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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ERIC NASLAND et al.,

Plaintiffs and Appellants,

v.

STEVEN D. NASLAND et al.,

Defendants and Appellants.

D055777

(Super. Ct. No.
37-2007-00101910-PR-TR-CTL)

STEVEN D. NASLAND et al.,

Plaintiffs,

v.

ROBERT G. HUNT,

Defendant.

(Super. Ct. No.
37-2007-00078245-CU-PO-CTL)

APPEALS from a judgment and from postjudgment orders of the Superior Court of San Diego County, John C. Meyer, Judge. Judgment affirmed in part, reversed in part; postjudgment orders affirmed.

INTRODUCTION

This case involves a dispute among siblings over the distribution of their deceased mother's trust estate to the remainder beneficiaries of the trust. Six adult children survived the mother, Sheila Nasland.¹ Sheila amended the Nasland Family Trust (the trust) shortly before she died to leave most of the trust's residual estate to four of the six children rather than to all six. The two who were excluded by the amendment, Don. K. (D.K.) and Steve, had purchased the family engineering business (Nasland Engineering) from Sheila after she acquired the business upon the death of Don Nasland, her husband and the father of the six children. D.K. and Steve claimed in this litigation that shortly after Don's death, they entered into an oral agreement with Sheila under which Sheila would make them equal remainder beneficiaries of her trust with the other four children if they purchased the business rather than waiting to acquire it upon her death, as provided in the original trust. After D.K. and Steve purchased the business, Sheila amended her trust to make them equal beneficiaries. However, she ultimately amended it again to exclude them as remainder beneficiaries. After Sheila's death, D.K. and Steve filed a petition in the probate court seeking, among other things, a determination that the last two amendments to the trust—the fifth and sixth amendments that excluded them as remainder beneficiaries—were void because the amendments were the product of their brother Eric Nasland's undue influence on Sheila. D.K. and Steve also claimed that

¹ For convenience and clarity, we will refer to Sheila Nasland and her children by their first names.

Sheila's oral agreement to make them equal remainder beneficiaries if they purchased the business entitled them to a constructive trust giving them equal shares of the trust residue. D.K. and Steve later filed a civil action seeking damages against the trustee, Robert G. Hunt, in his individual capacity, claiming that Hunt had made material misrepresentations to Sheila that had influenced her to amend the trust to exclude them as remainder beneficiaries.

After a court trial, the court entered judgment in favor of D.K. and Steve. The judgment imposed a constructive trust on the assets of Sheila's trust, requiring that the assets be distributed equally among the six children, and ruled that the fifth and sixth amendments to the trust were void as the product of undue influence and mistake. D.K. and Steve's brothers, Eric and Neal Nasland, appeal the judgment, contending that (1) D.K. and Steve lacked standing to pursue their claims because both their probate petition and the civil action that they brought against Hunt violated the no contest clause in Sheila's trust; (2) D.K. and Steve's operative first amended petition is barred by the doctrines of res judicata and retraxit as a result of the dismissal of their civil action against Hunt; (3) the parol evidence rule bars D.K. and Steve's claim that Sheila breached an oral agreement to make them equal remainder beneficiaries of her trust with the other four children; (4) D.K. and Steve's claim that Sheila breached an oral agreement was improperly brought against the trustee of Sheila's trust rather than against Sheila's personal representative; (5) the trial court erred by applying equitable estoppel to enforce the oral agreement that Sheila allegedly entered into with D.K. and Steve, because there was insufficient evidence that Sheila had ever entered into the alleged agreement, that

D.K. and Steve had detrimentally relied on the agreement, or that D.K. and Steve would suffer unconscionable injury and Sheila would be unjustly enriched if the agreement were not enforced; (6) the court erred in finding that Sheila executed the fifth and sixth amendments to her trust as a result of undue influence; and (7) the court erred in finding that Sheila executed the fifth and sixth amendments to her trust as a result of mistake.

D.K. and Steve appeal the order denying their postjudgment motion for bad faith sanctions and the order denying their postjudgment motion for discovery sanctions.

We reverse the portion of the judgment deeming the fifth and sixth amendments to the trust void. We otherwise affirm the judgment, and also affirm the orders denying D.K. and Steve's motions for sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

Sheila's husband, Don Nasland, a licensed civil engineer and land surveyor, founded Nasland Engineering in 1959 and incorporated the business in 1972. Don and Sheila had six children: Mara, D.K., Neal, Steve, Paul, and Eric. At the time of Don's death in 1997, D.K. was senior vice-president of Nasland Engineering and was responsible for the company's land surveying. Steve was the company's director of engineering. He was involved in the operations of its San Diego office and was also running the company's Riverside office. D.K. testified that Steve brought in new clients and was the company's "primary rainmaker." Paul worked for the company as a survey aid, and Eric maintained the company's computers. The company lost money in 1997 and had not been profitable for the preceding five or six years, having lost approximately \$1 million during that period.

Don and Sheila created the Nasland Family Trust in 1987. The trust provided that at the death of the first spouse, the trust would be divided into two separate trusts: a revocable "Marital Trust" designated as "Trust A," and an irrevocable "Residuary Trust" designated as "Trust B." Trust A would receive the surviving spouse's share of the community property and that spouse's separate property, and Trust B would receive the balance of the trust estate, consisting of the deceased spouse's share of the community property and the deceased's separate property. The trust provided that upon the death of the second spouse, the trustee would distribute all of the stock in Nasland Engineering to D.K. and Steve,² who were both licensed engineers, and would distribute the balance of the trust estate to the other four children, in equal shares. After Don's death, D.K. and Steve were the only licensed engineers in the Nasland family.

When Don died in February 1997, Sheila became trustee of the trust, as well as trustee of Trusts A and B. The trust owned all of the 460 shares of Nasland Engineering common stock. However, Don's death left Sheila with limited income. Without Don's salary from the company, Sheila was unable to maintain her lifestyle. Shortly after Don died, Sheila asked D.K. and Steve if they would buy Nasland Engineering in return for her making them equal remainder beneficiaries of the trust with the other four children. D.K. and Steve agreed to purchase the business. Sheila did not tell her other children about her promise to make D.K. and Steve equal remainder beneficiaries of the trust

² The trust provided that the trustee would "set apart all stock of Nasland Engineering, Inc., or any successor corporation or other surviving business entity . . . , or an amount equal to the net proceeds received by the Trustee upon the sale, if any, thereof, and hold the same in trust for the benefit of [D.K. and Steve]"

because she did not want to upset them. She asked D.K. and Steve not to disclose her promise to their siblings or to anyone else.

In March 1997, about a month after Don died, Sheila announced to all of the children at a family meeting that she was planning to sell the business to D.K. and Steve. Eric testified that he was shocked by the announcement. For his entire adult life he had planned on eventually becoming a part owner of the business, because he remembered Don and Sheila saying in 1987 that any of the children who earned a bachelor's degree and worked full time at Nasland Engineering would share equally in the ownership of the business.

Shortly after Don's death, Sheila, D.K., and Steve had the first of a number of meetings with attorney John Brown, the attorney who drafted the Nasland Family Trust, concerning the sale of the business. Brown was representing Sheila and the trust. At that initial meeting, Sheila said that only D.K. and Steve were qualified to run the business and that there would be problems if Eric and Paul were also owners. She later told D.K. that she did not know how to run a business and that she did not want to be in the engineering business.

In May 1997, Brown's paralegal, Carolyn Stalcup, sat in on a telephone conversation between Brown and D.K. that was conducted on speakerphone. Stalcup took notes of the discussion. Those notes include the statement: "Sheila has decided to sell [the business] to D.K. and Steve, then she'll rewrite [the] trust to split all 6 ways. [¶] Paul thinks D.K. and Steve are getting the business free and also [one-sixth] of estate." Stalcup testified that she independently recalled that at various meetings, Sheila had said

that she wanted to sell Nasland Engineering to D.K. and Steve, and that she wanted her estate to go to her six children in equal shares.

At a meeting in June 1997 that Sheila, D.K., and Steve had with Brown to discuss the value of Sheila's estate and how she would fund Trusts A and B, Brown presented a diagram showing proposed distributions to the two trusts. Under a column that listed assets to be distributed to revocable Trust A, Brown noted in black marker: "Amend [Trust] A—6 way distrib[ution] on [Sheila's] death." At a second meeting that took place the same month, Brown circled that notation in red marker.

Brown told D.K. and Steve that they would have to obtain an appraisal of Nasland Engineering for Sheila's estate. Nasland Engineering hired the firm, The Marathon Partnership (Marathon), to appraise the business as of February 17, 1997. Marathon valued the business at "approximately \$1.2 million." Because that appraisal did not include life insurance proceeds of approximately \$400,000 that had been paid to Nasland Engineering from a "key man" insurance policy on Don's life, the Marathon appraiser later revised the valuation of the business to approximately \$1.6 million.³ The appraiser

³ Although the key man policy paid Nasland Engineering \$500,000, the company netted about \$420,000 because it paid approximately \$80,000 in taxes on the insurance proceeds. This is presumably the reason that Marathon added "approximately \$400,000" to the value of the business in a letter dated October 1, 1997, which was admitted at trial. Citing that letter, D.K. and Steve incorrectly state in their responding brief that the Marathon appraiser revised the value of Nasland Engineering to \$1.7 million (rather than \$1.6 million) to reflect the company's receipt of the key man insurance proceeds. In their opening brief, Eric and Neal similarly state that Marathon revised its appraisal to \$1.7 million on November 1, 1997, citing to "Trial Exhibit 39," which is not in the record and apparently was not admitted at trial.

noted that the loss of one or more key personnel working for the company "could discount or reduce the value of the firm by 25 to 50 percent." For purposes of D.K. and Steve's purchase of the business, the parties agreed to value the business at \$1.7 million.

The sale of Nasland Engineering to D.K. and Steve was accomplished through several transactions. One of the objectives in structuring the sale was to provide Sheila with the proceeds of the key man insurance policy, which, under the terms of the policy, had to be directly paid to Nasland Engineering.⁴

Sheila's first step in effecting the transfer of Nasland Engineering to D.K. and Steve was to execute a "Community Property Division Agreement and Funding of Trusts," by which she divided assets between her revocable Trust A and the irrevocable Trust B. Sheila funded Trust B with 156 of the 460 shares of Nasland Engineering stock plus \$23,478, to bring the total value of Trust B to \$600,000, the maximum amount that could be placed in that trust without incurring tax liability. Sheila then signed a "Disclaimer," by which she disclaimed any interest in the shares of Nasland Engineering stock that she had transferred to Trust B. The legal effect of the disclaimer was that the stock in Trust B passed immediately to D.K. and Steve as if Sheila had died, since the trust provided that D.K. and Steve were to receive all shares of Nasland Engineering upon termination of the trust at Sheila's death.

⁴ If Nasland Engineering had simply transferred the net (after-tax) proceeds to Sheila as a shareholder of the company, the proceeds would have been taxed as a dividend, and Sheila would have netted only about 50 percent of the amount transferred.

The \$600,000 in Trust B represented a key man discount of 50 percent applied to the \$1.2 million value of Nasland Engineering (before its receipt of the \$500,000 in insurance proceeds from the policy on Don's life), in accordance with the appraiser's assessment of the decrease in value of Nasland Engineering if D.K. and Steve were to leave the company. At trial, D.K. explained that Sheila essentially "left the value of [the stock of Nasland Engineering] at [\$1.7 million], took stock that was equal to the [key man] discount, which was basically equity that Steve and I would have in the business had we already been owners . . . , put that stock in Trust 'B,' then disclaimed it to us."

D.K. and Steve's acquisition of the remaining shares of Nasland Engineering was structured as a recapitalization or stock repurchase agreement. Under that agreement, Nasland Engineering purchased the remaining 304 shares of its common stock from Sheila and the trust for \$1,124,000, paid by a check in the amount of \$600,000 and a 10-year secured promissory note in the amount of \$524,000. Sheila received and deposited the \$600,000 check from Nasland Engineering, and Nasland Engineering ultimately paid the \$524,000 note in full.

After D.K. and Steve acquired all of the stock in Nasland Engineering through the recapitalization agreement, Sheila asked Steve to help her find an attorney to amend the trust to carry out her agreement to make D.K. and Steve equal remainder beneficiaries of her trust. Sheila hired an attorney, whom Steve recommended, to prepare the first amendment to Trust A, which Sheila signed in January 1999. The first amendment provided that upon Sheila's death, the remainder of Trust A would be distributed in equal shares to her six children.

In the spring of 1999, Sheila married Bob Stall. After they were married, Sheila and Stall met with D.K. and Steve in D.K.'s office in the building on Ruffner Street where Nasland Engineering's headquarters was located. The building, in which Nasland Engineering was a tenant, was held by Trust A. According to D.K., Sheila offered to sell the building to D.K. and Steve, explaining that she wanted to get out of the rental business and that she and Stall wanted to travel and wanted to have more income so that they could "travel well." She told D.K. and Steve that she intended to sell the building and was offering it to them first.

D.K. and Steve had the building appraised by an appraiser whom Stall recommended. The appraiser valued the building at \$1.58 million, as of March 13, 1999. After a period of negotiations over price and interest rate, Sheila agreed to sell the building to D.K. and Steve and their wives for \$1.6 million, with a down payment of \$20,000 and a promissory note for the balance, at an annual interest rate of seven percent, fully amortized over 20 years. Before Sheila agreed to sell the building to D.K. and Steve, Stall and his accountants determined that Sheila's net income from the sale of the building would be greater than the net rental income she had been receiving after paying the mortgage and property taxes on the building and income tax on the rental income.

In December 2002, Sheila confronted D.K. and Steve in D.K.'s office and demanded that they give the building back to her. She appeared to be intoxicated. D.K. and Steve told her that they were not in a position to return the building because they had spent several hundred thousand dollars on repairs and improvements, and had been making payments to her for the building since the time they purchased it.

In January 2003, Sheila again visited D.K. and Steve at work. Steve testified that Sheila again appeared to be inebriated and was unusually agitated and argumentative. She told D.K. and Steve, "You guys didn't take me seriously so I'm pulling you out of my trust." She also expressed her displeasure over a clause in the recapitalization agreement that would allow the company to defer payments on the stock repurchase if the business was not doing well over a period of time. At the end of the meeting, she said to D.K. and Steve, "Don't punish Eric." On January, 21, 2003, Sheila eliminated D.K. and Steve as remainder beneficiaries of the trust by executing the third amendment to Trust A, which provided that upon her death, the remainder of the trust would be distributed in equal shares to Mara, Neal, Paul, and Eric.⁵

Sometime in 2004, Steve had lunch with Sheila and gave her a spreadsheet he had prepared that showed how much he and D.K. had been paying her for the business and the building, and reflected that over a period of years those amounts would total \$4.3 million. D.K. testified that Steve wanted to show Sheila the total amount that they would ultimately pay her for the business and building because Sheila appeared to believe that she had given them the business and that they had not been paying her for it, despite the fact that they had been making payments to her every month. Steve testified that Sheila said she was afraid that she would run out of money, so he "just wanted to ease her mind a little bit that we're actually paying her for the business and the building." Steve testified that Sheila appreciated and was receptive to the spreadsheet. He reminded her that "part

⁵ The second amendment to Trust A added a no contest clause.

of the deal" was that she would make him and D.K. equal beneficiaries of her trust.

Sheila said she would think about it. When Steve raised the subject again in 2005 with Sheila, she said she "was still thinking about it" and seemed more receptive.

In January 2006, Eric told D.K. and Steve that if they would make him a partner in Nasland Engineering, he could talk Sheila into putting them back into the trust. D.K. and Steve told Eric that they were not ready to bring in partners because they were still paying Sheila for the business. However, they gave him a \$15,000 bonus because he said he needed more money.

Sheila was diagnosed with pancreatic cancer in November 2006. In December 2006, she told D.K. that she was going to see her estate attorney, David Hickson, and "make things right." On December 11, 2006, Sheila signed the fourth amendment to Trust A, which again made all six of her children equal remainder beneficiaries of the trust. The fourth amendment included the statement: "Having included my sons, **D.K.** and **STEVEN**, in the above distribution, it is my wish and desire that they consider having my son, **ERIC**, added as a partner in **NASLAND ENGINEERING** with them, this being precatory and not mandatory."⁶

Sheila told Mara later in December 2006 that she had put D.K. and Steve back into the trust. In January 2007, Mara told Eric during a telephone conversation that Sheila had "put D.K. and Steve back in the will" Eric responded, "Well, that's not

⁶ Sheila was married to Jean-Paul Weber at the time she signed the fourth amendment. At some point, Sheila told Weber that D.K. and Steve would "be out of the trust" unless they made Eric a partner in the business.

right Why would she do that?" Mara told Eric that she (Mara) thought it was fair because D.K. and Steve had purchased the business. Eric told Mara that she did not know what she was talking about and ended the conversation by saying, "We'll see about that."

After Sheila was diagnosed with cancer, Eric took the lead in helping her; D.K. and Steve told him to take time off work for that purpose. Nasland Engineering continued to pay Eric his full wages while he was helping Sheila, although he was away from the office 30 to 50 percent of his normal work days during that period. In last few months of her life, Sheila was taking prescription pain medications, including oxycontin and vicodin. Eric also provided her with fentanyl "lollipops" that had been prescribed for his wife. Sheila consumed alcohol during the period that she was taking pain medications.

Eric testified that D.K. told him to suggest to Sheila that someone review her assets. Eric relayed that message to Sheila, and Sheila asked him to do it for her. In February 2007, while Eric was caring for Sheila and helping her get her finances in order, he prepared a computer spreadsheet on which he listed "Issues" and "Resolutions" pertaining to Sheila's trust estate. One of the "Issues" that Eric listed on the spreadsheet was: "D.K. & Steve vs. Non Business Owners." Regarding that issue, Eric wrote the following in the "Resolutions" column: "1) I love my children equally and wish to have all [my] children share in inheriting personal effects and sentimental items. [¶] 2) My wish is to have all of my children who do not own an equal share of Nasland Engineering and the 4740 Ruffner Street building to Inherit an Equal Share of the Nasland Family

Trust Assets that are not considered personal effects and sentimental items." Eric testified that Sheila had dictated those statements. Eric never printed the spreadsheet; he stored it on a portable thumb drive under the name, "Mom's Estate What Is Fair Share."

Eric testified that in February 2007, when he was helping Sheila, he told her that he felt she should "just follow the original trust," by which he meant that the children who owned Nasland Engineering should not share in the rest of the trust estate. Eric told Sheila that it would be fair to leave the trust remainder to the four non-business owners because D.K. and Steve had made millions from the business and from their ownership of the Ruffner Street building. Eric said that "it would [add] insult to injury" and be wrong to give D.K. and Steve one-third of the estate after they had benefitted so much and done so well. When Sheila asked Eric whether D.K. and Steve had taken any steps to make Eric a partner in the business, Eric told her that they had not, and said that if they were to make him a partner in the business, she should take him out of the trust, as well, because it would not be fair to share in both the business and the trust estate. At trial, Eric testified that D.K. and Steve purchased the business rather than waiting to inherit it because they knew that if Sheila had time to think about it, she would change the trust to make Eric a co-owner. He asserted that making him a co-owner of the business was "the deal" because Don had said that anyone who earned *any* bachelor's degree would share in the business.

On February 28, 2007, Sheila and Hunt met with Sheila's estate attorney, Hickson, to discuss changes that Sheila wanted to make to her estate plan. At that meeting, Sheila questioned whether she had received the \$600,000 down payment that D.K. and Steve

were to have paid her under the recapitalization agreement. Hickson called Nasland Engineering and asked the company's controller, Alison Makibbin, to send him a copy of the \$600,000 check. Later that day, Makibbin faxed a copy of the check to Hickson and also mailed a copy to Sheila.⁷

On March 13, 2007, Eric gave Sheila a folder that contained various documents he had prepared to show her "all of the scenarios that essentially could come up" concerning the disposition of her trust estate. The folder included documents that showed the value of her trust estate with and without various personal debts owed to the estate, and documents that set forth a comparison of a four-way equal division of the estate with a six-way division.

The following day, March 14, 2007, Sheila and Hunt went to the Nasland Engineering offices and met with D.K., Steve, and Makibbin in a conference room to inquire about the sale of the business. Sheila said that she did not remember having received the \$600,000 check for the down payment. D.K. told her that she had in fact received the check, and that she had deposited it in her bank account and later purchased certificates of deposit (CDs) with the money. Sheila replied, "I never owned a CD in my life." In response to accusatory questions posed by Hunt, D.K. attempted to explain how the sale of the business had been structured, but Hunt did not let him finish his answers. D.K. testified: "The meeting was more like an inquisition. And so [Hunt] would ask questions. I would try to answer them, and I would get halfway through an answer or a

⁷ Sheila wrote on her copy of the check, "This check was put into Trust and disclaimed by Sheila to D.K. & Steve."

third of the way through, and he would take off on another question. But they all boiled around [*sic*] to, did you give us the \$600,000 check?" D.K. added, "And the questions just kept hammering on us. We tried to explain, but didn't get an opportunity to complete our answer or tell our answer. It was very accusatory."

Makibbin brought the original \$600,000 check into the meeting. Hunt looked at both sides of it and said, "Sheila, this is the check." Sheila had signed the back of the check, which was marked as having been deposited into an account at Peninsula Bank. Sheila repeated that she did not remember having received the check. The meeting ended when Steve said to Hunt, "[I]t is disrespectful of you to come in here . . . and address us like you are." Sheila said she had "heard enough," and left with Hunt.

A letter dated March 27, 2007, from Hickson to Sheila reflects that Sheila asked Hickson to prepare a fifth amendment to the trust that would again eliminate D.K. and Steve as remainder beneficiaries of the trust and provide that upon her death, the remainder of the trust would be distributed in equal shares to the other four children. Hickson's letter stated: "As to this disposition, we discussed, at length, the following: [¶] 1. You understand that this will not result in an equal division or distribution to all six of your children Steve and D.K. will only have received the disclaimed amount of \$300,000 each from Trust B. [¶] 2. You feel very strongly that Steve and D.K. benefitted significantly from their acquisition of the business and the building, even though they purchased them, to such an extent that the only way to make up for that difference is to leave them out as remainder beneficiaries of the trust. [¶] 3. At the time of your husband's (Don's) death, the trust provided for an outright bequest of the shares of

stock of Nasland Engineering to D.K. and Steve, with the remainder of the trust to the other four children. You understand that these provisions of the original trust no longer apply since the trust now does not hold title to the shares (they were sold). Therefore, any reference to how the trust was originally set up is now irrelevant."

In closing, Hickson asked Sheila to return a signed copy of the March 27 letter "agreeing to the points we discussed." Sheila signed the letter on April 2, 2007, but circled the word "agreeing" and handwrote: "I agree that we discussed these points, but I do not agree with your presentations or conclusions or that you represented all my conclusions or desires as I express[ed] to you via telephone."

Hickson drafted the fifth amendment to the trust and Sheila signed it on April 2, 2007. The fifth amendment eliminated D.K. and Steve as remainder beneficiaries of the trust, with the exception that they were to share equally with the other four children in Sheila's personal property, specified as "jewelry, clothing, works of art, household furniture and furnishings, all automobiles included in the trust estate, and all other items of domestic, household or personal use or adornment"

The fifth amendment also included a "Specific gift of residence" section, which provided that Sheila's residence and an additional \$200,000 would be held in a continuing trust for five years following her death, and stated that the trustees of the continuing trust would be Mara, D.K., Steve, Paul, and Eric. Weber would be entitled to live rent-free in the residence for up to five years following Sheila's death. The trust would be responsible for all insurance payments, mortgage payments, property taxes, and assessments on the property, and Weber would be responsible for utilities and ordinary

repairs and maintenance. Any structural or extraordinary expenses pertaining to the property would be paid from the funds retained in the trust. The continuing trust would terminate five years after Sheila's death or whenever Weber no longer desired to live in the residence or failed to make required payments, whichever occurred earliest. Upon termination of the trust, the residence would be sold to one of the children, or to a third party if none of the children were willing or able to purchase it, and the proceeds of the sale plus any remaining assets of the continuing trust would be distributed to the four remainder beneficiary children.

Eric testified that he was working on the fax machine located upstairs at Sheila's house on April 2, 2007, when the machine printed out the copy of the fifth amendment to the trust for Sheila to sign. He testified that he was "there specifically to make sure that she received the document," and that he delivered it to Sheila without reading it because Sheila was at the bottom of the stairs waiting for it.

On April 5, 2007, Hickson received by fax a copy of the fifth amendment to the trust on which Sheila had made handwritten notes directing certain minor changes and corrections. The fax cover sheet stated: "Amendment corrections for Sheila Stall Trust. [¶] Please call her when corrections are done. Thank you very much. [¶] Bob Hunt for Sheila Stall." Hunt testified that he had not sent the fax and never authorized anyone to send Hickson a fax. Hickson drafted the sixth amendment to the trust incorporating Sheila's changes to the fifth amendment, and Sheila signed the sixth amendment on April 10, 2007. Like the fifth amendment, the sixth amendment excluded D.K. and Steve as

remainder beneficiaries of the trust estate except as to Sheila's personal effects.⁸ Hickson confirmed in subsequent telephone conversations with Sheila that the fifth and sixth amendments to the trust reflected her wishes.

Sheila died on May 20, 2007, and Hunt became the trustee of her trust.

On September 28, 2007, D.K. and Steve filed a petition in probate court seeking an adjudication that the fifth and sixth amendments to the trust were void in whole or in part or, in the alternative, that they (D.K. and Steve) were entitled to a constructive trust giving them equal shares of the trust residue because of Sheila's agreement to make them equal remainder beneficiaries with the other four children. D.K. and Steve's operative first amended petition (the petition), filed in July 2008, included causes of action alleging that Sheila executed the fifth and sixth amendments as a result of incapacity, undue influence (by Eric), mistake, and fraud (by Eric). The petition also included causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, a cause of action seeking a constructive trust as a remedy for Sheila's alleged

⁸ The sixth amendment also eliminated D.K. and Steve as trustees of the "continuing trust" that allowed Weber to live rent-free in of Sheila's residence for up to five years.

breach of contract, and a cause of action for declaratory relief.⁹ Neal and Eric filed an objection to the petition.

On October 7, 2007, D.K. and Steve filed a verified complaint against Hunt in his personal capacity, alleging that Hunt had caused Sheila to execute the fifth and sixth amendments to the trust by making false representations to Sheila concerning D.K. and Steve's purchase of Nasland Engineering and the Ruffner Street building. Specifically, D.K. and Steve alleged that Hunt had falsely represented to Sheila that (1) Nasland Engineering had not paid her a \$600,000 down payment when it purchased the shares from Trust A as part of the recapitalization agreement or; (2) she had returned the \$600,000 down payment to Nasland Engineering; (3) she had given—not sold—the business and the Ruffner Street building to D.K. and Steve; and (4) D.K. and Steve were making payments on the Nasland Engineering stock and the building with Sheila's money.¹⁰ Based on these alleged misrepresentations, D.K. and Steve asserted causes of action against Hunt for intentional and negligent interference with prospective economic

⁹ D.K. and Steve also claimed in their petition that they were each entitled to one-sixth of an independent retirement account (IRA) that Sheila held outside the trust. D.K. and Steve alleged, on information and belief, that Sheila had executed a change of beneficiary form that changed the beneficiaries of her IRA from all six of her children to just four of the children. Although D.K. and Steve clearly intended to allege that the four beneficiaries after the change were Mara, Neal, Paul, and Eric, they inadvertently listed all six children as the four beneficiaries after the change. The disposition of the IRA is not an issue in this appeal.

¹⁰ Both D.K. and Steve's original probate petition, filed nine days before their complaint against Hunt, and their first amended petition, alleged that Eric had made essentially the same misrepresentations to Sheila that their complaint had charged Hunt with having made.

advantage, intentional and negligent interference with expectation of inheritance, and declaratory relief.

In April 2008, the trial court to which the civil action was assigned granted Hunt's motion to consolidate the probate action and the civil action, but denied his request to transfer the consolidated action to probate court. The court ordered the consolidated cases assigned to the civil department and designated the civil action as the lead case.

Before trial, all of the beneficiaries of Trust A and Hunt entered into a settlement agreement.¹¹ Pursuant to that agreement, Hunt resigned as trustee and the trust beneficiaries waived any claims against him. The agreement provided that the successor trustee had no duty to defend D.K. and Steve's probate petition, and that all of the other beneficiaries had standing to defend against the petition. Presumably in accordance with their waiver of claims against Hunt, D.K. and Steve voluntarily dismissed their civil action against Hunt with prejudice on November 13, 2008. On the same day, the court entered an order confirming the settlement agreement.

After trial on D.K. and Steve's petition, the court filed a statement of decision in which it found that Sheila orally agreed to amend the trust to make D.K. and Steve equal remainder beneficiaries with the other four children if they would buy the trust's shares of Nasland Engineering stock. The court found that the oral agreement was reasonable, that D.K. and Steve had performed their obligations under the agreement, and that Sheila

¹¹ The parties to the settlement agreement were D.K., Steve, Mara, Eric, Neal, Paul, Weber, and Hunt. The agreement referred to D.K., Steve, Mara, Eric, Neal, Paul, and Weber collectively as "BENEFICIARIES."

"renege[d] on the oral agreement" by executing the fifth and sixth amendments to the trust. The court ruled that "Sheila was equitably stopped to disinherit Steve and D.K. as equal beneficiaries under the Trust as a result of her acceptance of their payment in full of the consideration she had required in order to include them as equal beneficiaries, and Steve and D.K.'s full performance of the oral agreement in reliance upon Sheila's promise to include them as equal beneficiaries in the Nasland Family Trust." Accordingly, the court ordered "that a constructive trust be imposed upon the assets of Trust A of the Nasland Family Trust as of the date of Sheila's death, and that the assets of [the trust] as of Sheila's death be distributed equally to the six children of Sheila"

The court found that the fifth and sixth amendments to the trust were invalid because they were the result of undue influence on the part of both Eric and Paul. The court further found that a presumption of undue influence existed because Sheila had a confidential relationship with Eric and Paul at the time she executed the fifth and sixth amendments, and that Eric and Paul had failed to rebut the presumption.¹² The court also found that the fifth and sixth amendments were invalid because Sheila had executed them as a result of her mistaken belief "that D.K. and Steve either had not paid her the \$600,000 down payment required by the Recapitalization Agreement or that she had not received the benefit of that payment." The court ordered that the residue of the trust "be distributed under the terms of the Fourth Amendment to [the trust] . . . , which requires

¹² Paul testified at trial, but was not a party to the litigation.

that the residue of the trust estate be distributed in equal shares to all six of Sheila's children."

In accordance with its statement of decision, the trial court entered a judgment in favor of D.K. and Steve that imposed a constructive trust on the assets of Sheila's trust, requiring that the assets be distributed equally among the six children. The judgment also declared that the fifth and sixth amendments to the trust were void, and that the trust was to be distributed under the terms of the fourth amendment.

DISCUSSION

ERIC AND NEAL'S APPEALS

A. *Res Judicata Effect of D.K. and Steve's Dismissal of the Civil Action*

Eric and Neal contend that the doctrines of res judicata and retraxit barred D.K. and Steve's probate petition, as a result of the dismissal of their civil action against Hunt.¹³

"As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' [Citation.] . . . 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] ' . . . The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A

¹³ A dismissal with prejudice following a settlement is deemed to be a judgment on the merits for res judicata purposes. (*Alpha Mechanical, Heating, & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1327-1333 (*Alpha Mechanical*).)

claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' [Citation.]" (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.) However, "[e]ven if these threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]' [Citation.]" (*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065.)

"Whenever a judgment in one action is raised as a bar to a later action under the doctrine of res judicata, the key issue is whether the same cause of action is involved in both suits. California law approaches the issue by focusing on the 'primary right' at stake: if two actions involve the same injury to the plaintiff *and the same wrong by the defendant* then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174, italics added.)

The civil action and the probate proceedings did not involve identical claims and issues. Rather, they involved different wrongs alleged to have been committed by different "defendants" and, thus, different primary rights. In the civil action, D.K. and Steve claimed interference with prospective economic advantage by means of fraud (misrepresentation) by Hunt, whereas the main wrongs that D.K. and Steve alleged in their probate petition were undue influence by Eric and breach of contract by Sheila. The

settlement and dismissal of the civil action thus did not bar litigation of D.K. and Steve's claims in the probate proceeding under the doctrine of res judicata.

Even if the threshold requirements for application of res judicata were met, we would decline to apply the doctrine because doing so would result in injustice. D.K. and Steve filed their probate petition first, and it was pending at the time they filed their civil action against Hunt. All of the parties to this appeal, together with their other siblings and Weber, were parties to the settlement agreement, which contemplated that D.K. and Steve would seek to be made equal remainder beneficiaries of the trust in the probate proceeding rather than seeking an equivalent recovery as damages in the civil action against Hunt. The settlement agreement notes that D.K. and Steve filed their petition attacking the fifth and sixth amendments to the trust before they filed the separate civil action against Hunt, and that the court had consolidated the two actions. The agreement provides that Hunt would resign as trustee, and that all of the beneficiaries to the trust agreed to waive any claims against him. The beneficiaries also agreed that the successor trustee had no duty to defend D.K. and Steve's probate petition, and that all of the other beneficiaries had standing to defend against the petition.

These provisions of the settlement agreement demonstrate that all parties to the agreement contemplated that D.K. and Steve would seek relief in the probate proceeding, and that the parties regarded this as an incentive for D.K. and Steve to dismiss their civil action against Hunt. It would be unjust to preclude D.K. and Steve from maintaining their claims against the trust merely because they settled their *later filed* claims against Hunt—a non-beneficiary with no interest in the trust estate, when it appears that their

willingness to settle with Hunt was due largely to the fact that they would be able to pursue their claims in the probate proceeding.

Eric and Neal's argument that the doctrine of retraxit barred the probate proceeding similarly fails, because a retraxit does not provide a basis to bar a subsequent action, independent of the doctrine of res judicata. "In common law, a retraxit was 'a voluntary renunciation by plaintiff in open court of his suit and cause thereof, and by it plaintiff forever loses his action.' [Citations.] In California, the same effect is now accomplished by a dismissal with prejudice." (*Morris v. Blank* (2001) 94 Cal.App.4th 823, 828.) Because a retraxit is deemed to be a judgment on the merits against the plaintiff that estops the plaintiff from maintaining a later action on the renounced cause of action, *it is equivalent to a judgment on the merits that bars further litigation between the parties on the same subject matter.* (*Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169.) Accordingly, the issue of whether a retraxit (i.e., dismissal with prejudice) bars a subsequent action is analyzed under traditional principles of res judicata. (*Ibid.*; *In re Estate of Redfield* (2011) 193 Cal.App.4th 1526, 1534 [reviewing court applies principles of res judicata to resolve what issues are barred by a retraxit]; *Alpha Mechanical, supra*, 133 Cal.App.4th at p. 1331 [res judicata principles and doctrine of retraxit operate together].) For the reasons explained above, the doctrine of res judicata did not bar D.K. and Steve's probate proceeding, notwithstanding their "retraxit" of their action against Hunt.

B. Breach of Contract Claim

1. Admission of parol evidence

Eric and Neal contend that because the written recapitalization agreement by which D.K. and Steve became the owners of Nasland Engineering was a fully integrated agreement, the parol evidence rule bars D.K. and Steve's claim that Sheila breached an oral agreement to make them equal remainder beneficiaries of her trust if they purchased the business. The trial court concluded that the oral agreement that Sheila entered into with D.K. and Steve was not subject to the integration clause in the recapitalization agreement.

Code of Civil Procedure section 1856 codifies the parol evidence rule, which seeks to preserve the integrity of written agreements by prohibiting the parties to a written agreement from introducing evidence of purported oral agreements that are inconsistent with the terms of the written agreement. Subdivisions (a) and (b) of section 1856 provide: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing

is intended also as a complete and exclusive statement of the terms of the agreement."¹⁴

Subdivision (g) of Code of Civil Procedure section 1856 provides: "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud."

"The parol evidence rule is not merely a rule of evidence concerned with the method of proving an agreement. Rather, it is a principle of substantive law. The rule derives from the concept of an integrated contract. When the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an integration in fact becomes the complete and final contract between the parties. Such a contract may not be contradicted by evidence of purportedly collateral agreements. As a matter of law, the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, both oral and written, are excluded." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 14.)

¹⁴ Civil Code section 1625 states: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

D.K. and Steve do not dispute that the written recapitalization agreement is an integrated agreement.¹⁵ However, the fact that the recapitalization agreement is fully integrated did not bar evidence of the separate oral agreement that Sheila entered into with D.K. and Steve, because D.K. and Steve and Sheila were not the parties to the integrated recapitalization agreement. The parol evidence rule "is based upon the premise that the written instrument is the agreement of the *parties*. [Citation.] Its application involves a two-part analysis: 1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements [citation]; and 2) is the agreement susceptible of the meaning contended for by the party offering the evidence?" " (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1364, italics added.) Thus, the parol evidence rule, when it applies, bars evidence of a collateral agreement between *the parties* to the integrated agreement.

The parties to the written recapitalization agreement were identified in the agreement as Nasland Engineering (the buyer), and The Nasland Family Trust and Sheila (the sellers). The parties to the collateral oral agreement were D.K., Steve, and Sheila.

¹⁵ The recapitalization agreement contains an "integration clause" that states: "With reference to the subject matter hereof, this Agreement, together with the Note, the Security Agreement and the Pledge Agreement is the complete and exclusive statement of all terms of the agreement between the parties and supersedes and cancels all prior and contemporaneous negotiations, agreements and representations and constitutes the entire agreement between the parties. There are no representations, inducements, promises or agreements, oral or otherwise, with reference to the subject matter hereof, other than as expressly set forth herein or in the Note, the Security Agreement or the Pledge Agreement. No modification, alteration, amendment or waiver of any provision of this Agreement shall be effective unless in writing and signed by both parties."

The recapitalization agreement was the complete and final contract between *Nasland Engineering*, and *the trust and Sheila*, concerning D.K. and Steve's acquisition of the company's stock. Because the oral agreement was a separate agreement between parties different from the parties to the recapitalization agreement, the parol evidence rule did not bar admission of evidence of the oral agreement.

Even if the parties to the recapitalization agreement and the oral agreement are viewed as being the same, the parol evidence rule would not preclude admission of evidence of the oral agreement, because the oral agreement was an independent agreement that did not affect the terms of the recapitalization agreement. "[T]he rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations . . . has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument.'" (*Wright v. Title Ins. & Trust Co.* (1969) 274 Cal.App.2d 252, 260 (*Wright*));¹⁶ *Lacy Mfg. Co. v. Gold Crown Mining Co.* (1942) 52 Cal.App.2d 568, 578 [where parol evidence is consistent with and does not change or contradict the written contract, it should be admitted because

¹⁶ In *Wright*, the appellate court concluded that parol evidence of an oral agreement between equal owners of stock in an automobile corporation to purchase life insurance and to name the other owner as the beneficiary was admissible even though it was not included in the parties' later written buy and sell agreement, because the oral agreement was separate, collateral, and consistent with the written buy and sell agreement. (*Wright, supra*, 174 Cal.App.2d at pp. 259, 261; see also *Mytee Products, Inc. v. H.D. Products, Inc.* (S.D. Cal. June 22, 2007, No. 05CV2286 R (CAB) 2007 WL 1813765 [parol evidence rule did not bar evidence of a collateral oral agreement involving temporary use of plaintiff's trademark where the oral agreement was a separate agreement involving a different subject matter from the parties' integrated written equipment purchase agreement and did not contradict the written agreement].)

the rule that a writing supersedes all contemporaneous oral negotiations does not apply to an independent contract arising out of matters provided for in the written agreement].)

The extrinsic evidence of the related oral agreement that D.K. and Steve entered into with Sheila, does not contradict the terms of the recapitalization agreement, and was not introduced to prove what the actual recapitalization agreement was, nor to explain or supplement the terms of the recapitalization agreement. As expressly stated in its integration clause, the recapitalization agreement—together with the related promissory note, security agreement, and stock pledge agreement—was the "complete and exclusive statement of all terms of the agreement between the parties" only "[w]ith reference to *the subject matter hereof . . .*" The subject matter of the recapitalization agreement—i.e., the sale of Nasland Engineering stock to D.K. and Steve and Nasland Engineering—was different from the subject matter of the oral agreement—i.e., Sheila's amendment of the trust in exchange for D.K. and Steve's purchasing the business rather than waiting to acquire it upon Sheila's death. Because the oral agreement that Sheila entered into with and D.K. and Steve was a separate agreement involving different subject matter from that of the recapitalization agreement, and was consistent with the recapitalization agreement, the trial court's admission of evidence of the oral agreement did not violate the parol evidence rule.

2. *Sufficiency of the evidence*

The court ruled that "Sheila was equitably stopped to disinherit Steve and D.K. as equal beneficiaries under the Trust as a result of her acceptance of their payment in full of the consideration she required in order to include them as equal beneficiaries, and Steve

and D.K.'s full performance of the oral agreement in reliance upon Sheila's promise to include them as equal beneficiaries in the Nasland Family Trust." The court ordered imposition of a constructive trust on the assets of Sheila's trust as of the date of her death, and ordered that the assets be distributed equally among her six children. Eric and Neal contend that the trial court erred by applying equitable estoppel to enforce the oral agreement that Sheila allegedly entered into with D.K. and Steve, because there was insufficient evidence to support the court's findings that the oral agreement existed, that D.K. and Steve detrimentally relied on the agreement, or that D.K. and Steve would suffer unconscionable injury and Sheila would be unjustly enriched if the agreement were not enforced.

The substantial evidence rule governs appellate review of a challenge to the sufficiency of the evidence. (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747.) As this court has observed, in evaluating the sufficiency of the evidence to support a finding, we " 'resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences. [Citation.] Second, [we] must determine whether the evidence thus marshaled is substantial.' " (*Valenzuela v. State Personnel Bd.* (2007) 153 Cal.App.4th 1179, 1184-1185, citation omitted.) The term "substantial evidence" is not synonymous with "any evidence"; it refers to evidence that is reasonable, credible and of solid value. (*Id.* at p. 1185.) "We focus on quality, not quantity, because very little solid evidence might be substantial, while a host of extremely weak evidence might be insubstantial. [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and

reason. Speculation or conjecture alone is not substantial evidence. [Citation.] The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.]" (*Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 192.)

"In general, a contract to make a particular testamentary disposition of property is valid and enforceable. As in every contract, 'there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.] Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed.' [Citation.]" (*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 100.)

The record shows that the parties and the court shared the view that former Probate Code section 150 (repealed by Stats. 200, ch. 17, § 2), which required that a contract to make a *will or devise* be in writing,¹⁷ was a "statute of frauds" that applied to

¹⁷ All further statutory references are to the Probate Code, unless otherwise specified.

Former section 150 stated, in relevant part: "(a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made after December 31, 1984, can be established only by one of the following: [¶] (1) Provisions of a will stating material provisions of the contract. [¶] (2) An expressed reference in a will to a contract and extrinsic evidence proving the terms of the contract. [¶] (3) A writing signed by the decedent evidencing the contract." When used as a noun, "devise" "means a disposition of real or personal property by will" (§ 32.)

Former section 150, subdivision (c) stated: "A contract to make a will or devise, or not to revoke a will or devise, if made on or before December 31, 1984, can be established only under the law applicable to the contract on December 31, 1984." Accordingly, section 150's requirement that a contract to make a will or devise must be in

Sheila's agreement with D.K. and Steve to amend her trust such that it was necessary for D.K. and Steve to successfully invoke the doctrine of equitable estoppel in order to enforce the oral agreement. "Equitable estoppel may preclude the use of a statute of frauds defense. . . . "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances.' " (*Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1068, quoting *Monarco v. Lo Greco* (1950) 35 Cal.2d 621, 623.)

"The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute.' " (*Redke v. Silvertrust, supra*, 6 Cal.3d at p. 101.) "Whether the doctrine of equitable estoppel should be applied in a given case is generally a question of fact." (*Byrne v. Laura, supra*, at p. 1068.)

Preliminarily, we note that former section 150 applies only to an agreement to make a "*will or devise*"; it does not apply to an agreement to amend a trust. (*Hall v. Hall* (1990) 222 Cal.App.3d 578, 583 [statute of frauds provision of former § 150 did not apply to an alleged oral agreement to modify an existing trust because an agreement to modify a trust is not "an agreement to make transfers by way of will"].) Although an oral agreement to make a trust must be established by clear and convincing evidence

writing or referenced in the will applies to a *will* made in 1987, when Don and Sheila created the Nasland Family Trust.

(§ 15207, subd. (a); *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 484), there is no statutory requirement that an agreement to make a trust be in writing. The same logically applies to an agreement to amend an existing trust.

Regardless of whether an oral agreement to amend a trust must be in writing, when the trustor dies without having performed a contractual promise to amend his or her trust, the promise is properly enforced through equitable estoppel if denying enforcement would result in unconscionable injury because the promisee has been induced to make a serious change of position in reliance on the promise, or the promisor has been unjustly enriched by receiving the benefits of the promisee's performance. (*Redke v. Silvertrust, supra*, 6 Cal.3d at pp. 100-101.) Accordingly, despite the fact that former section 150 does not apply in this case, we conclude that the trial court properly imposed the equitable remedy of a constructive trust to effect specific performance of Sheila's oral agreement to amend the trust. (*Estate of Housley* (1997) 56 Cal.App.4th 342, 357-358 [remedy of quasi-specific performance involves the imposition of a constructive trust to enforce a promise to make a will after the promisor's death].)

We conclude that there is substantial evidence to support the trial court's finding that Sheila entered into an oral agreement with D.K. and Steve to amend her trust to make them equal remainder beneficiaries with the other four children if D.K. and Steve would purchase the trust's shares of Nasland Engineering. D.K. and Steve both testified that the oral agreement existed—i.e., that Sheila offered to make them both equal remainder beneficiaries with the other four children if they would purchase Nasland Engineering, and that they accepted her offer. The trial court could reasonably have found D.K. and

Steve to be credible on this point. In the words of the *Crail* court, "[t]he weight to be accorded [their] testimony was . . . primarily a matter for the trial court to decide." (*Crail v. Blakely* (1973) 8 Cal.3d 744, 749.)

The oral agreement was further evidenced by Mara's testimony that Sheila told Mara that she was selling the business to D.K. and Steve because she had no income and needed money to live on. Additionally, as noted in our statement of facts, attorney Brown's paralegal, Stalcup, took notes during a telephone conversation on speakerphone between Brown and D.K. in 1997 in which she wrote that Sheila had decided to sell the business to D.K. and Steve, and intended to "rewrite [the] trust to split all 6 ways." Stalcup's notes were admitted in evidence. In addition, Stalcup testified that she independently remembered from various meetings that Sheila said she wanted to sell Nasland Engineering to D.K. and Steve and wanted her estate to go to her six children in equal shares.

The existence of the oral agreement that Sheila entered into with and D.K. and Steve is also evidenced by the diagram that Brown drew during his June 1997 meeting with Sheila, D.K. and Steve to discuss how Sheila would fund her trusts (Trusts A and B). The diagram contained the following statement written in black marker and circled in red: "Amend [Trust A]—6 way distrib[ution] on [Sheila's] death." This statement on Brown's diagram, Stalcup's notes reflecting that Sheila intended to "rewrite [the] trust to split all 6 ways" in connection with her selling Nasland Engineering to D.K. and Steve, and the fact that Sheila actually amended her trust after D.K. and Steve acquired the

business to make all six of her children equal remainder beneficiaries strongly corroborate D.K. and Steve's testimony concerning their oral agreement with Sheila.

There is also substantial evidence to support the trial court's finding that not enforcing the oral agreement "would create an unconscionable result" because D.K. and Steve detrimentally relied on the oral agreement—i.e., they were induced to make a serious change of position in reliance on the agreement—and Sheila would be unjustly enriched by D.K. and Steve's performance of the agreement if the agreement were not enforced. As the trial court discussed in its statement of decision, D.K. and Steve "significantly changed" their position by purchasing Nasland Engineering stock at a time when the company had been losing money for over five years, rather than waiting to acquire the stock upon Sheila's death, as provided under the terms of the original trust. There is an obvious inherent risk in purchasing a business that is losing money. Although Nasland Engineering became successful under D.K. and Steve's leadership, at the time D.K. and Steve agreed to purchase the business, they assumed a very real risk that it would fail.

With respect to unjust enrichment, the evidence showed that Sheila asked D.K. and Steve to buy Nasland Engineering primarily because Don's death left her with insufficient income to allow her to maintain her lifestyle. Additionally, she did not know how to run the business and did not want to run it. There was evidence that Sheila received full value for the business, and that her receipt of the \$600,000 down payment and the payments she received on the 10-year \$524,000 promissory note enabled her to maintain her lifestyle, free of any responsibility for the management of Nasland

Engineering. That fact alone is sufficient to establish that if D.K. and Steve's oral agreement with Sheila were not enforced, Sheila, and ultimately, her estate, would be unjustly enriched by the receipt of the proceeds of the sale of the business to D.K. and Steve. The evidence clearly supports the trial court's findings that D.K. and Steve both significantly changed their positions in reliance on the oral agreement and that Sheila would be unjustly enriched if the agreement were not enforced. The court thus did not err in applying the doctrines of equitable estoppel and constructive trust to enforce the oral agreement.

3. *Propriety of proceeding against the trust*

Eric and Neal contend that D.K. and Steve improperly brought their claim that Sheila breached an oral agreement against the trustee of Sheila's trust, and that instead, they should have brought this claim against Sheila's personal representative under Code of Civil Procedure section 377.40. That section provides that "a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest." We conclude that this provision does not apply to D.K. and Steve's contract claim against Sheila because the claim directly pertained to specific provisions of Sheila's trust, and the remedy requested was a constructive trust against the assets of the trust estate.

The probate court may apply general and equitable principles and provide equitable remedies in matters over which it has jurisdiction. (*Estate of Jimenez* (1997) 56 Cal.App.4th 733, 741, fn. 5.) The probate court has jurisdiction over matters that affect the internal affairs of a trust, including the disposition of its assets. Section 17200,

subdivision (a), provides that a "beneficiary of a trust may petition the [probate] court . . . concerning the internal affairs of the trust" Proceedings concerning the internal affairs of a trust include proceedings for the purposes of "[d]etermining the existence or nonexistence of any . . . right" (§ 17200, subd. (b)(2)) and "determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument." (§ 17200, subd. (b)(4).) As beneficiaries of Sheila's trust,¹⁸ D.K. and Steve had standing to file a petition in the probate court seeking the remedy of a constructive trust, because their claim and request for relief required the court to make a determination *not made by the trust instrument* regarding to whom property would pass upon final termination of the trust. (*Ibid.*)

Section 17001 provides that "[i]n proceedings commenced pursuant to this division, the court is a court of general jurisdiction and has all the powers of the superior court." Accordingly, it was proper for the trial court, in exercising probate court jurisdiction over the *trust estate*, to hear D.K. and Steve's petition and decide whether it would be proper to impose the equitable remedy of constructive trust against *the trust estate*. (See *Munn v. Briggs* (2010) 185 Cal.App.4th 578, 588 [citing secondary authority for the principle that if the wrong for which an heir seeks a constructive trust relates to the execution or revocation of a will, the claimant has standing in the probate

¹⁸ As noted, the fifth and sixth amendments to the trust eliminated D.K. and Steve as remainder beneficiaries of the trust *except* as to certain personal property, specified as "jewelry, clothing, works of art, household furniture and furnishings, all automobiles included in the trust estate, and all other items of domestic, household or personal use or adornment"

proceeding].) Because D.K. and Steve's probate petition involved the internal affairs of the trust and directly challenged the trust's provisions for the final distribution of the trust estate, it was properly brought against the trustee and adjudicated by the court in the exercise of its probate jurisdiction.

C. Undue Influence Claim

Eric and Neal contend that the court erred in finding that Sheila executed the fifth and sixth amendments to her trust as a result of undue influence.¹⁹

The California Supreme Court has noted that the right to testamentary disposition of one's property is a fundamental right that courts have vigilantly protected. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 374 (*Fritschi*), superseded by statute on other grounds as stated in *Rice, supra*, 28 Cal.4th at pp. 96–98.) "Illustrative expressions of the courts demonstrate the stringency with which they protect the testamentary disposition against the attack of undue influence. Thus such influence must 'destroy the testator's free agency and substitute for his own another person's will.' [Citation.] 'Evidence must be produced that pressure was brought to bear directly upon the testamentary act [The influence] must amount to *coercion* destroying free agency on the part of the testator.' [Citations.] '[T]he circumstances must be *inconsistent* with voluntary action on the part of the testator' [citation]; and '[the] mere opportunity to influence the mind of the testator,

¹⁹ The law regarding undue influence that applies in the context of wills is equally applicable in the context of estate plans formalized by inter vivos trusts. (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182, superseded by statute on other grounds as stated in *Rice v. Clark* (2002) 28 Cal.4th 89, 96–98 (*Rice*).

even coupled with an interest or a motive to do so, is not sufficient [citation].' " (*Fritschi*, *supra*, at pp. 373-374.)

We conclude that there is insufficient evidence to support the trial court's finding that Sheila executed the fifth and sixth amendments to her trust as a result of undue influence exerted by Eric and Paul.²⁰ First, the evidence does not show that Eric or Paul exerted the kind of influence over Sheila that courts have viewed as *undue*. The evidence demonstrates that Eric expressed to Sheila his opinion that it was not fair that D.K. and Steve be equal remainder beneficiaries because their success in running Nasland Engineering had made them wealthy, and that Sheila was persuaded by Eric's argument to amend her trust to exclude D.K. and Steve as equal remainder beneficiaries. However, the evidence does *not* show that Eric's efforts to influence Sheila to amend the trust rose to the level of coercion that destroyed Sheila's free agency, or that the circumstances surrounding Sheila's amending the trust were inconsistent with voluntary action on her part, and the court made no such findings.

²⁰ The parties disagree as to the burden of proof that applies to a claim of undue influence. Eric and Neal argue that undue influence must be established by clear and convincing evidence, relying mainly on a statement to that effect in *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326, 334. D.K. and Steve argue that the applicable burden is preponderance of the evidence, citing authority for the proposition that the burden of proof for both the showing required to raise the presumption of undue influence, and the showing required to rebut that presumption, is preponderance of the evidence. (E.g., *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863; *Estate of Stephens* (2002) 28 Cal.4th 665, 677.) We need not resolve this dispute because even assuming that the applicable burden of proof at trial was the lower burden of preponderance of the evidence, we conclude that there is not substantial evidence to support the court's undue influence finding.

There was abundant evidence that Sheila exercised her own free will in executing both the fifth and sixth amendments to the trust. The letter dated March 27, 2007, that Hickson wrote to Sheila concerning her directive to prepare the fifth amendment of her trust was clearly intended to confirm that she truly wished to exclude D.K. and Steve as equal remainder beneficiaries of the trust. The letter noted that Hickson and Sheila had "*discussed, at length*, the following: [¶] 1. You understand that this will not result in an equal division or distribution to all six of your children Steve and D.K. will only have received the disclaimed amount of \$300,000 each from Trust B. [¶] 2. You feel very strongly that Steve and D.K. benefitted significantly from their acquisition of the business and the building, even though they purchased them, to such an extent that the only way to make up for that difference is to leave them out as remainder beneficiaries of the trust." (Italics added.) Hickson asked Sheila to return a signed copy of the letter "agreeing to the points we discussed[,]" and Sheila signed the letter on April 2, 2007. In addition, despite her handwritten statement that she disagreed with unspecified "presentations or conclusions" in Hickson's March 27 letter and that Hickson failed to represent all of her "conclusions or desires as [she] express[ed] to [him] via telephone," Sheila later executed both amendments. Hickson confirmed in telephone conversations with Sheila that the fifth and sixth amendments to the trust reflected her wishes, and he testified that Sheila was always lucid and coherent when he spoke with her in person and on the telephone.

Sheila's husband, Weber, testified that Sheila was strong willed and mentally sharp until the end, despite her physical decline, and that she was "in full charge of her

faculties" at the time she entered hospice care. Sheila told Weber that D.K. and Steve were not going to be in the trust because of the sale of the building and because she had "made them millionaires" by selling them the business. Sheila's cousin, Marilyn Munson, testified that she visited Sheila for two days in March 2007, and that Sheila was lucid and did not appear to be over-medicated or disoriented. Sheila told Munson that she had changed her estate back to the way she and Don had originally intended it to be before the business was sold to D.K. and Steve. She also told Munson about certain provisions of the fifth and sixth amendments that are not at issue in this litigation, including the provision that Weber would be permitted to live in Sheila's home for five years, and the provision that Mara would have the right to purchase the house after that.²¹ Munson testified that Sheila was "strong willed," and "very much in control, she was mentally acute, she was strong and determined." Sheila's long-time friend, Theresa McGuire, testified that she visited Sheila in late March 2007, and that Sheila said she was at peace with herself, had all her affairs in order, and thought she had been "very, very fair with—to all her children."

The trial court based its undue influence finding largely on the facts that Eric and Paul resented D.K. and Steve, that Eric met with Sheila on a regular basis after she was diagnosed with cancer and created written reports for her after she gave him access to her financial records and estate planning documents, and that Eric shared with Sheila his

²¹ The fifth and sixth amendments gave Mara the right to purchase the house after termination of the continuing trust that gave Weber the right to live in the house for five years.

view of what a fair distribution of her estate would be. In its statement of decision, the court stated that "the evidence suggests that [Eric's] discussions with Sheila were continuous, emotional and forceful. He was 'working' her." Although there was evidence, including Eric's own testimony, that Eric told Sheila how he thought her trust estate should be distributed upon her death, there is simply no evidence that he pressured Sheila to amend the trust to the point of destroying her free agency. The court's use of the phrase "the evidence suggests" indicates that whether Eric "worked" Sheila by "continuous[ly], emotional[ly], and forceful[ly]" pitching his views regarding a fair distribution of the trust residue is more speculation or conjecture than a finding based on the evidence presented at trial. As noted, "[s]peculation or conjecture alone is not substantial evidence." (*Buckley v. California Coastal Com.*, *supra*, 68 Cal.App.4th at p. 192.)

In any event, even if the evidence supported a finding that Eric repeatedly, emotionally, and forcefully communicated to Sheila his opinion of what a fair distribution of the trust residue would be and that she ultimately agreed with him, this would not establish that Eric *coerced* Sheila to amend the trust to the point of destroying her free agency and substituting his will for her own. "While undue influence may be proved by circumstantial evidence [citations], proof of circumstances consistent with undue influence is insufficient—the proof must be of circumstances inconsistent with voluntary action." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 607.) The evidence demonstrates that Eric persuaded Sheila to amend her trust in the way he wanted, but

there is no evidence that shows that the circumstances leading to Sheila's execution of the fifth and sixth amendments were inconsistent with voluntary action on her part.

To set aside the testamentary disposition of a deceased person on the ground of undue influence, there must be proof " 'of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the [instrument] was made." ' [Citation.]" (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 586-587.) The evidence that Eric influenced Sheila to amend her trust is not evidence that he *unduly* influenced her to do so by pressuring her to the point of overpowering her mind and boring down her volition at the very time she executed the fifth and sixth amendments to her trust. There is simply no evidence in the record that Eric subjected Sheila to anything like this type of pressure, and the witnesses who interacted with Sheila during the relevant time period, including friends, relatives, and her attorney, all said that Sheila was clearly exercising her free will and doing exactly what she wanted to do in executing the fifth and sixth amendments.

We further conclude that trial court erred in finding a rebuttable presumption of undue influence. "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.' [Citation.]" (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) The presumption of undue influence arises upon a showing that " '(1) the person alleged to have exerted undue influence had a confidential relationship

with the testator [or trustor]; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.' [Citation.]" (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800; *Rice, supra*, 28 Cal.4th at p. 97.) The presumption arises only if *all* three elements are shown. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605 (*Sarabia*).

Although there was evidence from which the trial court could reasonably have found that Eric had a confidential relationship with Sheila and that he actively participated in procuring the fifth and sixth amendments to the trust, the evidence does not support the court's finding that Eric and Paul unduly benefitted from the fifth and sixth amendments. In deciding whether the element of undue benefit is satisfied, reviewing courts have considered whether the disposition in question is "unnatural." (See, e.g., *Sarabia, supra*, 221 Cal.App.3d at pp. 607–609; *Estate of Mann, supra*, 184 Cal.App.3d at pp. 606–607.) "[W]here the beneficiary is a natural object of the testator's bounty, the [disposition] is not unnatural and no presumption arises." (14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 135, p. 199.)

As Sheila's children, Eric, Paul, Mara, and Neal were unquestionably natural objects of her bounty. Therefore, Sheila's amending the trust to leave the trust residue to the four of them *in equal shares*, as the original trust provided, cannot be deemed an unnatural disposition. The fact that two other siblings received the same benefit as Eric and Paul from the fifth and sixth trust amendments, together with the fact that the challenged disposition was in accordance with the original Nasland Family Trust,

precludes a finding that the disposition was unnatural and that it bestowed an undue benefit on Eric and Paul.

Moreover, "[w]hether between relatives, or between friends and relatives, numerous cases have held that a will is not unnatural where it provides for one who has had a particularly close relationship with, or cared for the testator, or is in comparatively greater need of financial assistance." (*Estate of Mann, supra*, 184 Cal.App.3d at p. 607.) The evidence showed that Eric had a particularly close relationship with Sheila in the months preceding her death, and that Sheila reasonably viewed Eric—as well as Paul, Neal, and Mara—as being *comparatively* in greater need of financial help than D.K. and Steve, who had prospered financially as owners of Nasland Engineering. Because the evidence does not support the trial court's finding that Eric and Paul unduly benefitted from the fifth and sixth amendments to Sheila's trust, the presumption of undue influence does not arise. The burden thus did not shift to Eric and Neal to prove that the fifth and sixth amendments were *not* procured through undue influence.²²

We conclude that the court erred in finding that Sheila executed the fifth and sixth amendments to her trust as a result of undue influence, and in ruling that those amendments were void on that ground.

D. Mistake Claim

We additionally conclude that there is insufficient evidence to support the trial court's finding that Sheila executed the fifth and sixth amendments to the trust as a result

²² There was also no evidence to support a finding that Paul actively participated in the procurement of the fifth and sixth amendments.

of a mistaken belief either that D.K. and Steve had not paid her the \$600,000 down payment for the sale of Nasland Engineering, or that she had not received the benefit of that payment.

As noted, Hickson sent Sheila a letter in which he summarized their discussions concerning her wish to execute a fifth amendment to her trust. With respect to her decision to exclude D.K. and Steve as remainder beneficiaries, Hickson wrote: "You feel very strongly that Steve and D.K. benefitted significantly from their acquisition of the business and the building, *even though they purchased them*, to such an extent that *the only way to make up for that difference is to leave them out as remainder beneficiaries of the trust.*" (Italics added.) Hickson's letter, in which he articulated his understanding of what Sheila had told him in prior discussions, made no reference to the \$600,000 check, and reflected that Sheila was not at that time questioning any aspect of D.K. and Steve's purchase of the business. Nothing in Hickson's letter connects Sheila's earlier concern or confusion about whether she had received the \$600,000 down payment for the business with her decision to amend the trust.

Weber similarly testified that Sheila told him that she was excluding D.K. and Steve as remainder beneficiaries because of the sale of the building and because she had "made them millionaires" by selling them the business. Neither Weber nor any other witness testified that Sheila mentioned or otherwise indicated that her decision to exclude D.K. and Steve as remainder beneficiaries of her trust was based on her prior concerns about whether she had received the \$600,000 down payment for the business. Hunt testified that after Sheila was shown the cancelled \$600,000 check for the down payment,

she acknowledged to him that she had received the check.²³ Thus, although the evidence shows that at one point Sheila thought she had not received \$600,000 down payment or was uncertain whether she had received it, the evidence did not show any causal link between her concerns about the check and her later decision to amend the trust.

Even assuming that Sheila executed the fifth and sixth amendments to the trust as a result of a mistaken belief that she had not received the \$600,000 down payment for the business, we conclude that the trial court erred in ruling that the fifth and sixth amendments were invalid because they were executed as a result of that mistake. "Even a demonstrated mistaken belief, which is much stronger than an uncertainty, does not necessarily vitiate a devise." (*Estate of Strong* (1966) 244 Cal.App.2d 250, 255 (*Strong*)). As noted in *Strong*, " 'it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless.' " (*Id.* at p. 256, citation omitted; *Estate of Smith* (1998) 61 Cal.App.4th 259, 271 (*Smith*)).

²³ Hunt testified that after the March 14, 2007 meeting between Sheila, Hunt, D.K., Steve, and Makibbin at Nasland Engineering in which Makibbin showed Sheila and Hunt the cancelled \$600,000 check, Sheila "pretty much understood . . . she got this check, she signed it, she knew that [it] was a dead issue." He testified that as he and Sheila were driving to a restaurant for lunch after the meeting he asked, "Well, did you get your answer?", and that Sheila replied, "Well, I guess so, yeah." Hunt further testified: " I said, it looks like, you know, you signed the check, you endorsed the check. She said, yeah, I guess so."

"Thus, a mistake by the testator does not preclude admission of a will to probate unless the mistake vitiates the execution of the will or the formation of testamentary intent. 'Testamentary intent' in this context does not refer to the testator's intentions regarding particular dispositions of property. It means the testator's general intent to make a revocable disposition of his or her property, effective on the testator's death." (*Estate of Smith, supra*, 61 Cal.App.4th at p. 270; *In re Estate of Carson* (1920) 184 Cal. 437, 447 [A mistake that "does not in effect show a want of execution of the will, or, what is the same thing, a want of testamentary intent as to a portion of it, is not a ground of contest"].) This public policy disfavoring the defeat of a testamentary disposition on the ground of a mistake applies equally to the distribution of a trust estate to remainder beneficiaries when a trust terminates upon the trustor's death, because such distribution is in the nature of a testamentary disposition.

Even if it were reasonable to infer that Sheila's decision to amend her trust was based in part on the mistaken belief that she had not received the benefit of the down payment for the business, the trial court erred in declaring the fifth and sixth amendments void based on that mistake, because the mistake did not vitiate Sheila's execution of the fifth and sixth amendments or her formation of "testamentary intent"—i.e., it did not show a want of intent on her part to dispose of the trust estate upon her death as provided in the fifth and sixth amendments.

E. No Contest Clause Issues

Eric and Neal contend that D.K. and Steve lacked standing to pursue their claims because their probate petition and the civil action that they brought against the trustee,

Robert G. Hunt, in his individual capacity, violated the no contest clause in Sheila's trust.²⁴ Under the former statutory scheme that applies to this case,²⁵ "[a] 'contest' means any action identified in a 'no contest clause' as a violation of the clause. The term includes both direct and indirect contests." [Citation.] A 'direct contest' means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on one or more statutory factors, including revocation, lack of capacity, fraud, and misrepresentation. [Citation.] An 'indirect contest' means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms on any . . . ground [other than the statutory grounds] and that does not contain any of those grounds. [Citation.] A 'no contest clause' means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court. [Citation.]" (*Schwartz v. Schwartz* (2008) 167 Cal.App.4th 733, 743 (*Schwartz*).)

²⁴ In the trial court, D.K. and Steve conceded that their probate petition was a contest under the trust's no contest clause, and Eric and Neal argued only that D.K. and Steve's *civil* action against Hunt violated the no contest clause, and that this violation divested D.K. and Steve of standing to pursue their *petition*.

²⁵ As this court noted in *Munn v. Briggs, supra*, 185 Cal.App.4th 578 (*Munn*), "effective January 1, 2010, our Legislature repealed Probate Code sections 21300 through 21308 (General Provisions) and sections 21320 through 21322 (Declaratory Relief) and enacted a major revision of our statutory scheme governing no contest clauses. The new statutes limit the enforceability of no contest clauses to only three types of claims: (1) direct contests brought without probable cause; (2) challenges to the transferor's ownership of property at the time of the transfer if expressly included in the no contest clause; and (3) creditor's claims and actions based on them, if expressly included in the no contest clause." (*Munn, supra*, at p. 593, fn. omitted.) The new statutes do not apply to this case because judgment was entered prior to their effective date. (§ 3, subd. (e); *Munn, supra*, at p. 593, fn.5.)

"Whether there has been a 'contest' within the meaning of a particular no contest clause depends upon the circumstances of the particular case and the language used. No contest clauses are valid and favored by the public policies of discouraging litigation and giving effect to the testator's intent. Nevertheless, they are also disfavored by the policy against forfeitures, are strictly construed, and may not extend beyond what plainly was the testator's intent. The testator's intentions control, and a court must not rewrite an estate planning document in such a way as to immunize legal proceedings plainly intended to frustrate the testator's unequivocally expressed intent from the reach of the no contest clause." (*Schwartz, supra*, 167 Cal.App.4th at pp.743-744.)

The no contest clauses in both the fifth and sixth amendments to Sheila's trust state, in relevant part: "If any beneficiary under this trust, or any trust created by this document, shall, singly or in conjunction with any other person or persons, contest in any court the validity of this trust or of any trust created by this document, or any will or other document making a transfer to this trust, or shall seek to obtain an adjudication in any proceeding in any court that this trust or any of its dispositive provisions are void, or otherwise seeks to void, nullify, or set aside the trust or any of its provisions, then the right of that person to take any interest given to him or her by this document shall be determined as it would have been determined had that person predeceased the execution of this declaration of trust without surviving issue."

It is undisputed that D.K. and Steve's probate petition was a contest within the meaning of the no contest clause in the fifth and sixth amendments to the trust. At trial,

their counsel stated to the court: "[W]e never asked for [section] 21320²⁶ relief in this case because we knew what we were doing was a contest. [The probate petition] was always a contest. So, our position has always been we are contesting the trust, Steve and D.K."

We agree that, as a matter of law, D.K. and Steve's probate petition is a contest within the meaning of the no contest clause in the fifth and sixth amendments to the trust. Our reversal of the portion of the judgment declaring the fifth and sixth amendments to the trust void means that the sixth amendment to the trust is operative, and that D.K. and Steve have forfeited their status as beneficiaries under the trust by violating the trust's no contest clause.²⁷

However, D.K. and Steve's violation of the no contest clause does not affect their ability to enforce their oral agreement with Sheila through the remedy of constructive trust. A no contest "clause essentially acts as a disinheritance device, i.e., if a beneficiary

²⁶ Former section 21320 (repealed by Stats. 2008, ch. 174, § 1) allowed a beneficiary to file a "safe harbor" petition for declaratory relief in the form of a determination whether a proposed challenge to an instrument would amount to a contest under the instrument's no contest penalty provision. If the court determined that the proposed action would constitute a contest, the beneficiary could then make an informed decision whether to pursue the contest and forfeit his or her rights under the instrument or forgo the contest and accede to the instrument's provisions. (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1130.)

²⁷ Both the fifth and sixth amendments provided that D.K. and Steve would share equally with the other four children in Sheila's personal property, described as "jewelry, clothing, works of art, household furniture and furnishings, all automobiles included in the trust estate, and all other items of domestic, household or personal use or adornment" The sixth amendment also gave D.K. and Steve the fifth and sixth right of refusal, respectively, to purchase Sheila's residence for its fair market value if none of the other four children were willing or able to do so.

contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise *provided under the instrument.*" (*Burch v. George* (1994) 7 Cal.4th 246, 265 (*Burch*), italics added; *Tunstall v. Wells* (2006) 144 Cal.App.4th 554, 562, fn. 6 ["[A] testamentary no contest clause never precludes litigation; it merely confronts a potential litigant with the possibility of losing a testamentary gift, and thus also the decision whether the gain from contesting the will or trust is substantial and probable enough to outweigh the loss of the testamentary entitlement"].)

Burch supports the principle that a contestant's forfeiture under a no contest clause of his or her rights *as a beneficiary under an instrument* does not result in the forfeiture of any *independent* right in the estate disposed of by the instrument—i.e., a right that exists independently of the contestant's status as a beneficiary of the testamentary instrument. The appellant in *Burch*, as a beneficiary of her deceased husband's inter vivos trust, petitioned the probate court to determine whether she would violate the trust's no contest clause if she were to litigate her rights as a surviving spouse to certain assets of the trust estate under California community property law and the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) The Supreme Court held that although the appellant's proposed litigation would violate the trust's no contest clause, it would not prevent her from obtaining everything to which she was entitled under California community property law and federal law; it would simply mean that she could "not, at the same time, obtain in addition the portion of [her deceased husband's]

separate property that was conditionally left to her under his trust." (*Burch, supra*, 7 Cal.4th at pp. 252, 274.)

Similarly, the fact that D.K. and Steve's probate petition violated the no contest clause of the trust prevents them from taking *under the trust instrument as beneficiaries of the trust*, but does not preclude them from obtaining the share of the trust residue to which they are equitably entitled, since their entitlement to that share of the trust is not based on their status as beneficiaries of the trust, but rather, on their oral agreement with Sheila.

Relying on *Montegani v. Johnson* (2008) 162 Cal.App.4th 1231 (*Montegani*), Eric and Neal contend that D.K. and Steve's dismissal of the civil action divested them of standing to pursue their petition because their civil action also violated the trust's no contest clause. In *Montegani*, the appellate court decided that the appellant lacked standing as a beneficiary to bring a safe-harbor petition under former Probate Code section 21320 concerning three related trusts because the court had previously determined that the appellant had violated the no contest clause in one of the trusts by filing an earlier complaint. (*Montegani, supra*, at pp. 1234, 1239.)

Assuming, without deciding, that the civil action was a contest because it challenged the validity of the fifth and sixth amendments by seeking a declaration that the provisions of those amendments did not reflect Sheila's true intentions with respect to D.K. and Steve, *Montegani* does not persuade us that the filing of the civil action divested D.K. and Steve of standing to pursue their petition. Unlike *Montegani*, there was no prior adjudication in this case establishing that D.K. and Steve had violated a no contest clause

before they filed their petition. D.K. and Steve had standing as beneficiaries to file their petition regardless of whether the civil action violated the no contest clause, because they filed the petition before they filed the civil action, and they dismissed the civil action before the court decided their claims in the petition that the fifth and sixth amendments were void due to undue influence and mistake. Because an adjudication that the fifth and sixth amendments were void would have rendered moot Eric and Neal's claim that the civil action violated the no contest clause in those amendments, D.K. and Steve were entitled to have their undue influence and mistake claims adjudicated before the trial court considered whether their civil action violated the contest clause in the fifth and sixth amendments. Accordingly, the trial court did not err in ruling that D.K. and Steve had standing to pursue their probate petition after they dismissed the civil action

In any event, even if D.K. and Steve's dismissal of the civil action resulted in their no longer being beneficiaries of the trust on the theory that the civil action was an unsuccessful contest, as explained above, their loss of beneficiary status would not deprive them of standing to seek a constructive trust against the trust residue on their claim that Sheila breached her oral agreement to make them equal remainder beneficiaries in exchange for their purchase of Nasland Engineering. Regardless of their beneficiary status at the time of trial, D.K. and Steve had standing to enforce their oral agreement with Sheila as parties to the agreement because their rights under the agreement were independent of their rights as beneficiaries under the trust.

Our reversal of the trial court's determination that the fifth and sixth amendments were the products of undue influence means that the sixth amendment is operative. In

addition, as discussed, *ante*, our conclusion that D.K. and Steve's probation petition violated the trust's no contest clause means only that they cannot take under the trust, and does not preclude them from obtaining a portion of the trust estate under the constructive trust. Because we affirm the trial court's rulings with respect to the oral agreement, the constructive trust remains in effect, negating the effect of the revived sixth amendment insofar as that amendment eliminated D.K. and Steve as equal remainder beneficiaries of the trust. Other provisions of that amendment pertaining to different subject matter, as discussed, *ante*, are in force under our ruling. Under the constructive trust, D.K. and Steve are each entitled to receive what they would have received as equal remainder beneficiaries under the trust, including, shares of Sheila's personal effects specified as "jewelry, clothing, works of art, household furniture and furnishings, all automobiles included in the trust estate, and all other items of domestic, household or personal use or adornment . . . ," all of which are included in the trust residue.

D.K. AND STEVE'S APPEAL

D.K. and Steve contend that the trial court abused its discretion in denying their postjudgment motion for discovery sanctions and their separate postjudgment motion for bad faith sanctions against Eric and Neal and their counsel, Philip Stillman. In their motion for discovery sanctions, D.K. and Steve requested sanctions of "at least \$459,860.28" for abuse and misuse of the discovery process based on allegations that Eric committed perjury at his deposition and failed to produce relevant documents prior to or at his deposition; Stillman suborned perjury by Eric and also failed to produce relevant documents prior to or at Eric's deposition; and Eric, Neal, and Stillman

intercepted confidential communications between D.K. and Steve and their counsel and used those communications improperly in preparing their defense against D.K. and Steve's claims. In their motion for bad faith sanctions, D.K. and Steve requested sanctions of at least \$61,372.83 based on their claim that Eric and Neal stole attorney-client communications and other private records that belonged to D.K. and Steve and used such confidential information in their defense, and that Stillman participated in the theft of D.K. and Steve's attorney-client communications and used them in Eric and Neal's defense.

A. *Facts underlying the motions*

Eric worked as Nasland Engineering's computer systems manager from sometime in 1988 or 1989 until he was fired on November 20, 2008. In that capacity, he was responsible for keeping all of Nasland Engineering's computers and its network running, and for backing up data.

In the summer of 2008, D.K. and Steve noticed Eric's deposition for August 14, 2008, by service of a deposition subpoena that included a 31-page request for production of documents. The request for production of documents required Eric to produce documents concerning all aspects of the case, including any documents on any computer that Eric had ever used or to which he had access.

On November 20, 2008, D.K. discovered a thumb drive sticking out of a port of his computer at Nasland Engineering. D.K. opened the drive and saw that it contained, among other things, his personal income tax return; private Nasland Engineering accounting records; recordings of conversations concerning Nasland family matters,

including a conversation between D.K. and Eric that was recorded without D.K.'s knowledge; scanned copies of letters to D.K. from his attorneys that had been sent by regular mail; and copies of emails that D.K. had received from his attorneys.

D.K. gave the thumb drive to his attorney, who had it analyzed by a consulting firm with expertise in the area of computer hardware and software. The consulting firm made a forensic copy of the thumb drive and transferred its contents to compact discs (CDs), which were provided to the parties' counsel. The forensic copies showed that the drive also contained a copy of the fifth amendment to the trust, which had been scanned onto the drive two days after Sheila signed the amendment; the "Issues" and "Resolutions" spreadsheet that Eric prepared regarding Sheila's trust estate; copies of attorney-client communications between D.K., Steve, and their counsel, including emails, letters, and draft discovery responses; and copies of emails between Eric, Neal, and Stillman, including an email from Neal to Stillman that forwarded an email chain between D.K. and Steve and their counsel concerning the effect of the *Montegani* opinion on this case, and Stillman's reply message to Neal, which included Stillman's analysis of *Montegani*. Eric did not produce any of the documents from the thumb drive at his deposition.

B. *Rulings on the motions for sanctions*

In its order denying D.K. and Steve's motion for discovery sanctions, the trial court stated: "Although [Eric and Neal] unreasonably delayed producing documents, [D.K. and Steve] were able to adequately present their case and prevail. The Court was able to assess Eric's credibility at trial, which included considering any contradiction in

Eric's deposition testimony. Although the Court denounces attempts to surreptitiously obtain attorney-client privileged communication, [D.K. and Steve] bear some of the fault. [D.K. and Steve] failed to take precautions or steps to protect their attorney-client communications. [D.K. and Steve] knew Eric had unfettered access to the computers at Nasland Engineering and yet they communicated with their attorneys through those computers. Furthermore, considering the Court's Statement of Decision and Judgment, [Eric and Neal] did not benefit from the information obtained."

The trial court cited *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327, for the principle that a court may not impose discovery sanctions that are designed to impose punishment rather than accomplish the objects of discovery. The court concluded that "[d]espite [Eric and Neal's] conduct, [D.K. and Steve] were not denied a fair trial, had the ability to present their case, and prevailed at trial. [D.K. and Steve's] contention that the case would have settled earlier [if Eric had testified truthfully at his deposition and produced the documents he withheld] is speculative."

In its order denying the motion for bad faith sanctions, the trial court noted that the motion was based on D.K. and Steve's contention that Eric, Neal, and Stillman "wrongfully obtain[ed] attorney-client communications and us[ed] information gleaned from those communications in defense of [D.K. and Steve's] claims." As in the order denying the motion for discovery sanctions, the court denounced "attempts to surreptitiously obtain attorney-client privileged communication[s]," but placed some of the fault on D.K. and Steve for "fail[ing] to take precautions or steps to protect their attorney-client communications." The court also repeated that in light of the judgment in

favor of D.K. and Steve, Eric and Neal had not benefited from the information they obtained from the thumb drive, that D.K. and Steve were not denied a fair trial, and that whether the case would have settled earlier if Eric had produced the documents in question at his deposition was speculative.

C. *Standard of review*

The trial court has broad discretion in deciding whether to grant or deny discovery sanctions, and its decision is subject to reversal on appeal only if there is no reasonable basis for the decision. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1454.) The appellant bears the burden of establishing that the trial court abused its discretion in deciding a motion for discovery sanctions. (*In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1476; *Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815 [the burden to establish an abuse of discretion is on the party complaining].)

Similarly, we review an order granting or denying sanctions for alleged bad faith conduct for abuse of discretion. (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867 (*Kurini*); *Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345.) As noted in *Kurini*, " ' "Where the issue on appeal is whether the trial court has abused its discretion, the showing necessary to reverse the trial court is insufficient if it presents facts which merely afford an opportunity for a different opinion: 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently

grave to amount to a manifest miscarriage of justice" (Kurini, *supra*, 55 Cal.App.4th at p. 867, citations omitted.) The appropriate test is whether the trial court exceeded the bounds of reason, all of the relevant circumstances being considered. (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

D. *Discussion*

We conclude that the trial court did not abuse its discretion in denying D.K. and Steve's motions for discovery sanctions and bad faith sanctions. Code of Civil Procedure section 2023.030, subdivision (a) provides: "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction *unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.*" (Italics added.)

The trial court's rulings on the motions reflect the implied finding that the imposition of sanctions would be unjust under the circumstances. Eric, Neal, and Stillman's opposition to the motions provided a reasonable basis for the court to make that finding. Although the opposition conceded that Eric should have produced some of the documents on the thumb drive at his deposition, Eric averred in a declaration that he had just returned from vacation at the time of his deposition and did not recall that the

documents were on the drive. The opposition also argued that the communications on the thumb drive were "legitimately obtained by Eric using the very computers that he was tasked to maintain," and that there is no reasonable expectation of privacy in email sent to and from the workplace, citing *TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 454 (*TBG*).²⁸ The opposition emphasized that Eric had unlimited access to all files on Nasland Engineering's computers, and that D.K. and Steve did not limit Eric's access even after the litigation had begun. With respect to prejudice, the opposition pointed out that D.K. and Steve had three months to take new discovery after they learned about the files on the thumb drive, and they were able to use documents on the drive at trial and examine Eric about them.

Eric's explanation as to why the thumb drive was on D.K.'s work computer was that he had upgraded the anti-virus software on the computer on November 19, 2008, because an anti-virus server had flagged the computer as being infected and having an out-of-date anti-virus definition list. Eric updated the anti-virus program and ran a scan, which identified an email attachment as being potentially infected. He copied the file to the thumb drive so he could quarantine it, and left it in the computer when he left work for an appointment.

²⁸ The Court of Appeal in *TBG* concluded that "the use of computers in the employment context carries with it social norms that effectively diminish the employee's reasonable expectation of privacy with regard to the use of his employer's computers." (*TBG, supra*, 96 Cal.App.4th at p. 452.) Although D.K. and Steve are the employers and not employees, the opposition cited *TBG* for the general proposition that there is a diminished expectation of privacy in one's workplace computer.

Stillman argued that there was no showing that he had advised Eric or Neal to review attorney-client communications between D.K. and Steve and their counsel, or to send such communications to him. He averred in his declaration that he directed Eric and Neal not to send him email that contained potentially privileged attorney-client communications, and that he first learned of the thumb drive on November 20, 2008, the day that D.K. and Steve discovered it. That same day, Stillman notified D.K. and Steve's counsel that the drive contained attorney-client communications between Stillman and Eric. D.K. and Steve's counsel refused Stillman's requests to return the drive or to immediately stop reviewing its contents, and, according to Stillman, obtained attorney-client communications to which they were not entitled.

The trial court's finding that D.K. and Steve were partly responsible for Eric's obtaining their attorney-client communications because D.K. and Steve communicated with their counsel on those computers knowing that Eric had legitimate access to the Nasland Engineering computers, was tantamount to a determination that communications between D.K. and Steve and their counsel over Nasland Engineering computers were not privileged—a determination that finds support in case law. (See *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1068-1069 [attorney-client communications by email over a work computer were not confidential and privileged where client knew the emails were not private].)

The trial court also expressly found that D.K. and Steve were not denied a fair trial and impliedly found that they were not otherwise prejudiced by Eric, Neal, and Stillman's alleged bad faith conduct and misuse of the discovery process. The facts that D.K. and

Steve were allowed to conduct new discovery after they learned of the files on the thumb drive, that they used documents found on the drive at trial, and that they succeeded in obtaining equal shares of the trust residue by prevailing on their claim that they were entitled to a constructive trust to enforce their agreement with Sheila, support these findings. The court could reasonably consider the lack of prejudice to D.K. and Steve as a factor in deciding whether the imposition of sanctions would be unjust under the circumstances. (See *Colgate-Palmolive Co. v. Franchise Tax Bd.* (1992) 10 Cal.App.4th 1768, 1788-1789 [trial court did not abuse its discretion in denying defendant's posttrial motion for discovery sanctions based on findings that the motion was untimely and defendant was not prejudiced by the delayed discovery].)

The trial court's finding that the requested discovery sanctions would be improperly punitive was also reasonable. Although the issue of whether discovery sanctions are designed to impose punishment rather than to accomplish the objects of discovery usually involves nonmonetary sanctions (see e.g., *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1183-1185; *Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331-332; *Petersen v. Vallejo* (1968) 259 Cal.App.2d 757, 780-784), the trial court could reasonably have viewed discovery sanctions in the requested amount of "at least \$459,860.28" as punitive under the circumstances of this case, including D.K. and Steve's success at trial.

The trial court could reasonably have concluded that the imposition of sanctions would be unjust under the circumstances. The court's broad discretion to deny sanctions for that reason extends to D.K. and Steve's motion for bad faith sanctions, as well as to

their motion for discovery sanctions. The court did not abuse its discretion in denying either motion.

DISPOSITION

The portion of the judgment ruling that the fifth and sixth amendments to the Nasland Family Trust are void and directing distribution of Trust A of the Nasland Family Trust under the terms of the Fourth Amendment to Trust A is reversed. The judgment is otherwise affirmed. The orders denying the postjudgment motions for discovery sanctions and bad faith sanctions are affirmed. The parties shall bear their own costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.