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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDA LANCASTER, as Trustee etc.,

Plaintiff and Appellant,

v.

CHARLES PICKETT,

Defendant and Respondent.

D060855

(Super. Ct. No.  
37-2009-00151777-PR-TR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

In December 2006 and May 2007, Betty Clemens executed amendments to the Coyle and Betty Clemens Trust (the Trust) that gave Charles Pickett, Betty's companion and caregiver, a 6 percent remainder interest in her trust and the home they shared. After Betty's death in April 2009, petitioner Linda Lancaster, in her capacity as successor trustee of the Trust, filed a petition to invalidate these amendments. After a lengthy trial, the court issued a statement of decision denying the petition. Lancaster moved for a new

trial and the court denied the motion and filed a modified statement of decision. Lancaster timely appealed. On appeal, Lancaster appears to contend (1) the evidence cannot support the judgment, (2) the court applied the incorrect legal standard to determine whether to invalidate the amendments, and (3) the court abused its discretion by denying the new trial motion.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. The Facts<sup>1</sup>

In early 1989, Betty and her husband (Coyle) established the Trust. They had no children. Betty was both physically and mentally abused by Coyle, who dominated their relationship and exercised total control over their finances. Except for the time Betty worked, more than 20 years in San Diego County's Comptroller Department, Coyle kept her largely isolated in their home for most of her adult life. Coyle's control over their finances caused them to live like paupers and, except for occasional camping trips or motorcycle rides, Betty did not travel.

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<sup>1</sup> We provide a truncated discussion of the facts because Lancaster's opening brief ignored a fundamental rule of appellate practice obligating her to completely and fairly summarize the evidence *supporting* the court's findings and judgment. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.) Instead, Lancaster's opening brief consists of a jumbled factual recitation devoted almost entirely to facts that would undermine the trial court's findings, with no attempt to summarize those facts supporting the trial court's findings. This failure to discuss evidence supporting the court's findings and judgment excuses us from any need to address any contention rooted in the sufficiency of the evidence, and we therefore deem those contentions abandoned. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Ajaxo Inc. v. E\*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 50.)

When Coyle became seriously ill for the last time, Mr. Rheinbold (a next door neighbor designated a cotrustee of the Trust in March 2002) began assisting the Clemenses with their affairs. After Coyle died in May 2003, Betty became unstable and was placed in a mental hospital. The hospital indicated it could not release her unless she went either to a nursing home (which Betty did not want) or arranged for in-home care, Betty's preference. When Rheingold asked Betty if there was anyone she wanted to provide her with in-home care, she immediately identified Pickett, so Rheingold hired him to provide Betty with in-home care.

Pickett began living at the home in June 2003, providing Betty in-home care, and her mental stability and quality of life immediately began dramatically to improve. During the next several years, Betty began caring for her personal appearance, socialized independently and received "gentlemen callers." She began controlling her own money and took an interest in both meeting new people Pickett introduced to her and in the outside world. To Betty's delight, Pickett also helped her to start travelling by accompanying her on trips to Atlanta, New York City, Hawaii, and other places, which opened up a new world for her.

Pickett also integrated Betty into his extended family, and the younger members of Pickett's extended family loved Betty and treated her like their grandmother. Pickett made sure Betty never spent another holiday alone, and Betty loved belonging to Pickett's family. Betty's vibrant relationship with Pickett and his family contrasted with Betty's relationship with her blood relatives. Other than an occasional phone call from a sister,

Betty had virtually no contact with her blood relatives, even with those who lived near her.

In 2006, Betty discussed with her attorney preparation of an amendment to the Trust that would give to Pickett a 6 percent remainder interest in the Trust. Her attorney believed she had the requisite capacity to understand what she was doing. Pickett was not present when Betty and the attorney discussed the amendment or when Betty signed the amendment.

In May 2007, Betty and her attorney discussed preparation of a further amendment to the Trust that would give the home to Pickett. Pickett was not present during those discussions. The attorney, although satisfied Betty was competent to make this disposition, expressed his concern that this would mean Betty's sister and other relations would not get the home, but Betty told the attorney she thought her relations were sufficiently comfortable and she wanted to leave the home to Pickett.<sup>2</sup> Betty later signed the amendment leaving the home to Pickett.

Pickett did not discuss with Betty receiving the home or the remainder interest before she signed the amendments, and did not learn she had made him a beneficiary of the Trust until sometime after the amendments had been signed. In mid-April 2009, Betty died.

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<sup>2</sup> Betty's sister learned of this bequest around the time of the amendment and tried to talk Betty out of it, but Betty remained firm that she wished Pickett to have the home. Betty also told a social worker, during a conversation at which Pickett was not present, that she was happy about giving the home to Pickett.

## B. The Lawsuit and Judgment

In January 2010, Lancaster, allegedly in her capacity as successor trustee of the Trust, filed a petition to invalidate the Trust amendments benefitting Pickett. The petition alleged the amendments were invalid under Probate Code<sup>3</sup> section 21350 because Pickett was a caretaker of Betty within the meaning of section 21350 to whom transfers are prohibited, and the transfers did not qualify for the exemptions from section 21350 specified under section 21351 because there was no certificate of independent review validating the transfers as required by section 21351, subdivision (b). Pickett opposed the petition.

After a lengthy bench trial, at which Pickett called numerous witnesses (including himself) and introduced numerous exhibits supporting his contention that the transfer was valid under the provisions of 21351, subdivision (d), the court ruled in Pickett's favor. The court issued a tentative statement of decision finding Pickett had shown, by clear and convincing evidence, that the Trust amendments were not the product of undue influence. After Lancaster filed objections to the tentative statement of decision, the court issued its Statement of Decision finding in favor of Pickett.

The court's Statement of Decision noted undue influence exists when the influence effectively overcomes the trustor's free agency, substituting the will of another for the will of the trustor, and procures the testamentary disposition. The court noted that, when evaluating the issue of undue influence, a court examines (1) the existence of a

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<sup>3</sup> All further statutory references are to the Probate Code unless otherwise specified.

confidential relationship between the trustor and the beneficiary of the grant, (2) active participation by the beneficiary in preparing the testamentary document, and (3) whether the testamentary document unduly benefitted the person allegedly exercising undue influence. The court also noted the trustor's mental condition is a relevant consideration.

The court found, based on the testimony of numerous witnesses, that Betty was competent, she knew she was benefitting Pickett, and that she intended and wanted to leave the property to Pickett. The court also found, from the testimony of the witnesses, that Betty exercised her own judgment as to her financial affairs (and was sufficiently strong to resist the importuning of others as to her finances and her testamentary desires), and that as "between [Betty and Pickett], she had the stronger personality," and therefore Pickett was not "the type of person who would control Betty." The court also noted the amendments were prepared without Pickett's participation, and on most occasions Pickett was excluded from the attorney's office when financial matters were discussed. Finally, addressing whether the Trust amendments "unduly benefitted the person allegedly exercising undue influence," the court found (based on testimony from numerous witnesses) Betty and Pickett had a good relationship, Betty was effectively estranged from her blood relatives, and therefore it "cannot be said [Pickett] unduly benefitted" because she bestowed on Pickett a bequest of a portion of her estate.

### C. The New Trial Motion

Lancaster moved for a new trial. Her principal argument was that the court relied heavily on Betty's mental capacity in finding there was not undue influence, and there was newly discovered evidence (in the form of testimony from her treating doctor and

from an expert who would testify) that Betty continued to suffer from mental disabilities that made her susceptible to undue influence and impaired her ability to understand the nature and consequences of signing the amendments. Pickett opposed the motion, asserting this showing was inadequate to demonstrate the evidence qualified as "newly discovered," or that the evidence would likely have caused a different result.

The court issued a modified Statement of Decision to respond to the issues raised in the motion for new trial but otherwise denied the new trial motion. The court stated that "on more than one occasion the court asked [Lancaster] if there was an issue of competence and the court was advised this was not an issue." Because Lancaster had expressly abandoned that claim, and because the proposed evidence was readily available before and during trial, the court denied the new trial motion.

### III

#### ANALYSIS

##### A. The Improper Consideration of Pickett's Testimony Claim

Lancaster appears to assert the trial court's judgment must be reversed because, when it assessed whether Pickett showed by clear and convincing evidence that the Trust amendments were not the product of undue influence, it included consideration of Pickett's testimony. Lancaster, citing language from *Bernard v. Foley* (2006) 39 Cal.4th 794 (*Bernard*), asserts this was reversible error.<sup>4</sup>

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<sup>4</sup> Lancaster's claims of reversible error include other complaints, including: (1) the trial court "incorrectly imposed burdens of proof on appellant" to produce medical testimony or to show Betty did not want Pickett to receive the home, (2) the trial court

Section 21350 et seq. sets forth certain limitations on donative transfers by testamentary instrument. Among the categories of persons presumptively excluded as valid recipients of such donative transfers is "[a] care custodian of a dependent adult who is the transferor" (§ 21350, subd. (a)(6)). The parties stipulated Pickett fit that description.

Section 21351 sets forth several exceptions to section 21350, the relevant provision of which is subdivision (d), which states the prohibition of section 21350 does not apply if "[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350 [i.e., any prohibited transferee], that the transfer was not the product of fraud, menace, duress, or undue influence." Thus, after it is determined that a person is presumptively prohibited under section 21350 from receiving a transfer, "section 21351 creates a rebuttable presumption that the transfer was the product of fraud, duress, menace, or undue influence. A person who is prohibited from receiving a transfer under section

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did not "properly take into account the natural objects of [Betty's] bounty," and (3) the trial court permitted Pickett to call a witness not previously listed on the Joint Trial Readiness Report. These claims are meritless. For example, the numerous iterations of the Statement of Decision clearly show the trial court did understand and apply the correct burden of proof, and the trial court explained (in response to Lancaster's claim of an improper allocation of the burden of proof) that "petitioner argues the court somehow changed the burden of proof by discussing the evidence presented by both sides. This is incorrect. The court is merely detailing the evidence presented by each side before discussing the evidence with the understanding [Pickett] has the burden of proof by clear and convincing evidence . . . ." Lancaster's claim that the trial court did not "properly take into account the natural objects of [Betty's] bounty" is equally spurious: the trial court specifically discussed that Betty and Pickett had a good relationship, while Betty was effectively estranged from her blood relatives, and therefore it "cannot be said [Pickett] unduly benefitted" because Betty bestowed on him a bequest of a portion of her estate.

21350 may still inherit, if [he or she] . . . successfully rebuts the section 21351 presumption (§ 21351, subd. (d))." (*Estate of Shinkle* (2002) 97 Cal.App.4th 990, 1003, disapproved on other grounds by *Bernard, supra*, 39 Cal.4th at p. 816, fn. 14.)

As applied here, the statutory presumption states the exemption applies if the court finds, by clear and convincing evidence "not based *solely* on [Pickett's] testimony," that the amendments were not the product of undue influence. Although the plain statutory language precludes the transferee from relying *solely* on his or her own testimony to satisfy his burden of supplying clear and convincing evidence of the absence of undue influence, it neither categorically disqualifies the transferee from testifying nor precludes the court from considering the transferee's testimony when assessing whether the transfer was not the product of undue influence. Instead, the plain statutory language merely enjoins the court, as trier of fact, from relying *solely* on the testimony of the prohibited transferee to find the transfer was not the product of undue influence. In the instant case it is clear the court did not rely solely on Pickett's testimony, but instead considered the evidence of numerous witnesses to conclude Pickett had satisfied his evidentiary burden.

Lancaster quotes language from *Bernard, supra*, 39 Cal.4th at page 800 as holding consideration of Pickett's testimony must be entirely *excluded* from consideration by the court, and therefore *any* reliance on Pickett's testimony is reversible error. The court in *Bernard* did lift language from *Estate of Shinkle*, in which the *Shinkle* court observed section 21351, subdivision (d), "places the burden on the donee to establish by clear and convincing evidence, *excluding the donee's own testimony*, that the transfer was not the product of . . . undue influence." (*Estate of Shinkle*, at p. 1003, italics added.) However,

this quotation by the *Bernard* court was dicta, because *Bernard* expressly noted the parties were not challenging whether there was substantial evidence to rebut the statutory presumption (*Bernard, supra*, 39 Cal.4th at p. 815), and therefore *Bernard* had no occasion to examine the proper role the transferee's testimony might play in the evidentiary calculus under section 21351, subdivision (d). More importantly, the *Shinkle* court's observation *Bernard* quoted--section 21351, subdivision (d), placed the burden on the donee to establish "by clear and convincing evidence, *excluding the donee's own testimony*, that the transfer was not the product of . . . undue influence" (*Estate of Shinkle*, at p. 1003, italics added)--was based on the *prior* version of section 21351, subdivision (d). However, after *Shinkle* was decided, the Legislature amended section 21351, subdivision (d), to (among other things) *delete* from subdivision (d) the word "excluding" and *replace it* with "but not based solely upon." (See Stats. 2002, ch. 412 (S.B. 1575), § 1, p. 2006.) The language on which Lancaster relies to contend consideration of Pickett's testimony was error has been superseded by language that permits consideration of Pickett's testimony, and therefore her claim of error is without merit.

The court here did find, by clear and convincing evidence not based solely on Pickett's testimony, that the Trust amendments were not the product of undue influence.<sup>5</sup> We have already concluded Lancaster's remaining claims (to the extent she attempts to

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<sup>5</sup> The Modified Statement of Decision specifically stated "even without the testimony of . . . Pickett, the respondent still has rebutted the presumption by clear and convincing evidence."

reargue the sufficiency of the evidence to support the judgment<sup>6</sup>) must be deemed abandoned (see fn. 1, *ante*) and therefore do not further examine them.

B. The Improper Consideration of Betty's Mental Competence Claim

Lancaster appears to assert that the sole issue was whether Pickett had rebutted the presumption of undue influence but the trial court erred by relying on an incorrect test of whether Betty was mentally competent, and then finding she was competent without expert medical evidence.

The various iterations of the Statement of Decision demonstrate Lancaster's first claim is meritless. The court specifically and repeatedly acknowledged the issue was whether Pickett had shown, by clear and convincing evidence, the amendments were not the product of undue influence. Although the court certainly *considered* the evidence of Betty's mental competence or condition, whether a testator's "mental and physical condition was such as to permit a subversion of his [or her] freedom of will" is a proper evidentiary consideration in assessing the issue of undue influence. (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585.)

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<sup>6</sup> For example, Lancaster argues Betty "knowingly failed to secure the 'certificate of independent review,' " without explanation of the relevance of this contention. Lancaster also asserts (1) Pickett did not show, by clear and convincing evidence other than from his own testimony, that the amendments were not the product of undue influence, (2) the record was "devoid of any evidence" of what motivated Betty to make the bequest amendments apart from his undue influence, and (3) the evidence was "unrefuted" that Betty had a history of being unduly influenced by men. All of these contentions merely invite us to consider the sufficiency of the evidence to support the judgment, but we have concluded Lancaster has abandoned those arguments.

Lancaster's second claim is also meritless. Although the parties chose *not* to introduce expert testimony concerning Betty's mental competence, numerous percipient witnesses (including her attorney, who specifically probed into Betty's capacity and concluded she had the requisite capacity to understand what she was doing) testified she was mentally competent, which is sufficient evidence to support the finding she was competent. (See, e.g., *Pfingst v. Goetting* (1950) 96 Cal.App.2d 293, 308.)

### C. The New Trial Motion

Lancaster asserts the trial court abused its discretion by denying her motion for new trial. She argues there was no indication the court was interested in Betty's mental competence or condition until after the court issued its tentative Statement of Decision, and therefore Lancaster was not on notice of the need to proffer expert medical evidence concerning Betty's mental condition until after trial. Accordingly, she asserts the proposed new evidence (from Betty's treating physician and from an expert) was newly discovered evidence warranting a new trial, and it was an abuse of discretion to deny her motion for new trial.

A trial court may grant a new trial motion based on newly discovered evidence if the moving party has shown the evidence is newly discovered, the party used reasonable diligence in discovering the evidence, and the evidence is material to the party's case. (Code Civ. Proc., § 657, subd. (4).) We review for abuse of discretion the denial of a new trial motion based on newly discovered evidence. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161.)

The order denying the motion for new trial was not an abuse of discretion. First, the central issue before the court was whether Pickett exercised undue influence over Betty, and Lancaster was "on notice" that Betty's mental condition during the relevant period was germane to that question even before trial commenced. The record shows Lancaster, in opposing a pretrial motion in limine filed by Pickett that sought to exclude certain hearsay statements made by Betty's psychiatrist concerning her mental state, argued Betty's "mental state is clearly in issue because there is a continuing issue in this proceeding whether [Pickett] exercised undue influence over [Betty]" and her mental condition was relevant to "whether she was susceptible to being influenced." Lancaster's claim that she was somehow surprised Betty's mental state would be germane is meritless.

Second, contrary to Lancaster's argument below and on appeal, the proffered evidence was not newly discovered. Indeed, the proffered new evidence included a declaration from a psychiatrist (Dr. Palica) who had twice seen Betty and had also reviewed her treatment records. However, during trial, Lancaster *had Palica under subpoena to testify* (as well as to provide foundation for Betty's medical records), but the subpoena was withdrawn by Lancaster as "prohibitively expensive." A trial court could reasonably conclude that neither Palica nor the records were "newly discovered" within the meaning of Code of Civil Procedure section 657, subdivision 4. Under these circumstances, the court did not abuse its discretion by denying Lancaster's motion for a new trial.

DISPOSITION

The judgment is affirmed. Pickett is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.