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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DONNA DEE ARAMBULA, Plaintiff and Respondent, v. ERNEST R. ACOSTA, Defendant and Appellant.	B262636 (Los Angeles County Super. Ct. No. BP133083)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lesley C. Green, Judge. Affirmed.

Law Offices of Barry K. Rothman, Barry K. Rothman and Lawrence M. Boesch for Appellant.

Borden Law Office, Alex R. Borden and Priya Bahl for Respondent.

When Connie Martinez Acosta (decedent) died in 2011, she left seven adult children. She also had a trust, executed in 2004, which distributed her main asset, her home, to two of her sons, appellant Ernest W. Acosta and Ronald R. Acosta.[1] The trust also provided that Ronald alone would be responsible to pay the existing mortgage on the property. One of decedent's other children, respondent Donna Dee Arambula, filed a petition to determine the validity of the trust, arguing, among other things, that the trust was the product of undue influence exerted on decedent by Ernest. After a bench trial, the court concluded that Donna had established the necessary prerequisites to give rise to a presumption of undue influence, and Ernest had failed to rebut the presumption. Accordingly it found the trust "invalid and void."

Ernest appeals, arguing there is insufficient evidence to support the court's finding that the rebuttable presumption had been established, and that there was undue influence. As the evidence is legally sufficient, we affirm.

PROCEDURAL BACKGROUND

Although decedent signed the trust in 2004, she never actually transferred title of any property into the trust. This case commenced when, after decedent's death, Ernest filed a petition for an order that the family home be transferred into the trust and that Ronald pay the trust the $90,000 balance on the mortgage. Two of decedent's other children, Donna and Mabel, opposed the petition. Thereafter, Donna filed a petition challenging the validity of the trust itself. The court held a bench trial on Donna's petition first, on the theory that if the trust were invalidated, Ernest's petition to transfer property into the trust would become moot.

At trial, the court heard testimony from four of the children (Ernest, Ronald, Mabel and Donna) and the attorney who had prepared the trust, Dennis Sanchez. After trial, the court prepared a detailed statement of decision, concluding that Donna had established undue influence. The court specifically found that certain testimony given

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[1] In order to avoid confusion, and not out of disrespect, we usually refer to decedent's children by their first names.

by Ernest and Attorney Sanchez was not credible. Considering the three-part test necessary to establish a presumption of undue influence, the court found, by a preponderance of the evidence, that each of the elements had been established. The court further found that Ernest had not defeated the presumption. The trust was therefore invalidated as being the product of undue influence.

Judgment followed. Ernest filed a timely notice of appeal.

FACTS

By all accounts, decedent was unsophisticated. She did not attend high school, and had her first child at age 15. She was largely illiterate and had vision problems which also prevented her from reading. She never had financial independence. Her husband, who ultimately predeceased her, handled all of the bills. At one point, decedent and her husband separated, but she did not live alone, and she and her husband never divorced.

The family home had both a front house and a back house on the property. When decedent's husband passed in 1991, decedent moved into the back house; Ronald and his family were living in the front house. Ronald took over handling decedent's financial matters. Ten years later, Ronald moved out of the front house; decedent moved to the front house; and Ernest moved into the back house and took over his mother's finances.

Decedent never paid a bill on her own. She did not know how to fill out a check. She never even went to the market alone to buy groceries. She did not know how to manage or handle cash. When she had to go to the doctor, she always took one of her children with her. She would not understand what a doctor told her; her children would have to explain things so she could understand. When decedent's husband died, he left some property to daughter Mabel. However, decedent still had a community property interest in the property. It was necessary to involve an attorney so that decedent could convey her interest in the property to Mabel. Decedent, Ronald, and Mabel went to an attorney's office. Decedent did not understand what the attorney said, and Mabel had to

explain it to her. She could understand after Mabel broke things down for her into more simplistic terms.

When Ernest took over decedent's finances in 2001, he kept her credit card and bank card in his safe. He put a lock on the mailbox; decedent could only get her own mail if she "grab[bed his] keys." Ernest did not always buy sufficient food for decedent; there were times when she would call another one of her children because there was no food in the house. In 2009, Ernest was incarcerated for a few months, and Ronald briefly returned to handling decedent's finances. He discovered that Ernest was paying his car loan with decedent's money, and decedent had not known about it. He also went into the back house and saw that, although Ernest was buying cheap quality items (such as detergent) for decedent, Ernest had been using decedent's money to buy himself higher quality products.

The trust was prepared in 2003 and signed in 2004. It was not a model of drafting and was, in fact, the first trust Attorney Sanchez ever prepared. It is six pages long, and indicates that decedent, the "settler," (i.e. settlor) held in trust certain property "described in schedule A, attached to[] this instrument." No such schedule was attached. Key for our purposes is that the trust purports to list decedent's seven children, although it apparently has several errors in their names and dates of birth. Thereafter, it indicates that only two of those children shall have any distributions from the trust. Specifically, the family home is to be distributed to Ernest and Ronald, on the condition that Ronald repay the mortgage on the house. A second condition is that, while Ronald and Ernest own the house, their brother Victor shall have the right to live there rent-free as long as he pays an equal share of the property taxes.[2] Residuary trust assets shall be equally split between Ernest and Ronald.

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[2] Victor suffers from a mental disorder and has been institutionalized. Ernest is his conservator.

Testimony as to the preparation of the trust, given by Ernest and Attorney Sanchez, was contradictory and according to the statement of decision, not credible. Indeed, each one offered a scenario which was, in many ways, implausible.

According to Ernest, seeing Sanchez was his mother's idea. He claimed that his mother told him that Sanchez had prepared a trust for Ernest's Uncle Joe, and that she received Sanchez's card from an intermediary. Decedent made Ernest drive her to Sanchez's office. There, they made an appointment and returned. On the return visit, Ernest did not speak with Sanchez at all; he got up to leave as soon as Sanchez walked in. Some time later, a female notary came to the house for decedent to sign the trust. Ernest opened the door for the notary, and then left. (In contrast, Ernest testified, at deposition, that the notary explained the trust to decedent at the house.) Later, Ernest took his mother to Sanchez's office to pick up the finalized document. Decedent gave it to Ernest, in a sealed envelope, when they were sitting in the car.

According to Attorney Sanchez, Ernest sat in on the first meeting for a few minutes. Ernest did not leave until decedent said she wanted Sanchez to prepare a living trust, at which time Sanchez asked him to leave. The information in the intake sheet was given by decedent, not Ernest. After this initial meeting, there was a second meeting at Sanchez's request. He needed decedent to clarify some information about the loan on the property. Ernest waited in the reception room during this meeting. Ernest then brought decedent to Sanchez's office for a third time to sign the trust; Ernest waited in the waiting room. Sanchez went over the document with decedent. Specifically, he read it out loud to her while she followed along as she supposedly read her own copy. She had no corrections or questions. He asked if it was what she wanted; she agreed. Sanchez then called in Mark Hirabayashi to serve as a notary; the document was notarized in Sanchez's office.

The trial court found neither scenario plausible. Seeing Sanchez could not possibly have been decedent's idea based on a recommendation from Uncle Joe. Joe had died 30 years earlier, in fact, three years before Sanchez was admitted to practice. The idea of a living trust was not likely to have come from decedent; she lacked the financial

sophistication to fill out a check or buy groceries. The information on Sanchez's intake sheet was not likely provided by decedent; the names and birthdates of her children were wrong – mistakes she was not likely to make. As to execution and notarization, Ernest's story is a complete fabrication; the document itself indicates that it was executed at Sanchez's office and the notary was, as Sanchez stated, Mark Hirabayashi. Yet Sanchez's story is also unworthy of belief; decedent could not have read along when Sanchez read the document to her. Even if he did read it aloud to her, she would have noticed the errors in the names of her own children. Moreover, her prior experience with physicians and attorneys indicates that she would not possibly have understood what Sanchez read without one of her children present to explain it in simpler terms.

We are therefore left with the undisputed fact that Ernest took decedent to Sanchez's office. Somehow Sanchez obtained the information on the intake sheet and the directions for the trust; if these things did not come from decedent, they must have come from Ernest. While it is possible that Sanchez did read the entire document to decedent before she signed it; decedent's level of unsophistication points to the conclusion that she did not understand it, and had no idea of the legal effect of the unexplained document she was signing.

DISCUSSION

A. Standard of Review

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or

uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) Whether the evidence establishes undue influence is a question of fact. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605.)

B. Overview of Undue Influence

Undue influence constitutes 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. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) This doctrine applies to any testamentary document, including a living trust. (*Id.* at pp. 679-680, 684.) The person challenging the testamentary instrument has the burden of proving undue influence. (*Ibid.*) However, under common law a rebuttable presumption of undue influence can arise.[3] "The presumption of undue influence arises only if *all* of the following elements are shown: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the actual preparation or execution of the [document], such conduct not being of a merely incidental nature; and (3) undue profit accruing to that person by virtue of the [document]. If this presumption is activated, it shifts to the proponent of the [document] the burden of producing proof by a preponderance of evidence that the [document] was not procured by undue influence. It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied. [Citations.]" (*Estate of Sarabia, supra,* 221 Cal.App.3d at p. 605, original italics.)

Here, the trial court found the presumption arose and was not rebutted. On appeal, Ernest does not challenge the evidence to establish the first element – confidential

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[3] In Ernest's opening brief, he notes that Probate Code section 21350 creates a statutory presumption of undue influence in certain circumstances. Neither respondent nor the trial court relied on this presumption and we therefore do not address it.

relationship. However, he argues that insufficient evidence supports the court's findings that Donna established the second two elements – active participation in preparation and undue profit.[4]

C. Active Participation

Active participating in the preparation of the document may be established by inference. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 481.) It is established where the evidence warrants the inference that the document was the direct result of the influence exerted for the purpose of procuring the document, and was not the natural result of the uncontrolled will of the decedent. (*Ibid.*) Merely procuring an attorney to prepare the document is not sufficient to establish this element. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 608.) Nor is selecting the attorney and accompanying the decedent to his office, or mere presence in the attorney's outer officer or presence during the giving of instructions for the document and at its execution. (*Ibid.*)

In this case, the evidence supports the trial court's finding that Ernest was not merely present at Attorney Sanchez's office, but was an active participant in preparing the trust. Specifically, the court found that Ernest, not decedent, had given Sanchez the information in the intake sheet, which included directions for the disposition of the house

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[4] Ernest makes an additional argument – that Donna was required to call the notary as a witness, and her failure to call this witness somehow constituted prejudicial court error, despite Ernest never raising the issue before the trial court. Ernest relies on Probate Code section 8253 which provides that, in a will contest, "each subscribing witness shall be produced and examined. If no subscribing witness is available as a witness . . . , the court may admit the evidence of other witnesses to prove the due execution of the will." But, under Probate Code section 8252, it is the proponent of a will that has the burden of proof of due execution. Thus, even assuming the statutes applied in this case – where execution was not challenged – it would have been Ernest, the trust's proponent, who had the burden to call the notary, not Donna. Because any such statutory violation is thus irrelevant to our disposition of the appeal, we deny Ernest's motion to augment the record with evidence intended to establish that the notary was, in fact, available for trial. Ernest also sought to augment the record with the trial court's order, which is already part of the record on appeal; that too is denied as unnecessary.

to only himself and Ronald. The evidence supporting this finding includes: (1) Errors in the names and birthdates of decedent's children were errors decedent would not have made; in fact, the intake sheet references a fake middle name for daughter April which was an inside joke between only April, Donna, and Ernest; (2) Decedent's inability to handle even the smallest task on her own suggests that she could not have provided information, or direction, to Sanchez by herself; and (3) The terms of the trust were likely dictated by Ernest, because they were based on his incorrect view of the facts. For example, Ernest believed the mortgage on the property was a loan from which Ronald had received nearly all the proceeds. If true, this would explain the trust's provision requiring Ronald to repay the loan. But, in fact, Ronald had received only $25,000 of the loan; $50,000 had been used for repairs to the two houses. This suggests that the trust term requiring Ronald to repay the mortgage was proposed by Ernest, who did not know what had actually become of the loan proceeds.

D. Undue Profit

"To determine if the beneficiary's profit is 'undue' the trier must necessarily decide what profit would be 'due.' These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition. [Citations.] That evidence may include dispositional provisions in previous wills executed by the decedent [citation], or past expressions of the decedent's testamentary intentions. [Citation.] It may also encompass a showing of the extent to which the proponent would benefit in the absence of the challenged will." (*Estate of Sarabia, supra,* 221 Cal.App.3d at p. 607.) The issue is whether the profit was unwarranted, excessive, inappropriate, unjustifiable or improper. (*Id*. at p. 604.)

The evidence supporting the trial court's conclusion that Ernest stood to profit unduly from the trust includes the following: (1) Decedent once told Ronald that all the

children would be taken care of after she passed; when asked at trial if he believed it was his mother's intent to disinherit five of her children, he responded, "No, no, I don't think – there's no way she –"; (2) Decedent died intestate. Without the trust, her children would share equally in her estate; with it, Ernest obtains the lion's share – getting half of the real property asset free and clear of the existing debt. Ernest had already benefitted from his mother's generosity during her lifetime; he paid for his car and his living expenses from her funds. That he would take the majority of her estate over all of his siblings, under the circumstances, is an undue profit.

E. Conclusion

Substantial evidence supports the trial court's findings. Ernest argues that different conclusions should be made from the evidence; but the trial court's findings were supported by the evidence. On appeal, Ernest challenges the admissibility of some of the evidence. Because he never objected to the evidence, he has waived any contention that it was improperly admitted. (Evid. Code, § 353.)

DISPOSITION

The judgment is affirmed. Donna shall recover her costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.