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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RABBI AHARON SIMKIN,

Plaintiff and Appellant,

v.

MICHAEL J. SIMKIN,
individually and as Trustee, etc.

Defendant and Respondent.

B268818

(Los Angeles County
Super. Ct. No. BP154310)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Office of Steven R. Friedman, Steven R. Friedman and Michael E. Friedman for Plaintiff and Appellant.

Oldman, Cooley, Sallus, Birnberg & Coleman,
Marshal A. Oldman; Benedon & Serlin, Gerald M. Serlin and Kelly Riordan Horwitz for Defendant and Respondent.

Plaintiff Aharon Simkin appeals from a judgment of dismissal after the probate court sustained a demurrer without leave to amend to his petition alleging wrongful conduct by his brother, defendant Michael Simkin, regarding their deceased father's assets and living trust. Aharon¹ alleged that Michael unduly influenced their elderly and infirm father, who depended on Michael as a caretaker and attorney, to make various transfers and trust amendments to Michael's benefit. The probate court found the causes of action lacking largely on the basis that Aharon had failed to plead undue influence adequately. We disagree with the probate court's conclusion, and accordingly reverse the order sustaining the demurrer to seven of Aharon's 10 causes of action. Aharon has also shown a reasonable possibility that the defects in two of the remaining causes of action may be cured by amendment. Finally, we hold that the probate court properly sustained the demurrer to Aharon's cause of action seeking an accounting, which the court found Michael had already provided.

FACTUAL BACKGROUND

We accept as true the following facts pleaded in the second amended petition (SAP), the pleading to which the probate court sustained the demurrer. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 156 (*T.H.*).)

Spouses Raymond and Barbara Simkin created a revocable living trust in February 1991 as co-settlors and co-trustees. The trust was amended and restated in its entirety by Raymond and

¹ Because the parties and relevant individuals share a last name, we refer to them by their first names and mean no disrespect in doing so.

Barbara in September 2003. The trust designated their three children—Michael, Aharon (formerly Allen), and Roberta—as successor co-trustees and gave each an equal one-third share of the trust. The trust was amended in 2008 designating Michael as the sole successor trustee for the period of postdeath administration, followed by Aharon and Roberta jointly; each child continued to receive exclusive control over his or her equal share of the trust estate.

During her lifetime, Barbara handled all the family's finances, with Raymond typically deferring to her on business and financial decisions. Barbara managed the couple's multiple rental properties while Raymond managed the physical maintenance of the buildings. Together they accumulated millions in assets, mainly in real estate. Aharon valued the trust assets at approximately \$17 million.

Barbara died in 2010. Raymond, then in his 70's, became severely depressed after her death, crying incessantly and expressing suicidal thoughts to Aharon. Michael, a licensed attorney who had provided legal services to his parents for many years, took over the management of Raymond's day-to-day affairs.

In 2012, at age 78, Raymond began noticeably suffering from weakness in his extremities and trouble with speech and swallowing. He was diagnosed with amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease, which impacted his ability to walk, eat, and speak. His condition rapidly deteriorated to the point that he required full-time care. At the same time, he was being treated for depression. Raymond "was at a complete loss for how to oversee the running of the rental properties and the family's finances." Michael took control of

Raymond's "finances and other affairs." Michael controlled Raymond's real estate portfolio and coordinated his care, including scheduling and accompanying him to medical appointments, supervising his medication, hiring in-home health providers, and taking him grocery shopping. Michael was the "sole gatekeeper" of Raymond's medical information, which he would not share with Aharon.

Aharon claimed that Michael took steps to isolate Raymond from the other children and grandchildren and controlled who could stay in Raymond's house. As an example, in 2013 Raymond offered to pay the travel expenses of a grandson who wanted to visit him from Chicago. When the grandson presented the prospective itinerary to Michael, Michael refused to pay for it, asserting it was too expensive, and offered instead to pay for a more inconvenient itinerary that, Aharon claims, Michael knew would not work for the grandson. Ultimately, the grandson did not visit before Raymond died.

Another grandson lived with Raymond. Michael forced him to move out of the house, after falsely accusing him of substance abuse problems, and prevented him from visiting Raymond in the hospital in Raymond's final days.

Aharon also alleged on information and belief that Michael spoke ill of him, telling Raymond that Aharon was a bad parent, Aharon did not like Roberta, and Aharon wanted Roberta's inheritance and could not be trusted to manage it.

Aharon alleged Michael took advantage of his position of authority over the ill and vulnerable Raymond to effect transactions and changes to Raymond's estate plan that were beneficial to Michael. Michael overcame Raymond's will through isolation, nagging, and "repeated entreaties" that Raymond could

not resist given his weakened physical and mental state and his dependence on Michael for his well-being. Aharon alleged that Michael actively participated in the changes to the estate plan by directing Raymond to give certain instructions to Raymond's estate planning attorney, communicating other instructions to the attorney himself, reviewing the draft documents, transporting Raymond to the attorney's office to sign the changes, and orchestrating the signing of documents outside the presence of the estate planning attorney. "Michael tried to keep most, if not all of the changes, a complete secret, hidden from his siblings until after his father's death." (Boldface and italics omitted.)

Aharon alleged that Michael orchestrated the following transactions and changes to Raymond's estate plan between 2011 and 2013:

(1) In April 2011 the trust was amended to hold each child's share in trust until Raymond's youngest grandchild turned 35. Prior to this amendment, each child would have received his or her share free and clear upon Raymond's death. The effect of the amendment, Aharon claims, was to give Michael, the successor trustee, control of his siblings' inheritance and continued entitlement to trustee and attorney fees.

(2) In September 2011 Raymond purchased a "million dollar" home in Cheviot Hills "for Michael's ultimate use." Michael "pressured" Raymond to tell the other children that Michael, not Raymond, had purchased the home. In October 2011 the trust was amended to leave the home to Michael upon Raymond's death. In June 2012, Raymond transferred the home to Michael outright. Michael already owned a home at that time.

(3) In April 2013 the trust was amended to leave an apartment building on Glendon Avenue to Michael. Aharon

alleged that this was Raymond's "most valuable asset," worth approximately \$5 million. In September 2013 Raymond transferred the rights to all rents, profits, and income from the Glendon building to Michael.

(4) In June 2013 the trust was amended to place Roberta's share of the trust in an irrevocable trust with Michael as sole trustee for Roberta's lifetime.

(5) In June 2013, Raymond granted Michael a durable power of attorney with full powers effective immediately.

(6) In September 2013, Raymond's personal residence on Castle Heights was transferred to Michael as trustee of Roberta's trust. Aharon claims that Michael used this authority to eject Raymond's grandson from the house.

The overall effect of the above transactions and changes was to give Michael beneficial ownership of half of the trust's assets and legal control as trustee over 30 percent more, leaving Aharon with 20 percent, "reduced further by the disproportionate use of Raymond's applicable lifetime gift/estate tax exclusion." (Underlining omitted.) Aharon asserted that as a result of Michael's actions, Raymond was deprived of millions of dollars during his lifetime, the full benefits of his estate tax exemption, and the right to distribute his estate as he saw fit.

Aharon alleged that any advice Raymond may have received from his estate planning attorney before effecting these transactions and changes was not independent because that attorney and Michael had a prior working relationship, Michael communicated instructions directly to the attorney, and the transactions and changes did not reflect prudent independent counsel given certain estate tax consequences. The new estate plan "did not reflect the careful, deliberate and tax-sensitive

planning of Raymond when he was in control of his own affairs, but rather the hurried efforts of impatient Michael to gain control over as many of Raymond's assets as he could before Raymond died."

The SAP attached and referenced exhibits as "example[s] of Michael directing the substantive changes to Raymond's estate plan." In particular, exhibit 9 contained an email from Michael to the estate planning attorney stating that Raymond wished to put his residence in Roberta's trust, and a subsequent email stating that Michael had a quit claim deed accomplishing this. In the first email, Michael also inquired about a discrepancy as to how Roberta's trust was named in one of the trust amendments. The SAP also referenced exhibit 10, an email from Michael to the estate planning attorney in which Michael lists "substantive changes" to be added to the trust, specifically that the Cheviot Hills home be given to him, and a provision that "[t]rustees of the trust do not need to follow the prudent investor rule." Michael also asked whether it was better to execute an entirely new "Raymond Simkin Family Trust" rather than continue to amend the existing trust documents.

Raymond died in March 2014.

PROCEDURAL BACKGROUND

A. The Second Amended Petition

In August 2014 Aharon filed a petition in probate court followed by an amended petition after Michael demurred. Michael again filed a demurrer, which the probate court sustained with leave to amend.

On March 13, 2015, Aharon filed the SAP, the operative petition for purposes of this appeal. Aharon asserted 10 causes of

action. The first two causes of action asserted financial abuse of an elder based on takings for wrongful use and undue influence, respectively, and sought compensatory and punitive damages and attorney fees. The third cause of action sought to void the trust amendments allegedly obtained through undue influence. The fourth cause of action sought to disinherit partially Michael pursuant to Probate Code section 259 based on financial abuse of an elder, undue influence, bad faith, and recklessness, oppression, fraud, or malice. The fifth cause of action sought recovery of trust property Michael had acquired while Raymond was still alive, specifically the Cheviot Hills and Castle Heights homes. The sixth cause of action sought an accounting from Michael as trustee. The seventh cause of action asserted claims for breach of fiduciary duty and constructive fraud based on Michael's status as Raymond's attorney and sought to suspend Michael as trustee or, alternatively, freeze any distributions of trust assets to Michael or require him to post a \$15 million bond. The eighth cause of action sought to remove Michael as trustee and appoint Aharon and Roberta as successor co-trustees. The ninth cause of action sought reimbursement of Aharon's attorney fees based on the wrongful taking of trust property, Michael's alleged thwarting of Raymond's intent, and financial abuse of an elder. The tenth cause of action sought to preclude Michael from using trust funds to pay legal counsel absent a court order.

B. The Probate Court Sustains The Demurrer

Michael filed a demurrer to the SAP and the probate court sustained it in a 10-page minute order on September 24, 2015. The probate court found that the SAP failed to allege undue influence with sufficient specificity. The probate court determined the SAP only pleaded "legal conclusions, insinuation,

and speculation” without specific facts showing Raymond was not acting voluntarily or that his free will was overpowered. The probate court also found many of the background facts in the SAP “misleading and irrelevant” and not “ultimate facts.” The probate court stated that alleging risk factors alone, “such that Michael aided [Raymond] with his finances and shopping,” or that the amendments favored Michael, did not establish undue influence. The probate court indicated neither the durable power of attorney nor Michael’s status as an attorney established a presumption of undue influence when the power had never been used for estate planning and the SAP did not allege that Michael had performed any legal work in connection with Raymond’s estate plan. The probate court found the allegation that Raymond had been deprived of property rights insufficient to establish the taking had been for a wrongful use.

The probate court further found that the SAP did not sufficiently allege that Michael was involved in the transactions and changes to the estate plan; Aharon only alleged that Michael took Raymond to see the estate planning attorney, and the exhibits attached to the SAP did not establish Michael had any further involvement. The probate court characterized exhibit 9 as “requesting information about a drafting inconsistency” and exhibit 10, which the probate court noted was copied to Raymond, as “questioning whether creating a new trust would be preferable to making amendments.”²

² The probate court also took issue with exhibits purportedly establishing that Michael notarized documents outside the presence of the estate planning attorney, finding that the documents had not been challenged in the petition and had no bearing on the undue influence analysis. The probate court

As for the SAP's allegations on information and belief that, among other things, Michael directed the changes to Raymond's estate plan, the probate court stated that these "generalities . . . are not capable of determination by the use of discovery. These assertions largely concern statements allegedly made by Michael to [Raymond] in private before [Raymond's] death. [¶] Michael is incapable of meaningfully responding to the charges against him, aside from making his own unsupported averment which cannot be proven or disproven using specific facts or evidence. Aharon cannot plead wrongdoing on information and belief where, by definition, there is no possibility of obtaining additional information to prove or disprove his claim."

The probate court found the "only specific allegations of wrongdoing" (*italics and underlining omitted*) pertained to Michael's threatened eviction of one grandson and refusal to purchase an airline ticket for another, and neither tended to show undue influence. Exhibits attached to the SAP showed that Raymond was included on the emails regarding the eviction, and that it was Raymond, not Michael, who had emailed the grandson in Chicago about the expensive airfare. Based on the above findings, the probate court sustained the demurrer to the first and second causes of action for financial abuse of an elder.

The probate court also sustained the demurrer as to the other causes of action for the following reasons:

found no impropriety in an email from Michael to the estate planning attorney attaching a signed copy of a trust amendment. We need not decide whether the probate court's analysis of these documents was correct because that question is not necessary to our holding at this stage of the proceedings.

- (1) the third cause of action to void the amendments failed for lack of showing of undue influence;
- (2) the fourth cause of action seeking to disinherit Michael failed for lack of allegations of financial abuse, bad faith, or fraud;
- (3) the fifth cause of action to recover trust property failed because there was no allegation that Raymond lacked capacity;
- (4) the sixth cause of action for an accounting was moot because Michael had already provided an accounting, and Aharon did not wait the required period of time to bring the petition;
- (5) the seventh cause of action for breach of fiduciary duty and constructive fraud failed because in the absence of allegations that Michael as an attorney aided in preparing the estate plan, there was no presumption of undue influence;
- (6) the eighth cause of action to remove Michael as trustee failed because a conflict between a trustee and a beneficiary did not justify removal and the SAP did not establish a breach of duty;
- (7) the ninth cause of action for attorney fees failed for lack of sufficient allegations of wrongful taking of property or elder abuse; and
- (8) the tenth cause of action to prevent Michael from using trust assets to pay his attorney fees failed because the SAP did not sufficiently allege that Michael had used the funds for his personal benefit, nor did the probate court have sufficient information “to justify depriving Michael of the ability to defend the [t]rust with [t]rust funds.”

The probate court dismissed the SAP with prejudice and directed Michael to prepare a judgment.

Aharon filed a motion for reconsideration on October 7, 2015. Attached was a proposed third amended petition. A hearing on the motion was set for November 16, 2015. On October 13, 2015, however, the probate court entered judgment in favor of Michael. Notice of entry of judgment was served December 1, 2015.³ Aharon timely appealed.

STANDARD OF REVIEW

“In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.” (*T.H.*, *supra*, 4 Cal.5th at p. 162.) “[W]e accept as true all properly pleaded facts.” (*Id.* at p. 156.)

“If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment.” (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 847.) The plaintiff bears the burden on appeal of showing how the complaint may be amended to state a cause of action.

³ Despite the entry of judgment in October 2015, the parties filed additional briefing in the probate court on the motion for reconsideration, and the probate court held a hearing on November 16, 2015 in which it stated that it was inclined to grant the motion. Because entry of judgment deprived the probate court of jurisdiction to rule on the motion for reconsideration (*Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482), we do not consider these postjudgment proceedings for purposes of this appeal. Also, given our holding, we do not reach the parties’ arguments on appeal concerning the motion for reconsideration.

(*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 36.) The plaintiff may make that showing in the reviewing court even if not made below. (*Ibid.*)

DISCUSSION

I. The SAP Adequately Alleged Undue Influence

In sustaining the demurrer, the probate court focused primarily on the issue of undue influence, and that is where we begin our discussion. Welfare and Institutions Code section 15610.30 states that financial abuse of an elder⁴ occurs when a “person or entity” “[t]akes, secretes, appropriates, obtains, or retains . . . real or personal property of an elder . . . by undue influence.” (*Id.*, subd. (a)(3).) Deprivation of “any property right, including by means of an agreement, donative transfer, or testamentary bequest” qualifies as a taking under this provision, “regardless of whether the property is held directly or by a representative of an elder.” (*Id.*, subd. (c).)

The SAP’s cause of action for financial abuse of an elder by undue influence was based on the current version of the elder abuse statute, effective January 1, 2014, which defines “undue influence” as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” (Welf. & Inst. Code, § 15610.70, subd. (a).) The statute provides an extensive list of factors that “shall be considered” in making a determination of undue influence, including “[t]he vulnerability of the victim,” “[t]he influencer’s apparent authority,” “[t]he actions or tactics used by

⁴ “Elder” is defined as a person residing in California who is 65 years of age or older. (Welf. & Inst. Code, § 15610.27.)

the influencer,” and “[t]he equity of the result.” (*Ibid.*) As of January 1, 2014, the Probate Code expressly incorporates the definition of undue influence from Welfare and Institutions Code section 15610.70. (Prob. Code, § 86.)

At the time of the alleged events underlying the petition in this case, however, another version of the statute applied. The earlier version of Welfare and Institutions Code section 15610.30 adopted the definition of undue influence from Civil Code section 1575. (Welf. & Inst. Code, § 15610.30, former subd. (a)(3), enacted 2008.) Civil Code section 1575 states that “[u]ndue influence consists: [¶] 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; [¶] 2. In taking an unfair advantage of another’s weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another’s necessities or distress.” As for the Probate Code, prior to 2014, its definition of undue influence was provided by the common law which defined it as “pressure brought to bear directly on the testamentary act, sufficient to overcome the testator’s free will, amounting in effect to coercion destroying the testator’s free agency.” (*Rice v. Clark* (2002) 28 Cal.4th 89, 96 (*Rice*).)⁵

For purposes of this appeal, we do not have to determine which definition of undue influence applies and whether the

⁵ The probate court in its order sustaining the demurrer did not specify which version of the undue influence statute it was applying; however, in stating that “Aharon fails to plead any fact indicating excessive persuasion,” the probate court appeared to be invoking the current definition under Welfare and Institutions Code section 15610.70.

allegations of the SAP meet that definition, because the SAP has alleged facts that, if true, give rise to a *presumption* of undue influence, thus shifting the burden to Michael to prove the challenged amendments and transactions were valid. (*Estate of Auen* (1994) 30 Cal.App.4th 300, 308 (*Auen*).) Most importantly, the SAP alleged that Michael served as Raymond's attorney. "A transaction between an attorney and client which occurs during the relationship and which is advantageous to the attorney is presumed to violate that fiduciary duty and to have been entered into without sufficient consideration and under undue influence." (*Lewin v. Anselmo* (1997) 56 Cal.App.4th 694, 701; see *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1151-1152 (*Fair*) [under Prob. Code, § 16004, subd. (c), transaction between trustee and beneficiary benefiting trustee is presumptively a violation of fiduciary duty; this provision applies to the attorney-client relationship].) Applied to testamentary instruments in particular, a presumption of undue influence arises upon a showing that the person allegedly exerting undue influence "(1) had an attorney-client relationship with the testator at the time the will was prepared, (2) actively participated in preparation or execution of the will, and (3) benefited thereby." (*Auen, supra*, 30 Cal.App.4th at p. 311.)

Here, the SAP alleged an attorney-client relationship and that Michael benefited both from the amendments to the trust and various transfers of property while Raymond was alive. Although the probate court read the SAP to allege that Michael's only involvement in the trust amendments was taking Raymond to see his estate planning attorney, the SAP in fact alleged that Michael himself provided instructions to the estate planning attorney, either directly or through Raymond, reviewed drafts,

and arranged the signing and notarizing of the relevant documents. This was sufficient to establish active participation, even if, as the probate court found, that the SAP did not specifically allege that Michael performed “legal work” in connection with the estate plan.

We disagree with the probate court’s finding that alleging on information and belief Michael actively participated in, initiated, and directed the changes to Raymond’s estate plan was insufficient because these allegations “are not capable of determination by the use of discovery.” On demurrer, “ ‘ “the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” ’ ” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) The fact that Aharon may not be able to prove the allegations is not an appropriate basis for sustaining a demurrer.

Contrary to the probate court’s finding and Michael’s argument on appeal, the exhibits attached to the SAP did support, or at least were not inconsistent with, the allegations that Michael directed changes to Raymond’s estate plan. The probate court took particular issue with exhibits 9 and 10 on the basis that they only reflected Michael inquiring about naming discrepancies and whether amendment was preferable to executing a new trust. These exhibits also demonstrated that Michael was communicating substantive changes to the estate plan. In exhibit 9, Michael informed the estate planning attorney that Raymond wished to transfer his residence to Roberta’s trust, and later stated that he had a quit claim deed accomplishing this. In exhibit 10, Michael listed two “substantive changes” to be made to the trust, including gifting the Cheviot Hills home to

himself. While it is possible in each case Michael was simply conveying his father's wishes, the exhibits certainly showed Michael was involved in the estate planning process, and did not preclude the possibility of undue influence. To the extent the probate court found this evidence weak, the SAP also made clear these exhibits were not intended as the sole examples of Michael's involvement, and that "[e]vidence of Michael's orchestration of the changes . . . is still being discovered." Thus, the exhibits did not provide a basis to sustain the demurrer.

Michael argues that the presumption of undue influence should not apply because the challenged transactions "were authorized by Raymond as the trustee," not as an individual, and Michael only had an attorney-client relationship with Raymond as an individual. Michael asserts that because the trust (via Raymond as trustee) was never Michael's client, "no presumption arises that Raymond's changes to the [trust] are the product of Michael's undue influence." Michael is apparently suggesting that the presumption would apply only if he obtained property that Raymond held individually, but not property held in Raymond's living trust (which, presumably, was where most of his property was held). We will not endorse such a proposition; an attorney's potential for undue influence is not mitigated by a vulnerable elder's legal relationship to his property. Indeed, the statute defining financial abuse of an elder draws no such distinction. Instead, it applies whether the property wrongfully taken belongs to the elder directly or to "a representative" of the elder, including a "trustee." (Welf. & Inst. Code, § 15610.30, subds. (c) & (d)(1).)

We find further support in the case law concerning undue influence. As *Auen* makes clear, the presumption of undue

influence arises based on the attorney's relationship with the testator. (*Auen, supra*, 30 Cal.App.4th at p. 311.) The principles of undue influence apply equally to an "estate plan formalized by [a] simultaneously executed inter vivos trust and will" (*Rice, supra*, 28 Cal.4th at p. 96), in which case authorities have deemed the trustor the equivalent of the testator. (See *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182 [referring to "trustor/testator" in context of undue influence analysis].) Thus, the rule in *Auen* does not require an attorney-client relationship with the trust itself, but with the individual who creates (or amends) the trust.

The authority cited by Michael does not support his position. In *Stine v. Dell'Osso* (2014) 230 Cal.App.4th 834 (*Stine*), a malpractice case, the appellant conceded, and the court accepted, that a successor conservator could sue her predecessor's attorneys for malpractice only for actions taken in their representation of her predecessor as conservator, not their actions in representing her predecessor as an individual. (*Id.* at p. 839.) The court further held that the successor's claim was not barred by her predecessor's malfeasance and the doctrine of "unclean hands." Although the successor assumed her predecessor's fiduciary power, she did not assume the predecessor's "personal limitations or liabilities," in part because of the distinction between conservator as fiduciary and conservator as individual. (*Id.* at pp. 844, 846, italics omitted.)

To illustrate that distinction, the *Stine* court discussed the attorney-client relationship in the context of trust administration, noting that an attorney hired by a fiduciary to aid in administering a trust represents that fiduciary qua fiduciary, not as an individual. (*Stine, supra*, 230 Cal.App.4th

at p. 846.) The court quoted a law review article (also cited in Michael's brief on appeal) stating that " 'a lawyer who represents a fiduciary in the client's capacity as fiduciary (Client X) has no conflict of interest in representing another client (Client Y) adverse to Client X in [his or her] personal capacity.' " (*Ibid.*, quoting Streisand, *Malpractice Melee: Fending Off the Disgruntled and Disappointed, an Estate Planner's Guide* (2010-2011) 3 Est. Plan. & Community Prop. L.J. 241, 280.)

Absent, however, from *Stine* is any discussion of the scope of the attorney-client relationship for purposes of undue influence. Michael does not explain how *Stine's* discussion of malpractice and dictum concerning conflict of interest has any bearing on the instant case.

Michael also contends that the SAP failed to allege that Raymond was not independently advised by his estate attorney, and the exhibits show that Raymond was included in the emails between Michael and the estate attorney. Michael argues this undercuts the claim that Raymond was unduly influenced. This is a factual determination not appropriate for resolution on demurrer. Regardless, the SAP did not allege that the estate attorney was involved in all of the challenged transactions, and therefore did not establish that Raymond was at all times advised by an independent attorney. To the extent he was, the SAP alleged any advice was not independent given the attorney's previous working relationship with Michael. Raymond's inclusion on the emails is not determinative when the SAP also alleged that Raymond had no choice but to follow Michael's instructions.

Michael asserts that any changes made to the trust were not a radical departure from the original estate plan, and the

changes merely allocated individual pieces of property to the children rather than requiring an equal division of assets. Again, this is a factual determination. The SAP adequately alleged an inequitable distribution; although Raymond and Barbara's original trust divided their assets equally among their three children, the SAP alleged that upon Raymond's death, Michael obtained fully half of the assets, with legal control over his sister Roberta's share for her lifetime. Michael, moreover, had obtained valuable assets, namely the Cheviot Hills home and the income from the Glendon apartment building, while Raymond was still alive.

In sum, we conclude the SAP adequately pleaded a cause of action for financial abuse of an elder by undue influence.

II. The Probate Court Erred In Sustaining The Demurrer Without Leave To Amend To The Majority Of Aharon's Causes Of Action

Aharon argues that the probate court wrongly dismissed "causes of action 1, 2, 4, 5, 7, 8, 9, 11" "solely because of the failure to properly plead the claims of undue influence." We presume Aharon inadvertently omitted from this list his third cause of action, to which the probate court sustained the demurrer expressly for failure to plead undue influence, and that the reference to an 11th cause of action is instead intended to refer to the tenth cause of action. Aharon also argues that his sixth cause of action for an accounting was dismissed based on an erroneous conclusion that he had failed to plead undue influence and elder abuse. Thus, Aharon asserts, the judgment should be reversed. We agree in part.

A. The probate court erred in sustaining the demurrer to the second, third, fourth, fifth, seventh, eighth, and ninth causes of action

As we have already explained, the probate court erred in sustaining the demurrer to the second cause of action for financial abuse of an elder by undue influence. Aharon is correct that the probate court also sustained the demurrer to the third and seventh causes of action for failure to plead undue influence. In light of our holding as to the second cause of action, this also was error. Similarly, the probate court erred in sustaining the demurrer to the fourth and ninth causes of action for failure to plead financial abuse of an elder. The probate court further erred in sustaining the demurrer to the eighth cause of action on the basis that Aharon had not shown a breach of duty, given that Probate Code section 16004, subdivision (c) creates a presumption that an attorney who benefits from a transaction with a client violates his fiduciary duties. (*Fair, supra*, 195 Cal.App.4th at pp. 1151-1152.)

The probate court sustained the demurrer to the fifth cause of action, for recovery of trust property, “because Aharon does not allege that [Raymond] lacked capacity.” Recovery of trust property does not turn on the question of a decedent’s capacity; it is simply a remedy when a trustee “wrongfully disposes of the trust property” and a beneficiary seeks a return of that property. (13 Witkin, Summary of Cal. Law (11th ed. 2017) Trusts, § 146.) Aharon also sought damages for twice the value of any recovered property under Probate Code section 859, which permits such damages if the property was taken “by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse.” Because the SAP adequately alleged

undue influence and elder financial abuse, the probate court erred in sustaining the demurrer to the fifth cause of action.

B. Aharon has failed to show the probate court erred in sustaining the demurrer to the first and tenth causes of action, but has shown a reasonable possibility the defects can be cured

Contrary to Aharon's assertion, the probate court did not dismiss his first cause of action, financial abuse of an elder by wrongful use, because of a failure to plead undue influence. Instead, the probate court stated that no wrongful use was alleged and "[d]eprivation of a property right alone does not establish wrongful use." Aharon does not challenge this finding; to the extent he asserts his undue influence claim also establishes a wrongful use claim, this would seem contrary to the elder abuse statute that clearly distinguishes between the two. (See Welf. & Inst. Code, § 15610.30, subds. (a)(1) & (3).)

In the proposed third amended petition, Aharon alleged additional facts in support of wrongful use, including that Michael deceived Raymond into purchasing a condominium as an investment despite knowing that the tenant was struggling financially and was not trustworthy. Raymond ultimately had to file an unlawful detainer action to recover \$335,000 in unpaid rent. A taking is deemed for a wrongful use if the person who takes (or assists in taking) the property "knew or should have known that this conduct is likely to be harmful to the elder." (Welf. & Inst. Code, § 15610.30, subd. (b).) Convincing an elder to invest in a property known to be financially questionable could fall within this definition. We therefore hold that Aharon has demonstrated on appeal that he could amend the SAP to state a cause of action for wrongful use, and remand for that purpose.

The probate court sustained the demurrer to the tenth cause of action, which sought to preclude Michael from using trust funds to pay his litigation costs, on the basis that Aharon had failed to allege facts “showing that Michael used trust funds for his own personal benefit,” and had not “provided . . . sufficient information to justify depriving Michael of the ability to defend the Trust with Trust funds.” Aharon does not challenge this finding; in the proposed third amended petition, Aharon alleged additional facts, including that Michael had used trust funds to defend various claims against him personally, as opposed to in his capacity as trustee. Having shown a reasonable possibility that the defects in the tenth cause of action may be cured by amendment, we remand for that purpose.

C. The probate court properly dismissed the sixth cause of action

Aharon is incorrect that the probate court dismissed his sixth cause of action for an accounting for failure to plead undue influence or elder abuse. The probate court ruled this cause of action moot after taking judicial notice that Michael had provided the requested accounting. Aharon fails to show any error in this ruling. He similarly has failed to demonstrate that the cause of action can be saved by amendment; his proposed third amended complaint omits the cause of action entirely. The probate court properly sustained the demurrer to the sixth cause of action.

DISPOSITION

The judgment is affirmed in part and reversed in part, and the matter is remanded. The probate court is directed to vacate its order sustaining the demurrer and enter a new order (1) overruling the demurrer to the second, third, fourth, fifth, seventh, eighth, and ninth causes of action, (2) sustaining the demurrer to the first and tenth causes of action with leave to amend; and (3) sustaining the demurrer to the sixth cause of action without leave to amend. Plaintiff Aharon is awarded his costs on appeal.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.