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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SANDRA ARNOLD et al.,

Plaintiffs and Respondents,

v.

ROBERT FULLER, as Trustee, etc.,

Defendant and Appellant.

B241450

(Los Angeles County
Super. Ct. No. BP122665)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marvin Lager, Judge. Affirmed as modified.

Paul Kujawsky for Defendant and Appellant.

Randall & Associates and Betty G. Barrington for Plaintiffs and Respondents.

* * * * *

Appellant Robert Fuller and Doris Fuller are brother and sister.¹ Robert and Doris have three more siblings, Shirley Ritchey, Sandra Arnold, and Steven Fuller. This action pits Robert and Doris on the one hand against Shirley, Sandra, and Steven on the other. The father of all five, Thesley Fuller, died in August 2009. Thesley created a trust in July 2008 that divided the trust estate equally between his five children upon his death. In September 2008, Thesley amended his trust so that Shirley, Sandra, and Steven would receive \$90 collectively, and the remainder of the trust estate would be split equally between Robert and Doris. In July 2009, he also withdrew approximately \$235,000 from his bank and gave it to Robert and Doris.

Sandra and Shirley filed a probate petition to determine the validity of the trust amendment and the purported monetary gifts to Robert and Doris. After a bench trial, the court found the trust amendment and gifts void due to the undue influence of Robert and Doris and entered judgment for Sandra and Shirley. We affirm.

FACTS AND PROCEDURE

Thesley and Edwina Fuller married in 1937. They had five children -- Shirley, Sandra, Doris, Robert, and Steven. Thesley and Edwina never legally dissolved their marriage, but they separated. Before their separation, they lived together in a residence on Belhaven Avenue. Thesley moved out of the Belhaven residence in 1968 and never moved back. He moved into a residence on 12th Avenue with his girlfriend, Odessa Gaines. Edwina never lived at the 12th Avenue residence.

1. Conservatorship Litigation

In June 2006, Steven filed a petition for conservatorship of Edwina and her estate. Edwina had lived with him since 1999, and before that time, she lived at the Belhaven property. The court appointed him conservator of her and her estate in February 2007. In May 2008, Steven filed a petition to determine title to real property in the conservatorship

¹ Because so many of the witnesses and parties share a surname, we will refer to them all by their first names. We do not intend this informality to reflect a lack of respect.

action. The petition alleged that in 1968, while still married to Edwina, Thelsey took community property funds and purchased the 12th Avenue property with Odessa. Odessa quitclaimed her interest in the 12th Avenue property to Thelsey before her death in 2003. Steven was seeking a determination that a one-half interest in title to the 12th Avenue property was vested in him as conservator of Edwina's estate. He also wanted the court to determine that he held a one-half interest in title to the Belhaven property as conservator of Edwina's estate.

2. Management of Thelsey's Affairs and Care

Shirley is Thelsey's oldest child. Around April 2008, Shirley had power of attorney to manage Thelsey's bank accounts for a short time. A bank employee suggested the arrangement when Shirley was there with her father. Thelsey revoked the power of attorney to Shirley and gave Robert and Doris power of attorney over his bank accounts on May 22, 2008.

According to Shirley and Sandra, in 2008, there was no animosity between Thelsey and Shirley or Thelsey and Sandra. Shirley would visit Thelsey often up to the first part of 2008. Sandra said she "got along beautiful[ly]" with her father. They loved to pray and watch gospel together. Thelsey told Sandra he wanted Shirley to have the Belhaven house and Sandra and Robert to have the 12th Avenue house. He did not want to leave a house to Doris and Steven because they already had homes of their own. Thelsey also told Sandra he wanted to split his assets evenly among his five children. Sandra described her father as "wishy washy," and at times he "would say one thing and [then] do another." Steven described his father as somewhat of a pushover and easily manipulated, not stubborn or strong-willed.

Around May 2008, Thelsey's health was failing. He had been in and out of the hospital since at least 2007. In early 2008, he had to be rushed to the hospital, where he was resuscitated. Though Shirley would go to Thelsey's house and help him often, she has lupus and was not capable of caring for him full time because of her own illness. This was why Thelsey did not live with her. Sandra would go to Thelsey's house to help him three to four times a week when he lived on 12th Avenue, even though she used a walker. She did this

until she was not capable of helping him anymore. Steven would also visit him at the 12th Avenue property.

Around late April 2008, Thelsey was hospitalized, and right after that, Thelsey moved in with Doris on or about May 1, 2008. Doris believed her home was appropriate for her father because she was able to care for him better than her siblings. Although Steven could also care for Thelsey, Thelsey did not want to live with Steven because Edwina lived with him. While Thelsey lived with Doris, she cooked his meals, bathed him, drove him around, and paid his bills. He was, essentially, reliant on her. Within two weeks of him moving in with her, he started receiving palliative and hospice care at her house. Someone would come at least three times a week to check his vitals, bathe him, or provide other care.

After Thelsey moved in with Doris, it became “very, very difficult” for Shirley to see him. Shirley would be told Thelsey was asleep or not there. Shirley saw him three to four times in the latter part of 2008. Steven also felt that Doris “isolated” Thelsey after he moved in with her. Doris would never answer the phone when he called. Doris and Robert would not tell the family if Thelsey was in the hospital. One of Thelsey’s grandsons who lived on the east coast, Michael Long, was extremely close to Thelsey and would talk to him nearly every day by phone until Thelsey moved in with Doris. After Thelsey moved in with her, Michael had been unable to contact him by phone. Michael sent two certified letters to Doris and Robert asking to speak to Thelsey. He also called the Los Angeles County Sheriff’s Department and asked them to check on Thelsey. Shirley, Sandra, and Steven on a second occasion contacted the sheriff’s department because a niece told them Thelsey was missing, they could not locate Thelsey, and they were concerned about him.

Doris required major surgery around June 2008. While she was in the hospital and recuperating, Thelsey lived with Steven for five or six weeks. On or around July 21, 2008, she and Robert went to see Thelsey at Steven’s home. Thelsey immediately told her he had been waiting for her and was “ready to go home.” He went outside and got into the car even though everyone else was still inside the house talking. Steven was not at home when Doris and Robert arrived. He received a call from his nephew, who said they were at Steven’s

home and were taking Thelsey. He was surprised because neither of his siblings had told him they were coming.

3. Creation of the Trust

Thelsey created the Thelsey Fuller Revocable Trust on July 23, 2008. According to Doris, a social worker from Kaiser Permanente advised Thelsey to create a trust. Thelsey told Doris and Robert to “take care of it,” and they found the attorney to create the trust. The trust divided the trust estate equally between Thelsey’s five children after his death, providing: “If any of the children of the settlor survive him, the trustee shall divide the trust estate into as many shares of equal market value as are necessary to create one share for each of the settlor’s children who survive him and one share for each of the settlor’s children who predecease him but who leave issue surviving him.” The trust assets included Thelsey’s real and personal property and the funds in his bank accounts.

Thelsey was both settlor and trustee of the trust, with Robert and then Doris in order of priority named as successor trustees. Thelsey executed the trust document at Doris’s house. Doris was present in the house but not at the table where Thelsey executed the document. At the table with Thelsey were the attorney, the notary, and Robert.

4. Amendment of the Trust

Thelsey amended the trust on September 16, 2008. He again executed the document at Doris’s house with Doris, Robert, his attorney, and the notary public present. Robert knew the amendment was happening and expected to be present. Robert testified Thelsey was amending the trust to correct an error in the spelling of Thelsey’s name. The original document inaccurately identified Thelsey’s middle initial as an “S.,” when it was actually an “L.” Doris said Thelsey never spoke to her about amending the trust, and she first learned about the amendment when the attorney came to her house to do it. She did not know whether Thelsey or Robert had contacted the attorney. Robert thought that Doris had “probably” contacted the attorney to amend the trust.

The amendment also ended up changing the disposition of the trust estate, providing: “On the settlor’s death, the remaining trust estate shall be disposed of as follows: [¶] Shirley C. Ritchey shall be given the amount of forty dollars (\$40.00), Sandra Arnold shall

be given the amount of forty dollars (\$40.00), Steven A. Fuller shall be given the amount of ten dollars (\$10.00). [¶] The remaining trust estate shall be distributed as follows: [¶] Robert Fuller shall be given fifty percent (50%) of the trust estate. [¶] Doris Fuller shall be given fifty percent (50%) of the trust estate.”

Robert thought there was some “misunderstanding” between Shirley, Sandra, Steven, and Thelsey that caused Thelsey to change the division of the trust estate. A relative told Doris that Shirley was trying to transfer the Belhaven property into her name and Sandra was trying to transfer the 12th Avenue property into her name. Doris then told Robert and Thelsey her sisters were trying to change the deeds to the properties. Robert said Thelsey was very upset when he heard this. Doris did not know whether Thelsey was upset with Shirley and Sandra when he amended the trust.

The few times Shirley was able to see Thelsey in the latter part of 2008, she never spoke to him about his trust.

5. Withdrawal of Thelsey’s Savings

Around June 2009, Steven filed a petition for a restraining order to freeze the funds in Thelsey’s bank accounts because he became concerned about Doris and Robert’s access to the accounts under the power of attorney. He wanted to protect Thelsey from losing all of his estate and Edwina from losing her share of the estate. Before the court could rule on the petition, on July 1, 2009, Thelsey withdrew nearly all of his money from the bank with Doris and Robert’s help.

Doris testified Thelsey was angry at Steven when he found out Steven had attempted to freeze his funds. He directed Doris and Robert to withdraw all of his money from the bank. He wrote a note while he was laying in bed for Doris to take to the bank. The bank manager would not accept the note and would not let Doris withdraw the money even though she had power of attorney. Doris saw that the bank manager had a copy of Steven’s petition for a restraining order on her desk. Thelsey then accompanied them to the bank and withdrew approximately \$235,000 from an account in his trust’s name. The bank would not allow the withdrawal until two bank employees talked to Thelsey. Because Thelsey was not feeling well and was not able to go into the bank without a wheelchair, the bank employees

came out to the car and spoke to him through the passenger-side window. They asked him questions, like whether he knew who he was and what he was doing, whether anyone was pressuring him to withdraw the money, who was the President, and what his birth date was. In response to the question about the President, he told them “Bush” was the President. The bank employees handed him paperwork through the car window. Thelsey initialed the withdrawal slip for the money.

According to Doris and Robert, he gave them each one-half of that money as a gift. He had the bank write checks to them for approximately \$117,572 each. He had less than \$5,000 left in the bank after that. Thelsey did not explain why he was gifting the money to Robert and Doris.

Around August 5, 2009, Thelsey was placed in a convalescent home. He remained there until August 26, 2009, when he died at age 92.

6. Trial Court’s Statement of Decision and Removal of Robert and Doris as Trustees

In May 2010, Shirley and Sandra filed the instant probate petition against Robert and Doris seeking to invalidate the September 2008 amendment to the trust. They also asserted causes of action for undue influence, to impose a constructive trust on the trust assets then held by Robert as successor trustee, to impose a constructive trust over the approximately \$235,000 Thelsey had allegedly given to Robert and Doris, for declaratory relief, and for elder abuse. The court consolidated for trial the probate petition and Steven’s conservatorship petition to determine title to real property. This appeal relates only to the court’s findings on the probate petition.

After a bench trial at which the parties adduced the foregoing facts, the court issued a statement of decision finding as follows:

“On July 23, 2008, shortly after leaving Steven’s home, and returning to Doris’, Thelsey executed the Thelsey S. [sic] Fuller Revocable Trust. Upon his death, as relevant, the trust provided that its assets were to be distributed equally to each Thelsey’s [sic] five children. Less than [sic] two months later, on September 16, 2008, Thelsey executed an amendment to the trust that made Doris and Robert the sole beneficiaries, except for \$40 to Shirley, \$40 to Sandra and \$10 to Steven. There is no credible explanation – other than

undue influence and/or fraud – for the dramatic reduction in the gift to Shirley and Sandra. Steven, on the other hand, was pursuing claims as Edwina’s conservator against Thelsey.

“Carol^[2] and Robert had physical control of Thelsey when the trust amendment was executed. His physical condition was poor. They led him to the false conclusion that Shirley and Sandra were attempting to steal his property. They selected the attorney who drafted the trust and amendment. They were present when both were executed. Robert testified he came to his sister’s house because he knew an amendment was to be signed correcting errors, such as the use of a wrong middle initial. I do not credit this testimony. They procured the amendment. It was the product of undue influence.

“On July 1, 2009, Carol and Robert drove Thelsey to his bank where he withdrew \$235,152.28 from a Trust account. Doris and Robert each received one half of the money. They claim it was a gift. I find it was the result of undue influence.”

After the court issued its statement of decision, Shirley and Sandra filed an ex parte application to remove Robert as trustee and disqualify Doris as successor trustee. The court held a hearing on the matter and granted the application. It also appointed a new trustee, Patrick Barnitt. The court entered judgment for Shirley and Sandra on the probate petition and awarded them “reasonable” attorney fees against Doris and Robert. The judgment states the September 2008 trust amendment is null and void, Doris and Robert are jointly and severally liable to the trust for \$235,152.28,³ and their acts constitute financial elder abuse. Robert timely appealed.

² Shirley’s middle name is Carol. The witnesses sometimes referred to Shirley as Carol. It seems apparent, however, that the trial court meant to refer to Doris in this sentence and the first sentence of the next paragraph, not Carol or Shirley. Doris was the sister with whom Thelsey lived at the time in question and who went with Thelsey to the bank to make his withdrawal.

³ The judgment actually states Doris and Robert are jointly and severally liable for \$235,158.28, an amount which is off by \$6. The correct amount according to the evidence, as we have stated above and as the trial court itself noted in the statement of decision, is \$235,152.28.

STANDARD OF REVIEW

“Where findings of fact are challenged on a civil appeal, we are bound by the ‘elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below.” (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) Substantial evidence is that which is reasonable in nature, credible, and of solid value. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.) We view the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in the evidence in its favor. (*Jessup Farms*, at p. 660.) So long as there is substantial evidence supporting the judgment, we may not reverse. (*Bowers*, at pp. 873-874.)

DISCUSSION

Doris and Robert contend we must reverse because there was insufficient evidence they procured the trust amendment and the monetary gifts through undue influence. We disagree.

1. The Trust Amendment

A testamentary document may be set aside if procured by undue influence. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) “Undue 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 v. Clark* (2002) 28 Cal.4th 89, 96.) It is conduct that subjugates the testator’s or settlor’s will to that of another, causing a disposition of property different from that which the testator or settlor would have made if allowed to follow his or her own inclination or judgment. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 480.)

The contestant of the testamentary act generally has the burden of proving undue influence. (*David v. Hermann, supra*, 129 Cal.App.4th at pp. 684-685.) The contestant may, however, shift the burden of proof to the proponent of the testamentary act by establishing a presumption of undue influence. The presumption arises when “(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.” (*Rice v. Clark, supra*, 28 Cal.4th at p. 97.) Once the presumption arises, the burden shifts to the proponent of the testamentary act to prove it was not procured by undue influence. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605.)

Even if the contestant has failed to establish the necessary factors for the presumption to arise, the contestant may still prevail if he or she demonstrates the evidence as a whole establishes undue influence. (*David v. Hermann, supra*, 129 Cal.App.4th at p. 684.) “What constitutes undue influence and what constitutes sufficient proof thereof depend upon the facts and circumstances of each particular case. It ‘is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded.’ [Citation.]” (*Sparks v. Sparks* (1950) 101 Cal.App.2d 129, 135.) Proof of undue influence by circumstantial evidence is sufficient and often necessary. (*Estate of Garibaldi* (1961) 57 Cal.2d 108, 113; *Estate of Washington* (1953) 116 Cal.App.2d 139, 146.) “By the time the undue influence is under investigation, the decedent is no longer available to testify about it. Undue influence also normally takes place behind closed doors. Rarely will a case be decided on the basis of testimony or other direct evidence of the ultimate fact of undue influence.” (1 Cal. Trust and Probate Litigation (Cont.Ed.Bar 2013) Grounds for Setting Aside Will or Trust, § 6.22.) Proof of undue influence by circumstantial evidence typically requires a showing of a number of factors which, in combination, justify the inference, though taken individually each factor may not be sufficient. (*David v. Hermann*, at p. 684.)

Indicia of undue influence include: (1) unnatural provisions cutting off from any substantial bequests the natural objects of the decedent's bounty; (2) dispositions at variance with the intentions of the decedent, which he or she may have expressed both before and after execution; (3) relations between the chief beneficiaries and the decedent that afforded the chief beneficiaries an opportunity to control the testamentary act; (4) a mental or physical condition suffered by the decedent that permitted the subversion of his or her freedom of will; and (5) the chief beneficiaries' active procurement of the contested

instrument. (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585; *Estate of Yale* (1931) 214 Cal. 115, 122.) The court may rely on facts occurring both before and after execution of the contested document, so long as they warrant the inference that undue influence existed at the time of execution. (*Estate of Baker, supra*, 131 Cal.App.3d at p. 481.) Moreover, the person exerting undue influence need not be present at the time of execution, so long as the influence itself was there. (*Ibid.*)

A review of the record in this case shows substantial evidence supported the court's determination that Doris and Robert procured the trust amendment through undue influence. The amendment resulted in an unnatural division of the estate and a division at odds with Thelsey's previously expressed intentions. Even before creating the trust, Thelsey said he wanted to split his assets evenly among his five children. There was no animosity between Shirley or Sandra on the one hand and Thelsey on the other. Shirley had power of attorney over Thelsey's bank accounts until he moved in with Doris. Neither Shirley nor Sandra could care for him full time because they had health issues of their own. But they would visit his house and help him to the extent they could. Steven cared for the siblings' mother as her conservator and could not also care for Thelsey, though he did care for Thelsey temporarily from June to July 2008 while Doris was hospitalized. Although Steven filed the conservatorship petition seeking a community property interest in Thelsey's 12th Avenue property on Edwina's behalf, he did so in May 2008. To the extent Doris and Robert argue Steven's petition in the conservatorship action poisoned Thelsey against him, this does not ring true. Steven filed the petition well before Thelsey created the trust in late July 2008 leaving all his children, including Steven, equal parts of the trust estate. Thus, the evidence was that *all* five children helped care for Thelsey in his declining years and were the natural objects of his bounty, and he had expressed an intention to have them share equally in the estate.

Further evidence of undue influence existed in that the relations between Doris, Robert, and Thelsey afforded Doris and Robert the opportunity to control the amendment of the trust. Contestants may establish the influencers' power to control the testamentary act through a variety of circumstances, including "control over the decedent's business affairs,

dependency of the decedent upon the beneficiary for care and attention, or domination on the part of the beneficiary and subserviency on the part of the deceased.” (*Estate of Washington, supra*, 116 Cal.App.2d at pp. 145-146.) Some of these factors were present here. Doris and Robert had power of attorney over Thelsey’s bank accounts, which allowed Doris to control his money and pay his bills. Thelsey relied completely on Doris for the daily necessities of life, including eating, bathing, and transportation when necessary. Additionally, Doris and Robert isolated Thelsey from his other family. When Thelsey originally created the trust, it was just two days after he had returned to Doris’s home from Steven’s, where he had spent five to six weeks. There was no evidence Steven made it difficult for his siblings to see Thelsey or otherwise cut them off while Thelsey lived with him. Doris, however, made it very difficult for all but herself and Robert to see him. Shirley would be told Thelsey was not at home or was asleep when she called. Doris would not answer the phone when Steven called. Neither Doris nor Robert would tell their siblings when Thelsey was hospitalized. Thelsey’s grandson, Michael, with whom he was very close, was not able to contact Thelsey by phone at Doris’s house and resorted to sending a certified letter to Doris and Robert asking to speak with him, which apparently did not work. The isolated family members became concerned enough about their lack of contact with Thelsey that they called the sheriff’s department. Thelsey executed the amendment after almost two months in Doris’s home, where he would have been isolated from the rest of his family (except Robert).

Doris and Robert suggested the amendment could be legitimately explained by Thelsey’s learning that Shirley and Sandra were trying to put the Belhaven and 12th Avenue properties in their names. But Doris’s communication of this information to Thelsey actually supports the judgment. Even if it were true they were trying to take the properties (and there is no evidence this was the case), the truth of the representations is not a complete defense to charges of undue influence. The court’s inquiry must focus on whether the influencers successfully overpowered the decedent’s free agency, not “on whether particular words assertedly used to that end were true or false.” (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182.) “It is plausible, for example, that an influencer’s declaration that the

trustor/testator's issue 'do not need your money as much as I do' might be demonstrably true but might nevertheless, through repetition, emphasis, or combination with other forms of persuasion and in light of the trustor/testator's particular susceptibilities, amount or at least significantly contribute to 'coercion destroying free agency on the part of the [trustor/]testator.'" (*Ibid.*) Here, Doris relayed the information about Shirley and Sandra while also isolating Thelsey from the rest of his family. The court could logically infer Doris and Robert gave their sisters no chance to refute the allegations against them by blocking their access to Thelsey, thus using the information to influence him. In addition, there was evidence Thelsey was not strong-willed but easily manipulated, and he was in a weakened physical state; his physical condition was so poor he was on palliative care and in and out of the hospital.

Further, the court found the asserted circumstances of the amendment's execution not credible, suggesting it believed more was going on than Doris and Robert were disclosing. Robert claimed to know about the amendment ahead of time and came to Doris's house to witness it, but he thought it was simply to correct Thelsey's middle initial. He did not contact the attorney to do it and thought Doris had probably done it. Doris claimed to not know of the amendment until the attorney arrived at her home. She said she did not know who had contacted the attorney to arrange the matter. There is no dispute Doris and Robert were in a confidential relationship with Thelsey, a fact which they concede. (*Estate of Llewellyn* (1948) 83 Cal.App.2d 534, 562.) They controlled all of Thelsey's financial affairs and care at this point. The court did not seem to credit the notion that neither one arranged for the attorney to come to the house and did not know Thelsey was going to drastically change the disposition of the estate. The court could have logically inferred from the circumstances that they were not being truthful about the role they played in procuring the amendment.

In sum, a review of the record discloses substantial evidence that the trust amendment was the product of undue influence. We decline to reverse the court's ruling, though we do think a slight amendment to the judgment is in order. The judgment provides the entire "September 16, 2008 amendment to the Fuller Trust is null and void." The

amendment did two things -- it changed the statement of Thelsey's name in the trust so that his middle initial was correctly identified, and it changed the disposition of the estate. No one argues that the change to his middle initial was unnatural, coerced, or otherwise the product of undue influence. Thus, when we discuss the trust amendment as being the product of undue influence, strictly speaking, we mean the part that changed the disposition of the estate. If only part of an instrument is the result of undue influence, the remainder is valid if it is severable and not inconsistent with the contested part. (*Estate of Stauffer* (1956) 142 Cal.App.2d 35, 41.) Accordingly, the May 19, 2012 judgment should be amended to state only the portion of the trust amendment relating to the disposition of the estate (paragraph 3, entitled "Amendment of Section 5.3") is null and void.

2. Monetary Gifts to Doris and Robert

Consent to a gift is not free when induced by undue influence, and the gift may be rescinded when the donee obtained the donor's consent through undue influence. (Civ. Code, §§ 1566, 1567, subd. 4, 1689, subd. (b)(1).⁴) Undue influence over one's consent to a gift occurs when (1) one party reposes confidence in another, and that other uses such confidence "for the purpose of obtaining an unfair advantage" over the first party; (2) one party takes "unfair advantage of another's weakness of mind"; or (3) one party takes "a grossly oppressive and unfair advantage of another's necessities or distress." (§ 1575.)

Substantial evidence also supported the court's determination that Thelsey's asserted gifts to Doris and Robert were the product of undue influence. As we discuss above, Doris and Robert were indisputably in a confidential relationship with Thelsey. By July 2009 when Thelsey withdrew his money, he had been receiving palliative care for over a year. Doris and Robert tried to accomplish the withdrawal with a note from Thelsey, written while he was lying in bed. When that did not work, they drove him to the bank. But his

⁴ Although this chapter of the Civil Code speaks in terms of consent to contracts, the rules are equally applicable in cases of gifts. (*Estate of Truckenmiller* (1979) 97 Cal.App.3d 326, 330-331 & fn. 1.)

health was declining such that he did not feel well enough to get out of the car. The bank employees were concerned enough about Thelsey's state that they tested his mindfulness with questions; he did not, in fact, correctly identify the President in July 2009.

Additionally, Thelsey was distressed because he knew Steven was attempting to freeze his bank accounts.

In other words, people in whom Thelsey reposed confidence and trust compelled him to give away the vast majority of his wealth to them while he was still living, but in very poor health and distressed about his finances. His worry over Steven's actions demonstrated Thelsey wanted anything but to be deprived of his money. He had no way of knowing how much longer he would need to support himself or what medical bills he might incur. For him to give away over \$235,000 to Doris and Robert and keep only about \$5,000 in the bank defies logic. Indeed, Doris and Robert had no explanation for why Thelsey was making an inter vivos gift of the money, other than to suggest he wanted to protect it from being frozen. But this only explains why he would withdraw the money, not why he would give it away when he could still need it. The much more logical inference is that Thelsey wanted Doris and Robert to hold the money for him in trust so that it would not be frozen, but he did not intend to make a gift of it while he was living. Taken as a whole, the evidence supports the inference that Doris and Robert took unfair advantage of their confidential relationship, his weakened state, and his distress to procure a so-called gift from him.

Shirley and Sandra sought to impose a constructive trust over the money. "A constructive trust is an equitable remedy to compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto." (*Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 600; see also Civ. Code, § 2224 ["One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."]) Because they showed Doris and Robert gained the money through undue influence or other wrongful act, the court properly ordered them to return the money to the trust estate.

3. Removal of Robert and Doris as Trustees and Attorney Fees

Robert and Doris argue we should reverse the court's order removing them as trustees because it was based on the court's assertedly erroneous undue influence findings. They do not advance any other arguments for reversing the order. In light of our holdings in parts 1 and 2 of the Discussion, their argument necessarily fails. We decline to reverse the order removing them as trustees.

They also argue the basis for the attorney fee award is unclear, and moreover, we should reverse the attorney fee award because it "necessarily collapses" with the judgment. These arguments fail as well. The court found Robert and Doris's acts constituted financial elder abuse. An elder is any person residing in California who is 65 years old or older. (Welf. & Inst. Code, § 15610.27.) Financial elder abuse consists, in pertinent part, of taking or obtaining real or personal property of an elder by undue influence. (§ 15610.30, subd. (a)(3).) A defendant who commits financial elder abuse is liable for reasonable attorney fees and costs, in addition to compensatory damages. (§ 15657.5, subd. (a).) Thus, the court impliedly based the attorney fee award on the financial elder abuse statute. And because we are not reversing the judgment, the argument that the attorney fee award necessarily collapses has no merit.

DISPOSITION

Page 3, lines 5 through 9 of the May 19, 2012 judgment shall be amended so that it reads as follows:

4 Paragraph 3 ("Amendment of Section 5.3") of the September 16, 2008 amendment to the Thelsey Fuller Revocable Trust, dated July 23, 2008 (hereafter, "the Fuller Trust") was the result of undue influence and fraud on the part of ROBERT FULLER and DORIS FULLER aka DORIS FULLER STEWART, and against THELSEY FULLER.

Page 4, lines 1 and 2 of the May 19, 2012 judgment shall be amended so that it reads as follows:

3 Paragraph 3 ("Amendment of Section 5.3") of the September 16, 2008 amendment to the Fuller Trust is null and void, and is of no legal force or effect.

In all other respects, the judgment is affirmed. Respondents shall recover their costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.