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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

JUDY FAHLMAN,

Plaintiff and Respondent,

v.

JOHN A. LAGOMARSINO III, Individually and as Trustee, etc.

Defendant and Appellant.

2d Civil No. B231431
(Super. Ct. No. 56-2009-00348782-PR-TR-OXN)
(Ventura County)

Appellant and respondent are brother and sister. Their mother died leaving property to be disposed of by will, trust and deed. Appellant received virtually all of that property. Respondent successfully sought to set aside that disposition on the ground that appellant had unduly influenced their mother. Appellant contends that there is not substantial evidence to support the judgment of the trial court. The role of this court is elementary and clear: We decide questions of law. The trial court decides questions of fact. (*Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263.) Here, the trial court found, inter alia: (1) appellant was "not credible," (2) appellant had the motive and the opportunity to exercise undue influence upon his mother and physically isolated her from her daughter; and (3) appellant overcame his mother's will, destroyed her "free

agency," and caused an "unnatural disposition" of her estate. These findings and the evidence presented at trial amply support the judgment.

John A. Largomarsino, III, (John) son of Helen Lagomarsino (Helen), trustee of the Helen Lagomarsino Trust dated September 26, 2008 (2008 trust), appeals from a judgment granting the petition filed by Helen's daughter, Judy Fahlman (Judy). John was the primary beneficiary of Helen's 2008 trust, and contemporaneous will and quitclaim deed. The trial court found that Helen's 2008 trust, will and quitclaim deed were the "result of the undue influence of" John, and therefore void. John contends that there is not sufficient evidence to support the court's findings and judgment. Because this case is fact driven, we set forth in detail the evidence adduced at trial and conclude that John's contention is without merit. Accordingly, we affirm.

BACKGROUND

Judy and John's parents, Helen and John A. Largomarsino, Jr., (Pud) married in 1951. Their only two children, Judy and John, were born in 1955, and 1960, respectively. In 1974, Helen and Pud's marriage ended with a final judgment of dissolution.

In 1973, in 1980, and again, in 1988, Helen signed a will. Her 1973 and 1988 wills provided for the equal distribution of her estate to John and Judy. The 1980 will also had provided for an equal distribution of her assets to them, subject to a life estate for their aunt.

In 2001, Pud's third wife, Joni, died suddenly. In 2002, Pud signed a will that named Judy as his personal representative. It also provided for equal distribution of his assets to John and Judy.

In 2002, after separating from his wife, Marilyn Lagomarsino (Marilyn), John acquired her 50 percent interest in their residence at 284 Orange Drive in Oxnard (the Oxnard house). John invited Helen, who was then 70 years old, and her husband, Calvin Pauley (Cal), to move into the Oxnard house. John told her that he would lose everything, including that house, if Helen did not help

him. Helen paid John $150,000, acquired a 50 percent interest in the Oxnard house, and moved there with Cal. Helen sold her house. Helen did not drive. John helped her with transportation. They spoke daily and shared their meals. Cal predeceased Helen.

Judy lived in the same community as John and Helen. For many years after Helen moved into the Oxnard house, she and Judy maintained a close and loving mother-daughter relationship, with frequent visits and telephone contact. Helen spent holidays and birthdays with Judy's family.

Pud remained in a house on his 40-acre ranch in Oregon for several years. In November 2006, Pud was diagnosed with cancer. In February 2007, during a visit with Pud, John accompanied him to the office of his estate planning attorney, Robert S. Lovlien. On March 2, 2007, Pud signed a will that revoked his prior will and left the bulk of his estate, including his ranch, free of encumbrance, to John, with the residue to be divided between John and Judy. Pud died on March 12, 2008.

After Pud's death, Helen and Judy were both surprised to learn the terms of his 2007 will. John testified that Pud did not tell him the terms of that will before he died.

On July 17, 2008, Judy filed an action in Oregon claiming that John had unduly influenced Pud to execute a will and trust for the primary benefit of John (Oregon will contest). Judy did not discuss the Oregon will contest with Helen. After John discussed it with her, she became upset, believing that Lagomarsino family men "always get the ranches," and that the will contest would ruin family gatherings.

Within days of her filing of the Oregon will contest, Judy found that she was banned from the Oxnard house. The gate was now locked, and an answering machine was installed on the telephone. According to John, Helen wanted the answering machine so that the phone would not disturb her when she was on the treadmill.

On July 24, 2008, Judy scaled the wall between a neighbor's property and the Oxnard house to see Helen. Helen appeared frightened and shaken, and she told Judy to leave before John returned and found her there.

On August 25, 2008, John called the Nordman Cormany law firm and asked for an appointment with its "best" estate planning attorney. On September 5, 2008, he drove Helen to that firm, where they met for approximately 30 minutes with Scott Samsky, an estate planning attorney. Helen told Samsky that she planned to disinherit Judy. Samsky then met with Helen alone. Helen told him that she intended to disinherit Judy because she did not want Judy to use her inheritance to finance litigation against John, and that Judy had lied to her. Helen told him that Lagomarsino family men "always get the ranches." However, she also advised Samsky that she might later change her views about disinheriting Judy.

On September 16, 2008, John sent Samsky an email message regarding his agreement to expedite the estate planning process, if possible, and expressing Helen's appreciation for that. On September 22, 2008, Samsky sent Helen a draft of the estate planning documents with a letter describing the trust and will provisions, including those that would disinherit Judy. Helen called Samsky and told him that the draft documents were what she wanted, and that the disposition for Judy was correct. Samsky then completed the documents.

On September 26, 2008, John drove Helen to Samsky's office. John was present when Helen signed the will, trust and quitclaim deed. He also signed the trust, as cotrustee. The trust and will disinherited Judy and named John as Helen's primary beneficiary. The trust explained Helen's unequal distribution as follows: "Provisions Regarding Judy. Trustor acknowledges that she has an account at Bank of America held in joint tenancy (or similar) form of title with JUDY that will pass to JUDY outside of this trust. In addition, Trustor has given most of her jewelry to JUDY and has provided financial assistance to JUDY over the years. Because Trustor is not happy with JUDY's present legal

actions relating to JOHN III, Trustor is making no other provision for JUDY at this time."

On December 1, 2008, Helen was diagnosed with liver cancer. On December 5 or 15, 2008, John called Samsky. John expressed concern about the Oregon will contest and asked whether they could "take any steps to try to minimize the likelihood of litigation" in California. Samsky recommended that another lawyer speak with Helen and examine her estate plan. Samsky advised John to obtain a certificate of independent review and suggested Susan Siple, an estate planning attorney who practiced with another firm.

John then telephoned Siple to thank her in advance for providing a certificate of independent review. On December 29, 2008, Siple met with Helen for an hour. She reviewed Helen's will and trust. She saw that Helen was gravely ill, but failed to inquire about Helen's physical health or what medications she had taken before their meeting. Siple provided a certificate of independent review stating that she did not believe Helen's estate plan was the product of undue influence. John continued telephoning Samsky regarding Helen's estate plan, the certificate of independent review and title to Helen's accounts.

On January 1, 2009, Judy asked the Ventura County Sheriff's Office (sheriff) to check on Helen's welfare. A deputy sheriff spoke with Helen outside Judy's presence. On January 3, 2009, Judy again asked the sheriff to check on Helen's welfare, and she accompanied a deputy sheriff to the Oxnard house. John told Judy to stay outside. After Helen said that she would talk to Judy if the men would step out because she was not dressed, John said, "Mom, I'm going to let Judy see you." When Helen saw Judy, she said, "You just had to go after the ranch, didn't you?" (John was Helen's only source of information regarding the Oregon will contest.) Helen also told Judy that she was "not up to visiting any more" when Judy suggested that her grandchildren visit her.

John never advised Judy that Helen was terminally ill, nor did he instruct anyone to advise her of that fact. Helen died on January 9, 2009, at the age of 76.

In July 2009, John and Judy settled the Oregon will contest. The settlement provided that Pud's 2007 will would be declared void and the estate would be controlled by the terms of his prior will, with all assets to be distributed equally between John and Judy. John also agreed that the estate would pay $50,000 of Judy's legal fees.

In July 2009, Judy filed a petition challenging Helen's 2008 will and trust. Her first amended petition states claims for undue influence, financial abuse of an elder adult, fraud, duress, cancellation, conversion, breach of fiduciary duty and constructive trust.

Over three days in October and November 2010, the trial court conducted a bench trial. Several witnesses testified regarding an August 4, 2008 letter that purportedly bore Helen's signature, and was addressed to John's defense attorney in the Oregon will contest (August 4, 2008 letter). Among other things, that letter expressed Helen's disappointment and shame about Judy's "bringing false irrational accusations against her only brother." It challenged several statements in Judy's complaint, and described an "ancient nostalgic accustomed tradition" in the Lagomarsino's Italian family whereby the son or sons "always received the inheritance of the family farm." The August 4, 2008 letter did not acknowledge that Pud's 2002 will had left his entire estate, including his ranch, in equal shares, to John and Judy.

At trial, John admitted that he and Marilyn spoke and exchanged email messages from July 8, 2008 through August 3, 2008, concerning the August 4, 2008 letter. According to John, Helen wanted Marilyn to retype a draft of Helen's letter, and after Marilyn did so, she emailed it to John, who printed it and gave it to Helen. She read it for 15 or 30 minutes and then signed it. John and Marilyn both testified that Marilyn only retyped Helen's draft, and

reformatted it by breaking it into paragraphs. Helen's original draft was not produced at trial. In his pretrial deposition, John had testified that Helen did not show him the August 4, 2008 letter before she sent it; that she might have shown him a draft, but that he did not review it; that he thought he read it but could not remember whether it was typed or handwritten. He also denied that he participated in any way in the preparation of the letter and said he thought Helen showed him the final product after it was sent and that he probably read it.

A forensic linguistics expert reviewed and compared the style of the August 4, 2008 letter with that of documents that were authored by Helen. He opined that Helen did not author the August 4, 2008 letter.

Samsky, the attorney who drafted Helen's 2008 trust, will and quitclaim deed, testified that he believed those documents were not the product of undue influence. Several other witnesses, including Judy, John, Marilyn, and Helen's brother, Joe Samples, testified about Helen's physical condition and the extent of Helen's contact with friends and relatives after July 2008.

After both parties rested, the trial court announced and explained the basis for its decision. It concluded that the presumption of undue influence did not apply because John did not actively participate in preparing Helen's estate plan. (See *Estate of Swetmann* (2000) 85 Cal.App.4th 807, 821.)

The trial court found, however, that Judy had established by a preponderance of the evidence that the 2008 will and trust were the product of undue influence. It announced several related factual findings, including that John was "very angry" with Judy for filing the Oregon will contest and that he used pressure to coerce Helen, and overcame her free will. It cited evidence that beginning in July 2008, the telephone at the Oxnard house was answered only by a machine; telephone calls were not returned; the formerly open, accessible gate was padlocked; and Judy was forced to scale a wall to see Helen. When Judy did see her, Helen appeared surprised, nervous and shaky. Quoting the record, the court said Helen told Judy, "You need to leave. Your brother is going to be here

at any time." It cited John's testimony regarding the January visit when Judy accompanied the sheriff to the Oxnard residence; "I said, 'Mom I am going to let Judy see you,'" which the court found was "strong evidence that [he] was controlling" Helen.

The trial court ruled in favor of Judy on the undue influence claim, granted her petition, and declared that the 2008 trust, will, and quitclaim deed were deemed void or voided. It ruled in favor of John on the remaining claims in the petition, with the exception of the claim of financial elder abuse, which Judy withdrew.

Judy submitted a proposed statement of decision, to which John submitted objections. The trial court modified and executed the proposed statement, and filed it as the court's statement of decision on December 30, 2010. It included the court's specific finding that John was not a "credible witness." The court further found that John "had a confidential relationship with [Helen] and isolated her from" Judy; that John used pressure to overcome Helen's free will and coerced her and destroyed her free agency; that Helen's will and trust providing solely for John was an unnatural disposition of Helen's estate; and that the will, trust and quitclaim deed were invalid as a result of John's undue influence. The court entered judgment on December 30, 2018, and invalidated Helen's 2008 estate plan.

DISCUSSION

John contends that there is not substantial evidence to support the trial court's finding that John unduly influenced his mother's estate plan.[1] We disagree.

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[1] We recognize that John refers to the trial court's determination of undue influence as a conclusion. Where, as here, the presumption of undue influence does not apply, the question of undue influence is "'. . . one of fact for the [fact finder's] determination.'" (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585.) We thus use the proper term, finding, in addressing his contention.

On appeal, we evaluate the court's finding that John unduly influenced his mother's estate plan under the highly deferential substantial evidence standard of review. (*In re Teel's Estate* (1944) 25 Cal.2d 520, 526; 2 Cal. Trust and Probate Litigation (Cont.Ed.Bar 2009) Appeals, § 23.34 [appellate court defers to trial court's factual determinations where supported by any substantial evidence, contradicted or not].) Under this standard, we must affirm the court's finding even where "'. . . two or more inferences can be reasonably deduced from the facts . . . .'" (*In re Teel's Estate*, *supra*, at p. 526.) We "'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]' [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*In re Estate of Young* (2008) 160 Cal.App.4th 62, 76.)

"Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment." (*Estate of Ricks* (1911) 160 Cal. 467, 480; see also *Rice v Clark* (2002) 28 Cal.4th 89, 96 [the undue influence principle recognized in *Estate of Ricks* predates the 1931 adoption of the Probate Code and is not codified in Probate Code section 6104].) "'Undue influence,' obviously, is not something that can be seen, heard, smelt or felt; its presence can only be established by proof of circumstances from which it may be deduced." (*Estate of Ferris* (1960) 185 Cal.App.2d 731, 734.)

During oral argument, counsel for John emphasized his claim that there is no evidence that the circumstances of her 2008 estate plan were "inconsistent with voluntary action" on her part. We reject that claim, as well as

the related claim that the "trial court erroneously speculated that [he] isolated and controlled [Helen] such that her free will was destroyed." The presence or absence of undue influence is a question for the trier of fact, not this court. (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 867.)

The court's express findings reflect its conclusion that the circumstances of Helen's 2008 estate plan were inconsistent with voluntary action on her part. The court cited evidence of John's confidential relationship with Helen and his isolation of her, including evidence that 76-year-old Helen did not drive, and she lived with, and depended on, John for transportation. It found that John was very angry about the Oregon will contest; that he discussed it with Helen; and that days after Judy filed that contest, John denied her access to Helen by locking the gate to the Oxnard house. Helen seemed frightened of having John find Judy there. The court further found that Helen did not author the August 4, 2008, letter that described Judy's claims as "false irrational accusations against her only brother."

Helen told Samsky that she was angry that Judy had filed the Oregon will contest challenging John's right to inherit Pud's ranch, and that there was a long-standing tradition in the Lagomarsino family of the sons' inheriting the land or ranch. However, she also informed Samsky that she might change her mind about disinheriting Judy. Meanwhile, John continued to isolate Helen, failed to advise Judy that Helen was dying, and urged Samsky to expedite the estate planning process. Before 2008, Helen had signed three wills in which she gave equal shares of her property to John and Judy. Under Helen's expedited 2008 estate plan, John would inherit nearly all of her property. The court expressly found that John was not a credible witness. This court is bound by the trial court's credibility determinations, and we may not reweigh the evidence. (*In re Estate of Young*, *supra*, 160 Cal.App.4th at p. 76.) Substantial evidence supports the court's finding that Helen's estate plan was the product of John's undue influence upon her.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Glen M. Reiser, Judge

Superior Court County of Ventura

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