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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RACHEL CORONA et al.,

Plaintiffs and Appellants,

v.

YVONNE CLAYTON,

Defendant and Respondent.

G049180

(Super. Ct. No. 30-2012-00563499)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Law Office of John K. York and Celinda Tabucchi for Plaintiffs and Appellants.

Linda K. Ross for Defendant and Respondent.

* * *

Rachel Corona (Corona) and Tommy Torres III (Tommy) (collectively plaintiffs) appeal from a judgment declining to set aside an amendment to the Esperanza A. Torres Family Trust on the grounds of undue influence and fraud. Plaintiffs, the daughter and grandson of trustor Esperanza Torres (Esperanza), contend the trial court erroneously denied their request for a statement of decision, failed to apply a presumption of undue influence, and insufficient evidence supports the judgment. For the reasons expressed below, we agree the trial court erred in failing to comply with plaintiffs' timely request for a statement of decision (Code Civ. Proc., § 632). We reverse and remand to the trial court to issue of a statement of decision.

I

FACTS AND PROCEDURAL HISTORY

In April 2012, plaintiffs filed a petition to set aside a January 31, 2011, amendment to Esperanza's family trust. Plaintiffs asserted Yvonne Clayton (Clayton), Esperanza's granddaughter, influenced Esperanza before she died on November 18, 2011, at age 96, to remove them as beneficiaries under the trust.¹

Various family members and other witnesses testified at trial concerning the circumstances surrounding Esperanza's decision to remove plaintiffs as trust beneficiaries. The trial court declined to set aside the January 2011 trust amendment, explaining "[T]he most important issue is why did she change her trust, and the best evidence of that is the testimony of the attorney [who prepared the amendment, Gerard O'Brien] He wrote down in his book . . . that Tommy was fighting with her, her meaning the decedent, and my daughter made a big mess." The court cited O'Brien's

¹ The petition alleged Esperanza lacked legal capacity to execute the January 2011 trust amendment and that Clayton used her status as Esperanza's attorney in fact under Esperanza's durable power of attorney to isolate Esperanza from other family members and persuaded Esperanza to amend the trust to exclude plaintiffs as beneficiaries. Plaintiffs sought compensatory and punitive damages and attorney fees for elder abuse by Clayton, but abandoned these claims at trial.

testimony that Esperanza also complained that Tommy entertained friends at her house and paid himself from Esperanza's checking account for work he did not complete, and this was "independent of anything from Yvonne Clayton." The court remarked Esperanza had a history of changing beneficiaries, and relied on the testimony of Esperanza's niece, who said Esperanza declared she was unhappy her family was fighting and was upset with Corona and Tommy. Esperanza explained she believed her family had mistreated Clayton and she was going to leave everything to Clayton because Clayton was the person who helped her. The court also stated it was "not convinced from the evidence that fraud on the part of [] Clayton was the cause of Esperanza [] signing her fourth trust amendment, changing her beneficiaries."

In an August 14, 2013 minute order the court further explained it found "very relevant the testimony that after Esperanza [] was released from Walnut Manor, she told Tommy . . . she no longer wanted him living in her house. She presumably made this demand for the same reasons that she amended her trust. Thus, when [she] spoke to [him] about him leaving her house, [he] had the opportunity to ask about and respond to the concerns [Esperanza] had about him, including the checks payable to him. These concerns presumably were the same ones that [plaintiffs] contend were fraudulent. Since [Tommy] failed to convince [Esperanza] to allow him to continue living at her house, he presumably failed to convince [her] that whatever [] Clayton told her about him was false, and also would have also been unsuccessful trying to convince her that she should not have amended her trust to omit him as a beneficiary. [¶] The Court concludes that [plaintiffs] have failed to establish that the [trust amendment] was the result of fraud or undue influence on the part of [] Clayton."

II

DISCUSSION

Plaintiffs contend the trial court erred in denying their request for a statement of decision as untimely. We agree.

The court held trial on August 13 and 14, 2013. At the conclusion of the trial, the court announced its decision and stated reasons on the record, as noted above. The court directed Clayton's counsel to prepare the formal order. Clayton's counsel served by mail a "Proposed Order After Hearing" (judgment) on plaintiffs' counsel on August 19. On August 26, plaintiffs electronically filed a request for a statement of decision. The court signed and filed the judgment on September 16. Plaintiffs filed a notice of appeal on October 16. On November 14, the court filed a minute order noting it had just become aware of the request for a statement of decision, but denied the request because the notice of appeal might have divested the court of jurisdiction, and the trial lasted seven hours and 34 minutes, which fell short of the eight hours required to trigger the court's duty to issue a statement of decision. The trial court also found the request for a statement of decision was untimely because it was not made before the matter was submitted for decision, and the court's oral explanation of its decision on the record on August 14 "complied with any oral request for statement of decision that could have been made." The court noted its minute order dated August 14 included "an additional reason for the decision"

Code of Civil Procedure section 632 provides in relevant part, "In superior courts, upon the trial of a question of fact by the court, . . . [t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours

over more than one day in which event the request must be made prior to the submission of the matter for decision.” (See Cal. Rules of Court, rule 3.1590(n).)

The trial court explained it denied the request for a statement of decision because plaintiffs did not make a request before submission of the matter for decision and the trial concluded in less than eight hours. A party’s entitlement to a statement of decision depends on the party making a timely request. (*In re Marriage of Ananeh–Firempong* (1990) 219 Cal.App.3d 272, 280.) Here, the trial court calculated the trial spanned seven hours and 23 minutes (and seven hours, 12 minutes before the matter was submitted for decision). Plaintiffs, relying on the court’s minutes, argue the court “erroneously excluded cumulative mid-morning and mid-afternoon recesses of 68 minutes.” In *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, the court observed “the eight-hour rule in [Code of Civil Procedure] section 632 requires a simple and obvious mode of timekeeping that everyone, including attorneys, can keep track of. This means that, for purposes of keeping time of trial under [Code of Civil Procedure] section 632 in civil proceedings other than administrative mandamus (an issue not before us), *the time of trial means the time that the court is in session, in open court, and also includes ordinary morning and afternoon recesses when the parties remain at the courthouse. It does not include time spent by the judge off the bench without the parties present — lunch, for example — except for such routine recesses as occur during the day.*” (*Id.* at pp. 979-980, italics added.)

The record reflects the trial began at 9:31 a.m. on August 13. The court took a lunch break at 11:57 p.m., and reconvened at 1:38 p.m. The court adjourned for the day at 4:11 p.m. The following day, the court reconvened at 9:40 a.m., recessed for lunch at 11:45 a.m., and reconvened at 1:52 p.m. The court took a recess at 3:08 p.m., reconvening at 3:38 p.m. to announce its decision. Plaintiffs correctly calculated the trial time exceeded eight hours.

Clayton concedes the trial court erred in its calculation if ordinary recesses are included. But Clayton argues the request was untimely because it was not made within 10 days after the court announced its tentative decision. We disagree. The trial court announced its decision on August 14, and plaintiffs requested a statement of decision electronically on August 26. Because the 10th day (August 24) fell on a Saturday, plaintiffs had until August 26 (Monday) to request a statement of decision. (Code Civ. Proc., § 12a [if last day to perform act provided or required by law is a holiday (including Saturday and Sunday) the period is extended to and includes the next day that is not a holiday].)

Because a tentative decision is not binding on the court and can be modified before entry of judgment, a tentative decision generally does not constitute a statement of decision and cannot be relied upon either to support or impeach the judgment on appeal. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-647 [statement of decision allows the trial court to review its intended decision and make corrections, additions or deletions it deems necessary or appropriate and enables a reviewing court to determine what law the trial court employed]; Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2014) ¶ 16:164, p. 16-36.) The trial court's failure to provide a timely requested statement of decision is considered reversible error per se. (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397; Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence, *supra*, ¶ 16:200, pp. 16-45 to 16-46.) We also note that here, while the court's tentative decision and minute order arguably addressed some of the issues raised in plaintiffs' request, it did not resolve other issues. The remedy is to remand "to the trial judge who originally presided over the trial to complete the [statement of decision] process." (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530-1531.)

III

DISPOSITION

The judgment is reversed and the cause remanded for the trial court to comply with the statement of decision process. Plaintiffs are entitled to appellate costs.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.