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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

GAIL HERMANN et al., Plaintiffs and Appellants, v. DARCY TAYLOR, Defendant and Respondent.	C065073 (Super. Ct. No. SPR 4929)

Plaintiffs challenge the trial court's denial of their petition to set aside a testamentary trust amendment as procured by defendant's undue influence. We conclude substantial evidence supports the trial court's finding of no undue influence, and we affirm the judgment.

FACTS[1]

Jane and Ted Hermann married in the early 1950s. Ted had three children from a prior marriage: James, Randall, and

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[1] Because many of the persons involved in this matter bear the surname Hermann, we refer to them using their first names.

Karen. Jane and Ted raised two sons in their marriage: Gail, and Rand, who is also known as Buzz. Buzz has two daughters, Darcy and Jamie.

Jane and Ted divorced in late 1996 or early 1997, but they remarried in 1999. In the mid 1990's, Jane was treated for alcohol abuse at the Betty Ford Center. Jane and Ted had a history of alcohol abuse. Within two days of leaving the Betty Ford Center, Jane began drinking again on a daily basis.

In 2000, and at the age of 79, Jane created the Jane D. Hermann Living Trust. The trust named son Gail and granddaughter Darcy as cobeneficiaries. Each would receive 50 percent of Jane's estate upon her death. The trust specifically disinherited son Buzz (Darcy's father), stepsons James and Randall, and granddaughter Jamie (Darcy's sister). It said nothing about stepdaughter Karen, and made no bequest to husband Ted.

At the time, Jane was living in Rancho Mirage, Riverside County. In 2002, Jane had several accidents and falls. In 2003, she was diagnosed with cancer. Gail, acting then as trustee of the trust, arranged to have Jane move to Lincoln, Placer County, in December of 2003 so he could take care of her more easily.

Jane executed first and second amendments to the trust shortly before, and after she arrived at Lincoln, respectively. Neither amendment changed the beneficiaries. The second amendment, dated January 7, 2004, added Karen to the list of persons specifically disinherited.

By instrument dated October 11, 2004, Jane executed a third amendment to her trust. This amendment named granddaughter Darcy as the sole beneficiary to receive 100 percent of Jane's estate. It also named Darcy as the sole trustee. The amendment also added Gail to the list of persons specifically disinherited.

Jane died in Lincoln on August 26, 2007.

In December 2007, Gail and stepson James, in his capacity as conservator of Ted's estate, filed a petition in superior court to set aside the third amendment to the trust and for elder financial abuse against Darcy. They alleged the third amendment was the result of undue influence exerted by Darcy over Jane. They also alleged Darcy's conduct constituted elder financial abuse as described in Welfare and Institutions Code section 15657.

In April 2008, Buzz filed a separate petition for relief. He alleged the trust was the result of undue influence exerted by Darcy over Jane. He also alleged Jane was not competent when she created the trust. Buzz asked the court to set aside the entire trust.

The trial court denied both petitions. Following a trial and by statement of decision dated February 16, 2010, the court ruled the petitioners had failed to establish Darcy unduly influenced Jane in the execution of the third amendment. They also had failed to establish Jane was incompetent when she executed the trust or the third amendment. The court further

found Gail and James had failed to establish elder abuse by Darcy.

Gail and James appeal from the trial court's finding of no undue influence by Darcy. Buzz has not appealed.

DISCUSSION

I

Standard of Review

Gail and James (plaintiffs) assert the evidence was sufficient to establish Darcy exerted undue influence on Jane when she executed the third amendment. Whether the evidence was sufficient to support plaintiffs' argument is not a cognizable issue on appeal. The court's finding that there was not undue influence is a resolution of fact. Thus, the only issue before us is whether that finding is supported by substantial evidence. (See *David v. Hermann* (2005) 129 Cal.App.4th 672, 685.)

"Appellants often mistakenly assume that, if the evidence against the judgment greatly preponderates, a reversal is proper because of the absence of a *substantial conflict*. The test, however, is not whether there is substantial conflict, but rather whether there is *substantial evidence in favor of the respondent*. If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the

respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' (*Estate of Teel* (1944) 25 Cal.2d 520, 527.)" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 370, pp. 427-428, original italics.)

Plaintiffs' appeal is thus limited to determining whether substantial evidence in the record supports the trial court's determination that Darcy did not unduly influence Jane in executing the third amendment. If substantial evidence supports the court's determination, our review ends and we affirm the judgment.

II

Undue Influence

Our review of the record has found substantial evidence supporting the court's determination that Darcy did not exercise undue influence on Jane to execute the third amendment. We turn first to explain the elements of undue influence, and then we explain the facts in the record which support the court's determination.

A. *Legal background*

The execution of a testamentary document is ineffective to the extent the execution was procured by undue influence. (Prob. Code, § 6104.) "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. [Citations.]" (*Rice v. Clark* (2002) 28 Cal.4th 89, 96.)

To prove undue influence, the plaintiff may attempt to establish a presumption of undue influence, and thereby shift the burden to the defendant to prove otherwise. "While the person challenging the testamentary instrument ordinarily has the burden of proving undue influence, 'under certain narrow circumstances, a presumption of undue influence may arise, shifting to the proponent of the disposition the burden of proving by a preponderance of the evidence that the donative instrument was *not* procured by undue influence.' (*Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1059 [disapproved on another ground in *Bernard v. Foley* (2006) 39 Cal.4th 794, 816, fn. 14].) Evidence that the beneficiary procured the testamentary instrument is one of three circumstances required to create this presumption. A presumption of undue influence 'arises upon the challenger's showing 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.' (*Rice v. Clark, supra,* 28 Cal.4th 89, 97; see *Estate of Fritschi* (1963) 60 Cal.2d 367, 376.)" (*David v. Hermann, supra*, 129 Cal.App.4th at p. 684, original italics.)

Before the trial court, plaintiffs argued their evidence established a presumption that Darcy exerted undue influence on

Jane. The court determined plaintiffs did not establish a presumption of undue influence because they failed to establish one of the elements required to create the presumption: that Darcy actively participated in procuring the third amendment. Furthermore, because there was no presumption of undue influence, the court concluded plaintiffs could not prove the existence of undue influence.

We thus review the record to determine if substantial evidence supports the court's determination that plaintiffs did not establish a presumption of undue influence, as defined above. We conclude substantial evidence supports the trial court's determination that Darcy did not actively participate in procuring the third amendment, and that no presumption of undue influence arose.

B. *Additional background information*

Darcy attended college at Azusa Pacific University. While she attended college, she and Jane would speak by telephone maybe once or twice a month. Jane usually initiated those calls. During those years, Jane would also send Darcy cash gifts for her birthday, Christmas, and on other infrequent occasions. Darcy graduated from Azusa Pacific University in 1996.

Following college graduation, Darcy moved to Branson, Missouri, where she worked in a volunteer program at an at-risk group home. Besides speaking with Jane by telephone, Darcy would visit Jane two or three times a year.

In 2000, Darcy learned from Gail that Jane had named her as a beneficiary of the trust. She spoke with Jane about the designation by phone, but she did not remember the contents of that conversation at trial.

Darcy earned her master's degree in social work in 2004 and moved back to California in May of that year. She took up residence in Sonoma, where she still resides. After she moved back to California, Darcy began making day trips to see Jane about once a month. Darcy currently works as a social worker for Child Protective Services in Napa County.

In 2004, Darcy received a copy of the trust from Gail. It was the first time she had seen the trust paperwork. At the same time, Darcy learned Jane had executed the first amendment to the trust.

In September 2004, Jane asked Darcy to visit and have a conversation with her. In that conversation, Jane said she wanted to contact an attorney. She was concerned with how Gail was administering the trust. She was unhappy with a property venture in which Gail had invested trust funds without her knowledge, and she was frustrated that he had not provided her with an accounting. She believed Gail was spending trust money on things she did not want. She eventually told Darcy she wanted her to serve as trustee instead of Gail.

Darcy sought and received from an acquaintance a referral for a Sacramento area attorney, John Feser. Jane made the initial contact with Feser. Darcy also spoke with Feser, explained Jane's concerns, and asked if he would meet with Jane

at her home. Feser testified there was no substantive discussion about the trust with Darcy in this initial contact.

Feser came to Jane's house twice. The first meeting served as an introduction, and Jane signed paperwork to retain Feser. Darcy participated in only part of that meeting. Feser and Jane had already had several phone conversations about Jane's concerns with Gail's performance as trustee. Feser could not remember if Jane's desire to remove Gail as a beneficiary came up in their initial contact or at the first meeting. Feser was aware at the first meeting that another beneficiary (Darcy) was present, so he spoke with Jane alone for a time. All changes requested for the trust came from Jane. None came from Darcy.

Feser had additional phone conversations with Darcy after the first meeting, but these were "innocuous" calls to set up the next meeting. His communications with Darcy were "never substantively about what changes were going to be made, she was simply facilitating my representation of her grandmother and that was it." There was no indication to Feser that Darcy was trying to make changes to Jane's trust.

For the second meeting, Feser took the trust documents to Jane's house for her signature. On that day, Feser met with Jane alone before the parties signed the amendment. Darcy was not present during their conversation, but she was present afterward to sign the documents as trustee.

Darcy did not know Jane had removed Gail as a beneficiary until the second meeting with Feser when Jane and she signed the third amendment. Darcy asked Jane if that was what she really

wanted to do. Darcy had many other conversations with Jane after the third amendment was signed regarding her possibly amending the trust again to name Gail or Buzz or both as beneficiaries. Each time Darcy asked, Jane replied no.

Feser had no concerns about Jane's competency when she signed the third amendment. He stated: "I had had multiple conversations over the phone with Jane, I had met with her a couple times. She was remarkable for her age, in my opinion. I thought she was more than competent to make her decisions. She knew exactly what she was doing, she was able to articulate the reasons why she was doing it, she was able to explain, you know, concerns that she had with the management of her trust by Gail. Multiple conversations led me to the conclusion that she was competent to make the changes that she made." He had no concerns that Jane was not executing the third amendment of her own free will.

C. *Analysis*

The above discussion demonstrates substantial evidence supports the trial court's finding that plaintiffs did not establish a presumption of undue influence. Darcy did not actively participate in procuring the third amendment's preparation or execution.

Substantial evidence establishes that Darcy's involvement in the third amendment was very limited. Her participation in the process was restricted to making arrangements for Jane and Feser to meet, and to signing the third amendment as the new trustee. She was not party to discussions between Jane and

Feser about the proposed amendments to the trust. She did not provide any terms to Feser to include in the trust. Indeed, she did not know Jane had removed Gail as a beneficiary until the day of the signing, and even then she asked Jane if she really wanted to do that.

"Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. [Citation.] . . . [¶] 'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made."' [Citation.]" (*Estate of Arnold* (1940) 16 Cal.2d 573, 577, original italics.)

Here, the evidence supporting the judgment indicates there was no pressure from Darcy that overpowered Jane's mind and forcibly destroyed Jane's agency to amend the trust according to her own desires. The evidence shows the third amendment arose because Jane was unhappy with Gail's administration of the trust, and she acted in accordance with that dissatisfaction.

We thus conclude substantial evidence supports the trial court's determination that plaintiffs did not establish a presumption of undue influence by Darcy and, it logically follows, did not prove undue influence.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Darcy. (Cal. Rules of Court, rule 8.278(a).)

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.