Krsta was transported to the hospital, moaning and in severe pain, with a very painful ulcer on his foot. On October 15, 2005, 47 days after executing the 2005 will, Krsta died. Whalen called Dolinsky to tell him that Krsta had died. Dolinsky told Whalen that, as the executor of the will, she needed to get an attorney to probate the will.

8. *Whalen's Correspondence with Zivomir After Krsta's Death*

After Krsta's death Whalen sent a handwritten letter to Zivomir, which he received in December 2005. The letter reads, "Dear Zivomir, [¶] Please let me introduce myself. I am a neighbor and friend of your father; my name is Janeen Whalen. Fourteen years ago when I moved into this apartment building Dorothy and Krsta were the first people that I met. Over the

years we continued our friendship and *as they aged I've been able to help them with their every day needs*.

"Last January your father fell and broke his hip. Unfortunately his hip never healed and he was never able to walk after that. [¶] It saddens me deeply to let you know that your father died. I was with him a few hours before he died and I had a conversation with him about passing on. I reassured him that he had completed everything he needed to do in his life and that it was OK to leave the earth. Even though he could not respond, I know that he felt comforted and agreed.

"This past year was difficult for both Krsta and Dorothy. After your father went into the hospital, Dorothy was alone and unable to care for herself. She was hospitalized for a short time and was discharged to the same convalescent hospital where Krsta was. They both shared the same room and had each other for company. Fortunately, the Fireside Convalescent Hospital was very close to where we live, only 1 block away, *so that I could be with them every day*. I am very grateful that both your father and Dorothy had excellent medical care and didn't have much pain at the end of their lives.

"I wish that I could write you in your own language so that you would not have to have this translated. Unfortunately, that is not possible. I am send[ing] you a watch of your father[']s so please be looking for it to come in the mail. Please accept my deep regrets at the loss of your father. [¶] In Sympathy, [¶] Janeen Whalen." (Italics added.)

On January 31, 2006 Whalen sent another undated letter to Zivomir in which she wrote, "These watches belonged to your father and I thought you might like to have them. The wristwatch he wore everyday and the pocket watch didn't get

used very often. [¶] *Your father didn't value having a lot of possessions so these are the only things he kept.* [¶] Once again my sympathies for your loss. [¶] Sincerely, Janeen Whalen." (Italics added.)

Whalen testified she had been opening Krsta's mail, so she knew when she wrote the letter to Zivomir that Krsta had "several thousands of dollars in the bank." She also knew about five certificates of deposit, but she did not mention these accounts to Zivomir in her letters. She did not tell Zivomir about the accounts because she "didn't feel as though that was within [her] purview." She added that Dolinsky told her he would contact Zivomir. She also knew at that time that Zivomir would inherit only $1 under Krsta's will.

9. *Zivomir's Communications Regarding Krsta's Will*

On February 17, 2006 Zivomir contacted Hromadka, the attorney who had prepared Krsta's 1992 will, requesting that Hromadka "act upon it and fulfill their wishes." Hromadka responded on April 11, 2006 that he did not know that Krsta and Dorothy had died. He stated he was named as the executor of the estate and that any estate would pass outright to Zivomir. On June 15, 2006 Hromadka informed Zivomir by letter that he had been advised Dolinsky was handling Krsta's estate, and provided Dolinsky's address.[7]

Zivomir wrote to Dolinsky at the address provided in Hromadka's letter, requesting Krsta's and Dorothy's death

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[7] Hromadka provided Zivomir the address identified in the 2005 will as the address of witness Paula Dolinsky. The 2005 will did not state Dolinsky's name or address.

certificates and additional information. Zivomir sent the letter by Serbian registered mail. The letter was never returned as undeliverable, but Dolinsky did not respond. Zivomir continued to send Dolinsky a copy of the same letter every six months for the next five years. He never heard back from Dolinsky, and none of the letters was returned as undeliverable. Dolinsky testified he did not remember receiving any of Zivomir's letters.

In 2010 Zivomir enlisted the help of his cousin Begovic, who lived in southern California. Zivomir sent Begovic a packet of materials he had received from Hromadka. Begovic obtained a phone number for Dolinsky from the internet. After calling six or seven times and leaving messages, Dolinsky and Begovic talked, and on August 30, 2010 Dolinsky emailed Begovic a copy of the 2005 will.

In his email to Begovic, Dolinsky stated, "Whalen had assisted Krsta and Dorothy over the last 10 years of their lives. Krsta and Dorothy had promised to reward [Whalen] for her years of service by naming her their beneficiary." Dolinsky stated he would send Zivomir the documents "right away" if Begovic confirmed Zivomir's email address. Dolinsky added that he intended to submit the 2005 will to probate that week, and that "[o]f course, [Zivomir] will be notified in writing once probate is opened."

Neither Begovic nor Zivomir heard back from Dolinsky. Begovic emailed Dolinsky on October 23, 2012, inquiring when the will would be submitted to probate. Dolinsky did not respond. However, the same day Dolinsky forwarded Begovic's email to Whalen, writing: "I received this email . . . today. I have no idea what to respond or if to respond at all. Please tell me

what, if anything, you would like me to do." Whalen did not recall at trial how she responded.

10. *Filing of the Petitions To Probate Krsta's Wills*

Begovic filed a petition to probate the 1992 will on behalf of Zivomir on May 20, 2013. Dolinsky received a copy, and forwarded it to Whalen. Whalen testified that once she received a copy of Zivomir's petition, her "hand was forced at that point," so she filed her petition to probate the 2005 will. When asked why she did not promptly offer Krsta's will for probate, Whalen responded, "Probate to me is this big, ugly, gnarly, awful thing. Something that—territory that you don't want to tread into, that's—was how it was always presented to me. So there was no—I wasn't anxious to tread into that territory."

D. *The Trial Court's Statement of Decision and Order*

In its 14-page statement of decision, the trial court found the 2005 will complied with the requirements of the Probate Code that it be signed by Krsta and duly witnessed. The court found further that Zivomir failed to establish a lack of testamentary capacity at the time Krsta signed the 2005 will. The court therefore found the 2005 will was valid. However, the court found Whalen to be a "presumptively disqualified beneficiary since [Whalen] qualifies as a care custodian under . . . section 21350 et seq. given the nature of her personal services to Krsta. While [Whalen's] actions were not explicitly health services, her actions constituted substantial social services within the ambit of the Probate Code under the Supreme Court's ruling in *Bernard v. Foley* (2006) 39 Cal.4th 794, 800 [(*Bernard*)]. . . . Further, the

[c]ourt finds that [Whalen] failed to rebut the presumption by showing the absence of undue influence."

The court held, "Since the 2005 Will revoked the 1992 Will and the [c]ourt has found the 2005 Will valid, the [c]ourt concludes that there are no remaining dispositions under the 2005 Will. Thus, the bequest to [Whalen] is invalidated pursuant to . . . [section] 21353, which provides that in the case of such disqualification the transfer shall be made as if [Whalen] predeceased the transferor. Under the terms of the 2005 Will if [Whalen] predeceased Krsta, Zivomir inherits the entire estate." On March 25, 2016 the trial court entered its order on the competing petitions for probate consistent with the statement of decision, granting Whalen's petition in part, admitting the 2005 will to probate but otherwise denying the petition; denying Zivomir's petition; and concluding, "since [Whalen] legally predeceased Krsta Savic, Zivomir Savic inherits the entire estate of Krsta Savic pursuant to Article 5 of the 2005 Will. . . ."

Whalen filed a timely notice of appeal. Zivomir filed a protective cross-appeal challenging the portion of the trial court's order upholding the validity of the 2005 will.[8]

DISCUSSION

Whalen contends she was not a presumptively disqualified care custodian under former section 21350, subdivision (a)(6), and further, even if she was presumptively disqualified, she

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[8] Because we affirm the trial court's findings and order, we dismiss Zivomir's cross-appeal as moot.

rebutted the statutory presumption of undue influence by clear and convincing evidence. We disagree.

A. *The Trial Court Did Not Err in Finding Whalen Was a Care Custodian*

1. *Standard of Review*

We review the interpretation of a statute de novo. (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1123; *Estate of Odian* (2006) 145 Cal.App.4th 152, 162 (*Odian*) [reviewing the interpretation of former section 21350 de novo].) However, we review the trial court's factual findings for substantial evidence. (*Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 208, 211 [substantial evidence supported trial court's factual finding that beneficiary was disqualified from receiving donative transfer as attorney who drafted decedent's will]; *Estate of Austin* (2010) 188 Cal.App.4th 512, 520 ["Substantial evidence supports the trial court's conclusion that [the beneficiary] did not become [the decedent's] care custodian as a result of the limited services she performed for him while he was not in a nursing home"].) ""'Substantial evidence" is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citation.]'" (*Estate of O'Connor* (2017) 16 Cal.App.5th 159, 163.)

""'In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.]'"' (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102; accord, *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Further, "we do not evaluate the credibility of the

witnesses. [Citation.] Rather, 'we defer to the trier of fact on issues of credibility.' [Citation.]" (*Estate of O'Connor*, *supra*, 16 Cal.App.5th at p. 163.)

2. *Statutory Provisions*

Former section 21350 et seq.[9] "sets forth certain limitations on donative transfers by testamentary instrument."[10] (*Bernard*, *supra*, 39 Cal.4th at p. 799.) Former section 21350 lists seven

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[9] In 2010, former section 21350 et seq. was repealed and replaced by section 21380 et seq., along with new definitions in section 21360 et seq., which provisions became effective January 1, 2011. (Stats. 2010, ch. 620, §§ 6, 7; *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1136.) Under the new section 21362, subdivision (a), effective January 1, 2011, the definition of a care custodian now excludes "a person who provided services without remuneration if the person had a personal relationship with the dependent adult" within certain minimum time periods. However, because Krsta died in 2005, former section 21350 et seq. applies in this case. (See *Jenkins*, *supra*, at p. 1131 ["even though . . . former [§] 21350 et seq. has been repealed and replaced by . . . [§] 21380 et seq., which applies only to instruments executed on or after January 1, 2011, . . . former [§] 21350 et seq. still governs an instrument executed before January 1, 2011"].) Although Whalen concedes "we cannot apply the new statute retroactively to [Whalen]," she urges us to apply the policy underlying the legislative change "to avoid a forfeiture." However, it was never the intent of the Legislature that the 2010 amendment be retroactive. (See *id.* at p. 1138 [the Legislature intended that instruments that became irrevocable before January 1, 2011 be governed by the former law].)

[10] An "'Instrument'" includes "a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." (§ 45.)

categories of persons who presumptively cannot receive donative transfers, providing in pertinent part, "Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: [¶] . . . [¶] (6) A care custodian of a dependent adult who is the transferor." (Former § 21350, subd. (a)(6).) The seven categories of persons "cover various relationships between donor and donee that might logically offer opportunities for duress or undue influence." (*Bernard*, *supra*, 29 Cal.4th at p. 812.) Whalen does not dispute that Krsta was a dependent adult within the meaning of former section 21350.[11]

Former section 21350, subdivision (c), provides that "[t]he term 'care custodian' has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code." That section defines a care custodian to include 24 categories of agencies, as well as "[a]ny other . . . agency or person providing health services or social services to elders or dependent adults." (Welf. & Inst. Code, § 15610.17, subd. (y); *Bernard*, *supra*, 39 Cal.4th at p. 805.)

The party asserting the invalidity of a donative transfer has the burden to prove the transferee is one of the disqualified

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11 Former section 21350, subdivision (c), provides that the term "'dependent adult'" includes persons older than 64 who meet the definition of "dependent adult" under Welfare and Institutions Code section 15610.23, which includes any person "who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons . . . whose physical or mental abilities have diminished because of age." (Welf. & Inst. Code, § 15610.23, subd. (a).)

persons listed in former section 21350, subdivision (a). (*Estate of Austin*, *supra*, 188 Cal.App.4th at p. 516 [decedent's daughter failed to meet burden to prove the decedent's former stepdaughter was a care custodian under former § 21350]; *Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 255 [decedent's daughter had burden to prove the beneficiary under a trust was disqualified under § 21350 as a participant in preparation of the trust].) Thus, Zivomir had the initial burden to prove Whalen was a care custodian, causing her to be presumptively disqualified under former section 21350, subdivision (a)(6).

3. *Case Law Interpreting Former Section 21350*

In *Bernard*, our Supreme Court considered whether the care of a decedent by two "longtime personal friends" in their home during the last two months of the decedent's life disqualified them from inheriting under her trust as care custodians under former section 21350. Three days before her death, the decedent had amended her trust, naming each of the friends as a 50 percent residuary beneficiary. (*Bernard*, *supra*, 39 Cal.4th at p. 798.)

The decedent in *Bernard* was incapable of caring for herself, so she depended on the beneficiaries for her daily needs. (*Bernard*, *supra*, 39 Cal.4th at p. 805.) The beneficiaries did decedent's grocery shopping, prepared meals for her, handled her financial and investment affairs, assisted her with bathing, changed her diapers, applied topical medications, administered oral medications, including morphine, and cared for her wounds. (*Ibid.*) Our Supreme Court found the beneficiaries were care custodians, stating, "In sum, the record reflects that both [beneficiaries] provided substantial, ongoing health services to

decedent while, at the end of her life, she was residing in their home and that it was during this period that decedent amended her trust to include the donative transfers at issue." (*Ibid.*)

The beneficiaries had argued that section 21350 should be interpreted to include as care custodians only persons who have an occupational or professional relationship with the decedent, and not a personal friendship. (*Bernard*, *supra*, 39 Cal.4th at p. 806.) Our Supreme Court rejected this argument, observing that the inclusion of "'any other . . . agency or person providing health services or social services to elders or dependent adults'" in Welfare and Institutions Code section 15610.17, subdivision (y), was intended as a "broad catchall provision," and that "nothing in the statute's structure, terms or language authorizes us to impose a professional or occupational limitation on the definition of 'care custodian' . . . or to craft a preexisting personal friendship exception thereto." (*Bernard*, *supra*, at pp. 805, 807, 809.)

The court also found that a reading of section 21350 to exclude from the definition of care custodians individuals with a personal relationship with the decedent would be inconsistent with the legislative history, holding, "'In enacting sections 21350 and 21351, the Legislature was aware that certain individuals are uniquely positioned to procure gifts from elderly persons through fraud, menace, duress or undue influence.' [Citation.] Regrettably, preexisting personal friendship is no guarantee against the exercise of fraud, menace, duress or undue influence over dependent adults." (*Bernard*, *supra*, 39 Cal.4th at p. 811.)[12]

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12 The *Bernard* court acknowledged that its reading of former section 21350 could be unfair to volunteer health care providers, but found that "section 21351 provides a clear pathway to

The court concluded that the beneficiaries had provided "health services" to the decedent, and thus qualified as care custodians under former section 21350. (*Bernard*, *supra*, 39 Cal.4th at p. 808.) The court stated, "We disagree with [the beneficiaries] that, in ordinary parlance, one who prepares meals for or applies ointments to another person does not provide that person a service." (*Id*. at p. 807.) In reaching this conclusion, the court cited to the dictionary definition of "service" as the "'[p]erformance of labor for the benefit of another' and '[t]he deed of one who serves.'" (*Id.* at p. 807, fn. 10, citing Webster's New Internat. Dict. (2d ed. 1958) p. 2288.)

In *Odian*, the Fourth District considered the definition of "social services" in order to determine whether the beneficiary under the decedent's will and trust was a care custodian under former section 21350. The decedent had left her entire estate to the beneficiary, who had been paid to serve as a live-in companion during the two years before the decedent moved into a nursing home. (*Odian*, *supra*, 145 Cal.App.4th at pp. 154-155.) The trial court found the beneficiary was employed "'to provide in-home care,'" and that she had "'cooked, cleaned, and drove [the decedent] to appointments, meetings and shopping' *and* 'took care

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avoiding section 21350" by creating a procedure for an attorney to provide a "certificate of independent review" to the transferor. (*Bernard*, *supra*, 39 Cal.4th at pp. 814-815.) Under section 21351, subdivision (b), former section 21350 is inapplicable if an independent attorney reviews the donative instrument, counsels the transferor about the consequences of the intended transfer, and signs and delivers to the transferor a certificate of independent review "in which counsel asserts the transfer is valid because it is 'not the product of fraud, menace, duress, or undue influence.'" (*Bernard*, *supra*, at pp. 814-815.)

of [the decedent's] home, took care of [the decedent] and was [her] paid live-in caregiver.'" (*Id.* at p. 167.) In addition, the beneficiary was granted power of attorney, and wrote and signed checks on the decedent's account. (*Id.* at p. 156.)

The court observed that the meaning of "social services" for purposes of disqualification as a care custodian was "a question of first impression," but relied on the *Bernard* court's analysis of the legislative history of former section 21350 to interpret the term, noting, "we do not write on a completely blank slate." (*Odian*, *supra*, 145 Cal.App.4th at p. 166.)

The court in *Odian* first looked at the legislative intent behind the inclusion of care custodians as presumptively disqualified transferees under former section 21350, to prevent "'"unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior[,]"'" and to address the underlying problem that "'"care custodians are often working alone and in a position to take advantage of the person they are caring for." [Citation.]'" (*Odian*, *supra*, 145 Cal.App.4th at p. 166, citing *Bernard, supra,* 39 Cal.4th at pp. 809-810.)

Second, the court considered *Bernard*'s analysis of the Legislature's intent in enacting the Elder Abuse and Dependent Adult Civil Protection Act of 1994, of which Welfare and Institutions Code section 15610.17 is a part, in which the Legislature used the term care custodian to create "'an expansive class of individuals obligated to report elder abuse to the proper authorities.'" (*Odian*, *supra*, 145 Cal.App.4th at p. 166, citing *Bernard, supra*, 39 Cal.4th at p. 813.) The court in *Odian* found, "Thus, the court [in *Bernard*] recognized that the Legislature intended the definition of 'care custodian' as used in Welfare and

Institutions Code section 15610.17 to apply expansively to protect vulnerable elders. There is no reason to believe that it intended a narrower application of the identical term when it enacted section 21350[, subdivision] (a)(6). On the contrary, an expansive interpretation of 'social services' to include personal services provided by an in-home caregiver best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation." (*Odian*, *supra*, at pp. 166-167.)

The court in *Odian* concluded that based on the undisputed findings of the trial court, "A 'paid live-in caregiver' clearly provides social services within the meaning of section 21350[, subdivision] (a) and is, therefore, a care custodian. Thus, [the companion] was a care custodian within the meaning of section 21350[, subdivision] (a)(6)." (*Odian*, *supra*, 145 Cal.App.4th at p. 167.)

In *Estate of Austin*, the Fifth District considered whether the decedent's former stepdaughter, to whom the decedent gave $185,000 in checks while he was in a nursing home during the last nine months of his life, was a care custodian under former section 21350. The stepdaughter had previously lived next door to the decedent for 22 years, during which time the decedent lived with the stepdaughter's mother. (*Estate of Austin*, *supra*, 188 Cal.App.4th at p. 515.) The court concluded there was substantial evidence to support the trial court's finding that the former stepdaughter did not become the decedent's care custodian as a result of the "limited services" she provided before the decedent moved into the nursing home, "consisting only of driving [the decedent] to the doctor, preparing some of his meals and unspecified helping out." (*Id.* at p. 520.)

The only other published case to address the meaning of "social services" as used in Welfare and Institutions Code section 15610.17 is *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035 (*Davidson*), disapproved of by *Bernard*, *supra*, 39 Cal.4th at page 816, footnote 14.[13] In *Davidson*, the court considered whether the beneficiary under a trust was the care custodian of the decedent where the beneficiary had been a longtime friend who provided services consisting of "cooking, gardening, driving [the decedent] to the doctor, running errands, grocery shopping, purchasing clothing or medications, and assisting [the decedent] with banking." (*Davidson*, *supra*, at p. 1050.) However, the court also noted, "Up to the time she executed the trust in January 1996, Davidson administered her own medications and basically took care of herself, with some assistance from her housekeeper. . . . Thus, during the time period most relevant to

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[13] The court in *Bernard* disapproved of *Davidson*, *Conservatorship of McDowell* (2004) 125 Cal.App.4th 659, and *Estate of Shinkle* (2002) 97 Cal.App.4th 990 "to the extent they interpreted section 21350 as allowing for a preexisting personal friendship exception." (*Bernard*, *supra*, 39 Cal.4th at p. 816, fn. 14.) In *Conservatorship of McDowell*, the Court of Appeal found the beneficiary was not a care custodian even though he visited the decedent, brought her meals, bathed her, washed her hair, and changed her diapers because she provided these services as a "well-meaning friend," and not a professional or occupational caregiver. (*Conservatorship of McDowell*, *supra*, at pp. 673-674.) In *Estate of Shinkle*, the court did not reach the question whether the beneficiary provided "social services" because it found that he was a disqualified care custodian under former section 21350, subdivision (a)(6), as the long-term-care ombudsman for the decedent. (*Estate of Shinkle*, *supra*, at p. 1007.)

this case, [the decedent] was still essentially maintaining her independence." (*Ibid*.)

Whalen argues that the court in *Davidson* "expressed doubt" these services were "social services." However, the court in *Davidson* never decided this question because it concluded the beneficiary was not a care custodian under former section 21350 because he "had no professional expertise or occupational experience in providing such services," but rather, was a personal friend. (*Davidson*, *supra*, 113 Cal.App.4th at p. 1050.) The court stated, "In short, the kinds of errands, chores, and household tasks performed by [the beneficiary] for and on [the decedent's] behalf simply cannot be equated with the provision of 'health services and social services' specified by the subject statutes as constituting custodial care. Even if the kind of unsophisticated care and attention that [the beneficiary] provided to [the decedent] could be described as constituting health and social services, it is undisputed that [the beneficiary] had no professional expertise or occupational experience in providing such services." (*Ibid*.)

Given the *Davidson* court's conclusion that the longtime friend did not qualify as a care custodian because he was not a professional caregiver, we do not read *Davidson* to stand for the proposition that the kinds of tasks performed by the beneficiary were not "social services." (See *Odian*, *supra*, 145 Cal.App.4th at p. 165 ["*Davidson* did not actually hold that services such as those are not social services within the meaning of the statute"]; see also *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [a case is not authority for a point which it does not address].)

Similarly, while the court in *Bernard* distinguished the health care services provided by the beneficiaries there as a "'far

cry from the level of care provided by the longtime friends in *Davidson*'" (*Bernard, supra,* 39 Cal.4th at p. 806, citing to *Davidson, supra,* 113 Cal.App.4th at p. 1050), the court in *Bernard* never considered the breadth of the term "social services," instead finding that on the facts there the beneficiaries had provided significant health services to the decedent.

We agree with our colleagues in the Fourth District that, under *Bernard*, an "'expansive'" reading of the term "'social services'" "best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation." (*Odian, supra,* 145 Cal.App.4th at pp. 166-167.) Further, "services," as defined in *Bernard*, include the "'[p]erformance of labor for the benefit of another' . . . ." (*Bernard, supra,* 39 Cal.4th at p. 807, fn. 10.) Services provided to a dependent adult in a residential facility qualify as "social services" if the services go beyond merely visiting the individual, and are provided because of the person's dependent condition, including but not limited to companionship, housekeeping, shopping, cooking, assistance with finances, and taking care of other daily needs of the dependent adult.[14]

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[14] Our description of services that could be considered "social services" is consistent with *Bernard*'s analysis of the legislative intent behind former section 21350, the kinds of services at issue in *Bernard* and *Odian*, and the current language used in section 21362, subdivision (b), which defines "'health and social services'" to mean "services provided to a dependent adult because of the person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances." Although the current definition does not apply retroactively to this case (*Jenkins v. Teegarden*, *supra*, 230 Cal.App.4th at p. 1138), its definition of

Whether the services provided to a dependent adult qualify as "social services" will depend on an individualized inquiry into the facts of each case. We conclude below that the services provided by Whalen to Krsta were "social services" within the meaning of former section 21350.

4. *Substantial Evidence Supports the Trial Court's Finding Whalen Provided "Substantial, Ongoing" Social Services*

Whalen contends the "limited and infrequent" services she provided to Krsta do not support the conclusion she was a care custodian. She argues there was no substantial evidence that she helped Krsta with his "daily tasks" or that she "affirmatively controll[ed] Krsta's finances," instead only "help[ing] Krsta write a few checks" because of his deteriorating writing.

However, the trial court found in its statement of decision that Whalen provided "substantial social services" to Krsta, including that she "made checks for Krsta's rent and Fireside [b]ills, got supplies at the grocery store, brought his mail several times a week, took care of the apartment, and put Krsta's name on her mail box, helped him with daily tasks, [and] gave him a ride to a doctor's appointment." The court found further that "Krsta would tell [Whalen] what to write in his letters and she would write them. . . . [Whalen] had control of his checkbook and managed all his financial affairs demonstrating a fiduciary relationship and that she provided social services to Krsta, who was unquestionably a dependent adult."

"health and social services" is consistent with our reading of the case law that preceded its enactment.

Substantial evidence supports the trial court's findings. For example, in his October 15, 2004 letter to Zivomir, Krsta wrote, "[t]he food that we get prepared is good, the woman that helps us is also good. . . ." Krsta wrote again on March 1, 2005, "With great help we still live well." It was Whalen who testified that starting in 2004 she assisted Krsta and Dorothy "with certain daily tasks," including picking up items at the grocery store, and that on two occasions she drove them to medical appointments. After Krsta died, Whalen wrote Zivomir, "as they aged I've been able to help them with their everyday needs," and that she lived close to Fireside, "so that I could be with them every day." Dolinsky told Begovic that Krsta's 2005 will designated Whalen as the beneficiary based on her last ten years of assistance to Krsta and Dorothy. While Whalen attempted in her testimony to minimize her involvement in Krsta's life, it was for the trial court to judge her credibility.

Whalen also testified that she frequently visited Krsta at Fireside, had a key to his mailbox, brought Krsta's mail to him, and cleaned out the apartment after Dorothy died, including "purging" his important documents. Whalen and Zivomir testified to letters Krsta sent to Zivomir in the summer of 2005 that were handwritten by Whalen because of Krsta's "shaky" handwriting.

There was also substantial evidence to support the trial court's finding that Whalen "affirmatively controll[ed] Krsta's finances." Whalen wrote Krsta's checks because his handwriting was "so illegible that the payor could not read it." Whalen maintained Krsta's check register and balanced his checkbook. She testified, "[W]e were pretty on top of things." As of May 19, 2005 Krsta's checking account balance was $77,300.97. The trial

court noted that "big checks" were written after that point, including one for $19,581 on July 25, 2005 and one for $8,990 on August 29, 2005. As the trial court observed, "she admits that she's writing the checks."

Whalen contends the trial court improperly relied on evidence of services she provided before Krsta moved to Fireside and after he died. However, Whalen's relationship with Krsta leading up to his move to Fireside was relevant to their relationship. Further, the trial court's principal focus was on Whalen's care of Krsta and his financial affairs during his final months at Fireside. Whalen's correspondence with Zivomir after Krsta died and her delay in petitioning to probate the 2005 will were relevant to Whalen's credibility. The trial court properly considered this evidence.

Indeed, the trial court found Whalen's December 2005 letter to Zivomir was "highly suspicious," and that Whalen "lied when she told Zivomir that all Krsta [had] left was two watches," when she knew he had money in his bank accounts. The court rejected Whalen's "unpersuasive" explanation that she "only wanted to spare [Zivomir] from the fact of disinheritance." Instead, "[t]he [c]ourt can only infer that the reason for not disclosing the extent of Krsta's assets or the existence of a new will immediately after Krsta's death is so that [Whalen] could avoid any type of a will contest." The court added, "[H]ere is the problem: If I conclude that that's a lie, and I'm almost there, then I shouldn't believe a thing that [Whalen] said." Further, "[i]f I don't believe Ms. Whalen, then you [have] a problem on the presumption because it means that I do have to infer that she was in charge of his financial affairs as of August, certainly, of 2005, and her testimony was it was longer than that. And you

[have] a [$]19,000 check that's not accounted for. And that's a problem." On appeal, "'we defer to the trier of fact on issues of credibility.'" (*Estate of O'Connor*, *supra*, 16 Cal.App.5th at p. 163.)

After considering the evidence before it, the trial court concluded, "while [Whalen's] actions were not 'health services' her activities related to Krsta's finances [went] well beyond the facts of *Davidson* and support applying the presumption of disqualification." The trial court held further that Whalen provided "substantial social services within the ambit of the Probate Code under the Supreme Court's ruling in *Bernard*." Substantial evidence supports this finding. While Fireside took care of Krsta's health needs, Whalen was his sole visitor, controlled his finances, and took care of his other "every day" needs, in a manner comparable to the health services the *Bernard* court concluded supported a finding the beneficiaries were care custodians.

Although the in-home caregiver in *Odian* provided more comprehensive services than Whalen provided to Krsta while at Fireside, the services Whalen provided were extensive, and comparable to those the Fourth District in *Odian* found to constitute social services, which included cooking, cleaning, driving, and shopping. (See *Odian*, *supra*, 145 Cal.App.4th at pp. 166-167.) The services provided by Whalen went beyond her merely visiting Krsta, and were provided to him because of his dependent condition, including writing checks for him, maintaining his check register, writing letters on his behalf, receiving his mail and bringing it to Fireside, and cleaning out his apartment. These services were also comparable to those the First District considered in *Davidson*, including "cooking,

gardening, driving her to the doctor, running errands, grocery shopping, purchasing clothing or medications, and assisting her with banking." (See *Davidson*, *supra*, 113 Cal.App.4th at p. 1050.) Just as the decedent in *Bernard* depended on her longtime friends for her daily needs (*Bernard, supra,* 39 Cal.4th at p. 805), Krsta depended on Whalen for his daily comfort and financial and other needs. As our Supreme Court stated in *Bernard*, "'care custodians are often working alone and in a position to take advantage of the person they are caring for.'" (*Id.* at p. 810.) This aptly describes Whalen's role at the end of Krsta's life.

B. *The Evidence Does Not Compel a Finding That Whalen Rebutted the Presumption of Undue Influence*

1. *Governing Law*

Former section 21351 creates an exception to disqualification under former section 21350 if "[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. . . ." (Former § 21351, subd. (d).) Former "'section 21351 creates a rebuttable presumption that the transfer was the product of fraud, duress, menace, or undue influence.'" (*Bernard*, *supra*, 39 Cal.4th at p. 800.) However, "[a] person who is prohibited from receiving a transfer under [former] section 21350 may still inherit, if [he or she] successfully rebuts the [former] section 21351 presumption. [Citation.]" (*Ibid.*; *Estate of Winans* (2010) 183 Cal.App.4th 102, 113.) The presumptively disqualified transferee has the burden to rebut the presumption of undue

influence. (*Bernard, supra,* at p. 800; *Odian, supra,* 145 Cal.App.4th at p. 167.)

"The statute's purpose, evident on its face, is 'to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior.' [Citation.]" (*Estate of Winans*, *supra*, 183 Cal.App.4th at p. 113.) In enacting the statutory scheme, "the Legislature sought to strike a balance between 'protecting prospective transferors from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true "good Samaritans."'" (*Id.* at pp. 113-114, quoting Stats. 2006, ch. 215, § 1; accord, *Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419, 434.)

"'Direct evidence as to undue influence is rarely obtainable and hence a court or jury must determine the issue of undue influence by inferences drawn from all the facts and circumstances.' [Citations.] Thus, . . . the pressure, or undue influence, may be established by circumstantial evidence. [Citation.]" (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1355 [affirming trial court judgment voiding decedent's trusts based on finding that spouse exercised undue influence over decedent].)

In determining whether Whalen rebutted the section 21351 presumption of undue influence, the trial court properly considered the definition of "undue influence" in Welfare and Institutions Code section 15610.70, subdivision (a). (See § 86 ["'Undue influence' has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code"]; see also *Lintz v. Lintz, supra,* 222 Cal.App.4th at p. 1356, fn. 3 [probate court properly applied standard for undue influence under the Welfare and Institutions Code to void trust documents].) Welfare and

Institutions Code section 15610.70, subdivision (a), defines "'[u]ndue influence'" to "mean[] excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

"(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

"(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, . . . or other qualification.

"(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

"(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

"(B) Use of affection, intimidation, or coercion.

"(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

"(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the

value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

"(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence."

2. *Standard of Review*

In the probate and family law contexts, most courts have reviewed a trial court's finding that the beneficiary or spouse failed to rebut the presumption of undue influence for substantial evidence. (*Odian*, *supra*, 145 Cal.App.4th at p. 167 [finding substantial evidence to support the trial court's conclusion the beneficiary failed to overcome the presumption of undue influence under former § 21350]; *Estate of Shinkle*, *supra*, 97 Cal.App.4th at p. 1008 ["'We review the trial court's finding that [the beneficiary] failed to rebut the presumption of undue influence under the substantial evidence rule like any other issue of fact'"]; see also *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 344 [under Fam. Code, § 721, """[t]he question 'whether the spouse gaining an advantage has overcome the presumption of undue influence is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence"""]; *In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1520 ["Substantial evidence supports the trial court's implied finding that [the spouse] did not rebut the presumption [under Fam. Code, § 721] by a preponderance of the evidence"].)

However, in other contexts we have held that "'where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a

finding in favor of the appellant as a matter of law.' [Citation.]" (*In re Luis H.* (2017) 14 Cal.App.5th 1223, 1227 [concluding in dependency proceeding that children failed to meet their burden on appeal to show the evidence compelled a finding in their favor as a matter of law that they were at substantial risk of harm]; accord, *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 734 [concluding the employer failed to meet its "almost impossible" burden to show the evidence compelled a finding that its accommodation of employees' disabilities would cause undue hardship]; see also *In re R.V.* (2015) 61 Cal.4th 181, 201 [because minor was presumed competent and bore the burden of proving incompetency, "the inquiry on appeal is whether the weight and character of the evidence of incompetency was such that the juvenile court could not reasonably reject it"].)

Under this standard, the party with the burden of proof at trial must show on appeal that its evidence was "(1) ""uncontradicted and unimpeached"" and (2) ""of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."" [Citations.]" (*Atkins v. City of Los Angeles*, *supra*, 8 Cal.App.5th at p. 734; accord, *In re Luis H.*, *supra*, 14 Cal.App.5th at p. 1227.)

Our Supreme Court in *In re R.V.* characterized this standard as a "so-called substantial evidence test," and noted that "[t]here is . . . no single formulation of the substantial evidence test for all its applications." (*In re R.V.*, *supra*, 61 Cal.4th at p. 200.) The Fourth District in *Odian* described the standard of review in the probate context, stating, "the testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible.

[Citations.] More importantly, however, [the beneficiary's] argument inverts the burden of proof: Once her status as a care custodian was established, the burden shifted to her to rebut the presumption of undue influence. [Citation.] The presumption renders any deficiencies in the respondents' affirmative evidence of undue influence irrelevant. [Citation.] [The beneficiary] discusses the evidence she presented to rebut the presumption and argues, in effect, that her evidence was more persuasive. However, the weight and persuasiveness of the evidence is a matter exclusively for the trier of fact, *and we cannot say as a matter of law that [the beneficiary's] evidence was sufficient to overcome the presumption of undue influence.*" (*Odian*, *supra*, 145 Cal.App.4th at p. 168, italics added.) We follow the approach taken in *Odian*, and consider whether the evidence presented in the trial court compelled a finding as a matter of law that Whalen had rebutted the presumption of undue influence.

3. *Whalen Failed To Prove Krsta's Transfer to Her in the 2005 Will Was Not the Result of Undue Influence*

Whalen points to evidence that supported her position that she did not exert undue influence over Krsta, including that she referred Krsta to an "independent" attorney, that Dolinsky took his direction in drafting the will from Krsta, that Whalen was not involved in any discussions over the will, that Dolinsky was not impeached, and that Dr. Herbst stated Krsta had testamentary capacity.[15]

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[15] Whalen also argues that Dr. Herbst concluded that Krsta was able to resist undue influence; however, Dr. Herbst did not opine as to possible undue influence, instead only opining that Krsta was competent to understand and enter into the will.

Whalen misconstrues our role on appeal; the question is not whether her evidence was more persuasive, but rather, whether "as a matter of law [the beneficiary's] evidence was sufficient to overcome the presumption of undue influence." (*Odian*, *supra*, 145 Cal.App.4th at p. 168; see *In re R.V.*, *supra*, 61 Cal.4th at p. 201 ["the inquiry on appeal is whether the weight and character of the evidence . . . was such that the [trial] court could not reasonably reject it"]; *Atkins v. City of Los Angeles*, *supra*, 8 Cal.App.5th at p. 734 ["the question on appeal is '"whether the evidence compels a finding in favor of the appellant as a matter of law"'"].) '"'"[A]ny conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]' [Citation.]"'" (*Tribeca Companies, LLC v. First American Title Ins. Co.*, *supra*, 239 Cal.App.4th at p. 1102; accord, *In re Marriage of Davenport*, *supra*, 194 Cal.App.4th at p. 1531.)[16]

Whalen also contends the trial court's admission of the 2005 will to probate is "prima facie" evidence that the will was executed by a decedent who was competent and free from undue influence, citing to *Estate of Russell* (1947) 80 Cal.App.2d 711, 714. However, the issue in *Russell* was whether a party challenging a will could show undue influence; thus, the burden was on the contestants to show lack of testamentary capacity and undue influence. The court concluded there was not substantial evidence to show they had met that burden. (*Id.* at p. 722.) Here, Whalen as the beneficiary had the burden to rebut the presumption of undue influence.

[16] Whalen also argues the trial court abused its discretion in considering Whalen's conduct after execution of the will on September 3, 2005 in its finding Whalen had not met her burden. However, the trial court considered this evidence for the purpose of assessing her credibility, which it found lacking. The trial

Whalen has not met her burden on appeal to show that the evidence compelled a finding by the trial court that she rebutted the presumption of undue influence. In reaching its conclusion that Whalen did not meet her burden, the trial court properly cited to the factors set forth in Welfare and Institutions Code section 15610.70. Significantly, Krsta was vulnerable given his advanced age and fragile health, his emotional distress and isolation following Dorothy's death, and his dependence on Whalen for emotional support. As the trial court found, Whalen was the only person in contact with Krsta after Dorothy died. (See Welf. & Inst. Code, § 15610.70, subd. (a)(1).)

Whalen acted with "apparent authority" for the same reasons she was a care custodian, including that she wrote out checks for Krsta to sign and brought his mail from his apartment to him. (See Welf. & Inst. Code, § 15610.70, subd. (a)(2).) Whalen controlled Krsta's access to other people in that she handwrote his letters to Zivomir, was Krsta's only visitor, controlled his finances, and "purged" his apartment by throwing out his important documents. Indeed, Whalen described Krsta's trust in her at the end of his life by describing how she held his hand and "reassured him that he had completed everything he needed to do in his life"; even though he could not respond, he would squeeze her hand, and she "kn[e]w he felt comforted and agreed." (See *id.*, subd. (a)(3)(A).) Whalen also made the arrangements for Krsta's changes to his will in "haste" just 47 days before his death by calling Dolinsky to prepare the will, and

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court also properly considered Whalen's actions after Krsta's death in lying to Zivomir to support its finding that her conduct constituted acts of "secrecy in effecting those changes" to Krsta's 1992 will. (See Welf. & Inst. Code, § 15610.70, subd. (a)(3)(C).)

later lying to Zivomir as to the extent of Krsta's estate. (See *id.*, subd. (a)(3)(C).)

Finally, as the trial court found, the inequity of the 2005 will is evidenced by the dramatic change from Krsta in 1992 leaving his entire estate to Zivomir to leaving everything to Whalen, with only $1 going to Zivomir. Yet the letters from Krsta to Zivomir up until the end of July 2005—just months before his death—showed no change in Krsta's intentions. To the contrary, Krsta consistently expressed his love for Zivomir. The trial court cited to this evidence of "a close and continuous relationship between Zivomir and his father" as the reason Whalen had to retract her deposition testimony that Krsta left his estate to her instead of Zivomir because Zivomir had lost contact with his father. In addition, there was a significant disparity between the value of the $350,000 gift to Whalen (the value of the estate) in relation to the services Whalen performed for Krsta. (See Welf. & Inst. Code, § 15610.70, subd. (a)(4).)

As the trial court properly concluded based on this wealth of evidence, Whalen "failed to rebut the presumption by showing the absence of undue influence." We cannot say as a matter of law that the evidence compelled a different result as a matter of law. (*Atkins v. City of Los Angeles*, *supra*, 8 Cal.App.5th at p. 734; *Odian, supra,* 145 Cal.App.4th at p. 168.) We therefore affirm the trial court's order, and dismiss Zivomir's appeal as moot.

DISPOSITION

The order is affirmed. Zivomir is to recover his costs on appeal. Zivomir's appeal is dismissed as moot.

FEUER, J.*

We concur:

PERLUSS, P. J.

SEGAL, 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.