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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

Estate of SELMA V. SIMON, Deceased.	B275809 (Los Angeles County Super. Ct. No. BP165096)
LEONARD I. ANEBERE, Appellant, v. GREGORY JONES, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Maria E. Stratton, Judge. Affirmed in part, reversed in part and remanded with directions.

Leonard Anebere, in pro. per., for Appellant.

Monteleone & McCrory, Philip C. Putnam and Martha Eager for Respondent.

After Selma V. Simon died in 2013, her next-door neighbor, Leonard Anebere, petitioned the court to invalidate her living trust, claiming Simon had more recently executed a holographic will naming him the beneficiary of Simon's estate and the holographic will had effectively, albeit impliedly, revoked the trust. Anebere's operative second amended petition also alleged Gregory Jones, Simon's financial advisor and sole beneficiary under the trust, had exercised undue influence over Simon when she created and amended her trust. Having already provided Anebere with two opportunities to amend his petition to attempt to state a viable cause of action, the probate court sustained without leave to amend Jones's demurrer to both causes of action and entered judgment in favor of Jones. We reverse the judgment to permit Anebere one final opportunity to amend his petition to state a cause of action for undue influence and, in all other respects, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Simon's Trust*

In 2006 Simon created The Selma V. Simon Living Trust, naming herself the trustee and Jones both the successor trustee and a trust beneficiary after her death. Several charities were also named as beneficiaries of the trust. At the same time Simon executed a pour-over will, bequeathing all personal and real property in her estate to Jones in his capacity as trustee of her living trust. Both the trust and pour-over will were prepared by Simon's legal counsel.

In 2010 Simon, with the assistance of the same legal counsel who had prepared her trust, amended the trust to remove the charities as beneficiaries, leaving Jones as the sole beneficiary after her death. All other provisions of the trust

remained unchanged. Simon died in October 2013 at the age of 97. She never married and had no children.

2. *Anebere's Original and Amended Petitions To Invalidate the Trust*

On July 31, 2015 Anebere, represented by counsel, petitioned the court to invalidate the trust based on fraud, duress, menace and undue influence. Jones demurred to the petition on several grounds, including Anebere's lack of standing. The trial court sustained Jones's demurrer, ruling Anebere, who was not a beneficiary or other interested party under the trust, had failed to allege facts demonstrating he had standing to bring any of the claims he asserted. The court granted Anebere leave to amend his petition to state a claim for relief.

On October 19, 2015 Anebere, representing himself, filed a first amended petition, this time alleging Simon had executed a valid holographic will in February 2013 that revoked her 2006 trust and bequeathed to him her entire estate, including her home. Anebere, who referred to Simon as grandma, attached as an exhibit to his first amended petition a copy of the alleged will, which he claimed had been written in Simon's handwriting and signed by her on February 23, 2013. The note read, "Dear Leonard, I Selma Victoria will to you my estate and 4256 9th Avenue, LA, Calif. 90008. Love Grandma. Selma V. Simon."[1] Anebere also reasserted his cause of action for undue influence

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[1] On May 21, 2015 Anebere filed a separate petition in the probate court (Los Angeles Superior Court case No. BP163039) to admit a copy of the handwritten note in the probate proceeding involving Simon's estate.

and included new causes of action for elder abuse and financial elder abuse.

Jones demurred to the first amended petition arguing, among other things, even if the 2013 handwritten note was a valid holographic will,[2] it did not revoke her trust as a matter of law. Jones also argued Anebere had not alleged facts sufficient to demonstrate undue influence. In addition, Jones argued Anebere lacked standing to bring any of his claims.

Anebere retained new counsel and appeared at the December 22, 2015 hearing on the demurrer. The court sustained Jones's demurrer to all causes of action in the first amended petition and granted Anebere another opportunity to amend his petition.

3. *The Court's Order Sustaining Jones's Demurrer to the Second Amended Petition Without Leave To Amend*

On February 2, 2016 Anebere, once again self-represented, filed a second amended petition, claiming more specifically that Simon's holographic will had effected a revocation of her prior living trust. Anebere also reiterated his claim that Jones had exerted undue influence in the creation and amendment of Simon's trust. The elder abuse causes of action were abandoned.[3]

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[2] Although Jones insists the purported holograph will is a forgery, for purposes of this demurrer, which tests the legal sufficiency of the petition, Jones does not challenge that document's authenticity.

[3] The record on appeal includes the original and first amended petition but not the operative second amended petition. Because that omission appears to be a simple oversight by a self-represented litigant, we ordered the trial court record and, on our

The probate court sustained Jones's demurrer without leave to amend, concluding the 2013 document, even if a valid holographic will, did not revoke the living trust. The court also ruled Anebere had not alleged facts sufficient to state a claim for undue influence or to benefit from the evidentiary presumption of undue influence. The court entered judgment in favor of Jones.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1100; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; *Tepper v. Wilkins* (2017) 10 Cal.App.5th 1198, 1203.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726;

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own motion, augmented the appellate record to include the operative pleading. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

see *Schifando*, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 970–971.) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should not be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Ivanoff v. Bank of America, N.A., supra,* 9 Cal.App.5th at p. 726.)

2. *The Probate Court Properly Sustained the Demurrer to Jones's Second Amended Petition*

a. *The holographic will did not revoke the trust*

Probate Code section 15401 (section 15401), subdivision (a), provides, "A trust that is revocable by the settlor or any other person may be revoked in whole or in part by any of the following methods: [¶] (1) By compliance with any method of revocation provided in the trust instrument. [¶] (2) By a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph."

Without addressing section 15401 or the absence of any prescribed means of trust revocation in the trust instrument,[4] Anebere contends Simon's alleged holographic will sets forth her testamentary intent to bequeath her entire estate to him, including any former trust property. Citing *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 893 (*Gardenhire*), which held a will reflecting a testamentary intent to revoke a prior trust can effect a revocation if the trust authorizes revocation by a subsequent writing, even if it does not expressly authorize revocation by will, Anebere argues the holographic will implicitly revokes Simon's trust.

Anebere's reliance on *Gardenhire* is misplaced. *Gardenhire* concerned the revocable living trust created by Anne Pulizevich in 1989, which named herself as trustee and provided that, on her death, the trust assets were to be distributed to O'Connor Hospital in trust for the benefit of Ivka Barilovic, Josephine Francesconi and Mary Salles. Pulizevich also transferred her real property into the trust. The trust provided that Pulizevich as trustor could "by written notice signed by the Trustor and delivered to the Trustee: [¶] . . . [¶] C. Revoke in whole or in part any trust or trusts created by or to be created pursuant to

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[4] Section II of the trust, governing revocation and amendment of the trust, provides, "The Trustor may, during her lifetime, at any time and upon successive occasions, revoke this Trust in whole or in part, or may alter or amend any of its provisions and any amendment may be similarly cancelled or amended, provided, however, that the duties and responsibilities of the Trustee shall not be substantially changed without the Trustee's written consent. . . ."

this Declaration." (*Gardenhire, supra,* 127 Cal.App.4th at p. 886.) In 2002 Pulizevich executed a will in which she explicitly revoked all prior wills but did not mention the trust. The 2002 will stated it was Pulizevich's intent "'to dispose of all real and personal property which I have the right to dispose of by Will'" and explicitly bequeathed her personal property to Francesconi, and the residue of her estate to Francesconi and St. Anne's Maternity Home to be held in trust for the benefit of Francesconi and Barilovic. (*Id.* at p. 886.)

After Pulizevich died, the executor of her estate brought an action in probate to resolve competing claims from a trust beneficiary and an estate beneficiary under the 2002 will. The trust beneficiary argued section 15401 prohibited revocation of a trust by will unless the trust expressly provided it could be revoked by a subsequent will. Pulizevich's trust had no such provision. The *Gardenhire* court rejected the trust beneficiary's argument, holding section 15401, subdivision (a)(2), precluding revocation by will, was inapplicable under the circumstances presented by the case: "Section 15401, subdivision (a)(1) allows a trust to provide *any* method of revocation. If the trust is silent and does not provide a method, then section 15401, subdivision (a)(2) allows a revocation by a writing, other than a will, signed and delivered by the trustor to the trustee during the trustor's lifetime. If the trust is not silent and instead provides a method of revocation, then section 15401, subdivision (a)(2) is inapplicable." (*Gardenhire, supra,* 127 Cal.App.4th at p. 894.) Because the trust in *Gardenhire* provided it could be revoked by written notice signed by the trustor and given to the trustee and the will, a writing signed by the trustor and delivered to her during her lifetime, satisfied that condition, the will, with its

plain testamentary intent to revoke and supersede the prior trust, constituted a proper revocation. (*Id*. at p. 888.)

We need not decide whether we agree with *Gardenhire* that a general provision authorizing revocation of a trust by a subsequent writing is sufficient to permit revocation by will. Unlike the trust in *Gardenhire,* Simon's trust is silent on the method of revocation. Thus, even under *Gardenhire,* revocation of the trust could only be accomplished pursuant to section 15401, subdivision (a)(2), which expressly prohibits revocation by a will. Accordingly, the probate court properly sustained the demurrer to Anebere's claim without leave to amend.

b. *Anebere did not allege facts sufficient to support his undue influence claim*

A testamentary document, including a living trust, may be set aside if procured by undue influence. (*Rice v. Clark* (2002) 28 Cal.4th 89, 96; *David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) "[U]ndue influence is 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,* at p. 96; *David,* at p. 684.)

To support a cause of action seeking to set aside a testamentary document, it is not sufficient simply to plead the legal conclusion of undue influence. Facts must be alleged "from which the court may determine as a matter of law whether the facts so pleaded constitute the alleged undue influence." (*In re Estate of Graves* (1927) 202 Cal. 258, 263; accord, *In re Estate of Bixler* (1924) 194 Cal. 585, 589 [undue influence "averred only in general terms as a conclusion of law" is "fatally defective"; "[u]ndue influence is a legal conclusion to be drawn from certain

facts, and the facts must be pleaded"].) Allegations that "(1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument" are sufficient to state a prima facie claim and give rise to a presumption of undue influence, shifting the burden to the proponent of the document to show the absence of undue influence. (*Rice v. Clark*, *supra*, 28 Cal.4th at pp. 96-97; see Prob. Code, § 21380, subd. (a) ["[a] provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence: [¶] . . . (2) [a] person who transcribed the instrument or caused it to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed"].)

In the second amended petition Anebere alleged Jones was Simon's business advisor; she depended upon him for assistance in matters involving her assets; and "[b]y virtue of their business relationship, there existed a fiduciary relationship which by law creates a suspicion of undue influence in connection with any transactions created by the objector pertaining to the decedent's property and decisions related thereto where any such transactions were created in the objector's favor." The court found those allegations insufficient to create the presumption of undue influence, explaining, "Petitioner cannot rely on a presumption of undue influence where he fails to explain the fiduciary relationship he contends existed between Respondent and Decedent."

Anebere contends he adequately alleged, however inartfully, the existence of a fiduciary relationship between Jones

and Simon based on Jones's role as Simon's trusted financial advisor. Even if this allegation were sufficient to establish a confidential relationship for purposes of the presumption of undue influence (see *Estate of Aiello* (1980) 106 Cal.App.3d 669, 666-667 [trusted business advisor and beneficiary of testator's estate enjoyed confidential relationship with testator and bore burden of demonstrating the absence of undue influence]; *In re Estate of Hampton* (1940) 39 Cal.App.2d 488, 497 [decedent's relationship with his financial advisor was of a confidential nature, shifting burden of proof to financial adviser to demonstrate testamentary document not result of undue influence]), Anebere has not alleged that Jones actively participated in drafting, executing or procuring the 2006 trust or had any role in directing her to the law firm that prepared it. Without those allegations Anebere cannot benefit from the presumption of undue influence. (See *Rice v. Clark*, *supra*, 28 Cal.4th at pp. 96-97.)

To be sure, Anebere's second amended petition alleged, based on information and belief, that the 2010 trust amendment, which eliminated the charitable beneficiaries and made Jones the sole beneficiary under Simon's trust, "was the work of the objector, Gregory Jones, and not the decedent."[5] However, simply

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[5] In paragraph 17 of the second amended petition, Anebere alleged, "Petitioner is informed and believes that the September 27, 2010 First Amendment to the decedent's Declaration of Trust . . . was the work of the objector, Gregory Jones, and not the decedent. Petitioner is informed and believes that the objector had an advantage over the decedent that constituted undue influence. Petitioner contends that the

invalidating the 2010 amendment for undue influence would still leave in place the 2006 trust. Because Anebere is not a beneficiary of the trust, he has no cognizable interest in the outcome of such an undue influence action. (See Code of Civ. Proc., § 367 ["[e]very action must be prosecuted in the name of the real party in interest"]; *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 [a real party in interest is one who is beneficially interested in the controversy, that is, one who has "some special interest to be served or some particular right to be preserved or protected"]; *Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin American Dist. of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445 [same].) Anebere's lack of standing is fatal to his efforts to state a cause of action for undue influence. (*Tepper v. Wilkins*, *supra*, 10 Cal.App.5th at p. 1209 ["'[s]tanding is the threshold element' of a cause of action and may be the basis for sustaining a demurrer without leave to amend"]; *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031 [same].)

Anebere insists his interest in this undue influence action rests on his status as a beneficiary under the purported holographic will. Had Anebere properly pleaded a claim for undue influence in the preparation of the 2006 trust, we would agree. A finding the 2006 trust was invalid could affect Anebere's interest as the beneficiary of Simon's estate under the purported

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objector persuaded the decedent to perform transactions relating to her assets that would benefit the objector at the time of her demise which were not her actual wishes."

holographic will if that will is admitted to probate.[6] However, as discussed, Anebere has not stated a claim for undue influence in connection with the 2006 trust. Any ruling invalidating the 2010 trust amendment does nothing to assist Anebere in his effort to set aside the trust or otherwise afford him any interest in trust property.[7]

3. *Remand Is Required Because Anebere Has Described Facts on Appeal Demonstrating His Petition Can Be Amended To State a Cause of Action for Undue Influence*

In his reply brief and again at oral argument, Anebere described facts that, if true, would support an undue influence

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[6] On January 17, 2018, while this appeal was pending, the probate court in Los Angeles Superior Court case No. BP163039 denied with prejudice Anebere's petition to admit the purported holographic will into probate. Although we grant Jones's request for judicial notice of the court's ruling, we reject his contention that it is dispositive of the issues in this appeal. The probate court's ruling is not yet final—Anebere filed his notice of appeal in that action on February 15, 2018—and thus has no collateral estoppel effect. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 352 [a judgment is not final for collateral estoppel purposes so long as it remains open to direct attack on appeal]; *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 787 [same].)

[7] If the purported holographic will is valid and supersedes the 2006 pour-over will, any property remaining outside the trust at the time of Simon's death may well go to Anebere. However, Anebere's interest, if any, in nontrust property is a matter to be decided in the separate probate action.

claim relating to the creation of the 2006 trust.[8] In particular, Anebere asserted "during and continuing after 2006, [Jones] confined [Simon] to her home and/or his care and custody. Such isolation and confinement was intended by [Jones] to make [Simon] completely dependent upon him and also intended to terminate [Simon]'s contact and ties with her family and friends so that he could, as he did, take over [Simon]'s financial assets. . . . [Jones] utilized his position of power and authority over [Simon], isolated [Simon] from her family, to take unfair advantage of [Simon]'s weakened physical condition, confusion, weakness of mind, dependence upon him, without [Simon]'s knowledge or consent and to unduly influence [Simon] to create and execute the Estate Documents" that Jones, a trust beneficiary, now wishes to enforce.

Anebere explained during oral argument these allegations, sufficient on their face to establish undue influence (see *Rice v. Clark, supra,* 28 Cal.4th at p. 96), were not entirely new. He had included them in some form in earlier iterations of his petition, but had omitted them in his second amended petition when he removed the elder abuse causes of action to streamline his pleading. Because Anebere has demonstrated on appeal that he could amend his complaint to state a cause of action for undue influence, we remand to permit him that one final opportunity. (See *Aubry v. Tri–City Hospital Dist.*, *supra*, 2 Cal.4th at pp. 970-971.) However, because Anebere's standing to invalidate the

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[8] Anebere did not file a timely reply brief. In consideration of Anebere's self-represented status, we granted his request to file a late reply brief and permitted Jones to file a rejoinder to the reply.

trust for undue influence is premised on his status as a beneficiary under a valid holographic will, we suggest the probate court postpone any amendment in this action pending a final determination of the validity of that testamentary document. If Anebere's appeal from the dismissal of his action to admit the holographic will to probate is rejected, the amendment, which rests on his standing under that will, would be futile.[9]

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[9] At oral argument counsel for Jones suggested Anebere, neither a trustee nor beneficiary of the trust, lacked standing to prosecute his undue influence claim regardless of any new allegations that would otherwise state a claim for relief. The proper procedure, Jones argued, would be for Anebere to file a petition under Probate Code section 850 if the purported holographic will is found valid in the probate proceeding. Because any amendment in this action should await a final determination on the validity of the holographic will, we need not address that contention. If an amendment is ultimately permitted, Anebere can, at that time, amend his petition to comport with any pleading requirements of Probate Code section 850.

DISPOSITION

The judgment is reversed, and the matter is remanded to permit Anebere to amend his petition to allege undue influence upon a final determination the holographic will is valid. If the court determines an amendment would be futile because the holographic will has been found in a final judgment to be invalid, the court shall deny Anebere leave to amend his petition and dismiss Anebere's second amended petition in its entirety. In all other respects, the order sustaining Jones's demurrer without leave to amend is affirmed. Each party is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

Pagination changed during

ZELON, J. FEUER, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.