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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KURT WILLIAM CARLSON et al.,

Plaintiffs and Respondents,

v.

PATRICIA JEAN CARLSON,

Defendant and Appellant.

F068427

(Madera Super. Ct.  
No. MCV054470)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Dale J. Blea, Judge.

Patricia Jean Carlson, in pro. per., for Defendant and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Scott M. Reddie and Daniel S. Cho for Plaintiffs and Respondents.

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**INTRODUCTION**

Appellant Patricia Jean Carlson, proceeding in pro. per., raises several challenges to a trial court order enforcing a settlement agreement she signed purportedly resolving the present litigation. Respondents contend as a threshold issue that Patricia's opening brief is so severely flawed that the judgment should be affirmed on that "procedural"

basis. We acknowledge that certain defects in Patricia's brief are significant, including her failure to provide a cogent statement of the facts. (See Cal. Rules of Court, rule 8.204(a)(2)(C).) Nonetheless, we will proceed to the merits of Patricia's contentions insofar as they can be understood from her briefing.<sup>1</sup> However, for the reasons explained below, we ultimately find the contentions unpersuasive and affirm.

## FACTS

Herbert Carlson executed the Herbert A. Carlson Trust on March 23, 2000 (the "Trust"). At the time, Herbert was married to Patricia,<sup>2</sup> and had several children from a previous marriage, including respondents Kurt and Mark Carlson. The Trust left several real properties to Patricia, and Kurt and Mark, including the six properties that are at issue in the present litigation and described below.

Herbert named Kurt and Mark as cotrustees in the event of his death, and as residual beneficiaries. The Trust was amended several times thereafter, but Kurt and Mark remained residual beneficiaries. The provision establishing Kurt and Mark as cotrustees in the event of Herbert's death was not amended.

The Trust, as amended, required the trustee to hold and administer a business called Aaron Safe Mini Storit ("Mini Storit") for the benefit of Kurt, Mark, Patricia and Matthew Carlson. Patricia and Matthew were to receive \$600 per month from Mini Storit, and Kurt and Mark were to receive the rest of the business's income. If Kurt and Mark sold the Mini Storit, Patricia and Matthew<sup>3</sup> were to receive \$100,000 each.<sup>4</sup> Kurt

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<sup>1</sup> As a result of the deficient briefing, however, Patricia cannot be heard to complain that we have overlooked pertinent facts. (See *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430, 435, fn. 2.)

<sup>2</sup> Since Patricia, Kurt and Mark share a last name, we refer to them by their first names. No disrespect is intended.

<sup>3</sup> Matthew's \$100,000 would be held in trust until he turned 62.

<sup>4</sup> Presumably, this provision concerns when and if Kurt and Mark sold the Mini Storit *after* Herbert's death.

and Mark would retain any sale proceeds remaining after these payments to Patricia and Matthew.

Aside from these provisions concerning Mini Storit, Kurt and Mark received the rest of the trust estate under the residual beneficiary clause. The trust estate included the six properties at issue in this case.<sup>5</sup>

Herbert died on March 12, 2008.

### ***Lawsuit Filed***

On October 25, 2010, Kurt and Mark filed a complaint against Patricia with causes of action for partition, accounting, appointment of receiver, breach of fiduciary duty, and fraud. The lawsuit concerned six of the real properties transferred by the Trust, which we will refer to as: the Mini Storit, Commercial Property 1, Commercial Property 2, Commercial Property 3, the Bass Lake Residence, and the “Patrick” Property.<sup>6</sup> Kurt and Mark claimed a 49 percent ownership interest in each of these properties, and Patricia claimed a 51 percent ownership interest.<sup>7</sup> Through the lawsuit, Kurt and Mark sought to

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<sup>5</sup> However, it appears Kurt and Mark acknowledge that something less than 100 percent ownership of these properties was transferred to the trust.

The properties were transferred to the Trust pursuant to its “Schedule A,” which reads: “I hereby transfer all right, title and interest in the following real and personal property to the Trust made a part hereof by reference.” The document then proceeds to list several categories of personal property and several real properties including the six properties at issue in this case. Patricia claims, and we see no reason to dispute, that she had a community property interest in several of these assets. Yet the Schedule A document does not limit the transfer of the properties to Herbert’s one-half interest in any asset listed. Instead, it purports to transfer “all right, title and interest in the following real and personal property to the Trust ....” However, there is a provision in the Trust that reads: “Community property of the Trustor transferred to this trust and the proceeds thereof, shall continue to be community property under the laws of the State of California ....”

<sup>6</sup> The complaint alleges that the “Patrick” property was located on Patrick Avenue.

<sup>7</sup> The complaint alleged that Kurt and Mark owned “at least” an undivided 49 percent interest.

sever their interests in the properties from Patricia's interests. The complaint alleged that Patricia had been unwilling to cooperate in the division of properties, necessitating the partition action.

### ***Settlement***

On February 16, 2012, lawyers for both sides began settlement negotiations. Following negotiations, the parties "agreed in principle" to a settlement. A detailed written settlement agreement was then prepared, and all parties signed and notarized the document. Above Patricia's signature appears the following handwritten text: "Further clarification to be placed in escrow documents to follow."

The settlement agreement divided the six properties as follows: Patricia was to receive "any and all title, right, and/or interest held by Mark and Kurt" to the Mini Storit and the Patrick properties; Kurt and Mark were to receive "any and all title, right, and/or interest held by Patricia" to the Bass Lake Residence, and Commercial Properties 1, 2 and 3.

### ***Postsettlement***

On June 21, 2013, Kurt and Mark executed grant deeds that would transfer their interests in the properties pursuant to the settlement agreement and deposited them in escrow. Patricia transferred her interests in the properties to Mark's son, Luke. However, she refused to allow Luke to transfer the property interests to Kurt and Mark in accordance with the settlement agreement. Patricia informed Kurt and Mark's lawyer that the settlement was "off."<sup>8</sup> Patricia then sent a letter to Kurt and Mark's lawyer claiming Kurt and Mark had breached the settlement agreement "by lack of performance," and that she had performed "every single condition of the settlement."

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<sup>8</sup> This quotation is from plaintiff's counsel's declaration describing his conversation with Patricia. The declaration does not use quotation marks.

On August 14, 2012, Patricia’s counsel was relieved and she proceeded in pro. per.

On September 11, 2013, Kurt and Mark filed a motion to enforce the settlement agreement under Code of Civil Procedure section 664.6.<sup>9</sup> Patricia opposed the motion on several grounds and claimed she was under the effects of medication when she signed the agreement.

The court granted the motion, and Patricia appeals.

## **DISCUSSION**

### **I. The Trial Court Did Not Err in Concluding Patricia Failed to Establish She Lacked Capacity to Contract When She Signed the Settlement Agreement**

Patricia claims she was of “unsound mind” when she signed the settlement agreement as a result of medication she was taking at the time it was executed. As a result, she argues, the judgment enforcing the settlement agreement should be reversed.

Persons of “unsound mind” are not capable of entering into contracts. (Civ. Code, § 1556.) To establish incapacity to contract, it must be shown that the person had a mental deficit which “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.” (Prob. Code, § 811, subd. (b).) Merely presenting evidence of a mental deficit (e.g., inability to concentrate, impaired information processing, etc.) is not enough (see Prob. Code, § 811, subds. (a)–(b)) because people with mental or physical disorders “may still be capable of contracting...” (Prob. Code, § 810, subd. (b).) Instead, the party claiming incapacity must show the mental deficit significantly impaired the person’s ability to understand and appreciate the consequences of entering into the contract being challenged. (See Prob. Code, § 811, subd. (b).) In other words, they must

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<sup>9</sup> On July 9, 2013, Kurt and Mark had sought and obtained a temporary restraining order preventing Patricia from transferring or encumbering her interests in the properties subject to the settlement agreement.

present “evidence of a correlation between the deficit ... and the decision ... in question.” (Prob. Code, § 811, subd. (a).)

There is “a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and be responsible for their acts or decisions.” (Prob. Code, § 810, subd. (a).) Consequently, if the party claiming incapacity fails to present sufficient “evidence of a deficit ... and evidence of a correlation between the deficit ... and the decision ... in question” (Prob. Code, § 811, subd. (a)), then the presumption will prevail, and the person shall be deemed competent to contract. (See Prob. Code, § 810, subd. (a).)

A trial court’s determination that the parties have entered into a binding settlement agreement is reviewed for substantial evidence. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) Under this standard, “ ‘we resolve all evidentiary conflicts and draw all reasonable inferences to support the trial court’s finding that these parties entered into an enforceable settlement agreement and its order enforcing that agreement.’ [Citation.]” (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 984.) Employing this standard of review, we find no reversible error in the court’s implied conclusion.

Here, Patricia failed to rebut the presumption that she had capacity to contract when she signed the settlement agreement. At the hearing on the motion to enforce the settlement, Patricia attempted to establish incapacity to contract by citing three items of correspondence. The documents indicate they were written by a Gary Critser, D.O.,<sup>10</sup> and were dated July 19, 2012; October 29, 2012; and January 14, 2013. Each correspondence contains the following sentence: “Due to medication side effects [Patricia] cannot safely sign legal documents of any kind currently.” The printed name

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<sup>10</sup> The suffix “D.O.” refers to medical practitioners who were trained in an osteopathic college. (See *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 23.)

Gary Crister, D.O. appears at the bottom of each, but there is no signature on the documents.

The trial court concluded that the correspondences were “different than declarations [] under penalty of perjury” and ruled that they were not “competent” evidence. Since the letters are hearsay and Patricia cites no applicable hearsay exception, we agree with the trial court’s conclusion.<sup>11</sup> The letters constitute evidence of an out-of-court statement being offered to establish the truth of the matter asserted: that Patricia was, in fact, not competent to enter into a contract. (See Evid. Code, § 1200.) Since the letters were hearsay, and Patricia cited no applicable exception to the hearsay rule, the trial court was at liberty to disregard them.<sup>12</sup>

Patricia also filed the declarations of several employees, friends and a personal trainer. The declarations contain conclusory statements on the issue of capacity, including: “The prescription medications her primary doctor had put her on put her in a state of confusion ...”; Patricia “was in no condition to sign any legal documents or to do any kind of mental work. Her brain was too full of narcotics ...”; “She was completely debilitated by the narcotic drugs her doctor had prescribed”; Patricia was “unable to make conscious decisions that would affect her life”; Patricia “was not in any mental condition

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<sup>11</sup> Instead, Patricia contends the letters “were not written for the benefit of the court” but rather for the benefit of counsel. This argument has no bearing on the admissibility of the letters. Nor does her contention that if Kurt and Mark’s lawyer “wanted the letters signed under penalty of perjury, [he] should have requested” it.

<sup>12</sup> We do not decide whether the trial court was *required* to disregard the letters as hearsay. Though it is clear that some exclusionary rules of evidence apply to a motion to enforce a settlement (see, e.g., *Radford v. Shehorn* (2010) 187 Cal.App.4th 852), it is not clear whether all such rules of evidence apply. (But see Evid. Code, § 300.) We need not decide this issue, however, because even if the trial court had discretion to consider hearsay evidence, its decision to disregard (or discount) the hearsay in this case would be a reasonable exercise of such discretion.

to sign anything ...”; Patricia’s “cognizant [*sic*] thinking was impaired[]”; and Patricia “was not capable of signing any legal documents during this period of time.”

These lay declarations were not discussed directly at the hearing on the motion to enforce the settlement. However, the record does indicate why the court did not find them persuasive. At one point during the hearing, the court told Patricia she had not provided competent evidence of the medication-related incapacity. Patricia disputed the court’s observation and claimed that she had in fact provided documentation. The court responded that there were “no statements *made by a doctor* that that’s the case.”<sup>13</sup> (Italics added.) It appears from the court’s comment that it did not find the claims of the lay declarants persuasive because they were not physicians. We see no error in how the court chose to weigh the evidence. On a motion to enforce a settlement, the court “acts as a trier of fact. [Citations.]” (*Estate of Dipinto* (1986) 188 Cal.App.3d 625, 629.) The central factual inquiry relating to Patricia’s incapacity claim was whether she had been experiencing a mental deficit which “significantly impair[ed her] ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.” (Prob. Code, § 811, subd. (b).) It was within the court’s province as the trier of fact to discount the opinions of lay witnesses on this issue because they were not physicians.

In sum, we see no basis for overturning the trial court’s implied determination that Patricia failed to rebut the presumption she was competent to enter into a contract.<sup>14</sup>

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<sup>13</sup> Patricia responded by citing “three letters from the doctor,” presumably referring to the correspondences bearing Gary Crister, D.O.’s name. The court then noted those correspondences were not declarations under penalty of perjury.

<sup>14</sup> Because we conclude the court did not err in its resolution of the capacity issue, we need not decide whether Patricia waived the incapacity issue by virtue of her postsettlement conduct.

II. Patricia's Interlineation Above her Signature Does not Render the Settlement Agreement Fatally Indefinite

Patricia also argues that the settlement agreement was rendered fatally indefinite by the interlineation she inserted above her signature, which read: "Further clarification to be placed in escrow documents to follow." We disagree.

An agreement is unenforceable when its terms "are not sufficiently certain to make the precise act which is to be done clearly ascertainable." (Civ. Code, § 3390(5).) However, the fact that a contract anticipates execution of additional documents in the future does not render it unenforceable. When the parties to a contract "have agreed in writing upon the essential terms of their contract, even though several more formal instruments are to be prepared and signed later, the written agreement which they have already signed is a binding contract. When one party refuses to execute the more formal instruments intended, the other has a right to rely upon the agreement already expressed in writing. [Citation.]" (*Mann v. Mueller* (1956) 140 Cal.App.2d 481, 487.) Moreover, in this case, the settlement agreement (which refers to itself as "the Release") expressly provided that the parties "acknowledge and agree that while this Release sets forth the material terms of their compromise, they, and each of them, understand that they will be required to cooperate with each other and execute further documents following the execution of this Release in order to fully effectuate the intent and terms of this Release."

Therefore, Patricia's interlineation that further "clarification" would be included in escrow documents does not render the settlement agreement itself insufficiently definite.

III. Patricia Failed to Present Admissible Evidence Establishing the Settlement Agreement was Unconscionable

Additionally, Patricia contends that the settlement agreement is unenforceable because it is unconscionable.

“Unconscionability consists of both procedural and substantive elements; the procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression and surprise due to unequal bargaining power, while the substantive element pertains to the fairness of the agreement’s actual terms. [Citation.] Both elements must be shown, but they need not be present to the same degree and are evaluated on a sliding scale. [Citation.]” (*Von Nothdurft v. Steck* (2014) 227 Cal.App.4th 524, 535.)

“The party challenging the validity of [the] contract ... bears the burden of proving unconscionability. [Citation.]” (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1347.) To meet this burden, the challenging party may “present evidence as to [the contract’s] commercial setting, purpose, and effect ....” (Civ. Code, § 1670.5, subd. (b).) If the court concludes the contract was unconscionable at the time it was made, it may refuse to enforce the contract, enforce only the conscionable provisions, or limit the unconscionable clause to avoid unconscionable results. (Civ. Code, § 1670.5, subd. (a).)

The specifics of Patricia’s argument are difficult to follow. First, she cites an unauthenticated appraisal valuing the six properties at \$2,249,000. She then computes Kurt and Mark’s share as 49 percent of the estate, arriving at a figure of \$797,214.<sup>15</sup> Then, she adds up various encumbrances on the properties to arrive at a “total debt” figure of \$1,764,103.56.<sup>16</sup> She then claims that Kurt and Mark were responsible for 49

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<sup>15</sup> It is unclear how Patricia arrived at this figure. Forty-nine percent of \$2,249,000 is more than \$797,214. Elsewhere, she appears to cite a specific page from the unauthenticated appraisal to support the \$797,214 figure. However, that figure does not appear on the cited page.

<sup>16</sup> This debt figure includes several line items not supported in the record. In support of a line item listing “2005 Income Taxes” as a debt of \$43,785.56, Patricia cited to her own opposition to the motion to enforce the settlement agreement. The opposition purports to quote an e-mail between attorneys indicating that there was a state tax lien against Patricia in the amount of \$43,785.56.

percent of this total debt amount, or \$871,205.30.<sup>17</sup> Her conclusion seems to be that Kurt and Mark should have received \$0, since their fair share of the debt (i.e., \$871,205.30) exceeds their share of the estate's assets (i.e., \$797,214).<sup>18</sup>

Kurt and Mark argue that Patricia failed to support the figures used in these calculations with admissible evidence. Patricia responds that the figures are reflected in the settlement agreement itself. Yet, the purported appraisal values are nowhere to be found in the settlement agreement.

Instead, the figures are contained in an exhibit to Patricia's opposition to the motion to enforce the settlement. The exhibit purports to be an appraisal of The Herbert A. Carlson Family Trust of 1993 and The Herbert A. Carlson Trust of 2000. Kurt and Mark note this document is not authenticated, and Patricia has made no argument on appeal that the document was in fact properly authenticated. Consequently, the issue of whether or not the calculations contained in Patricia's briefs establish unconscionability is not dispositive because the figures used in the calculations are not supported by admissible evidence. (See Evid. Code § 1401.)

Moreover, while a party claiming unconscionability can present evidence of the "commercial setting, purpose and effect" of the contract (Civ. Code, § 1670.5, subd. (b)), the purpose of that evidence is to aid the court in determining whether the contract was unconscionable "*at the time it was made.*" (Civ. Code, § 1670.5, subd. (a), italics added.) Here, the unauthenticated appraisal Patricia relies upon is dated December 11, 2008, whereas the settlement agreement was signed in July and August of 2012. The trial court could have permissibly concluded that evidence of the property values in 2008 did not

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<sup>17</sup> It is not clear how she arrived at this calculation, since 49 percent of \$1,764,103.56 is \$864,410.74, not \$871,205.30.

<sup>18</sup> During oral argument, Patricia indicated that her father was the ultimate source of funds used to purchase the property that would later become the subject of the settlement agreement in this case. The source of funds for purchase of the properties is not an issue before us in this appeal.

satisfy Patricia's burden of showing that the settlement agreement's division of property in 2012 was substantively unconscionable.<sup>19</sup>

#### IV. Patricia Forfeited Several Arguments by Failing to Raise Them Below

Patricia also contends the settlement agreement was an improper attempt to modify an irrevocable trust without the consent of all the beneficiaries. (See Prob. Code, § 15403, subd. (a).) Kurt and Mark point out that Patricia did not raise this alleged flaw in the settlement agreement below and cannot make the argument for the first time on appeal. We agree.

Arguments not asserted below are forfeited and will not be considered for the first time on appeal. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3.) This rule applies to motions to enforce settlement agreements. (E.g., *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 130–131; *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1184, fn. 9.)

It is difficult to understand Patricia's response to Kurt and Mark's forfeiture argument. She apparently contends that the trial court had the *evidence* it needed to determine whether the settlement agreement violated mandatory procedures for modifying an irrevocable trust. Patricia's argument suggests she believes that because the court had certain *evidence* relevant to her new theory, it is irrelevant that she did not actually present the theory below. However, the forfeiture doctrine applies not only when a litigant fails to present evidence supporting an argument, but also when a party raises a new theory on appeal which "depends on controverted factual questions whose relevance ... was not made to appear" at the trial court level. (See *Bogacki v. Board of*

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<sup>19</sup> Because we hold that Patricia did not supply admissible evidence on her unconscionability claim, we do not address whether she would have prevailed had she presented admissible evidence. However, we note a cursory review of the division of assets under the settlement agreement and their respective appraisal values did not uncover any overwhelming disparity as to what each side received under the settlement agreement.

*Supervisors* (1971) 5 Cal.3d 771, 780.) Here, Patricia failed to present this particular argument to the court when it considered the motion to enforce the settlement. As a result, she cannot raise it for the first time on appeal.<sup>20</sup>

V. Patricia's Issues with Counsel are not Relevant

Patricia raises several issues she had with her former counsel. She argues that she had no “retainer agreement” with the attorney who purportedly represented her during settlement negotiations. She contends that, as a result, the attorney had no authority to negotiate on her behalf.<sup>21</sup> These points are irrelevant. It is true that if Kurt and Mark sought to bind Patricia solely on the basis that her attorney agreed to the settlement, then principles of agency would likely be relevant. But Patricia signed the settlement agreement herself.

**DISPOSITION**

The order is affirmed. Respondents shall recover costs.

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POOCHIGIAN, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.

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<sup>20</sup> For the same reason, she cannot argue for the first time on appeal that the settlement agreement “conflicts with” Civil Code sections 2920–2944.7 or that it is invalid because not all beneficiaries signed.

<sup>21</sup> Patricia also criticizes the brief her attorney submitted ahead of a mediation.