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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MANUELA HERZER,

Petitioner and Appellant,

v.

SUMNER REDSTONE,

Real Party In Interest and
Respondent.

B276191

(Los Angeles County
Super. Ct. No. BP168725)

APPEAL from an order of the Superior Court of Los Angeles County. David J. Cowan, Judge. Affirmed.

Horvitz & Levy LLP, Jeremy B. Rosen, Eric S. Boorstin; Law Offices of Ronald Richards & Associates, A.P.C., and Ronald Richards for Petitioner and Appellant.

Hueston Hennigan LLP, Robert N. Klieger, Andrew K. Walsh; Loeb & Loeb LLP, Gabrielle A. Vidal and Amy L. Koch for Real Party in Interest and Respondent.

Appellant Manuela Herzer challenges the dismissal of her petition seeking to invalidate the revocation of an advance health care directive executed by her one-time friend, Sumner Redstone, in which she was named as Redstone's health care agent. Following testimony from Redstone that he did not trust Herzer and did not want her acting as his agent, the probate court dismissed the petition, reasoning that the proceeding was not reasonably necessary to protect Redstone's interests. Herzer asserts the trial court abused its discretion in dismissing the petition because (1) the court failed to recognize its authority to award relief other than restoring Herzer as Redstone's agent; (2) the court failed to make capacity and undue influence determinations, which were necessary in order to protect Redstone's interests; (3) the court erroneously relied on evidence not admitted at trial and failed to consider Herzer's evidence in resolving contested issues; and (4) the court's premature dismissal of the petition violated Redstone's and Herzer's rights to due process. We reject each argument and affirm the order of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

Herzer's Petition

On November 25, 2015, Herzer filed a petition pursuant to Probate Code section 4766, subdivisions (a) and (b),¹ seeking numerous determinations regarding advance health care directives executed by Redstone. At the time, Redstone was 92 years old.

¹ All future undesignated statutory references are to the Probate Code.

According to the petition, Herzer maintained a close relationship with Redstone for 16 years. In 2000, Redstone proposed marriage, but she declined. In April 2013, Redstone requested Herzer oversee his health care, at which point she began travelling between New York, where she lived with her daughter, and Los Angeles, where Redstone lived.

On May 21, 2014, Redstone executed an advance health care directive (May 2014 Directive), which named Herzer and his then-girlfriend, Sydney Holland, as agents to make health care decisions on his behalf. The directive provided that his agents' authority became effective only when Redstone's primary physician determined he was unable to make his own health care decisions.

In mid-2014, Redstone's health deteriorated and he was hospitalized for aspiration and pneumonia. Redstone's physician recommended a feeding tube, but Redstone's daughter, Shari Redstone,² became irate and stated it was against his religion. Herzer and Holland directed that the feeding tube be installed. Redstone's physician later told Herzer the decision prolonged Redstone's life.

In August 2015, Holland moved out of Redstone's house after she admitted to infidelity. According to Herzer, at that point, Redstone began exhibiting signs of a discernible and accelerated mental decline. Among other things, Redstone was no longer able to understand or willing to act in accordance with his physician's medical recommendations, exhibited short-term memory problems, lost the ability to write, became limited in his ability to express himself and communicate to others, was prone

² In order to distinguish Shari Redstone from Sumner Redstone, we will refer to her as Shari. We mean no disrespect.

to spontaneous crying spells for no discernable reason, lost interest in activities he previously enjoyed, and lost the sense of time.

On September 3, 2015, Redstone executed a new advance health care directive (September 2015 Directive), which named Herzer as his primary agent and removed Holland. Redstone designated his business associate, Philippe Dauman, as his alternate agent. In all other respects, the September 2015 Directive was identical to the May 2015 Directive.

On October 12, 2015, Redstone's attorney told Herzer to leave Redstone's house, purportedly at Redstone's direction. When asked for an explanation, the attorney stated that Herzer had lied to Redstone. According to Herzer, Redstone either did not direct his attorney to eject her from his home, or did not understand the nature and consequences of doing so.

On October 16, 2015, Redstone executed a new advance health care directive (October 2015 Directive), which named Dauman as his primary agent. Herzer was not named as a primary or alternate agent. The October 2015 Directive is identical to the September 2015 Directive in all other respects.

According to Herzer, the revocation of the September 2015 Directive was invalid because Redstone lacked the necessary capacity to execute the October 2015 Directive. Herzer asserted that Dr. Stephen Read, who is a board-certified physician in psychiatry with a subspecialty certification in geriatric psychiatry and forensic psychiatry, determined that as of October 16, 2015, Redstone was incompetent and unable to make, communicate, or understand health care decisions. According to Dr. Read, Redstone did not fully understand and appreciate the consequences of his decision to remove Herzer as his health care

agent.

Herzer further alleged that, as of October 15, 2015, Redstone was especially susceptible to undue influence, and his revocation of the September 2015 Directive was the result of such undue influence.

Herzer sought, among other things, determinations that the October 2015 Directive was invalid and the September 2015 Directive remained in full force and effect.

Initial Motion to Dismiss

On January 4, 2016, Redstone filed a motion to dismiss pursuant to section 4768,³ arguing the proceeding was not reasonably necessary to protect his interests. In opposition, Herzer asserted it was in Redstone's best interest to proceed with the trial given the accusations of lack of capacity and undue influence. As to the capacity issue, Herzer submitted a detailed report by Dr. Read based on his recent examination of Redstone, in which he concluded Redstone did not understand or appreciate the consequences of his decision to remove Herzer as his health care agent. As to the issue of undue influence, Herzer submitted evidence suggesting Redstone's nurses were manipulating and controlling him. In addition, Herzer accused Shari of attempting to trick Redstone and take control of his life. She also accused Dauman of using Redstone for his own personal gain and influence, including by forging a letter purportedly written by Redstone.

³ Section 4768 provides that the "court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient"

On February 29, 2016, the court denied Redstone's motion to dismiss. The court noted it "cannot, at least now, hold that . . . this proceeding is not reasonably necessary to protect Redstone's interests as a patient . . . [because] there are numerous factual disputes . . . which if one or more is determined in favor of Herzer at trial would have made the petition necessary to protect that interest."

April 2016 Directive

In April 2016, Redstone executed a new advance health care directive (April 2016 Directive), which named Shari and Rebecca Rothstein as his primary agents, with Kimberlee Ostheimer as his alternate agent. The parties stipulated that the court could consider the validity of the April 2016 Directive without the need for an amended petition.

Trial

The court bifurcated the trial. During the first phase, the court would consider whether Redstone had capacity to execute the October 2015 Directive and whether its execution was the result of undue influence. The court reserved for the second phase any other issues, including "restoring Ms. Herzer [as Redstone's agent], the validity of the April directive or other issues [the parties] hadn't thought about." Herzer indicated she intended to call 14 witnesses at trial.

The trial began on May 6, 2016. Herzer's first witness was Redstone, who testified via a videotaped deposition taken the day before. The entire deposition, which lasted approximately 20 minutes, was played for the court. Due to a severe speech impediment, Redstone testified through an interpreter.⁴

⁴ Herzer did not object to the use of an interpreter, nor did she object at the deposition that the interpreter did not

Redstone answered Herzer's questions for approximately 15 minutes, and then proceeded to answer questions from his own counsel.

Redstone testified that Herzer was once the love of his life, but he no longer loved her. He was aware that Herzer previously helped with his health care, but he was unable to elaborate on what care she provided. Redstone accused Herzer of stealing from him. He stated he kicked Herzer out of his home because she lied to him, and he provided specifics as to what she lied about. On four occasions during his deposition, Redstone referred to Herzer using expletives. He stated that he hated Herzer, and did not want her to make health care decisions for him. Instead, he wanted Shari to do so. In addition, Redstone stated he felt good about seeing his family.

Herzer's second witness, Dr. Read, opined that, on October 16, 2015, Redstone's mental capacity was severely compromised to such a degree that he did not have the requisite mental capacity to understand and appreciate the consequence of his actions in changing his health care directive. He further opined that Redstone was extremely vulnerable to undue influence on that date.

Dr. Read conducted an in-person mental status examination of Redstone on January 29, 2016. Dr. Read found Redstone was fully alert and attentive throughout the examination. Redstone was oriented to person, able to state the date (although not the year), and able to repeat three words from memory. Redstone was also able to state how many children, grandchildren, and great grandchildren he had, and was able to name the great grandchildren. Redstone performed very poorly

accurately interpret Redstone's testimony.

when asked to point to pictures of specific shapes and colors. Redstone was also unable to spell “world” backward or do simple arithmetic. Dr. Read witnessed Redstone experience moments of distress, which manifested as anger that emerged quickly.

Dr. Read concluded Redstone manifests features of dementia, toward the severe end of moderate, and diagnosed Redstone with a major neurocognitive disorder. Dr. Read believed Redstone suffered cortical brain damage, likely from a shortage of blood flow and oxygen to his brain over a period of time, which caused Redstone’s language impairment.

On cross-examination, Dr. Read agreed that Redstone was essentially able to understand his questions and provide meaningful responses. Dr. Read did not find unreasonable the opinion of Redstone’s expert, Dr. James Edward Spar, that Redstone had capacity to execute the October 2015 Directive.⁵ Dr. Read also agreed that Redstone knew he was signing an advance health care directive on October 16, 2015, and knew its terms. In addition, Dr. Read accepted that the terms of the October 2015 Directive expressed Redstone’s intentions.

Dr. Read testified that, at least to some extent, Redstone was aware of his medical conditions. For example, Redstone indicated he would want his feeding tube reinserted if it fell out, from which Dr. Read inferred that Redstone understood the consequences of such a situation. Redstone also understood that he would choke if he attempted to eat.

⁵ Dr. Spar, who is a physician and psychiatrist and the founding Director of the Division of Geriatric Psychiatry at UCLA School of Medicine, evaluated Redstone on October 16, 2015, the day he signed the October 2015 Directive.

In Dr. Read’s opinion, it would be “very difficult” for Herzer to act as Redstone’s health care agent given their current relationship. Dr. Read testified that a person whom a principal does not trust, is not a part of the principal’s life, and the principal does not want part of his life, would not be a good health care agent. He further testified that it would be rational that Herzer not be Redstone’s health care agent if their relationship had been severed.

Renewed Motion to Dismiss

After the conclusion of Dr. Read’s testimony, Redstone renewed his motion to dismiss pursuant to section 4768.⁶ In opposition, Herzer asserted the court should not accept Redstone’s testimony “at face value,” and “should not be guided solely by what Redstone purportedly ‘wants,’ unless the Court is convinced, after hearing and considering *all* the evidence, that Redstone has the capacity to articulate what he wants and that what he ‘wants’ is not the product of undue influence.” Herzer also stated that, given Redstone’s current animosity toward her, the court had the authority to appoint another individual to serve as Redstone’s agent. Herzer further asserted that Shari should have no control over Redstone’s health care decisions given her prior disagreements and estrangement from Redstone, as well as her objection to Redstone receiving a feeding tube. In addition, she represented that Dauman, who was living in New York, did not want to act as Redstone’s health care agent.

⁶ In order to provide the parties the opportunity to brief the issues and present oral argument, the court deferred its consideration of the motion to dismiss for several days. In the meantime, the court allowed Herzer to present testimony from Joseph Octavio, who was one of Redstone’s nurses.

The court dismissed the petition after concluding the proceeding was not reasonably necessary to protect Redstone's interests. The court stated its specific findings were that "Herzer cannot be restored as [Redstone's] agent and Redstone is satisfied with the care he is receiving and to be with his family." The court expressly stated it was "*not* making any ultimate finding related to Redstone's mental capacity, one way or another, or whether he was unduly influenced in revoking the September directive."

The court's relevant findings were based primarily on Redstone's testimony that he lost trust in Herzer, did not want her in his life, and instead wanted Shari to direct his health care if necessary. The court also relied on Dr. Read's testimony that "where there is a lack of trust, it would not make sense for Herzer to serve as Redstone's agent."

In explaining why it found Redstone's testimony compelling, the court noted that he was alert, composed, and did not appear angry. Redstone also did not appear to be confused about the questions, his wishes, or the reasons for his wishes. Redstone appeared to be aware of the significance of ejecting Herzer from his home as it related to his health care. In addition, the fact Redstone testified that he once loved Herzer suggested he was not brainwashed by Shari or those allegedly working with her. Further, Redstone's stated reasons for removing Herzer as his agent—he did not trust her because she lied to him and stole from him—were rational.

Although it relied on the interpreter to understand Redstone, the court noted it was able to see him enunciate words that seemed consistent with the interpreter's responses. In addition, Herzer proffered no evidence to suggest the

interpreter did not know how to interpret Redstone or did not follow her oath as an interpreter.

The court stated that Dr. Read's testimony did not alter its decision to follow Redstone's stated wishes. Dr. Read opined that Redstone was only somewhat impaired, had not lost his ability to comprehend matters, and was able to provide "meaningful" responses to many questions. Although Dr. Read testified that Redstone did not understand the consequences of his actions, the court felt otherwise having observed Redstone testify.

The court rejected Herzer's suggestion that it could order some form of relief other than reinstating her as Redstone's agent. The court explained that the nature of the proceeding was limited to the petition Herzer filed, which was for an order declaring the October 2015 Directive invalid for lack of capacity or because of undue influence. The court noted that, if Herzer wanted an order putting another individual in charge of Redstone's care, or otherwise creating a solution in Redstone's best interests, she should have filed a petition for conservatorship of his person. Because she did not do so, the court's power was limited to a finding that the October 2015 Directive was invalid, which would effectively restore Herzer as Redstone's agent.

The court determined it was not necessary to hear further evidence regarding Redstone's capacity and whether there was undue influence. It noted that Redstone's capacity in October 2015, and whether Shari, or anyone else, unduly influenced him to revoke the September 2015 Directive, would not change the fact that Redstone no longer trusted Herzer. This lack of trust was sufficient to show that Herzer could not act as Redstone's agent going forward.

Although the court was explicit that it was making no final determinations on the capacity and undue influence issues, it included in its order fairly detailed discussions of the level of capacity required to remove a health care agent and the likely weaknesses of Herzer's claims of lack of capacity and undue influence.

Motion for a New Trial

On June 13, 2016, Herzer moved for a new trial, arguing, among other things, that she did not have a full and fair opportunity to present her evidence. The court denied the motion on July 11, 2016.

Herzer timely appealed.⁷

⁷ Herzer's notice of appeal indicates she intended to challenge the court's order dismissing her petition, as well as its order denying her motion for a new trial. Herzer's opening brief on appeal, however, is concerned almost exclusively with the court's dismissal order. In a footnote, Herzer briefly argues that one of the court's purported reasons for denying her motion for a new trial was error. We decline to consider this argument. (See *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 160 ["[w]e do not have to consider issues discussed only in a footnote"]; Cal. Rules of Court, rule 14(a)(1)(B) [each point on appeal must be stated under a separate heading or subheading summarizing the point].)

DISCUSSION

I. The Court Did Not Abuse its Discretion in Dismissing the Petition

A. Standard of Review

Both parties urge us to review the court’s dismissal of the petition pursuant to section 4768 for abuse of discretion. Section 4768 provides that the court “may dismiss a petition [concerning an advance health care directive] if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient”

No court has considered the proper standard of review of a dismissal of a petition under section 4768. However, in *Gregge v. Hugill* (2016) 1 Cal.App.5th 561 (*Gregge*), the court reviewed for abuse of discretion the dismissal of a petition pursuant to a similarly worded statute, section 17202, which provides that the court “may dismiss” a petition concerning a trust “if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.” (§ 17202.) The *Gregge* court reasoned that an abuse of discretion standard was appropriate because, “[b]eing permissive and not mandatory, a dismissal under section 17202 invokes the discretion of the trial court. [Citation.]” (*Gregg, supra*, 1 Cal.App.5th at p. 567.)

The Legislature’s use of the phrase “may dismiss” in section 4768 similarly indicates a permissive grant of discretion to the trial court. Indeed, “[t]he normal rule of statutory construction is that when the Legislature provides that a court or other decisionmaking body ‘may’ do an act, the statute is permissive, and grants discretion to the decisionmaker. [Citations.]” (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802.) There is nothing in the statutory language or legislative history to

persuade us the Legislature intended a contrary interpretation. Accordingly, we review the court's dismissal of Herzer's petition for abuse of discretion.

We will not find an abuse of discretion unless "under all the evidence, viewed most favorably in support of the trial court's action, no judge could have reasonably reached the challenged result. [Citation.] '[A]s long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be . . . set aside" ' [Citation.] More specifically, a trial court's exercise of discretion will not be disturbed unless the record establishes it exceeded the bounds of reason or contravened the uncontradicted evidence [citation], failed to follow proper procedure in reaching its decision [citation], or applied the wrong legal standard to the determination." (*Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340; *Estate of Howard* (1955) 133 Cal.App.2d 535, 538.) "An exercise of discretion cannot be upheld when it is founded on incorrect legal premises." (*Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1459.) "The burden is on the complaining party to establish abuse of discretion, and the showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citation.]' [Citation.]" (*Conservatorship of Ben C.* (2006) 137 Cal.App.4th 689, 697.)

B. The Health Care Decisions Law

The Health Care Decisions Law (§ 4600 et seq.) (HCDL) "gives competent adults extremely broad power to direct all aspects of their health care in the event they become incompetent." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 534 (*Wendland*)). The HCDL governs advance health

care directives, which encompasses individual health care instructions and powers of attorney for health care. (§§ 4605, 4665, subd. (a).) Pursuant to the HCDL, an “adult having capacity may execute a power of attorney for health care,” which “may authorize [an] agent to make health care decisions” on the principal’s behalf. (§ 4671, subd. (a); see § 4683, subd. (a).) “Unless otherwise provided in a power of attorney for health care, the authority of an agent becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity.” (§ 4682.)

Generally, an “advance health care directive is effective and exercisable free of judicial intervention.” (§ 4750, subd. (a).)

Section 4766 enumerates the limited purposes for which an individual may seek judicial intervention with respect to an advance health care directive. Under that section, a petition may be filed for the following purposes: “(a) Determining whether or not the patient has capacity to make health care decisions. [¶] (b) Determining whether an advance health care directive is in effect or has terminated. [¶] (c) Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient’s desires . . . [or] are in the patient’s best interest. [¶] (d) Declaring that the authority of an agent or surrogate is terminated, upon a determination by the court that the agent or surrogate has made a health care decision for the patient that authorized anything illegal or upon a determination by the court of both of the following: (1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient’s desires or, where the patient’s desires are unknown or unclear, is

acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest. (2) At the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive or disqualify a surrogate. [¶] (e) Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate." (§ 4766.)

A court may dismiss a petition filed under section 4766 "if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient." (§ 4768.)

C. The Court Did Not Err in Finding its Powers Were Limited to Reinstating Herzer as Redstone's Agent

1. The Court Had No Power to Appoint an Agent for Redstone

Herzer asserts the court abused its discretion in that its order was premised on the erroneous belief that it lacked the authority to appoint someone other than Herzer as Redstone's agent in the event it invalidated the October 2015 and April 2016 Directives. We find no error.

Herzer implicitly acknowledges that the HCDL does not grant the probate court authority to appoint a health care agent on behalf of a principal. She argues instead that the probate court has the inherent authority to grant such relief, which is equitable in nature. Herzer proposes no limits on this power, nor does she explain under what circumstances it may be exercised.

Tellingly, Herzer fails to point to a single case in which a court has exercised this purported authority to appoint an agent to make health care decisions on behalf of a principal. Nor does she direct us to other cases in which courts have provided similar relief in non-health care contexts. Instead, Herzer relies on

authority standing for the general principles that superior courts have broad powers to fashion remedies, grant relief, and control the proceedings before them. (See, e.g., *Estate of Kraus* (2010) 184 Cal.App.4th 103, 114 [“the probate court is a court of general jurisdiction . . . with broad equitable powers”]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1552 [“[t]rial courts have broad equitable power to fashion any appropriate remedies”]; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 390 [“[e]quitable relief is by its nature flexible”]; *Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1012 [Code of Civil Procedure section 128 provides the court with “broad discretion to control the proceedings before it in the furtherance of justice”].) In addition, despite the fact this case does not involve a conservatorship, she cites authority providing that incompetent patients retain the right to have appropriate medical decisions made on their behalf by conservators. (*Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, 205.)

We agree with the probate court that it lacked the authority, in equity or otherwise, to appoint a health care agent to act on Redstone’s behalf. First, the court’s appointment of a health care agent would have been fundamentally inconsistent with the policy underlying the HCDL and the very concept of a health care agent. A health care agent is someone “freely designated” by the principal, not someone who is court-appointed. (*Wendland, supra*, 26 Cal.4th at p. 545; see § 4671 [an “adult having capacity” may authorize an agent to make health care decisions].) Indeed, the HCDL, which governs the appointment of health care agents (§ 4665, subd. (a)), “give[s] effect to the *decision of a competent person*, in the form either of instructions

for health care or the designation of an agent or surrogate for health care decisions. Such laws may accurately be described, as the Legislature has described them, as a means to respect personal autonomy by giving effect to competent decisions: ‘In recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care’ (§ 4650, subd. (a) [legislative findings].)” (*Wendland, supra*, 26 Cal.4th at p. 534, italics added.)

To the extent Redstone had the requisite capacity at the time of trial, by appointing an agent on his behalf and against his express wishes, the court would have usurped his fundamental right to control his own health care. Even if Redstone lacked capacity at the time of trial, the court cannot presume to know whom he would have designated as his agent in lieu of Herzer had he possessed the requisite capacity. Despite its broad equitable powers, the probate court has no authority to act in such a way.

We reject Herzer’s contention that the court’s purported equitable power to appoint an agent is confirmed by section 1046. Section 1046 provides that the “court shall hear and determine any matter at issue and any response or objection presented, consider evidence presented, and make *appropriate* orders.” (Italics added.) As discussed, the court lacked the authority to appoint an agent on Redstone’s behalf in the context of a section 4766 petition. As a result, any order doing so would have been inappropriate.

We also reject Herzer’s assertion, without any explanation, that the existence of her proposed equitable power is confirmed by section 4470. Section 4470 affords the court the authority to

issue “a temporary order prescribing the health care of the patient until the disposition of the petition filed under Section 4766.” It does not grant the court authority to appoint a permanent agent or permanently prescribe the patient’s health care. Thus, this provision does not support Herzer’s argument.

Further, we note that although the court lacked the authority to appoint an agent, Herzer could have obtained similar relief by petitioning the court to appoint a conservator. However, the distinction between a conservator and an agent is not one in name only. (See *Wendland, supra*, 26 Cal.4th at p. 545 [a conservator “is not an agent of the conservatee”].) Rather, the two differ in a fundamental way. As our Supreme Court has explained, “decisions made by conservators typically derive their authority from a different basis [than an agent]—the *parens patriae* power of the state to protect incompetent persons. Unlike an agent or a surrogate for health care, who is voluntarily appointed by a competent person, a conservator is appointed by the court because the conservatee ‘has been adjudicated to lack the capacity to make health care decisions.’ (§ 2355, subd. (a).)” (*Wendland, supra*, 26 Cal.4th at p. 535.) Given this difference, “[w]hile it may be constitutionally permissible to assume that an agent freely designated by a formerly competent person to make all health care decisions . . . will resolve such questions ‘in accordance with the principal’s . . . wishes’ (§ 4684), one cannot apply the same assumption to conservators and conservatees [citation].” (*Wendland, supra*, 26 Cal.4th at pp. 545–546.)

Despite the availability of such a remedy, the court was not required to construe Redstone’s petition under section 4766 as a request for the appointment of a conservator.⁸ This is because

⁸ Herzer did not ask the court to appoint a conservator.

there are significant procedural differences between the two types of petitions implicating fundamental due process rights. Most importantly, a proposed conservatee has the right to a trial by jury to determine whether to appoint a conservator (§ 1827), whereas there is no right to a jury trial in proceedings under section 4766 (§ 4754).

In addition, notice of a hearing on a petition to appoint a conservator must be provided to the proposed conservatee's spouse or domestic partner, and relatives within the second degree. (§§ 1821, subd. (b), 1822.) In contrast, notice of a hearing on a section 4766 petition need only be served on the agent and patient. (§ 4769.) Here, because the record does not disclose whether Redstone's relatives within the second degree received notice of the hearing, we must presume they did not. (See *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127 ["[i]n the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court"].) Given the lack of notice, it would have been error for the court to appoint a conservator in the context of Herzer's section 4766 petition. (See *Estate of Mims* (1962) 202 Cal.App.2d 332, 345 [oral request for relief may give probate court jurisdiction to act but only if "all parties who were entitled to receive notice had a written petition been filed, have notice of the proceeding"].)

Nonetheless, we consider this issue on appeal given Herzer's general assertion that the court's dismissal was premised on its erroneous belief that it could award no relief beyond restoring Herzer as Redstone's agent.

**2. *The Court Did Not Err by Failing to
Consider Other Remedies Suggested by Herzer***

In passing, and without citation to any meaningful authority, Herzer suggests the court could have ordered Redstone to meet with her to attempt to undo any undue influence. “ ‘The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.’ ” (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Nonetheless, we reject Herzer’s suggestion that the court had the authority to force Redstone, against his will, to meet with her. Regardless of his capacity, such an order would have likely violated his right to privacy under our state Constitution, which protects “interests in making personal decisions or in conducting personal activities free of interference, observation, or intrusion.” (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 387.) As such, it was not error for the court to decline to consider it as a possible remedy.

Herzer contends there were two additional outcomes the court overlooked, neither of which would have resulted in her acting as Redstone’s agent. According to Herzer, the court could have invalidated only the April 2016 Directive, thus leaving the October 2015 Directive in place. Alternatively, the court could have invalidated the October 2015 and April 2016 Directives, and then terminated Herzer’s agency. In either case, Dauman, rather than Herzer, would be designated as Redstone’s primary agent.

To the extent the court may have erred in overlooking these possibilities, we decline to review it on appeal because such error was invited by Herzer. An error is invited when a party purposefully induces its commission. (*Norgart v. Upjohn Co.*

(1999) 21 Cal.4th 383, 403.) The doctrine of invited error bars review on appeal based on the principle of estoppel and is intended to prevent a party from leading a trial court to make a particular ruling, and then profiting from the ruling in the appellate court. (*Ibid.*)

On multiple occasions, Herzer represented to the probate court that Dauman should not serve as Redstone's agent. In opposition to Redstone's initial motion to dismiss, Herzer accused Dauman of using Redstone for his own personal gain and influence, including by forging a letter purportedly written by Redstone. Although made in the context of an undue influence argument, the implication was that Dauman was unfit to act as Redstone's agent. Additionally, in opposition to Redstone's renewed motion to dismiss, Herzer represented that Dauman did not want to serve as Redstone's health care agent. Given such representations, we decline to consider whether the court erred in failing to address the possibility of appointing Dauman as Redstone's agent.

D. The Court Was Not Required to Make Determinations Regarding Capacity and Undue Influence

Herzer asserts the court could not protect Redstone's interests without first making determinations with respect to his capacity and whether he was subject to undue influence. We disagree.

Determinations that Redstone lacked capacity in October 2015 and April 2016, and was subject to undue influence at those times, would not have impacted the court's decision that it was not in Redstone's interests for Herzer to act as his agent. Indeed, Herzer's own expert, Dr. Read, determined Redstone lacked

capacity and was at risk of undue influence during those times, yet nonetheless testified it would be “very difficult” for Herzer to act as his agent.

Herzer’s reliance on *Gregge, supra*, 1 Cal.App.5th 561, is misplaced. In *Gregge*, the court reversed the dismissal of a beneficiary’s petition to determine the validity of an amendment to his deceased grandfather’s trust. The petitioner asserted the grandfather lacked capacity to execute the amendment and was subject to undue influence by the petitioner’s uncle. (*Id.* at p. 563.) The amendment increased the uncle’s share in the trust, and reduced the petitioner’s. (*Id.* at p. 564.) After the petition was filed, another beneficiary agreed to forego his share in order to restore the petitioner’s share to what it would have been prior to the amendment, conditioned on the entry of a final order dismissing the petition. (*Id.* at p. 567.) The probate court proceeded to dismiss the petition under section 17202, which provides that the “‘court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.’”

The Court of Appeal reversed, finding the dismissal was an abuse of discretion and contrary to public policy. (*Gregge, supra*, 1 Cal.App.5th at pp. 569–570.) The court noted that the public policy disfavoring litigation of wills did not give the trial court the authority or discretion to dismiss this sort of petition, especially in light of the long-held public policies of effectuating a testator’s intent and dissuading elder abuse. (*Id.* at p. 570.) The court also noted that the dismissal had the “incongruous result” of implementing the amended trust for only some beneficiaries. (*Id.* at p. 571.) Finally, the court stated its decision did not contravene the policy supporting settlements because petitioner

never agreed to settle the case. (*Ibid.*)

This case is distinguishable. Here, continuation of the proceeding would have harmed Redstone's interests, who was the very person the relevant statutory scheme was designed to protect.⁹ (§ 4768.) There were no similar concerns in *Gregge*. Moreover, although we recognize that dismissal did not necessarily serve the public policy of effectuating Redstone's intent and dissuading elder abuse, there were other means to effectuate such policy without risking harm to Redstone's interests. Indeed, Herzer could have simply renounced her appointment as Redstone's agent under the September 2015 Directive and proceeded with her petition. To the extent that would not sufficiently protect Redstone's interests, she was free to petition the court to appoint a conservator whom could be delegated control over Redstone's health care if the directives were declared invalid or his agents found to be unfit. For whatever reason, Herzer did not pursue those options.

⁹ Indeed, no matter what the outcome, Redstone's interests would have been harmed. In the event the court granted Herzer's petition, she would have been reinstated as Redstone's agent—an outcome her own expert opposed. Although Herzer could potentially be removed pursuant to section 4766, subdivision (d), it likely would have required a new petition and proceeding. Given that Herzer declined to renounce her authority under the September 2015 Directive, we presume she would have contested such efforts to remove her. Alternatively, if the court denied Herzer's petition, the status quo would be maintained. However, to get there, Redstone would have been required to proceed with the trial, which, based on Herzer's offers of proof, would have involved the presentation of highly sensitive evidence related to Redstone's medical conditions and private life.

Herzer's suggestion that the court was required to determine Redstone's capacity and whether he was subject to undue influence *at the time of his deposition* is also without merit. Herzer contends, without providing any authority, that it was error for the court to view Redstone's testimony as dispositive absent a determination that he had the requisite capacity to give such testimony legal effect.¹⁰ According to Herzer, before giving weight to Redstone's stated desires, the court was required to find that he was able to understand both the nature and consequences of his testimony. Similarly, she suggests the court could not credit Redstone's testimony as his own to the extent it was the result of undue influence.

Contrary to Herzer's suggestions, the court did not dismiss the petition because it concluded Redstone's testimony had the effect of revoking Herzer's agency or had any other legal

¹⁰ As we understand her argument, Herzer does not assert that Redstone was disqualified to be a witness due to a lack of capacity. Generally, "every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (Evid. Code, § 700.) "A person is incompetent and disqualified to be a witness if he or she is '[i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him' (Evid. Code, § 701, subd. (a)(1)), or is '[i]ncapable of understanding the duty of a witness to tell the truth' (Evid. Code, § 701, subd. (a)(2)). [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1150.) That an interpreter was required to understand Redstone did not render him incompetent to testify. (See *Cramer v. Tyars* (1979) 23 Cal.3d 131, 140 [witness with developmental disability and speech impediment who testified through an interpreter was not necessarily incompetent to testify].)

significance. Rather, it dismissed the petition because it concluded Redstone's interests would not be served by granting the petition, which would result in Herzer's reinstatement as Redstone's agent. This conclusion was based on Redstone's deposition testimony that he did not trust Herzer and did not want her acting as his agent. Given Dr. Read's testimony that it would be "very difficult" for Herzer to act as Redstone's agent in light of his statements at deposition, so long as Redstone's testimony accurately reflected his feelings and desires, the court had a sufficient basis for finding Herzer should not serve as his agent. It did not matter whether Redstone fully understood the implications or consequences of such testimony. Nor did it matter how he came to have these feelings and desires, or that they may have been the product of undue influence. Whether Redstone's testimony accurately reflected his feelings and desires was essentially a credibility determination, which we do not second-guess on appeal.¹¹ (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968; *Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.)

¹¹ We note the court gave numerous valid reasons for its decision to afford significant weight to Redstone's testimony. (See Evid. Code, § 780 [listing factors court may consider in determining credibility of a witness].) For example, the court relied on Dr. Read's determination that Redstone was able to understand and meaningfully respond to questions. The court also observed that Redstone was alert and composed, and did not appear confused about his wishes or the reasons for his wishes. Further, although his testimony was "strong," Redstone did not appear to the court to be "out of control" with anger. In addition, Redstone's stated reasons for his lack of trust in Herzer—that she lied to him and stole from him—indicated his thinking was rational.

Herzer further contends the court should have discounted Redstone's testimony due to the manner in which it was interpreted. She points out that the interpreter had difficulty interpreting responses to open-ended questions, began her interpretation before Redstone finished answering certain question, and at times, stopped her interpretation before Redstone finished speaking. According to Herzer, this shows the testimony was "the product of repeated rehearsal rather than an accurate depiction of [Redstone's] views."

Herzer, however, fails to acknowledge that testimony can be both well-rehearsed and an accurate depiction of the deponent's views. Indeed, it is common and prudent practice for attorneys to prepare with their clients through mock depositions. Such preparation would have been particularly prudent here given Redstone's condition. We find no abuse of discretion in the probate court's decision to give significant weight to Redstone's testimony.

E. The Court Did Not Err by Relying on Evidence Not Admitted at Trial and Refusing to Hear Additional Evidence

Herzer next argues the court erroneously made determinations regarding contested matters based on evidence not admitted at a trial and without hearing all her evidence. We disagree and find no error.

Herzer primarily finds fault with dictum in a section of the court's order entitled "Likely Weakness of Underlying Claims." As its heading suggests, the section concerned the weaknesses in Herzer's arguments that Redstone lacked capacity and was subject to undue influence.¹² Unlike Herzer, we read this entire

¹² Among other things, the court noted the following: (1) it

section as superfluous to the court's relevant factual findings and ultimate conclusion that the proceeding was not reasonably necessary to protect Redstone's interest.

Although Herzer maintains the court relied on these supposed weaknesses in dismissing her petition, the court repeatedly stated, including twice in the aforementioned section, that it was not making final determinations on the capacity and undue influence issues. Moreover, as discussed above, such findings would have been irrelevant to the court's ultimate conclusion that Herzer could not serve as Redstone's agent given his lack of trust in her and desire that she not act in that capacity. Thus, Herzer has failed to show that any of the statements in this section constituted prejudicial error. (See Code Civ. Proc., § 475; Cal. Const., art. VI, § 13; *Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 709 ["a fundamental precept in California is that in civil cases only prejudicial error is reversible"].)

would be difficult to prove Redstone had capacity to execute the September 2015 Directive, but lacked capacity to execute the October 2015 Directive; (2) even if Shari and Redstone had disagreements in the past, the bond between a parent and a child is strong, and it would have been natural for Redstone to reach out to her when he felt vulnerable; (3) Dr. Read found little fault in Dr. Spar's opinion that Redstone had the requisite capacity on October 16, 2015; (4) Dr. Read failed to investigate whether Redstone's reasons for executing the October 2015 Directive, as noted by Dr. Spar, were delusions; (5) it did not make sense that Redstone would name Dauman as his agent, rather than Shari, if the October 2015 Directive was the product of Shari's undue influence; and (6) Herzer failed to adequately explain how Shari profited from Redstone revoking the September 2015 Directive.

Herzer also takes issue with the following statement in another section of the court's order: "[I]f as Herzer argues [Redstone] was just brainwashed by Shari or those allegedly working with her, he would not have acknowledged his vulnerability by admitting [at deposition] that he had fallen in love with Herzer" Herzer asserts this statement constituted a finding that Redstone was not subject to undue influence at the time of his deposition, which the court could not make without first hearing all her evidence. However, as discussed above, whether Redstone's deposition testimony was the product of undue influence was irrelevant to whether Herzer could serve as his agent. Thus, to the extent there was error, it was not prejudicial.

The same is true with respect to Herzer's contention that the court erred by stating, in a footnote, that there was no controversy regarding the quality of health care Redstone was currently receiving. Herzer suggests the court made the determination without considering evidence she would have offered showing the quality of Redstone's health care deteriorated after revocation of the September 2015 Directive. However, the quality of Redstone's health care, both before and after the revocation of the September 2015 Directive, was irrelevant to whether continuation of the proceeding was reasonably necessary to protect Redstone's interest. Indeed, whether the quality of his health care had deteriorated would not have changed Redstone's testimony that he did not trust Herzer and did not want her serving as his agent. Nor would it have changed Dr. Read's opinion that it would be "very difficult" for her to do so. Further, it was undisputed that the September 2015, October 2015, and April 2016 Directives had never been activated. Thus, at all

relevant times, Redstone, and not Herzer or any other agent named in his advance directives, was in control of his health care. A finding that Redstone was inadequately directing his own health care would have had no impact on the court's finding that Herzer should not serve as his agent.

II. The Court Did Not Violate Herzer's or Redstone's Due Process Rights

Herzer asserts the court's dismissal of her petition violated her due process right to present relevant and competent evidence on the issues of capacity and undue influence. We disagree. As discussed in the previous section, Redstone's capacity and whether he was subject to undue influence were irrelevant to the court's determination that the proceeding was not reasonably necessary to protect his interests. As such, Herzer had no due process right to present evidence on those issues. (See *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 ["[t]he due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court"].)

Similarly, Herzer's assertion that she was denied the right to cross-examine witnesses is without merit. Herzer complains that the court based its decision on the opinion of Dr. Spar, without providing her the opportunity to cross-examine him. However, we do not read the court's decision as reliant on Dr. Spar's opinion. As discussed above, the only testimony relevant to the court's order was provided by Redstone and Dr. Read, both of whom were Herzer's own witnesses.

We further reject Herzer's argument, made in passing, that the court violated her right to due process when it refused her request to ask Redstone follow-up questions at his deposition. "A trial court has inherent as well as statutory discretion to

control the proceedings to ensure the efficacious administration of justice.” (*People v. Cox* (1991) 53 Cal.3d 618, 700, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390; see Evid. Code, § 765; Code Civ. Proc., § 2025.290, subd. (c).) Here, the court granted Herzer 15 minutes to take Redstone’s deposition, but denied her request for an additional five minutes to ask follow-up questions. The court felt 15 minutes was sufficient and was concerned that additional questioning could jeopardize Redstone’s health. On appeal, Herzer asserts, in conclusory fashion, the additional five minutes of examination would “have revealed how [Redstone’s] true interests were not being represented by the people purporting to speak for him.” However, she fails to explain what questions she would have asked, or how Redstone’s anticipated answers would have affected the court’s decision to dismiss the petition. Thus, even if the court erred in refusing her request, Herzer has failed to show the error was prejudicial. (Code Civ. Proc., § 475; Cal. Const., art. VI, § 13; *Biscaro v. Stern, supra*, 181 Cal.App.4th at p. 709.)

Finally, we reject Herzer’s assertion, also made in passing, that the court’s dismissal of her petition deprived Redstone of his fundamental interest in ensuring that decisions regarding his health care are made in accordance with his true wishes. At his deposition, Redstone was very clear that he did not want Herzer to act as his agent. In dismissing the petition, the court respected such wishes.

DISPOSITION

The order of dismissal is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We Concur:

RUBIN, J.

GRIMES, J.